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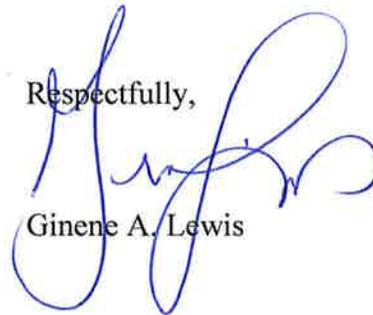
Re: Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, and TANYA J. McCLOSKEY, Acting Consumer Advocate v. HIKO ENERGY, LLC, Docket No. C-2014-2427652

Dear Secretary Chiavetta:

Enclosed for filing please find HIKO Energy, LLC's Motion to Strike Pre-Served Consumer Direct Testimony. 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)

COMMONWEALTH OF PENNSYLVANIA

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

**HIKO ENERGY, LLC'S MOTION TO STRIKE
PRE-SERVED CONSUMER DIRECT TESTIMONY**

TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

HIKO Energy, LLC ("HIKO"), by and through its counsel, files this Motion to Strike Pre-Served Consumer Direct Testimony ("Motion"), pursuant to Section 5.103 of the Pennsylvania Public Utility Commission's regulations, 52 Pa. Code § 5.103, and the Order Granting Motion for Continuance dated December 22, 2014. By this Motion, HIKO respectfully requests an order striking and ruling inadmissible certain customer witness testimony and exhibits pre-served by the Pennsylvania Attorney General, through the Bureau of Consumer Protection ("OAG"), and the Office of Consumer Advocate ("OCA") (collectively, "Joint Complainants").

I. INTRODUCTION

1. In accordance with the procedural schedule established for this proceeding, Joint Complainants served two volumes of "Consumer Direct Testimony" on HIKO on December 5,

2014. This pre-served written consumer testimony solicited by the Joint Complainants are responses to surveys or questionnaires sent to hundreds of potential consumer witnesses.

2. By this Motion, HIKO seeks to strike all or portions of certain pre-served consumer witness statements on three grounds: (a) the inclusion of answers to a leading question in most of the statements about whether sales representatives guaranteed savings, (b) the inclusion of inadmissible hearsay in many of the statements, and (c) the inclusion of vague and incomplete answers relating to the consumer's account of his or her interactions with a HIKO sales representative.

3. First, many of the statements submitted by the Joint Complainants contain answers to an impermissible leading question. Specifically, Question 12.a. asks, "Did the EGS salesperson guarantee savings?" If the consumer's response is an affirmative yes, then Question 12.b. asks the consumer to explain.¹ The Joint Complainants' attempt, by these leading questions, to put words in the consumers' mouths is impermissible and therefore must be stricken.

4. Second, several of the statements contain inadmissible hearsay that is offered for the truth of the matters asserted, and that testimony should be stricken in whole or in part. While the majority of the statements provide accounts of out-of-court declarations made by HIKO sales representatives, several of them go even further to relate what HIKO sales representatives allegedly told other individuals, who in turned shared those alleged statements with the consumer witness providing testimony.

5. Last, there are a few instances in which a consumer provides vague and incomplete responses to Joint Complainants' questions. This denies HIKO of its right to

¹ For ease in reference throughout the remainder of this Motion, HIKO will refer to both parts of this question as the "the guaranteed savings question."

effective cross-examination. Given that this action is predicated on the alleged consumer complaints made to Joint Complainants, information related to the consumer's interactions with HIKO should be first developed in Joint Complainants' case-in-chief and not left for HIKO to advance.

6. For these reasons, HIKO moves to strike all or portions of the consumer direct testimony pre-served by Joint Complainants.

II. LEGAL STANDARD

7. Section 5.403(a)(1) of the Commission's regulations authorizes the Presiding Officers to control the receipt of evidence, including ruling on the admissibility of evidence. 52 Pa. Code § 5.403(a)(1).

8. Section 5.403(b) of the Commission's regulations requires the Presiding Officers to "actively employ these powers to direct and focus the proceedings consistent with due process." 52 Pa. Code § 5.403(b).

9. "While the Commission as an administrative agency having quasi-judicial functions is not limited by the strict rules relating to the admissibility of evidence, essential principles must be observed." *Pittsburgh and Lake Erie Railroad Co. v. Pa. Public Util. Comm'n*, 85 A.2d 646, 653 (Pa. Super. Ct. 1952); *Bleilevens v. State Civil Serv. Comm'n*, 312 A.2d 109, 111 (Pa. Commw. 1973).

III. ARGUMENT

A. **The Guaranteed Savings Question Is Impermissibly Leading and Any Answers to That Question Should Be Stricken**

10. The guaranteed savings question asks, "Did the EGS sales person guarantee savings?" It then asks each witness, "If yes, please explain." As the guaranteed savings question is a leading question improperly directed to a friendly witness on direct examination, any

affirmative answers to that question, and any answers to the follow-up question are inadmissible and should be stricken.

11. A party may not lead its own witness with suggestive questions. *See In Re Rogan Estate*, 171 A.2d 177, 181 (Pa. 1961); *Pascone v. Thomas Jefferson Univ.*, 516 A.2d 384, 388 (Pa. Super. Ct. 1986); *see also* PA. R. EVID. 611(c). That principle applies equally to administrative proceedings. *See Harbison v. Workmen's Compensation Appeal Bd. (Donnelley)*, 496 A.2d 1306, 1309 (Pa. Commw. Ct. 1985) (noting that hearing officer could not allow counsel "to literally place the sought-after 'answers into the witnesses mouths.'") (citation omitted). Moreover, answers to inappropriate leading questions are not admissible and may not be used to support the examining parties' case. *Wilson v. A.P. Green Indus., Inc.*, 807 A.2d 922, 926 (Pa. Super. Ct. 2002).

12. The guaranteed savings question practically puts Joint Complainants' desired answer in the consumers' mouths because it makes clear to the consumer that he or she is expected to answer in the affirmative. Despite many consumers suggesting nothing about promised savings in response to the more general questions, most of them respond yes to the guaranteed savings question, including consumers who allege that they did not switch to HIKO.

13. In this context, each consumer witness knows that Joint Complainants are trying to recover money for them from HIKO on the basis of allegedly misleading statements by HIKO regarding pricing and savings. Asking the consumer, "Did the EGS salesperson guarantee savings?" clearly suggests that an affirmative answer is both desired and the one most likely to produce a refund for the witness. Had the question been phrased appropriately, consumers would not have been encouraged to answer in the affirmative, but rather would have provided their actual, unprompted recollection of the facts.

14. Moreover, if a consumer believes that a HIKO sales representative guaranteed savings, that is a claim that would have been raised in response to questions asking the consumer to describe the problem or to explain their understanding of the price or how it would be set. In fact, some statements do make such a claim in response to earlier questions.

15. HIKO should be required to defend such allegations only when they are offered by the consumer without being prompted by Joint Complainants. As such, Joint Complainants' guaranteed answer question and any answers thereto should be stricken.

B. Consumer Witness Statements Containing Inadmissible Hearsay Should Be Stricken

16. Pennsylvania Rule of Evidence 801 defines "hearsay" as an out-of-court statement offered for the truth of the matter asserted. PA. R. EVID. 801. In some instances, consumer statements involve references to alleged statements made by HIKO's sales representatives to other individuals. In each situation, these statements are offered for the truth of the matters asserted. As such, the statements contain inadmissible hearsay under Pennsylvania Rule of Evidence 801 and should be stricken in whole or in part.

17. Hearsay is not admissible as evidence under Pennsylvania Rule of Evidence 802, except as specifically provided by the Rules, a statute, or the Pennsylvania Supreme Court. PA. R. EVID. 802. 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. P.U.C. Docket No. C-2011-2244309, Initial Decision at 7 (Feb. 2, 2012).

18. Even when hearsay is admissible pursuant to an exception, it is well-settled that a finding based wholly on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Bd. of Review*, 367 A.2d 366, 369 (Pa. Commw. 1976)

(explaining that a “finding based Solely [sic] on hearsay, even if that hearsay was admitted without objection, cannot stand.”) The Commission has held that “[a]lthough 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 and Enforcement v. Yellow Cab Co. of Pittsburg*, Docket No. 2012-22449031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013). The Commission has expressly refused to make findings of fact on the basis of hearsay without separate evidence corroborating it. *See, e.g., Jackson v. PECO Energy Co.*, Docket No. F-2013-2351046, Initial Decision at 8 (July 5, 2013); *Davis v. Equitable Gas., LLC*, Docket No. C-2011-2252493, 2012 WL 3838095 (Apr. 27, 2012).

19. Accordingly, the following statements containing hearsay should be stricken in whole or in part, as follows:

- a. **Michael Walker.** According to the verified statement signed by Michael Walker, the HIKO sales representative spoke with his wife, Kacy Walker. Because Mr. Walker is providing an account of Mrs. Walker’s alleged interactions with HIKO, this testimony contains inadmissible hearsay and should be stricken in its entirety. At a minimum, the answers to Questions 7, 8, 9, 10, 11, 12, 13, and 17 should be stricken.
- b. **Mary Miller.** According to the verified statement signed by Mary Miller, the HIKO sales representative spoke with her “significant other while he was at his daughter’s house.” Because Ms. Miller is providing an account of some person other than herself, this testimony contains inadmissible hearsay and should be stricken in its entirety. At a minimum, the answers to Questions 7, 8, 9, 10, 11, 12, 13, and 17 should be stricken.

c. **Betty Shughart.** The verified statement of Betty Shughart was signed by Mrs. Shughart and her daughter, Cindy Fraker. In response to Joint Complainants' Questions 6 through 18, Ms. Fraker explains that the HIKO sales representative spoke with her deceased father, Leverne Shughart. Ms. Fraker's response also provides an account of Mrs. Shughart's communications with Mr. Shughart regarding his enrollment with HIKO. In turn, Ms. Fraker's response to Questions 6 through 18 involves triple hearsay as she is providing Mrs. Shughart's account of Mr. Shughart's account of his interactions with the HIKO sales representative. Accordingly, Ms. Fraker's responses to Questions 6 through 18 should be stricken in their entirety.

C. Vague and Incomplete Responses to Joint Complainants' Questions Should Be Stricken

20. In some instances, the pre-served consumer direct testimony provides vague and incomplete responses to Joint Complainants' questions, which deprives HIKO of its right to effective cross-examination. Given that this action is largely predicated on the alleged customer complaints made to Joint Complainants, a consumer's failure to provide full and complete responses to questions related to his or her interactions with HIKO's sales representatives is substantially prejudicial to HIKO's defense. Accordingly, the pre-served direct testimony of the following consumers should be stricken in its entirety:

a. **Isabel Santiago** fails to provide responses to Questions 7 and 11, concerning her interactions with the HIKO sales representative and her understanding of how the rate would be set. With respect to other questions, Ms. Santiago's responses are vague and incomplete.

- b. *Nancy Williams* fails to provide full and complete responses to the majority of Joint Complainants' questions. In particular, Ms. Williams does not provide an answer for Question 7, concerning her interactions with the HIKO's sales representative.
- c. *Barbara Gabello* fails to provide full and complete responses to the majority of Joint Complainants' questions. For Questions 7, 11, 15, and 18, Ms. Gabello simply responds with the notation "?", presumably indicating her inability to recount communications that she alleges took place with a HIKO representative.

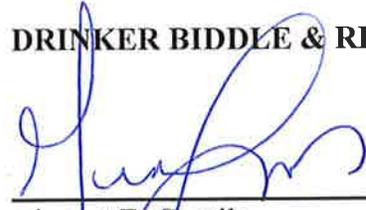
21. Joint Complainants' attempt to admit these incomplete and vague responses on direct-examination to then later develop their case-in-chief through HIKO's cross-examination is an impermissible use of the Evidentiary Hearings. As such, any consumer direct testimony that fails to clearly articulate the underlying basis for the complaint, such as the testimony provided by Ms. Santiago, Ms. Williams, and Ms. Gabello, should be stricken from the record in its entirety.

IV. CONCLUSION

WHEREFORE, on the basis of the foregoing, HIKO Energy, LLC, respectfully requests that the Administrative Law Judges grant this Motion to Strike Pre-Served Consumer Direct Testimony.

Respectfully Submitted,

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Dated: March 13, 2015

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

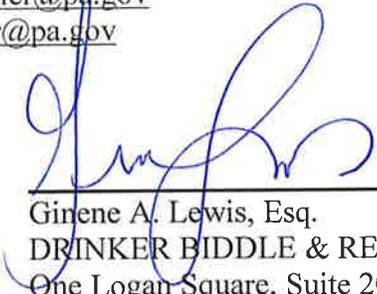
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Dated: March 13, 2015



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