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November 24, 2014

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VIA E-FILING AND FIRST CLASS MAIL

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

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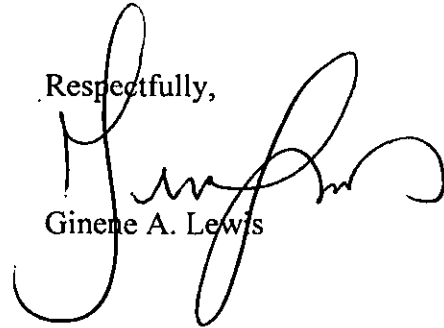
Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410

Dear Secretary Chiavetta:

Enclosed please find HIKO Energy, LLC's ("HIKO") Motion to Compel Further Responses by the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement to certain of HIKO's second set of interrogatories. 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.

Respectfully,



Ginene A. Lewis

GAL

Enclosures

cc: Per Certificate of Service

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement,

Complainant

v.

HIKO ENERGY, LLC,
Respondent.

Docket No. C-2014-2431410

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MOTION TO COMPEL RESPONSES BY THE BUREAU OF INVESTIGATION AND ENFORCEMENT TO HIKO ENERGY, LLC'S SECOND SET OF INTERROGATORIES

Pursuant to 52 Pa. Code §5.342(g), HIKO Energy, LLC ("HIKO") hereby files this motion to compel the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement ("Complainant" or "I&E") to provide responsive answers to certain of HIKO's second set of interrogations ("Interrogatories"), and in support thereof, avers as follows:

I. INTRODUCTION

On November 3, 2014, HIKO served upon I&E its Second Set of Interrogatories and Requests for Production of Documents ("Set II Discovery," attached hereto as Exhibit A). Complainant filed timely objections on November 13, 2014 to certain of HIKO's Set II Discovery ("Objections," attached hereto as Exhibit B). I&E has refused to provide responses to questions that seek to understand the basis for I&E's claims that HIKO's license as an electric generation supplier ("EGS") should be revoked and that civil penalties of \$14,780,000 are necessary. Given the severe sanctions that I&E is seeking, HIKO posed a series of interrogatories that asked I&E to explain why it believed those sanctions were necessary and

appropriate in the circumstances. Because I&E has not proffered any valid reason for refusing to answer seven (7) of HIKO's interrogatories, it should be compelled to respond.¹

II. ARGUMENT

I&E objects to Interrogatories 1, 2, 4, 23, 24, 25, and 26. These objections and HIKO's responses are discussed below. All of these interrogatories are aimed at probing the basis for the requested penalties in the event I&E were to succeed in proving the violations in the Complaint.

A. Interrogatories 1, 2, and 4

Interrogatories 1, 2, and 4 requested information about enforcement proceedings brought by I&E against other EGS companies in which I&E sought or obtained relief similar to that sought in this action. HIKO sought that information in order to evaluate the facts and circumstances of other actions against those in this case. HIKO believes that the revocation demand and the enormous civil penalty amount sought from HIKO are significantly more severe than the relief I&E has sought (or obtained) against other EGS companies whose conduct was more egregious. Understanding the relief that I&E and the Commission believed to be appropriate in the circumstances of those cases would allow HIKO to argue — and to show the presiding officers — that the relief sought in this action is excessive and unwarranted.

For purposes of assessing a civil penalty against HIKO, the presiding officers must consider the Policy Statement factors espoused in 52 Pa. Code §69.1201. See Pa. P.U.C., Bureau of Investigation and Enforcement v. Butts, C-2014-2325083, 2013 WL 5232326, at *5 (Pa. P.U.C. Sept. 12, 2013)(“[T]he Commission has desired that litigated proceedings handled by the [Office of Administrative Law Judge] address the Policy Statement factors and, further, the Commission has remanded cases where that analysis did not take place.”). Those factors include

¹ Although I&E objected to Interrogatory 3, I&E's objection included a representation that it “does not seek revocation of HIKO's license for failure to file a Commission report.” Objections at 9-10. Based on this statement, HIKO does not seek to compel a response to Interrogatory 3.

consideration of the Commission's past decisions in similar situations. See 52 Pa. Code §69.1201(c)(9). Indeed, I&E's past practice and the Commission's prior decisions would shed light on the kind of conduct and consequences that have been considered by the Commission to be "of a serious nature" to warrant a higher penalty. See 52 Pa. Code §69.1201(c)(2) (providing that the Commission may consider "whether the resulting consequences of the conduct at issue were of a serious nature" when evaluating civil penalties). To withhold this information may deprive HIKO of potential evidence that would allow it to place the regulatory violations asserted here in the context of other more egregious conduct. Notably, I&E has previously produced information on prior actions against other EGS companies in which it has sought civil penalties. See Complainant's Response to HIKO Interrogatory 30 (Set I), excerpt attached hereto as Exhibit C (providing information on the five largest civil penalties sought by I&E).

i. Interrogatories 1 and 2

Interrogatories 1 and 2 requested certain information related to similar actions brought by I&E against other EGS companies. Specifically, these Interrogatories stated as follows:

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.

Set II Discovery at 6.

I&E objects to these interrogatories on three grounds. First, it says that I&E is only a prosecuting bureau and lacks the power to revoke an EGS's license. Objections at 6.² That may well be the case, but it is irrelevant. Interrogatory 1 asked for information on other matters in which I&E "sought or obtained" the relief in subsections (a) through (d). Second, I&E contends that the information is "not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO" Id. This objection is off-base, too. The "subject matter involved in the pending action" includes the "defense of the party seeking discovery," 52 Pa. Code §5.321(c), and not just "the specific allegations against HIKO." And, the defenses include not only defenses to the claimed violations but defenses to the penalties sought. Furthermore, 52 Pa. Code §5.321(c) plainly states that "it is not a ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." As noted above, information on prior Commission decisions or settlements could well be relevant to the determination of the appropriate penalty here.

The Commission's decision in Pa. P.U.C., Bureau of Investigation and Enforcement v. Polzot confirms this principle. Docket No. C-2011-2271305, 2013 WL 5947206 (Pa. P.U.C. Oct. 31, 2013). In Polzot, the administrative law judge ("ALJ") found that I&E had failed to adduce any evidence to support or explain its requested civil penalty, and I&E filed exceptions. Id. at *2. Rejecting I&E's claim that it had met its burden of proof simply by proposing a penalty that was permitted by law, the Commission made clear that "past Commission decisions in similar situations" were highly relevant to the determination of the appropriate civil penalty:

² I&E has asserted an objection that its obligation to respond to discovery encompass only what is within I&E itself and cannot extend to the Commission. See Objections at 4-5. That objection is the subject of a separate motion to compel filed by HIKO on November 12, 2014. Accordingly, although HIKO does not address that point in this motion, the failure to do so should not be taken as a waiver of HIKO's position.

Our review of past Commission decisions in similar situations shows that I&E has consistently requested a \$250 civil penalty in its complaints which allege that a motor carrier has failed to provide a current list of vehicles to the Commission. It appears that many of these cases were ultimately settled by the Parties for smaller civil penalty amounts, such as \$50, and that these settlements were approved by the Commission based on an analysis of the factors in the Policy Statement.

Id. at *5. See also Butts, 2013 WL 5232326 at *5 (noting that, in determining the appropriate civil penalty for failure to file an assessment report, the ALJ should have taken into account that in prior cases “the Commission has imposed a civil penalty of \$1,000 on a utility” for this violation).

Falling back on yet a third reason for its objection, I&E claims that providing an answer “would entail an unreasonable and unduly burdensome investigation.” Objections at 6. This objection is purely make-weight. I&E concedes that it has only been in existence as a separate bureau for three years. During that limited time period, it likely has brought a limited number of cases against EGS companies, and likely there would be even fewer cases in which it has sought or obtained license revocation, civil penalties greater than \$50,000, injunctive relief, or restitution to consumers. This “burdensomeness” argument is not credible and simply serves as an attempt to deny HIKO’s right to discoverable information.

ii. Interrogatory 4

Interrogatory 4 sought to understand Complainant’s basis for demanding license revocation. This Interrogatory stated as follows:

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.

Set II Discovery at 7.

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.

Set II Discovery at 12.

I&E’s sole objection to Interrogatory 23 is that “[a]ny contention regarding deterrence of EGS companies other than HIKO is not relevant to this proceeding.” Objections at 12. Yet, it seems highly relevant to the penalty determination in this case whether I&E will contend that the \$14,780,000 million penalty is needed to serve as a deterrent to other companies in the marketplace. A relevant consideration in any penalty determination is “[t]he amount of the civil penalty or fine necessary to deter future violations.” See 52 Pa. Code § 69.1201(c)(8). I&E has not objected to a number of other interrogatories HIKO has posed to probe the basis for the civil penalty demand. See Interrogatories 11-22. And, I&E has stated that it believes that the maximum penalty of \$1,000 per violation must be imposed for the violations at issue. See Complainant’s Response to HIKO Interrogatory 28 (Set I), excerpt attached hereto as Exhibit D. Thus, HIKO asked I&E to explain why it believed the maximum civil penalty was appropriate even for de minimis financial injury to individual consumers. See Interrogatories 11-15 at 8-9. HIKO also asked whether I&E contended that \$14,780,000 was necessary to deter HIKO from committing future violations. See Interrogatory 22 at 11. Because I&E did not object to any of this discovery, there is no basis for it to object to Interrogatory 23.

As to Interrogatory 24, I&E objects on grounds of relevance, attorney work product and investigative privilege. Objections at 13. HIKO agrees with I&E that “the adequacy of any civil penalty is ultimately the determination of the presiding ALJ’s and the Commission.” Id. But it is also true that 52 Pa. Code §69.1201(c)(8) makes “[t]he amount of the civil penalty or fine

necessary to deter future violations” a relevant factor in the penalty determination. The size of the utility also may be considered when deciding the appropriate penalty amount. Thus, it is highly relevant whether I&E has made a determination as to the amount necessary to provide an adequate deterrent, and if so, whether some amount lower than \$14,780,000 million would also suffice.

Additionally, Interrogatory 24 does not seek to probe attorney work product and/or information protected under the investigative privilege. First, information reflecting the basis for I&E’s proposed civil penalty is not protected from disclosure under the investigative privilege. See 65 P.S. § 67.708(b)(17)(vi)(A)(providing that the noncriminal investigation exception does not apply to records showing “the imposition of a fine or civil penalty.”). Second, in propounding this Interrogatory, HIKO is not requesting that I&E disclose any information the Commission has not already required that it disclose for purposes of assessing a civil penalty. See Polzot, 2013 WL 5947206 at *2, 4 (Pa. P.U.C. Oct. 31, 2013) (adopting the ALJ’s decision that I&E has the burden to present evidence to support “the amount of the requested civil penalty and how it should be calculated”); see also U.S. Steel Corp. v. Dep’t. of Env’tl. Res., 300 A.2d 508, 515 (Pa. Cmwlth. 1973) (emphasizing that a civil penalty without any explanation or an opportunity by the accused to challenge that figure would “strike at one’s conscience as being unreasonable . . .”). If I&E contends that the \$14,780,000 civil penalty amount is necessary, HIKO has the right to ask for any calculations that show no lesser amount would serve as an adequate deterrent and the names of any witnesses who would testify in support of the answer. As such, the responses to these interrogatories are highly relevant to the presiding officers’ determination of the appropriate penalty amount.

C. Interrogatories 25 and 26

Interrogatories 25 and 26 seek to settle factual issues concerning HIKO's good faith attempts to resolve consumer complaints that could later be relevant to the civil penalty determination. These Interrogatories stated as follows:

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).

Set II Discovery at 12.

To each of these Interrogatories, I&E raised the identical objection — that the information sought was “not relevant to the subject matter of the pending action and will not lead to relevant or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint.” Objections at 14-15. Yet, this information is relevant to the presiding officers' penalty determination. Specifically, HIKO's compliance history and its efforts to resolve any consumer complaints are matters that are considered when evaluating whether a penalty for violating a Commission order is reasonable and in the public interest. See 52 Pa. Code §69.1201(c)(4)(considering whether the regulated entity made efforts “to address the conduct at issue”); 52 Pa. Code §69.1201(c)(6)(considering the “compliance history” of the regulated entity); see also Pa. P.U.C., Bureau of Investigation & Enforcement v. Public Power, LLC, Docket No. M-2012-2257858, 2013 WL 6835126, at *4-6 (Pa. P.U.C. Dec. 19, 2013) (noting that the EGS's compliance history, cooperation with I&E and corrective measures to resolve violations warranted the imposition of a low penalty). HIKO thus sought to gain I&E's agreement on the fact that all formal complaints filed by customers against HIKO had been


resolved, as this factor would bear on the appropriate penalty in the event the violations asserted in the Complaint were proven.

CONCLUSION

Based on the foregoing, Complainant's objections to Interrogatories 1, 2, 4, 23, 24, 25, and 26 are unavailing and therefore it should be compelled to provide responsive answers.

Respectfully Submitted,

DRINKER BIDDLE & REATH, LLP



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Counsel for HIKO Energy, LLC

Dated: November 24, 2014

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EXHIBIT A

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND
ENFORCEMENT,

Complainant

Docket No. C-2014-2431410

v.

HIKO ENERGY, LLC,

Respondent.

**HIKO ENERGY, LLC'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS ON THE PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT**

Pursuant to 52 Pa. Code §§ 5.341, 5.342, and 5.349, HIKO Energy, LLC ("HIKO") hereby propounds the following Interrogatories and Request for Production of Documents, Set II, on the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement ("Complainant" or "I&E") to be answered by those employees or agents of Complainant as may be cognizant of the requested information and who are authorized to answer on behalf of the Complainant.

In accordance with 52 Pa. Code § 5.342 and 5.349, the Interrogatories and Request for Production of Documents are to be answered in writing and verified, and are to be furnished and served in-hand upon the undersigned within twenty (20) days.

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INSTRUCTIONS

1. These interrogatories and document requests shall be construed as continuing. The Complainant is obliged to change, supplement and correct all answers to conform to available information; including such information as first becomes available to the Complainant after the answers hereto are filed.
2. If, after exercising due diligence to secure the information requested by any one of the following interrogatories or document requests, the Complainant cannot answer or provide the information requested in any specific requests, so state and answer to the extent possible those specific requests, specifying the Complainant's inability to answer the remainder of the request, providing whatever information or knowledge the Complainant has concerning the unanswered portion of the request, and detailing what attempts the Complainant made to secure the unknown information, including all persons consulted and all documents reviewed.
3. Restate the interrogatory and document request immediately preceding each response.
4. Identify the name, title, and business address of each person(s) providing each response.
5. Divulge all information that is within the knowledge, possession, control, or custody of the Complainant or may be reasonably ascertained thereby and to the extent the Complainant has the right or ability (whether as a practical matter or as a matter of law) to compel the action requested herein.
6. Provide verification by the responsible witness or witnesses that all facts contained in the response are true and correct to the best of the witness' knowledge, information and belief.

7. As used herein, but only to the extent not protected by 52 Pa. Code § 5.323, the word “document” or “workpaper” includes, but is not limited to, the original and all copies in whatever form, stored or contained in or on whatever media or medium including computerized memory, magnetic, electronic, or optical media, regardless of origin, and may consist of:

- a) notations of any sort concerning conversations, telephone calls, meetings or other communications;
- b) bulletins, transcripts, diaries, analyses, summaries, correspondence and enclosures, circulars, opinions, studies, investigations, questionnaires and surveys; and
- c) worksheets, and all drafts, preliminary versions, alterations, modifications, revisions, changes, amendments and written comments concerning the foregoing.

8. If the Complainant claims any information requested herein is protected pursuant to 52 Pa. Code § 5.323 or pursuant to any other rule of discovery, provide a general description of the information sought to be protected and the exact nature of the protection claimed.

9. The singular of any word used herein shall be deemed to include the plural of such word, and the plural shall include the singular.

DEFINITIONS

1. In answering these data requests, assume that all words used have their ordinary meanings in normal English usage, except as provided below or where context requires other interpretation.

2. “Commission” or “PUC” means the Pennsylvania Public Utility Commission.

3. “I&E” means the Bureau of Investigation and Enforcement.

4. "EGS" means a jurisdictional electric generation supplier licensed by the Commission as defined in Section 2803 of the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801-2812.

5. "Communication" means any transmission or exchange of information or meaning between two or more persons in any form.

6. "Complaint" means the complaint filed in this action on July 11, 2014.

7. "Document" or "documents" means all writings of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including, without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, summaries, pamphlets, books, inter-office and intra-office communication, notation of any sort of conversations, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, fax, work sheets, all drafts, alterations, modifications, changes and amendments of any of the foregoing, graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotapes, records) and any electronic, mechanical or electric records or representations of any kind (including, without limitation, tapes, cassettes, discs, records, and computer memories) now in the possession, custody or control of the Complainant, its agents, employees, attorneys and all other persons acting on its behalf.

8. "Identify" or "identity" when used in reference to any individual means to state his/her full name, age, present or last known home address, his/her present or last known employment position, including responsibilities, business affiliation and location, and his/her position, responsibilities, business affiliation and location at the time in question.

9. “Identify” or “identity” when used in reference to a document means to state the name, title, or caption of the document, the date of its making or execution, the identity of the person or persons who authored or executed it, the type of document, number of papers, a brief description of its contents and subject matter (or if the above information is not available, some other means of identifying it), and its present location and custodian. If any such document was, but is no longer, in your possession or subject to your control, state whether it (1) is missing or lost; (2) has been destroyed; (3) has been transferred, voluntarily or involuntarily, to others; or (4) has been disposed of otherwise. In each instance, explain the circumstances surrounding the authorization for such disposition and state the date or approximate date thereof. When used in respect to a communication, the terms “identify” or “identity” mean to state the parties to the communication, the means of communication, the location of the communication, and the date and time thereof.

10. “Person” means any individual, government or regulatory agency, organization, association, partnership, corporation, trust, foundation, or any other entity, however styled.

11. “You”, “Your”, or “Complainant” means the Pennsylvania Public Utility Commission or the Bureau of Investigation and Enforcement, including any attorneys, agents, employees, contractors, or other representatives of either the Commission or the Bureau, or anyone acting on behalf or at the direction of the Commission or the Bureau.

INTERROGATORIES

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.

RESPONSE:

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

RESPONSE:

3. State whether You have revoked the license of any EGS company for failure to file any required report with the Commission and, for each such instance, identify the EGS company and produce a copy of the revocation order or agreement supporting Your answer.

RESPONSE:

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.

RESPONSE:

5. State whether You contend that HIKO is continuing to make any misrepresentations to Pennsylvania consumers about the price of its electric supply 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.

RESPONSE:

6. State whether You contend that HIKO has been marketing to Pennsylvania consumers since January 2014 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.

RESPONSE:

7. State whether You contend that HIKO could not implement any sales practices that would protect Pennsylvania consumers and, if Your answer is anything but an unqualified "no," set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

8. State whether You contend that revocation of HIKO's license is necessary to punish HIKO for breaching its guaranteed price offerings to Pennsylvania consumers and, if Your answer is anything but an unqualified "no," set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

9. State whether HIKO has ceased marketing in Pennsylvania and, if Your answer is anything but an unqualified "no," provide the date on which HIKO ceased marketing or, if the exact date is unknown, the month and year.

RESPONSE:

10. State whether HIKO has made refunds to any customers whose invoices are included within Your Complaint and, if Your answer is anything but an unqualified "no," state the total amount of refunds that HIKO has provided and identify all customers who received refunds through the date of Your answer.

RESPONSE:

11. State whether You contend that a \$1,000 civil penalty is appropriate for each instance in which a HIKO customer was charged any amount more than 1% below the local electric distribution company's (EDC's) price to compare (hereinafter an "Overcharge") and, if Your answer is anything but an unqualified "no," set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

12. State whether You contend that a \$1,000 civil penalty is appropriate for each instance in which the Overcharge to a HIKO customer totaled less than \$1.00 and, if Your answer is anything but an unqualified “no,” set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

13. State whether You contend that a \$1,000 civil penalty is appropriate for each instance in which the Overcharge to a HIKO customer totaled less than \$5.00 and, if Your answer is anything but an unqualified “no,” set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

14. State whether You contend that a \$1,000 civil penalty is appropriate for each instance in which the Overcharge to a HIKO customer totaled less than \$10.00 and, if Your answer is anything but an unqualified “no,” set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

15. State whether You contend that a \$1,000 civil penalty is appropriate for each instance in which the Overcharge to a HIKO customer totaled less than \$25.00 and, if Your answer is anything but an unqualified “no,” set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

16. State whether You contend that a \$1,000 civil penalty is appropriate for each instance in which the Overcharge to a HIKO customer was not more than the local EDC's price to compare and, if Your answer is anything but an unqualified "no," set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

17. State whether You contend that a \$1,000 civil penalty is appropriate for customer invoices as to which HIKO has already provided customer refunds and, if Your answer is anything but an unqualified "no," set forth the basis for Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

18. State whether You contend that HIKO's history of compliance with Commission regulations warrants a penalty amount of \$1,000 per violation and, if Your answer is anything but an unqualified "no,"

- (a) identify (by date, regulatory citation and description) each and every regulatory violation (other than those alleged in the Complaint) that You contend HIKO committed;
- (b) identify (by date, regulatory citation and description) all actions taken by the Commission in response to each such regulatory violation (by date and description and/or docket number);
- (c) identify all persons with knowledge of Your Answer; and
- (d) provide all documents that support Your answer.

RESPONSE:

19. State whether You contend that HIKO did not cooperate with the Commission's investigation into the conduct alleged in the Complaint and, if Your answer is anything but an unqualified "no," set forth the facts that support Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

20. State whether You contend that HIKO actively concealed the violations alleged in the Complaint and, if Your answer is anything but an unqualified "no," set forth the facts that support Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

21. State whether You contend that HIKO attempted to interfere with the Commission's investigation and, if Your answer is anything but an unqualified "no," set forth the facts that support Your answer and identify all witnesses who will testify in support of Your answer.

RESPONSE:

22. State whether You contend that \$14,780,000 is necessary to deter future violations by HIKO 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.

RESPONSE:

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.

RESPONSE:

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.

RESPONSE:

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.

RESPONSE:

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).

RESPONSE:

27. For each denial of any Request for Admissions (Set I), identify the particular Request by number and set forth the facts supporting Your denial.

RESPONSE:

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

EXHIBIT B

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**OBJECTIONS OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO HIKO ENERGY, LLC'S SECOND SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to 52 Pa. Code §§ 5.342(c) and (e), the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), by and through its prosecuting attorneys, files the within Objections to HIKO Energy, LLC's Second Set of Interrogatories and Requests for Production of Documents, and in support thereof, avers as follows:

I. INTRODUCTION

On November 3, 2014, HIKO served upon I&E its Second Set of Interrogatories and Requests for Production of Documents. I&E communicated with HIKO counsel on November 10, 2014, in order to discuss an I&E general objection. No resolution was reached. I&E files the within general and specific objections.

II. OBJECTIONS

In proceedings before the Commission, a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant.

52 Pa. Code § 5.321(c). Section 5.321 outlines the scope of discovery as follows:

- (c) *Scope.* Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

Further, Section 5.361 of the Pennsylvania Code specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
 - (1) Is sought in bad faith.
 - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
 - (3) Relates to a matter which is privileged.
 - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

Objections of the Bureau of Investigation and Enforcement to
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C-2014-2431410

52 Pa. Code § 5.361(a).

I&E asserts that HIKO Energy, LLC's Second Set of Interrogatories and Requests for Production of Documents contain requests for information that are not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the allegations against HIKO in the above-docketed proceeding. As such, as set forth in detail below, I&E submits specific objections to HIKO Energy, LLC's Second Set of Interrogatories Nos. 1 through 4 and 23 through 27 and general objections to Definitions, Numbered Paragraphs 8 and 11.

III. OBJECTIONS

A. General Objections

Definitions, Paragraph 8.

8. "Identify" or "identity" when used in reference to any individual means to state his/her full name, age, present or last known home address, his/her present or last known employment position, including responsibilities, business affiliation and location, and his/her position, responsibilities, business affiliation and location at the time in question.

OBJECTION:

I&E objects to Numbered Paragraph 8 of HIKO's Definitions, wherein HIKO seeks, among other things, the "present or last known home address" of any individual when used in reference to the terms "identify" or "identity."

Objections of the Bureau of Investigation and Enforcement to
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Personal, identifiable information such as home addresses is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. The I&E Complaint does not rely on evidence or testimony from residential customers such that home addresses would be discoverable.

Definitions, Paragraph 11.

11. "You", "Your", or "Complainant" means the Pennsylvania Public Utility Commission or the Bureau of Investigation and Enforcement, including any attorneys, agents, employees, contractors, or other representatives of either the Commission or the Bureau, or anyone acting on behalf or at the direction of the Commission or the Bureau.

OBJECTION:

I&E objects to Numbered Paragraph 11 of HIKO's Definitions, wherein HIKO defines "You", "Your", or "Complainant" as meaning "the Pennsylvania Public Utility Commission or the Bureau of Investigation and Enforcement, including any attorneys, agents, employees, contractors, or other representatives of either the Commission or the Bureau, or anyone acting on behalf or at the direction of the Commission or the Bureau."

Objections of the Bureau of Investigation and Enforcement to
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As I&E has already explained to HIKO, I&E is an independent prosecutory arm of the Commission. As an independent prosecutory arm, I&E does not speak for other Commission bureaus. Moreover, the case caption speaks for itself. Complainant in this matter docketed at C-2014-2431410 is solely the Bureau of Investigation and Enforcement. Neither the Pennsylvania Public Utility Commission as a whole nor any other Commission bureau other than I&E is a party to this proceeding. This was the very purpose of the Commission's 2011 reorganization.

Consistent with this objection, I&E will endeavor to provide responses to HIKO's Second Set of Interrogatories and Requests for Production of Documents with the understanding that "You, "Your" and "Complainant" are limited to "the Bureau of Investigation and Enforcement, including any attorneys, agents, employees, contractors, or other representatives of the Bureau, or anyone acting on behalf or at the direction of the Bureau."

B. Specific Objections

I&E incorporates by reference the above general objections, as if set forth in their entirety.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
C-2014-2431410

INTERROGATORIES – SET II

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.

OBJECTION:

I&E objects to this Interrogatory in that I&E, as a prosecuting bureau, does not have the power or authority to revoke licenses. This authority lies solely with the Commission. Additionally, the information requested by HIKO – any and all enforcement action sought or obtained by I&E against any electric generation supplier (EGS company) - is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. Moreover, such information is outside the scope of this proceeding and would entail an unreasonable and unduly burdensome investigation.

The alleged violations against HIKO as set forth in the I&E Complaint are specific to HIKO's billing and marketing practices in Pennsylvania of HIKO customers enrolled

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
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in one specific HIKO price offering. This variable rate price offering to residential electric customers in Pennsylvania provided that the enrolled 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 electric distribution company’s (EDC) price to compare (PTC). HIKO’s *flagrant disregard of the terms of its own price offering is not related to or dependent upon enforcement action that may have been sought or obtained by I&E against any other EGSs for any reason.*

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
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2. Provide copies of any complaint, judgment, consent order or settlement agreement identified in the preceding Interrogatory.

OBJECTION:

I&E objects to this Interrogatory/Request for Production in that the documentation requested by HIKO is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. Moreover, such information is outside the scope of this proceeding and would entail an unreasonable and unduly burdensome investigation.

The alleged violations against HIKO as set forth in the I&E Complaint are specific to HIKO's billing and marketing practices in Pennsylvania of HIKO customers enrolled in one specific HIKO price offering. This variable rate price offering to residential electric customers in Pennsylvania provided that the enrolled 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 (PTC). HIKO's flagrant disregard of the terms of its own price offering is not related to or dependent upon enforcement action that may have been sought or obtained by I&E against any other EGSs for any reason.

Objections of the Bureau of Investigation and Enforcement to
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C-2014-2431410

3. State whether You have revoked the license of any EGS company for failure to file any required report with the Commission and, for each such instance, identify the EGS company and produce a copy of the revocation order or agreement supporting Your answer.

OBJECTION:

I&E objects to this Interrogatory in that I&E, as a prosecuting bureau, does not have the power or authority to revoke licenses. This authority lies solely with the Commission. Additionally, the information requested by HIKO is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. Moreover, such information is outside the scope of this proceeding and would entail an unreasonable and unduly burdensome investigation.

The alleged violations against HIKO as set forth in the I&E Complaint are specific to HIKO's billing and marketing practices in Pennsylvania of HIKO customers enrolled in one specific HIKO price offering. This variable rate price offering to residential electric customers in Pennsylvania provided that the enrolled 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 (PTC). I&E's Complaint contains no allegation regarding the failure to file a Commission report. The relief requested in I&E's Complaint does not seek revocation of HIKO's license for failure to

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
C-2014-2431410

file a Commission report. Information sought regarding any EGS other than HIKO is not relevant to I&E's Complaint. HIKO's flagrant disregard of the terms of its own price offering is not related to or dependent upon enforcement action that may have been sought or obtained by I&E against any other EGSs for any reason.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
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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.

OBJECTION:

I&E objects to this Interrogatory in that the information requested by HIKO on the basis that it is beyond the scope of permissible discovery because it seeks attorney work product; and it is protected by the investigative privilege. Section 5.323(a) of the Pennsylvania Code, 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 is seeking information regarding a "contention" of what is deemed "necessary" which falls within the mental impressions of a party's attorney.

Work performed by I&E's assigned prosecuting attorneys as it related to the allegations set forth in the I&E Complaint by way of summary or otherwise clearly falls within the scope of the attorney work product privilege. Moreover, the adequacy of any civil penalty is ultimately the determination of the presiding ALJs and the Commission.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
C-2014-2431410

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.

OBJECTION:

I&E objects to this Interrogatory in that the information requested by HIKO is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. The alleged violations against HIKO as set forth in the I&E Complaint are specific to HIKO’s billing and marketing practices in Pennsylvania of HIKO customers enrolled in one specific HIKO price offering. This variable rate price offering to residential electric customers in Pennsylvania provided that the enrolled 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 (PTC). I&E’s Complaint does not involve any EGS other than HIKO. HIKO’s flagrant disregard of the terms of its own price offering is not related to or dependent upon enforcement action that may have been sought or obtained by I&E against any other EGSs for any reason. Any contention regarding deterrence of EGS companies other than HIKO is not relevant to this proceeding.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
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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.

OBJECTION:

I&E objects to this Interrogatory in that the information requested by HIKO on the basis that it is beyond the scope of permissible discovery because it seeks attorney work product; and it is protected by the investigative privilege. Section 5.323(a) of the Pennsylvania Code, 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 is seeking calculations or analyses regarding a “contention” of what is deemed “necessary” which falls within the mental impressions of a party’s attorney. Work performed by I&E’s assigned prosecuting attorneys as it related to the allegations set forth in the I&E Complaint by way of summary or otherwise clearly falls within the scope of the attorney work product privilege. Moreover, the adequacy of any civil penalty is ultimately the determination of the presiding ALJs and the Commission.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
C-2014-2431410

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.

OBJECTION:

I&E objects to this Interrogatory in that the information requested by HIKO is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. The alleged violations against HIKO as set forth in the I&E Complaint are specific to HIKO's billing and marketing practices in Pennsylvania of HIKO customers enrolled in one specific HIKO price offering. Any reference to specific formal complaints filed with the Commission by consumers against HIKO have no bearing on and are not relevant to the 14,780 violations set forth in I&E's Complaint regarding HIKO's flagrant disregard for the terms of its price offering to customers that guaranteed a HIKO EGS customer a 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.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
C-2014-2431410

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).

OBJECTION:

I&E objects to this Interrogatory in that the information requested by HIKO is not relevant to the subject matter involved in the pending action and will not lead to relevant information or admissible evidence regarding the specific allegations against HIKO in the I&E Complaint. The alleged violations against HIKO as set forth in the I&E Complaint are specific to HIKO’s billing and marketing practices in Pennsylvania of HIKO customers enrolled in one specific HIKO price offering. Any reference to specific formal complaints filed with the Commission by consumers against HIKO have no bearing on and are not relevant to the 14,780 violations set forth in I&E’s Complaint regarding HIKO’s flagrant disregard for the terms of its price offering to customers that guaranteed a HIKO EGS customer a 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.

Objections of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC - Set II
C-2014-2431410

27. For each denial of any Request for Admissions (Set I), identify the particular Request by number and set forth the facts supporting Your denial.

OBJECTION:

I&E objects to this Interrogatory in that the request by HIKO is not an appropriate discovery request. I&E intends to object or answer HIKO's separate Requests for Admissions as permitted pursuant to 52 Pa. Code § 5.350. HIKO's request that I&E respond to its Request for Admissions as an Interrogatory request is duplicative and unnecessary. The information sought herein will be provided in I&E's timely responses and/or objections to HIKO's Requests for Admissions.

EXHIBIT C

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Responses of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC – Set I
C-2014-2431410

30. State the five (5) largest total civil penalty amounts I&E has sought in any complaint over the past five (5) years and identify the matters in which those penalties were sought.

ANSWER: I&E did not exist until 2011 when the Commission created the Bureau. See *Implementation of Act 129 of 2008, Organization of Bureaus and Offices*, Docket No. M-2008-2071852, pp. 3-5 (Order entered August 11, 2011). Moreover, none of the cases listed below were comparable to the present case for the reasons stated in Answer to HIKO Set I, No. 27.

I&E sought or obtained the following civil penalties in enforcement actions since August 11, 2011: (1) *Pa. PUC, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410- \$14,780,000; (2) *Pa. PUC, Bureau of Investigation and Enforcement v. Burgly Gas & Oil*, Docket No. C-2014-2411284- \$2,000,000; (3) *Pa. PUC, Bureau of Investigation and Enforcement v. West Penn Power Company*, Docket No. C-2014-2417325- \$1,300,000; (4) *Pa. PUC, Bureau of Investigation and Enforcement v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981- \$1,000,000; and (5) *Pa. PUC, Bureau of Investigation and Enforcement v. Respond Power LLC*, Docket No. C-2014-2438640- \$639,000.

EXHIBIT D

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Responses of the Bureau of Investigation and Enforcement to
Interrogatories and Requests for Production of Documents of HIKO Energy, LLC – Set I
C-2014-2431410

28. State all facts and circumstances I&E contends justify a penalty of "\$1,000 for each instance where a customer was overbilled in violation of 53 [sic] Pa. Code 54.4(a)" as alleged throughout the Complaint, including but not limited to the facts and circumstances that relate to any of the factors and standards in 52 Pa. Code §69.1201.

ANSWER: I&E contends that a serious, intentional and flagrant disregard of the Company's obligation to honor a supply rate discount as guaranteed to enrolled customers pursuant to the Company's Welcome Letter and Disclosure Statement combined with the Commission's "zero tolerance" for slamming and related unauthorized business practices justifies a penalty of \$1,000 for each instance where a customer was overbilled in violation of 52 Pa. Code § 54.4(a), as permitted under 66 Pa.C.S. § 3301(a).

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND
ENFORCEMENT,

Complainant

Docket No. C-2014-2431410

v.

HIKO ENERGY, LLC,

Respondent.

CERTIFICATE OF SERVICE

I, Ginene A. Lewis, hereby certify that on this day I caused a true and correct copy of the foregoing document 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).

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VIA ELECTRONIC AND FIRST CLASS MAIL

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Dated: November 24, 2014



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