



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

December 3, 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 Second 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 black ink, appearing to read "M. Swindler", written in a cursive style.

Michael L. Swindler
Prosecutor

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 RESPONSES TO HIKO ENERGY, LLC'S
SECOND SET OF INTERROGATORIES**

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, pursuant to 52 Pa. Code § 5.342(g)(1) to HIKO Energy, LLC's (HIKO, Company or Respondent) Motion to Compel Responses to HIKO's Second Set of Interrogatories.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)

¹ Pursuant to 52 Pa. Code § 5.342(g)(1), I&E's Answer to HIKO's Motion to Compel would have been due on Monday, December 1, 2014. Due to the intervening Thanksgiving Holiday, on Tuesday, November 25, 2014, I&E sought the consent of HIKO counsel for a two-day extension of time for I&E to file an Answer to HIKO's Motion to Compel. By electronic mail to Administrative Law Judges Barnes and Cheskis on that date, I&E communicated its unopposed extension request. On November 25, 2014, the presiding officers granted I&E's unopposed request for a two-day extension to Wednesday, December 3, 2014, to file an Answer to HIKO's second Motion to Compel.

related to allegations that HIKO billed rates that were higher than the rates promised by the Company. I&E's 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.

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 for this price offering.

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.

Of significance to the instant Motion, on November 3, 2014, HIKO served upon I&E its Second Set of Interrogatories and Requests for Production of Documents. I&E served timely Objections to certain of HIKO's discovery requests.³ HIKO did not communicate in advance of the filing of its Motion to Compel that it intended to file same.

By its Motion to Compel, HIKO seeks further responses to its Interrogatories 1, 2, 4, 23, 24, 25 and 26. HIKO's Motion should be denied for the reasons set forth herein.

II. ANSWER TO MOTION TO COMPEL RESPONSES TO HIKO SET II

A. I&E Supports Its Objections to HIKO Set II, Nos. 1 and 2

HIKO's Second Set of Interrogatories and Requests for Production of Documents Nos. 1 and 2 state the following:

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

³ On November 13, 2014, I&E served its Objections of the Bureau of Investigation and Enforcement to HIKO Energy, LLC's Second Set of Interrogatories and Requests for Production of Documents, containing objections to Interrogatories 1-4 and 23-27. I&E's objections also included a general objection to Numbered Paragraph 11 of HIKO's Definitions of "You," "Your" or "Complainant" wherein HIKO sought to improperly include more than I&E as the defined party.

1. Identify (by name, date, docket number and jurisdiction) *any* complaint, judgment, consent order or settlement agreement since January 1, 2000 in which You sought or obtained *from an EGS company*:

- (a) civil penalties greater than \$50,000;
- (b) revocation of any license;
- (c) injunctive relief in the form of changes to operating practices; and
- (d) restitution or refunds to any consumers.

2. Provide copies of any complaint, judgment, consent order or settlement agreement identified in the preceding Interrogatory.

(emphasis added.)

I&E properly objected to HIKO's request that I&E identify *any* complaint, judgment, consent order or settlement agreement sought or obtained *from any EGS company* regarding civil penalties greater than \$50,000, license revocation, injunctive relief and customer refunds. HIKO's requests seeking information and related documentation regarding the actions of *other* EGS companies are outside the scope of permissible discovery and are not relevant to the instant proceeding. In the "companion proceeding" of *Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC* at Docket No. C-2014-2427652 (*OAG/OCA v. HIKO*), HIKO similarly sought information from the Office of Attorney General and Office of Consumer Advocate (Joint Complainants) regarding EGS companies other than HIKO. Joint Complainants in that case objected and HIKO filed a Motion to Compel. In its

Order denying HIKO's Motion to Compel in *OAG/OCA v. HIKO*, the presiding officers ruled, in pertinent part:

The requested information about other EGS third party sales and marketing services appears to be outside the scope of discovery and not relevant to the issues to be addressed in this proceeding. The requested information is not likely to lead to the discovery of 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.

OAG/OCA v. HIKO, Order Denying HIKO Energy, LLC's Motion to Compel at 4, entered September 2, 2014.

Here, the allegations of violations set forth in I&E's Complaint are even more precise than those in the companion case. Consequently, the information sought by HIKO regarding relief sought or obtained from any other EGS company similarly has no bearing on the specific allegations set forth against HIKO in I&E's Complaint.

Moreover, information about other EGSs not named in a Formal Complaint has been determined to be irrelevant. *See Pennsylvania, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (*IDT*) (Order Denying IDT Energy, Inc. Motion to Compel entered on September 8, 2014). The presiding ALJs in *IDT* 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 the identity of each and every matter brought by I&E seeking certain relief against any other

EGS would not lead to relevant information or admissible evidence regarding the narrow and focused allegations against HIKO in I&E's Complaint – specifically, whether rates billed by HIKO reflect the agreed upon prices in the Welcome Letter and Disclosure Statement for one particular price offering over a specific four month period.

HIKO's reliance on the Commission's finding in *Polzot* is also misplaced.⁴ HIKO attempts to justify its discovery requests by citing the *Polzot* case as support for the proposition that "past Commission decisions in similar situations" are deemed relevant. However, the HIKO interrogatories at issue are not representative of or related to "past Commission decisions in similar situations." Rather, HIKO's questions seek the identity of I&E matters against *any* EGS *for any reason*, whether related to the allegations in I&E's Complaint or not. In *Polzot*, the Commission noted that in its prior decisions in similar situations, I&E consistently requested a certain civil penalty in complaints "which allege that a motor carrier has failed to provide a current list of vehicles to the Commission." *Polzot* Order at 9. HIKO, on the other hand, has not crafted its discovery with any such specificity, but seeks the identity of information in I&E matters against other EGS companies no matter what the violations alleged. As such, I&E properly objected and should not be compelled to respond.

Lastly, I&E properly objects that to provide answers to HIKO's interrogatories would entail an unreasonable and unduly burdensome investigation. The Pennsylvania Rules of Civil Procedure limit discovery requests of documents and tangible items to

⁴ *Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement v. Gary Polzot, t/a Airport Executive Car Service*, Docket No. C-2011-2271305 (Order entered October 31, 2013).

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). Past Commission decisions are not exclusively within the possession, custody or control of I&E. HIKO can research and obtain prior Commission decisions which are publicly available without requiring I&E to expend its resources to conduct research for it. Therefore, HIKO’s motion to compel a response to HIKO Set II, Nos. 1 and 2 should be denied.

B. I&E Supports its Objection to HIKO Set II, No. 4

HIKO’s Second Set of Interrogatories and Requests for Production of Documents, No. 4, states the following:

4. State whether You *contend* that revocation of HIKO’s license is *necessary* to protect Pennsylvania consumers and, if Your answer is anything but an unqualified “no,” set forth all facts that support Your answer and identify all witnesses who will testify in support of Your answer.

(emphasis added).

I&E properly objected to Interrogatory No. 4 on the basis that the information sought by HIKO is beyond the scope of permissible discovery as it seeks attorney work product and is protected by the investigative privilege. Section 5.323(a) of the Commission’s regulations, 52 Pa. Code § 5.323(a), is consistent with Pa. R.C.P. 4003.3, which codifies the attorney work product privilege and states as follows:

The discovery shall not include disclosure of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party’s attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or

opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. HIKO's Set II, No. 4 seeks information regarding a "contention" of what is deemed "necessary," which I&E argues falls within the mental impressions of a party's attorney. In each prosecution, I&E reviews the investigative materials and then makes a determination as to what it deems to be acceptable relief for the alleged violations. Any response to this Interrogatory would reveal the mental impressions, conclusions, opinions, memoranda, notes or summaries, legal research or legal theories of I&E's prosecutors, all of which are privileged information. The "work-product doctrine" provides broad protection for any material, including theories, notes, strategies and the like, prepared by the attorney or the attorney's representatives in anticipation of litigation, regardless of whether it is confidential. *Levy v. Senate of Pennsylvania*, 94 A.3d 436 (Pa. Cmwlth. 2014); *Heavens v. Pa. Department of Environmental Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013). *See also, Pennsylvania Public Utility Commission v. Seder*, Nos. 2132 C.D. 2013, 2254 C.D. 2013 (Pa. Cmwlth., filed Dec. 3, 2014.)

In addition, the use of discovery that seeks "opinions" or "contentions" is discouraged unless specific circumstances are present. The comments to Pa. R.C.P. 4003.1 state as follows:

Interrogatories that generally require the responding party to state the basis of particular claims, defenses or contentions made in pleadings or other documents should be used sparingly and, if used, should be designed to target claims, defenses or contentions that the propounding attorney reasonably suspects may be the proper subjects of early dismissal or resolution or, alternatively, to identify and to

narrow the scope of claims, defenses and contentions made where the scope is unclear.

HIKO admits that it is not seeking I&E's "contention" of why revocation is "necessary" for the purposes of an "early dismissal" or "resolution" of this matter. HIKO claims that a response to Set II, No. 4 is needed to prepare for hearing. HIKO Motion at 6. However, the scope of I&E's claims is patently clear. In the Complaint, I&E alleges that Respondent violated the Commission's regulations at 52 Pa. Code § 54.4(a) by billing prices for electric generation supply service that exceeded the marketed prices and the agreed upon prices in the customer's disclosure statement on 14,780 occasions during four specific, consecutive billing periods. I&E's Complaint consists of one hundred thirty-one (131) paragraphs on twenty-eight (28) pages, and provides specific details of the affected customer accounts.

I&E vehemently disputes any allegation that it is "hiding the ball." The information that provided the basis for the allegations in I&E's Complaint was disclosed to I&E by HIKO through a series of responses to data requests during I&E's informal investigation of the matter. Moreover, while I&E requests specific relief that it deems to be appropriate, the granting of any such relief is ultimately the determination of the presiding Administrative Law Judges and the Commission. Therefore, a response to HIKO Set II, No. 4 serves no purpose other than to reveal the privileged attorney work product of I&E prosecutors.

C. I&E Supports its Objections to HIKO Set II, Nos. 23 and 24

HIKO's Second Set of Interrogatories and Requests for Production of Documents

Nos. 23 and 24 state the following:

23. State whether You contend that \$14,780,000 is necessary to deter future violations by *other electric generation service companies* and, if Your answer is anything but an unqualified "no," set forth the facts that support Your answer, provide all calculations or analyses showing that no lesser figure would serve as a deterrent, and identify all witnesses who will testify in support of Your answer.

24. State whether You have performed any calculations or analyses to determine the civil penalty amount that would serve as an adequate deterrent and, if Your answer is anything but an unqualified "no," set forth the facts that support Your answer, provide all calculations or analyses showing that no lower figure would serve as a deterrent, and identify all witnesses who will testify in support of Your answer.

(emphasis added).

I&E properly objected to HIKO's request for information regarding the civil penalty amount sought by I&E in this case. In No. 23, HIKO asks I&E to state whether I&E contends that a fine of \$14,780,000 is necessary to deter future violations *of other electric generation service companies*. Again, HIKO's effort to explore the impact of this proceeding on EGSs other than HIKO is completely irrelevant and is certainly not reasonably expected to lead to the discovery of admissible evidence. HIKO's claim that it is "highly relevant" to know whether it is I&E's contention that a \$14.8 million penalty is needed to serve as a deterrent to other companies in the marketplace is totally misplaced. I&E's Complaint makes no claim regarding any other EGS company and

makes no comparison of HIKO to other EGS companies. The information sought by HIKO in this Interrogatory has no bearing on the specific allegations set forth against HIKO in I&E's Complaint.

Moreover, it will be the presiding officers and the Commission that ultimately impose the civil penalty and will do so based on their own findings. In *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. C & J Services, Inc.* at Docket No. C-2012-2335066 (Order entered May 9, 2013), the Commission imposed a civil penalty of \$1,000 for failing to file an assessment report in a case involving relatively small assessment amounts where the respondent was found to have violated the Public Utility Code. In *C & J*, the Commission found that a significant penalty was necessary to deter additional violations in the future. *See also, Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Hathaway Specialized Hauling, Inc. t/a Fantasia Machinery Transport*, Docket No. C-2012-2325066 (Order entered March 14, 2013).

In Interrogatory Set II, No. 24, HIKO seeks calculations or analyses regarding the civil penalty amount that would serve as an adequate deterrent. Again, I&E properly objected on the grounds that the information sought was not relevant. As stated in *C & J* and *Hathaway, supra*, it is for the Commission to determine the adequacy of the civil penalty sought by I&E. Whether I&E performed calculations to ascertain some magic number for an "adequate deterrent" has no bearing on I&E's straightforward request for relief of the maximum \$1,000 civil penalty for each of the 14,780 violations alleged in the I&E Complaint.

I&E also properly objected on the basis of the attorney work product privilege. Assuming the requested calculations or analyses were relevant and could lead to the discovery of admissible evidence, which they could not, the information sought would nevertheless be protected by the attorney work product exception to permissible discovery. The “work-product doctrine” provides broad protection for any material, including theories, notes, strategies and the like, prepared by the attorney or the attorney’s representatives in anticipation of litigation, regardless of whether it is confidential. *Levy v. Senate of Pennsylvania*, 94 A.3d 436 (Pa. Cmwlth. 2014); *Heavens v. Pa. Department of Environmental Protection*, 65 A.3d 1069 (Pa. Cmwlth. 2013). *See also, Pennsylvania Public Utility Commission v. Seder*, Nos. 2132 C.D. 2013, 2254 C.D. 2013 (Pa. Cmwlth., filed Dec. 3, 2014.) At the core of the work-product doctrine is that attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. *Bagwell v. Pa. Department of Education*, No. 79 C.D. 2014, 2014 WL 5490600 (Pa Cmwlth. 2014). The doctrine promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients. *T.M. v. Elwyn, Inc.*, 950 A.2d 1050 (Pa. Super. 2008).

I&E has already indicated how the proposed civil penalty was calculated and it is a rather simple exercise multiplying the maximum civil penalty permitted by the number of violations alleged in the Complaint. HIKO is free to challenge the proposed fine without the need for unrelated calculations of what someone could vaguely deem as “adequate.” I&E’s objections should be sustained.

D. I&E Supports its Objections to HIKO Set II, Nos. 25 and 26

HIKO's Second Set of Interrogatories and Requests for Production of Documents

Nos. 25 and 26 state the following:

25. State whether Complainant is aware of any Formal Complaints by consumers against HIKO other than the following: Stephen R. Tashir; Diane Vincent; Heidi Siebels; Peter Signore, Jr.; Sidonia Gorjan; Joanne Smith; Chris George; Lurena Falcone; and Craig A. Bixler.

26. State whether Complainant is aware of any Formal Complaints by consumers against HIKO that have not been satisfied and, if Your answer is anything but an unqualified "no," identify each such Formal Complaint (by name of complainant, filing date and docket number).

I&E properly objected to HIKO's request seeking information regarding whether I&E is "aware" of certain formal complaints by consumers against HIKO and any formal complaints by consumers against HIKO that have not been satisfied. I&E properly objected to these requests on the basis that the information sought could not reasonably be expected to lead to the discovery of admissible evidence. HIKO's claim that I&E's "awareness" of consumer complaints and whether such complaints were satisfied is somehow relevant to the penalty determination that is ultimately made by the presiding officers is fatally flawed. I&E's Complaint makes no allegation regarding consumer complaints against HIKO and HIKO makes no representation that the consumers named in the formal complaints are even within the class of HIKO customers who subscribed to the price offering that is the sole subject of I&E's Complaint.

Most importantly, whether any consumer formal complaints against HIKO were "satisfied" by HIKO – even if those consumers did subscribe to the price offering that is

the subject of I&E's Complaint – have no bearing whatsoever on the ability of I&E to allege violations of the Commission's regulations or assess appropriate civil penalties regarding the customer accounts of those vary consumers who brought their own formal complaints for whatever reason, even if such consumer formal complaints were eventually satisfied. In *Commonwealth of Pennsylvania, et al. v. Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656, the presiding officers recently issued an Order Denying Motion *In Limine* which is pertinent to the issue of addressing in litigation consumer formal complaints that have been previously satisfied. In that case, the Respondent, Energy Service Providers (ESP), filed a motion *in limine* to restrict the introduction of consumer formal complaints which had been resolved and closed by the filing of an unopposed certificate of satisfaction. ESP argued that no evidence of the allegations contained in the satisfied formal complaints should be permitted to be introduced into the record in this matter. The presiding officers denied ESP's Motion, noting that the evidence of the underlying consumer complaints was not being used to relitigate those complaints. The presiding officers ruled, in pertinent part:

...when a case is satisfied, the party complained against is relieved of the responsibility for that complaint as it pertains to that complaint. The party complained against is not relieved of other responsibilities that may have resulted from the facts underlying the Complaint, as ESP contends. This is particularly true where, as is the case here, the allegations in the underlying complaints may raise issues broader than those of the individual complaints.

Order at 5. HIKO's "efforts to resolve any consumer complaints" have no bearing on the outcome of I&E's Complaint. Consequently, responses to HIKO Set II, Nos. 25 and 26 serve no purpose that would be relevant to the pending action or that would lead to relevant or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint.

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

Respectfully submitted,



Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

Wayne T. Scott
First Deputy Chief Prosecutor
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Dated: December 3, 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).

Service by Email and First Class Mail:

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Dated: December 3, 2014