DrinkerBiddle&Reath LLP

Ginene A. Lewis
215-988-2707 Direct
215-988-2757 Fax
Ginene.Lewis@dbr.com

Law Offices
One Logan Square, Ste. 2000
Philadelphia, PA
19103-6996

(215) 988-2700 phone
(215) 988-2757 fax
www.drinkerbiddle.com

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March 13, 2015

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, and TANYA J. McCLOSKEY, Acting Consumer Advocate v. HIKO ENERGY, LLC, Docket No. C-2014-2427652

Dear Secretary Chiavetta:

Enclosed for filing please find HIKO Energy, LLC's Reply Memorandum of Law Regarding the Admission of "Pattern and Practice" Evidence. Copies of the Memorandum have been served in accordance with the attached certificate of service.

Please feel free to contact me if you have any questions or concerns.

Respectfully,

Ginene A. Lewis

GAL

Enclosures

cc: Certificate of Service
Administrative Law Judge Elizabeth Barnes (via email and First Class mail)
Administrative Law Judge Joel Cheskis (via email and First Class mail)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COMMONWEALTH OF PENNSYLVANIA, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate, Complainants v. HIKO ENERGY, LLC., Respondent	Docket No. C-2014-2427652

REPLY MEMORANDUM OF LAW OF HIKO ENERGY, INC. REGARDING THE ADMISSION OF "PATTERN AND PRACTICE" EVIDENCE

Respondent, HIKO Energy, LLC ("HIKO"), by its undersigned attorneys, hereby responds to the Joint Memorandum of Law submitted by the Commonwealth of Pennsylvania, by Attorney General Kathleen Kane ("OAG") and Acting Consumer Advocate Tanya J. McCloskey ("OCA") (collectively, "Joint Complainants") regarding the admission of "pattern and practice" evidence into the record in this proceeding.

I. INTRODUCTION

Joint Complainants have alleged that HIKO engaged in wrongful conduct, including by violating the Public Utility Code and regulations and Orders of the Pennsylvania Public Utility Commission ("Commission"). The Joint Complainants did not allege that HIKO engaged in a "pattern and practice" of misconduct, and the phrase "pattern and practice" does not appear

anywhere in the Joint Complaint. Instead, Joint Complainants alleged that, "upon information and belief, HIKO committed an unspecified number of violations of the Commission's regulations at 52 Pa. Code §§ 54.43, 54.42(a)(9), 54.5, 56.1, 111.4, 111.5, and 111.12, and Section 2807(d)(1) of the Public Utility Code."[1] The Joint Complainants did not allege any specific violations against individual customers (though they have sought to recover on behalf of individual customers), but instead alleged generalized misconduct on the basis of customer complaints.

All of the customer complaints and contacts at issue here related to HIKO's variable-rate pricing during the well-publicized Polar Vortex crisis during the winter of 2014. During this period, unusually severe cold weather, coupled with Canadian regulatory actions that caused natural gas prices to surge, combined with unplanned outages on the PJM system, all caused unprecedented increases in wholesale electricity prices, which in turn caused variable-rate retail electricity prices to spike sharply.[2] At the time of the Polar Vortex, all of HIKO's customers in Pennsylvania were on variable-priced enrollments for electric generation supply. As a result of these "unforeseeable" events, many of HIKO's customers saw their prices for electric generation supply increase in the period January through March 2014.[3]

The Complaint filed by the OCA and OAG attempts to make HIKO a scapegoat for the unprecedented wholesale electricity prices that rippled throughout the industry during early 2014. In furtherance of that goal, the OCA and OAG have submitted testimony from 98

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[1] Joint Complaints also allege that HIKO violated the Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1, et seq.) ("UTPCPL") and the Telemarketer Registration Act (73 P.S. § 2241, et seq.) ("TRA").

[2] Final-Omitted Rulemaking Order related to amending Provisions of 52 Pa. Code. Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers, p. 7, 22 (April 3, 2014); PJM, Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events (May 8, 2014).

[3] See generally, Answer and New Matter of HIKO Energy, filed July 30, 2014.

customers who initially made complaints about HIKO and asserted that they are entitled to have the Commission conclude that HIKO engaged in a "pattern and practice" of wrongdoing. These 98 customers were a much smaller subset of the total of approximately 371 consumers identified in the Joint Complaint (109 consumers who communicated with OCA, 254 who contacted the Attorney General and 8 who filed formal complaints).[4] The 98 customers, in effect, were a self-selected group that cannot even be said to be representative of the nearly 400 consumers who initially complained, let alone the entirety of HIKO's customer base. The OCA and OAG ask the Commission to make this sweeping "pattern and practice" conclusion based on written questionnaires from a very small number of customers (98), which represents only a tiny fraction (less than 1%) of HIKO's Pennsylvania customers, which in January 2014 numbered nearly 10,000. And the written questionnaire responses from that narrow sliver of HIKO's customers must then be sliced further into even smaller groups because only a smaller-portion of the 98 customers offer any testimony on each of the eight counts alleged in the Joint Complaint.[5]

The Joint Complainants have pre-served the written "testimony" of these 98 customer witnesses. The "testimonies" in question are actually handwritten customer responses to a template questionnaire that was designed by the Joint Complainants and mailed to the customer-witnesses months after this litigation was commenced and many more months after the events at issue. The Joint Complainants solicited these questionnaire responses from the 98 customer-witnesses by way of a form letter mailed under the letterhead of the OAG. In many cases, the customer responses do not respond to some of the questions posed; they refer to hearsay

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[4] See Joint Complaint, paras. 17-19.

[5] By way of example, at least 12 of the 98 consumers allege that they were promised a fixed rate for supply service. HIKO has never offered a fixed-rate product and the contract documents will confirm that these customers, in fact, had variable-rate service. Other consumers do not offer any questionnaire responses critical of HIKO's customer service and some express their satisfaction. Similarly, only 10 of the 98 customers (or 0.1% of all HIKO customers) have alleged slamming. HIKO intends to show that all of those customers, in fact, agreed to HIKO service.

statements of other persons; they refer to documents not in evidence (or even produced in this lawsuit); or they contradict other documentary evidence. The level of detail of the "testimonies" varies considerably. Some customers include fairly detailed recollections of their enrollment with HIKO, some contain almost no information, and some acknowledge that the customer cannot recall various aspects of their enrollment. Many of the statements vaguely recount conversations that they admit took place long ago.

HIKO believes that many of the assertions made in these statements will be qualified, modified, or retracted outright during cross-examination. Therefore, it is absolutely critical that HIKO be given the opportunity to cross-examine each and every one of the customer witnesses, if it so choses. This is especially important when the Joint Complaints assert that these 98 consumers are meant to be representative of "what [all] consumers *believed* HIKO's offer was based on HIKO's solicitations and new customer documents, and how [all] consumers *interpreted* these items." (Joint Complainants' Mem. at 4) (emphasis supplied). Joint Complainants should properly have a high burden to prove that the various differing beliefs and interpretations of 98 individuals can be representative of ***all*** HIKO customers (including the approximately 2,500 customers who have continued to be HIKO customers to date). While HIKO would be entitled to confront and cross-examine these witnesses in person, the OCA and OAG propose to allow the witness statements to be admitted into the record—even in the absence of any showing that many of the witnesses would not be available to appear in person. And even if it were proper to do so, that "evidence" could not form the basis for a "pattern and practice" of violations because it would directly conflict with the Commission's long-standing principles relating to authentication of witness statements, cross-examination of witnesses, and the burden of proving violations by substantial evidence of record.

II SUMMARY OF ARGUMENT

The Joint Complainants' Memorandum of Law concerns two evidentiary issues regarding the written customer statements upon which the Joint Complainants rely. First, the Joint Complainants seek to have the customer statements admitted into the evidence without authentication and without cross-examination. There is no legal basis for admitting the statements into evidence without authentication and without cross-examination. As a result, basing findings of law or fact on such unauthenticated statements would constitute reversible error.

Second, Joint Complainants seek to use the 98 customer statements to show a "pattern and practice" of violations by HIKO; in other words, Joint Complainants are looking for an improper shortcut to show a broader set of violations beyond those specifically alleged by the statements themselves. But it is clear that allegations made by such a small number of customers regarding their specific enrollments or dealings with an Electric Generation Supplier ("EGS") cannot form the basis for a finding of violations related to many thousands of other unspecified customers' enrollments or dealings with HIKO.

Tellingly, the Joint Complainants candidly admit that there is no Commission precedent for the evidentiary interpretations that they espouse. Indeed, they cannot point to a single Commission or Pennsylvania Appellate Court decision that even suggests that the Commission is the appropriate forum for a hearsay-based "pattern and practice" prosecution of the kind described in their Memorandum. The Joint Complainants' position on the admission of hearsay evidence must be rejected because (a) The Pennsylvania Supreme Court has explicitly not adopted the residual exception to hearsay upon which the Joint Complainants rely; (b) the Commission has likewise never adopted the residual exception and refrains from making

conclusions of fact based on hearsay; (c) even federal courts are very hesitant to apply the residual exception, and have rejected its use in cases when invoked for the same reasons that the Joint Complainants seek to invoke it here; (d) the FTC cases cited by the Joint Complainants to justify the use of the residual exception are not relevant to Pennsylvania proceedings and are easily distinguishable from the case at bar; and (e) the geographic efficiency and other justifications for the use of the residual exception are not present in this case.

III. ARGUMENT

A. Written customer statements cannot be admitted into the record without authentication and cross-examination

The Joint Complainants argue that written consumer statements should be admitted into the record without authentication and without cross-examination. The Joint Complainants' legal rationale for this position is fatally flawed and without precedent in Pennsylvania, and therefore must be rejected.

Unauthenticated written statements are hearsay

The unauthenticated written statements ("testimonies") proffered by the Joint Complainants constitute inadmissible hearsay. That is, they are statements other than those made by a declarant while testifying at trial that are being offered into evidence to prove the truth of the matters asserted therein. They thus constitute hearsay under Pennsylvania Rule of Evidence 801.

Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay into evidence. Hearsay rules are not mere "technical rules of evidence," but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. See, e.g., *Loudon v. Viridian Energy,* PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012), *Gibson*

v. W.C.A.B., 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.,* PA PUC No. C-2014-2408057 (Order entered July 30, 2014). A finding based solely on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review,* 367 A.2d. 366 (Pa. Cmwlth 1976).

Rule 901 of the Pennsylvania Rules of Evidence provides for the necessity of authentication of documentary evidence. Written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner, 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate the testimony as a witness with knowledge of the authenticity of the document pursuant to P.R.E. 901(b)(1). Without such authentication, the witness statements such as the ones proffered by the Joint Complainants are inadmissible as hearsay.

Pennsylvania does not recognize the residual exception to hearsay

Though Joint Complainants effectively acknowledge that the written witness statements constitute hearsay, they argue that the "residual exception" to the hearsay rule permits the statements to be admitted into the record without authentication or cross-examination. Relying on federal appellate cases involving prosecutions by the Federal Trade Commission ("FTC"), in which the courts allowed the admission of consumer affidavits into the record without cross-examination, Joint Complainants contend that the "residual exception" supports their argument for the admission of the written witness statements without authentication or cross-examination. In all of the FTC cases, the courts permitted admission of the affidavits pursuant to Federal Rule of Evidence 807 (formerly F.R.E. 803(24)), which codifies the "residual exception" to the hearsay rule. But the Pennsylvania Supreme Court has expressly chosen not to adopt F.R.E. 807 and its "residual exception" to hearsay. See P.R.E. 804(b)(5) and 807 and *Commonwealth v.*

Stallworth, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001) ("Pennsylvania has not adopted … the residual exception"). Indeed, *none* of Joint Complainants' authorities involved the rules of evidence that apply in the Commonwealth of Pennsylvania, and *no Pennsylvania court or administrative agency has ever held that the residual exception applies in Pennsylvania,* even in informal administrative hearings.[6]

Joint Complainants further argue that the customer statements can be admitted without cross-examination and relied upon even though they constitute hearsay. The Joint Complainants in effect argue that the Commission should ignore the Supreme Court's express rejection of the residual exception and rely on hearsay evidence to decide this case. But the Commission has rejected Joint Complainants' contention. "Although the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence." *Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh,* No. 20122249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013).

The very limited circumstances permitting use of the residual exception are not present

As set forth above, if the Commission were to rely on the residual exception to admit hearsay evidence, it would be the first adjudicatory body in the Commonwealth of Pennsylvania to do so. But even if the Commission were inclined to deviate from well-established precedent and practice, this case does not present the "rare" circumstances in which federal courts have applied the residual exception:

> Rule 807 "is to be utilized only rarely, and is not to be taken as a 'broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(6). In order to be admitted under Rule 807, there must be a 'clear basis of trustworthiness' to support the out-of-court

[6] The Pennsylvania Rules of Evidence contain other enumerated exceptions to the prohibition on hearsay, but none of those exceptions apply to the written customer statements that the Joint Complainants seek to admit in this case, and the Joint Complainants do not assert that any other exceptions would apply.

> statement. The burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of the requisite guarantees of trustworthiness." *Reassure Am. Life Ins. Co. v. Warner,* 2010 WL 4782776, *2 (S.D.Fla.2010) (Martinez, J.) (quoting *NLRB v. United Sanitation Serv. .,* 737 F.2d 936, 941 (11th Cir.1984); *United States v. Mathis,* 559 F.2d 294, 299 (5th Cir.1977); and *In re Terazosin Hydrochloride Antitrust Litigation,* No. 99—MDL-1317, 2005 WL 5955699, at *5 (S.D.Fla.2005).

In support of their position, the Joint Complainants point to several federal cases in which the courts admitted customer affidavits pursuant to the residual exception, but the circumstances underlying those rulings were far different than the ones present in this case. The Joint Complainants principally rely on *FTC v. Figgie International, Inc.,* 994 F. 2d 595 (9th Cir. 1993). In *Figgie,* the Ninth Circuit admitted letters that consumers provided at the time they purchased the product at issue. The letters were admitted not to prove liability or wrongdoing by Figgie, but instead were admitted during the remedy phase of the case in order to establish the prices that customers paid for Figgie's product. In the *Figgie* case, the letters were sent by consumers without solicitation by the FTC. By contrast, the Joint Complainants in the present case actively solicited their customer statements using template questionnaires specifically framed to elicit responses sought by the Joint Complainants in furtherance of their theory of the case. The fact that the statements were solicited using leading questions about events that took place many months or years before distinguishes the statements from those used in *Figgie,* and calls into question the trustworthiness of the statements. The Joint Complainants offer nothing to guarantee the trustworthiness of these hearsay statements, except to point to other similarly elicited hearsay statements as "corroboration". That rationale cannot reasonably satisfy the "guarantee of trustworthiness" required in *Figgie* and the other cases upon which the Joint Complainants rely. Joint Complainants simply have not offered any guarantees of

trustworthiness that justify admitting the statements into evidence without authentication or cross-examination.

The other FTC cases referenced by the Joint Complainants—*Amy Travel Service Inc.*[7] from the 7th Circuit and *Kitco*[8] from the Minnesota District Court— are similarly distinguishable. *Amy Travel* involved the admission of consumer complaint letters to demonstrate the requisite customer harm for restitution, not defendant liability, and a key factor relied upon by the court to admit the letters was the fact that the customer-affiants were located throughout the country, unlike in this case. *Kitco* also involved the admissibility of customer affidavits to establish the total amount of customer injury, not liability, and the court ruled that it would be too expensive and time consuming to call witnesses from all parts of the United States merely to establish total consumer injury. In the present case, all of the customer witnesses reside in Pennsylvania, (many of them even reside in the Harrisburg area), and accommodations have been made for many of them to testify by telephone, so no unreasonable efforts would need to be undertaken to obtain more probative evidence, i.e., authentication of the written testimony followed by cross-examination.

Regardless, numerous federal courts have rejected the FTC's attempts to admit customer letters under the residual exception in circumstances very similar to those present here. For instance, in *FTC v. Washington Data Resources,* 2011 WL 2669661 (M.D. Fla. July 7, 2011), the district court rejected the FTC's attempts to introduce letters that were obtained by way of outreach by the FTC to certain consumers to procure a declaration for the purpose of litigation, much like in the present case. Furthermore, the Court in *Washington Data Resources* noted that the statements were not trustworthy because the FTC sought to use them to establish more than

[7] *FTC v. Amy Travel Service, Inc.,* 875 F.2d 564, 576 (7th Cir. 1989

[8] *FTC v. Kitco of Nevada, Inc.,* 612 1282, 1294 (D. Minnesota 1985)

merely the extent of consumer injury. Rather, the FTC offered them as "substantive evidence of the defendants' alleged deceptive statements and marketing material, the defendants' course of dealing with a consumer, and the defendants' failure to deliver promised services"—which are the exact same reasons that the Joint Complainants seek to offer the customer statements in the present case.

State Courts have also rejected attempts by an Attorney General to introduce customer affidavits under the residual exception in consumer protection proceedings because of circumstances that are nearly identical to those present in the case at bar. In *People v. Shifi-in,* 342 P.3d 506, 2014 WL 785220 (Colo. App. Feb. 27, 2014), the Colorado Court of Appeals ruled that customer affidavits were not admissible because:

- The affiants knew that litigation was pending. (citing *Fed. Trade Comm'n v. E.M.A. Nationwide, Inc.,* No. 1:12—cv-2394, 2013 WL 4545143, at *2 (N.D.Ohio Aug. 27, 2013) (excluding consumer complaints under Rule 807 where "the complaints list events that, perhaps not created in anticipation of litigation, were created with knowledge that litigation was possible").

- The affiants stood to receive substantial restitution based on their affidavits. (Contrasting *Figgie Intl,* 994 F.2d at 608 (consumer complainants "had no motive to lie to the FTC regarding the price they paid for their heat detectors"), with E.M.A. Nationwide, 2013 WL 4545143, at *2 ("consumers often made the complaints with hopes of receiving some type of refund or other financial benefit").

- The affidavits were not written spontaneously or independently, but were obtained by representatives of the Attorney General's office. (citing *lams Co. v. Nutro Prods.,* Inc., No. C-3-00-566, 2004 WL 5780001, at *5 (S.D.Ohio July 26, 2004) (mystery shopper reports were unlike the complaint letters in *Figgie Ina,* 994 F.2d at 608, which "were sent independently to the FTC from unrelated members of the public").

- The Attorney General's office procured the affidavits to further its position in the litigation. (citing *Fed. Trade Comm'n v. Wash. Data Res.,* No. 8:09—cv-2309—T23TBM, 2011 WL 2669661, at *5 (M.D.Fla. July 7, 2011) ("[T]he declarations proffered by the Commission derive from the Commission's contacting certain consumers and procuring a declaration for the purpose of litigation.").

All four of the above-referenced factors are present in the case at bar. In short, even if Pennsylvania did recognize the "residual exception" (which it does not), the rare circumstances permitting admission of evidence pursuant to the residual exception are not present in this case. For all of the reasons set forth above, there is no legal basis to admit unauthenticated written customer statements into the record without cross-examination, and the Joint Complainants' proposal to do so must be rejected.

B. Any findings of violation against HIKO must be based on facts that appear in the record

The Joint Complainants' Memorandum of Law provides an extended analysis of the use of customer affidavits in FTC "pattern and practice" consumer protection prosecutions in various federal district courts. This analysis, however, is irrelevant here.

A Complaint to the Commission must set forth an act or thing done or omitted by a regulated entity, in violation of any law that the Commission has jurisdiction to administer or of any regulation or order of the Commission. 66 Pa. C.S. § 701, Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). "'Burden of proof' means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party." *Se-Ling Hosiery v. Margulies,* 364 Pa. 54, 70 A.2d 854 (1950). The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company,* 54 Pa. PUC 528 (1980), and *Waldron v. Philadelphia Electric Company,* 54 Pa. PUC 98 (1980).

Furthermore, the decision of the Commission must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a

reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. UN. Comm'n,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review,* 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center,* 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984).

In accordance with these well-settled principles, for each violation that the Joint Complainants seek to prove against HIKO, they must submit substantial evidence to support a finding that HIKO committed that violation. Neither the Public Utility Code, nor the Commission's regulations, nor the Commission's Orders permit the Commission to conclude that a regulated entity has committed a violation without proof that such a violation occurred. The Joint Complainants' "pattern and practice" theory is nothing more than an attempt to achieve findings of violations beyond that which they are able to prove with evidence in the record. The Joint Complainants readily admit that there is no precedent for the Commission to find that a regulated entity engaged in a "pattern and practice" of violations by extrapolating the "pattern and practice" from a discrete number of individual customer testimonies.[9] Indeed, the Joint Complainants cannot point to a single example of the Commission making such a finding of a "pattern and practice" of violations against a Respondent.

In support of their position that the Commission can base a determination of liability on evidence from "a representative sample of consumers," the Joint Complainants make the novel argument that the Commission should unilaterally adopt the practices of Common Pleas Courts in adjudicating civil class-action lawsuits, as outlined in Rules 1701-1717 of the Pennsylvania

[9] See OCA/OAG Joint Memorandum of Law, at p. 3 ("This type of case involving pattern of, inter alia, deceptive and misleading conduct and large volumes of consumer complaints and testimonies is of first impression to this Commission.")

Rules of Civil Procedure.[10] The Joint Complainants fail to provide any legal authority whatsoever for the Commission to take such an unprecedented step, other than to argue that the use of sampling evidence is "commonplace in Pennsylvania jurisprudence." It is debatable how "commonplace" the use of sampling evidence is to provide liability in Pennsylvania. But there can be no debate that the Pennsylvania Public Utility Commission is not authorized to unilaterally adopt the processes and evidentiary procedures that have been established for class action litigation in Pennsylvania. The Pennsylvania Rules of Civil Procedure cannot be used as a basis to rewrite longstanding Commission standards regarding the admissibility of evidence and the burden of proof. Rules 1701-1714 of Pennsylvania Rules of Civil Procedure apply only to class actions, and set forth a detailed procedural process for pleadings, class certification, definition of the class, notice to potential class members, conduct of the hearings, and disbursement of monetary awards. Obviously, none of these processes have been followed to date in the present case. The Rules of Civil Procedure plainly do not indicate that those rules apply to Commission proceedings or somehow should affect questions concerning the admissibility of evidence.

In short, to the extent that the Joint Complainants intend to prove multiple violations by HIKO, it is incumbent upon the Joint Complainants to submit substantial evidence of each and every specific alleged violation. The Joint Complainants cannot expect to prove a discrete number of violations and then ask the Commission to speculate that more violations must have occurred. Such a request would directly violate the bedrock principle that Commission findings cannot be based on conjecture, surmise or a "mere trace of evidence or a suspicion of the existence of a fact sought to be established". *Norfolk & Western Ry. Co. p. Pa. Pub. Util. Comm'n,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd.*

[10] See Joint Complainants' Memorandum of Law, at footnote 4.

of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare,* 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984).

The Commission has never seen fit to find violations or to assess civil penalties based on assumptions about how customers might have been affected by a utility's actions, without any evidence of violation against specific customers. Section 69.1201 of the Commission's regulations outlines the specific factors and standards that the Commission is to use in evaluating cases involving violations of the Public Utility Code and the Commission's regulations. 52 Pa. Code § 69.1201(c)(5) authorizes the Commission to consider the number of customers affected by a violation in determining an appropriate sanction for the violation. The Commission routinely considers the number of affected customers when determining an appropriate civil penalty for proven violations, but the Commission has expressly refrained from speculating about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were in fact affected by a violation. See, e.g., *Eckroth v. Verizon Pa. Inc.,* Docket No. C-2011-2279168 (Order entered April 18, 2013) ("In this case, the number of customers affected by Verizon PA's actions is unknown. Although the Complainant testified that his neighbors experienced similar problems and that they switched to RCN as a result, we find that this testimony is hearsay and may not be relied upon.")

In sum, the Joint Complaint in this matter was based in large part "upon information and belief," because the Joint Complainants' allegations of wrongdoing by HIKO were (and are) merely speculative. It is certainly permissible to make allegations "upon information and belief" in the filing of a Formal Complaint to the Commission. But in order to meet their burden of proof, the Joint Complainants must produce substantial evidence to support a finding

of each violation alleged against HIKO. The Joint Complainants have not provided any legal basis for the Commission to modify this longstanding statutorily mandated principle.

C. The Joint Complainants' vague "public policy" arguments do not trump HIKO's due process rights

The Joint Complainants in this case seek substantial restitution for HIKO's Pennsylvania customers, civil penalties and other relief against HIKO. It is apparent that the Joint Complainants wish to recover based on its unprecedented "pattern and practice" theory and based on hearsay evidence. The Joint Complainants cite "solid public policy" reasons for allowing them to achieve findings of violations against HIKO without individual proof of each violation. *See* Joint Complainants' Memorandum of Law, at p. 7. None of those reasons has any merit here.

The Joint Complainants' vague "public policy" argument for modifying the rules of evidence and their burden of proof cannot be used as a basis to violate HIKO's due process rights. "[G]overnment licenses to engage in a business or occupation create an entitlement to partake of a profitable activity, and therefore, are property rights." *Philadelphia Entertainment and Development Partners, L.P. v. Pennsylvania Gaming Control Bd.,* 34 A.3d 261 (Pa.Cmw1th.2011), citing *City of Phila. Bd. of License & Inspection Review v. 2600 Lewis, Inc.,* 661 A.2d 20, 22 (Pa.Cmwlth.1995) and *Young J Lee, Inc. v. Dep't of Revenue, Bureau of State Lotteries,* 504 Pa. 367, 474 A.2d 266 (1983). The principle that due process is fully applicable to adjudicative hearings involving substantial property rights before administrative tribunals is well established. See *Soja v. Pennsylvania State Police,* 455 A.2d 613, 500 Pa. 188 (1982), citing *Conestoga Nat'l Bank of Lancaster v. Patterson,* 442 Pa. 289, 275 A.2d 6 (1971); *Wiley v. Woods,* 393 Pa. 341, 141 A.2d 844 (1958); *Commonwealth ex rel. Chidsey v. Mallen,* 360 Pa. 606, 63 A.2d 49 (1949); *Pennsylvania State Athletic Comm. v. Bratton,* 177 Pa.Super.Ct. 598, 112 A.2d 422 (1955).

In *Sofa,* the Pennsylvania Supreme Court noted that the prerequisites of due process have been frequently articulated as follows:

> "[The] essential elements [of due process] are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause': 12 Am Jur. § 573, pp. 267, 268; *Corn. ex rel. Chidsey v. Keystone Mut. Cas. Co.,* 373 Pa. 105, 109, 95 A.2d 664; *Carter v. Kubler,* 320 U.S. 243, 88 L.Ed. 26, 64 S.Ct. 1; *Ohio Bell Telephone v. Public Utilities Commission of Ohio,* 301 U.S. 292, 81 L.Ed. 1093, 57 S.Ct. 724; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.,* 227 U.S. 88, 57 L.Ed. 431, 33 S.Ct. 185; *Jordan v. American Eagle Fire Insurance Company* [83 U.S.App.D.C. 192], 169 F.2d 281, 288." Moreover, "[i]n almost every setting where important decisions turn on questions of fact, due process requires **an opportunity to confront and cross-examine adverse witnesses."** *Goldberg v. Kelly,* 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). (Emphasis added).[11]

The *Sofa* court cited the United States Supreme Court's explanation of importance of cross-examination to due process:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We had formalized these protections in the requirements of confrontation and cross examination. They have ancient roots." *Greene v. McElroy,* 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).[12]

Because the Joint Complainants are seeking severe sanctions against HIKO, HIKO is entitled to full due process, including the rights of confrontation and cross-examination. The Joint

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[11] *Sofa v. Pennsylvania State Police,* 455 A.2d 613, 615, 500 Pa. 188, 194 (1982)
[12] *Id.*

Complainants' have simply not submitted any legal or public policy basis for altering the Commission's long-standing principles relating to authentication of witness statements, cross-examination of witnesses, and the burden of proving violations by substantial evidence of record.

III. CONCLUSION

The Joint Complainants' Memorandum is troubling in the extent to which it would trample HIKO's due process rights in furtherance of the goal of making HIKO a scapegoat for what the Commission itself has determined were unforeseeable events relating to the Polar Vortex. As set forth above, the Joint Complainants are asking the Commission to take the unprecedented step of finding a "pattern and practice" of wrongdoing against HIKO on the basis of a selected number of customer statements representing an infinitesimal fraction of HIKO's customer base. And, even more egregiously, the Joint Complainants are asking the Commission to make such an unprecedented finding based largely on *hearsay evidence,* which the Commission never has done, by relying on a hearsay exception that no Court or agency in Pennsylvania has ever recognized. The Joint Complainants have provided no cogent rationale whatsoever to deviate from the Commission's longstanding adjudicatory standards that forbid making factual findings based on hearsay and that require every violation to be proven by the preponderance of substantial evidence in the record.

Respectfully Submitted,

DRINKER BIDDLE & REATH, LLP

Dated: March 13, 2015

Vincent E. Gentile
Ginene A. Lewis
One Logan Square, Suite 2000
Philadelphia, Pennsylvania
Telephone: 215.988.2700
Fax: 215.988.2757

Motty Shulman
William Marsillo
Andrew Dressel
BOIES, SCHILLER & FLEXNER, LLP
333 Main Street
Armonk, NY 10504

Counsel for HIKO Energy, LLC

CERTIFICATE OF SERVICE

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

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

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

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

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

Dated: March 13, 2015

Ginene A. Lewis, Esq.
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
215.988.2707
215.988.2757 (FAX)
Ginene.Lewis@dbr.com