

COMMONWEALTH OF PENNSYLVANIA



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March 17, 2015

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,
Complainants

v.

HIKO Energy, LLC,

Respondent

Docket No. C-2014-2427652

Secretary Chiavetta:

Enclosed please find the Joint Answer of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate to HIKO Energy, LLC, Motion to Strike Consumer Direct Testimony, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

Handwritten signature of Candis A. Tunilo in cursive.

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

*185197

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

JOINT ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA, BUREAU OF
CONSUMER PROTECTION, AND THE OFFICE OF CONSUMER ADVOCATE
TO HIKO ENERGY, LLC, MOTION TO STRIKE CONSUMER DIRECT TESTIMONY

TO ADMINISTRATIVE LAW JUDGES BARNES AND CHESKIS:

Pursuant to Sections 5.61 of the Pennsylvania Public Utility Commission (Commission) regulations regarding answers to motions, 52 Pa. Code Section 5.61, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following Answer to the HIKO Energy, LLC Motion to Strike Pre-Served Customer Testimony (Motion) in the above-captioned proceeding.

I. INTRODUCTION.

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission’s regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. §

2241, *et seq.* (TRA). The Joint Complaint includes eight separate counts and alleges that HIKO Energy, LLC (Respondent or HIKO) violated Pennsylvania law and Commission Orders and regulations.¹ With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, and the TRA, and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's Electric Generation Supplier (EGS) license, if warranted. On July 30, 2014, HIKO filed an Answer to the Joint Complaint and New Matter. On August 19, 2014, the Joint Complainants filed a Reply to New Matter.

The matter was assigned to Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs). An Initial Prehearing Conference was convened on September 29, 2014, wherein a partial litigation schedule was adopted. Pursuant to the litigation schedule adopted in this matter, Joint Complainants timely served the ALJs and the parties on December 5, 2014, with consumer direct testimony, consisting of questions and answers and exhibits of 98 consumer witnesses and encompassing two volumes, totaling 464 pages. The testimony relates to each consumer's firsthand experience with HIKO's marketing, billing and customer service practices. Pursuant to the ALJs' grant of the Company's Motion for Continuance of Evidentiary Hearings, the hearings for the cross-examination of the consumer witnesses are scheduled for March 23 through 27, 2015.

On March 13, 2015, Respondent filed its Motion, seeking to strike and to have ruled inadmissible certain portions of the customer witness testimony and exhibits pre-served by the

¹ Specifically, the eight separate counts in the Joint Complaint are as follows: I) misleading and deceptive promises of savings; II) slamming; III) lack of good faith handling of complaints; IV) failing to provide rate information; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; VII) failing to follow POR program parameters; and VIII) failure to comply with the Telemarketer Registration Act.

Joint Complainants on December 5, 2014. In light of the fact that the hearings in this matter are to begin on March 23, 2015, the ALJs directed that Joint Complainants submit their Answer to Respondent's Motion by March 17, 2015. Joint Complainants therefore submit this Answer in compliance with that directive.

HIKO moves to strike parts of Joint Complainants' customer witness testimony and exhibits on several different grounds, all of which lack merit. First, Respondent asserts that the Joint Complainants' Question 12.a., *i.e.* "Did the EGS salesperson guarantee savings?" is "leading" and, therefore, every affirmative answer to that question and to the follow-up Question 12.b., *i.e.*, "If yes, please explain" should be stricken and ruled inadmissible.² Motion at 2-3. As discussed in Paragraphs 10 through 15 in Section III.B., below, this part of the Motion should be denied. First, as a matter of procedure, if opposing counsel objects to a leading question in the course of a hearing, the remedy is not to strike the witnesses' answers; rather, a Presiding Officer would allow counsel to rephrase the question and allow the witness to answer. Striking the testimony in this context would be an inappropriately harsh result, especially given the time constraints imposed upon Joint Complainants, as noted above, to procure, to organize, to reproduce and to serve the written testimonies of the hundreds of witnesses who called to complain about HIKO.

Second, the question is not unduly leading because it is immediately followed by the phrase "If yes, explain" -- clearly cuing the consumer that either a "yes" or a "no" answer is possible. Third, a review of the specific answers offered by the HIKO customers whose testimonies were served demonstrates that they were not answering in a rote manner that "yes, the EGS guaranteed savings." *See, e.g.*, Vol. 1, at 12 ("She gave me specific price examples to

² The Joint Complainants will refer to these two questions collectively as "The Guaranteed Savings" Questions.

show what we would start saving immediately.”); Vol. 1 at 222 (“Used the term ‘rate reduction’ compared to PPL many times during our phone conversation.”); Vol. 2, at 248 (“It is also written in the contract letter.”); and Vol. 2, at 402 (“That’s why I signed, I thought I would save money.”). The variety within the answers to Question 12 underscores that these consumer witnesses were not led by the question to answer “Yes.”

Additionally, HIKO moves that certain third-party statements “offered for the truth of the matter asserted” contained in certain statements and exhibits should be stricken and ruled inadmissible pursuant to the rule against hearsay. Motion at 2. As discussed in Paragraphs 16 through 19 in Section III.C., below, the ALJs should deny this part of the Motion as well. It is common knowledge within Commission practice that Presiding Officers are not bound by the technical rules of evidence in administrative hearings under the Pennsylvania Administrative Procedure Act. 2 Pa. Code § 505. Second, it is also common knowledge that Commission ALJs generally accept even statements that meet the definition of hearsay and are not within any of the exceptions to the hearsay rule into the record and accord such evidence appropriate weight. Hearsay so admitted may not, standing alone, support a finding of fact, however; admitted hearsay statements may support findings of fact in conjunction with other corroborative non-hearsay evidence. London v. Viridian Energy PA, LLC, Docket No. C-2011-2244309, I.D. (Feb. 2, 2012) (Final Order entered March 29, 2012); Davis v. Equitable Gas Co., LLC, 2012 PaPUC LEXIS 2068 (April 27, 2012), at *21-22.

Finally, HIKO complains of “vague and incomplete answers relating to the consumer’s account of his or her interactions with a HIKO sales representative.” Motion at 2-3. As discussed in Paragraphs 20 through 21 in Section III.D., below, the ALJs should deny this part of the Motion. Joint Complainants would acknowledge that the consumer statements are imperfect

in certain respects; however, Joint Complainants engaged in an intensive good faith effort to obtain the information from affected consumers in the short time allowed for this purpose and in the format directed by the ALJs. In the sixty days following the prehearing conference, Joint Complainants were required to prepare questions, first-class mail them to consumers, who had contacted their offices concerning HIKO, receive the answers back via U.S. mail, review, organize, reproduce and serve the statements, which were received in numbers far exceeding Joint Complainants' expectations. All of this was done to avoid the inordinate expenses to the Commission and all of the parties, including HIKO, of scheduling and attending hearings in various parts of the state or expending a great amount of telephonic hearing time to receive the testimony orally, which would have otherwise been required. For all of these reasons as more fully set forth below, the ALJs should deny this Motion.

II. ANSWER.

1. Admitted.
2. Admitted that the Respondent has moved to strike consumer testimony on the bases that Paragraph 2 describes; however, Joint Complainants deny that the reasons stated in support of the Motion are in any way valid.
3. Admitted in part and denied in part. It is admitted only that Question No. 12.a. reads as quoted in Paragraph 3. It is denied that the question is impermissibly leading and that the answers should be stricken.
4. Denied. It is denied that the hearsay statements referred to are inadmissible; it is also denied that some of the statements identified by Respondent as hearsay fall within the definition of "hearsay" set forth in Rule of Evidence 803

5. Admitted in part and denied in part. Joint Complainants made a good faith effort to procure statements from affected consumers in question-and-answer form as required by the ALJs and as agreed to by the Respondent. While some of the statements may be vague or incomplete, Joint Complainants engaged in best efforts to procure the information in the time allowed, which precluded working with each affected consumer individually. Moreover, Respondent has had ample time since December 5, 2014 to review the statements and engage in discovery to obtain more information from the consumers if it believed the vagueness or incompleteness to be material to its defense of the allegations, but did not do so.

6. Admitted only that HIKO moves to strike the testimony for the reasons asserted; it is denied that any of the stated reasons are valid.

III. ARGUMENT.

A. Applicable Legal Standards.

7. Admitted.

8. Admitted.

9. Admitted in part and denied in part. It is admitted that the Commission, as an administrative entity with quasi-judicial functions, is not limited by the strict rules relating to the admissibility of evidence. It is denied that any of the “essential principles” that must be observed, as noted by the courts in Pittsburgh and Lake Erie Railroad Company v. Pa. Public Utility Commission, 85 A.2d 646, 653, (Pa. Super. 1952) and Bleilevens v. State Civil Service Commission, 312 A.2d 109, 111 (Pa. Commw. 1973) support granting the HIKO motion to strike.

B. The Guaranteed Savings Question Is Not Impermissibly Leading.

10. It is admitted that the Joint Complainants' question reads as stated in the first sentence of Paragraph 10. Joint Complainants deny that the question is improperly leading and that any affirmative answers to that question and any answers to the follow-up question are inadmissible and should be stricken. This question should be looked at in context, as the following question, 12.b. states: "If yes, please explain." This second part cues the reader that the answer to the first question, *i.e.*, "Did the EGS salesperson guarantee savings?" may well be either affirmative or negative.

Moreover, if Joint Complainants direct-examined these consumers orally in the hearing room, a leading question might be objected to and, if the objection were sustained, counsel would generally be offered an opportunity to rephrase. Joint Complainants endeavored, within the extreme time constraints imposed to obtain, organize, reproduce and serve the testimonies in support of their Complaint in the interest of conserving the time and resources of the Commission and all parties. To strike testimony now because a question may be interpreted as leading, when no opportunity to rephrase exists, would be an unduly harsh penalty. Moreover, as the rule states, Respondent has the same opportunity to cross-examine the witnesses as if the statement had been offered orally in the hearing room.

11. Admitted in part and denied in part. Joint Complainants admit that, generally speaking, leading questions should not be used on direct examination in administrative proceedings. Joint Complainants would also point out, however, that Pennsylvania Rule of Evidence 611(c) cited by Respondent (Motion at 4) specifically states, "leading questions should not be used on direct or redirect examination, except as necessary to develop the witness's testimony." Considering the unusual nature of this case and the stringent time constraints, Joint

Complainants submit that presenting consumers with a standard set of questions, including Question 12, to assist in developing their testimony was necessary in this matter. Joint Complainants deny that the Presiding Officers in this case are bound by the cases Respondent cites (Motion at 4), most of which are appellate cases arising from civil trials.

12. Denied. It is impossible for Respondent to know what was in the minds of the consumers answering the questions received from the Joint Complainants. More important, a review of the series of the many different answers to Question 12 demonstrates that consumers were not rotely answering “Yes” to that question. *See, e.g.*, Vol. 1, at 12 (“She gave me specific price examples to show what we would start saving immediately.”); Vol. 1 at 222 (“Used the term ‘rate reduction’ compared to PPL many times during our phone conversation.”); Vol. 2, at 248 (“It is also written in the contract letter.”); and Vol. 2, at 402 (“That’s why I signed, I thought I would save money.”). Counsel for Respondent is entitled to explore the consumers’ perception and recollection of the interaction with the EGS salesperson on cross-examination. Further, counsel for HIKO could have explored consumers’ perception and recollection through timely discovery, as the Company has had this testimony since December 5, 2014, but it did not do so.

13. Denied. It is impossible for Respondent to know what is in the mind of the consumer witnesses concerning what the Joint Complainants are trying to do through this complaint case. The responses to Question 12 are admissible and should be admitted into the evidentiary record.

14. Denied. HIKO has no first-hand knowledge of what the consumers responding to the questions believed about the statements of the sales representative, nor at what exact juncture or in response to which question they would have first made such an assertion.

15. Denied. Counsel for HIKO could have explored consumers' perception and recollection through timely discovery, as the Company has had this testimony since December 5, 2014, but it did not do so. Respondent has the same opportunity to cross-examine the witnesses as if the statement had been offered orally in the hearing room.

C. The Third Party Statements in the Customer Testimonies Are Not Inadmissible Hearsay and Should be Admitted into The Record.

16. Admitted in part and denied in part. Joint Complainants admit that Pennsylvania Rule of Evidence 801 defines "hearsay" as an out-of-court statement offered to prove the truth of the matter asserted. Joint Complainants deny that the third party oral out-of-court statements contained in the consumer statements, including statements made by HIKO's sales representatives to other individuals, fall within the definition of hearsay, as many are not offered "to prove the truth of the matter asserted." Joint Complainants admit only that the statements were not made while testifying at a hearing in this matter. Joint Complainants further deny that Pennsylvania Rule of Evidence 801(c) applies to Commission proceedings, as argued above, 2 Pa.C.S. § 505, and deny that all of these statements are inadmissible and must be stricken from the testimonies pursuant to Pennsylvania Rule of Evidence 802, as Respondent asserts. *Id.*

17. Denied. Joint Complainants deny that hearsay is not admissible as evidence in Public Utility Commission proceedings. Presiding Officers are not bound by the rules of evidence and routinely admit hearsay if relevant to develop the evidentiary record; however, it may not be given the same weight as non-hearsay evidence and, if properly objected to, may only support a finding if corroborated by other non-hearsay evidence. These principles govern decisions on hearsay objections at proceedings of the Commission and are explained in the London v. Viridian Energy PA, LLC, Docket No. C-2011-2244309, I.D. (Feb. 2, 2012) (Final Order entered March 29, 2012), referenced by the Respondent. Joint Complainants would also

point out that the decision also expresses another principle applicable to the instant Motion, *i.e.*, that “agent acts or declarations ...when made in the course of one’s business and within the scope of one’s authority, either express or implied, are admissible against one even if they are hearsay.” *Id.* at 7. Thus, to the extent that the testimonies and exhibits the Respondent moves to strike contain statements of HIKO’s own agents and employees, such statements are clearly admissible.

18. Admitted.

19. Joint Complainants deny that it is essential that statements containing hearsay be stricken in whole or in part, for the following reasons:

a. Joint Complainants’ Consumer Witness **Michael Walker**, Vol. 1, Page 115. Respondent asserts that the statements made by Mr. Walker incorporate statements made to him by his wife, Kacy, who interacted with the HIKO sales representative when he was not present; this is correct. This same situation has arisen in other similar cases, which have already gone to hearings. To the extent possible, Joint Complainants have made available both the consumer witness and the spouse or other member of the household for cross-examination where statements by such others are included in the consumer statement.

However, consistent with the Order Granting In Part and Denying In Part Respond Power, LLC Motion To Strike, “to the extent that the consumer who provided the testimony resides at the service address that is the subject of the testimony, and the consumer accepts responsibility for the utility usage at the service address, the consumer” should be allowed to adopt the testimony of a relative. See Commonwealth of Pennsylvania and Office of Consumer Advocate, et al. v. Respond Power, LLC, Docket No. C-2014-2427659 et al., Order Granting in Part and Denying in Part Motion to Strike at 9 (Mar. 6, 2015). As such, HIKO’s

argument that a consumer who relates in their testimony what they were told by a relative should be stricken as hearsay should be rejected.

b. Joint Complainants' Consumer Witness **Mary Miller**, Vol. 2, Page 264. Respondent asserts that the statements made by Ms. Miller incorporate statements made to her by her significant other who interacted with the HIKO sales representative when she was not present. This same situation has arisen in other similar cases, which have already gone to hearings, see Paragraph 19a, above. To the extent possible, Joint Complainants have made available both the consumer witness and the spouse or other member of the household for cross-examination where statements by such others are included in the consumer statement.

c. Joint Complainants' Consumer Witness **Betty Shughart**, Vol. 2, Page 308. Respondent asserts that the statements made by Mrs. Shughart incorporate statements made to her by her deceased husband who interacted with the HIKO sales representative when she was not present. This same situation has arisen in other similar cases, which have already gone to hearings, see Paragraph 19a, above. Additionally, Respondent asserts that the recitation of information typed by Ms. Fraker of what Mrs. Shughart recalls from conversations with her deceased husband should be stricken; however, this is merely the assistance of a daughter to help her senior mother respond to the testimony and not triple hearsay. To the extent possible, Joint Complainants have made available both the consumer witness and the other member of the household for cross-examination where statements by such others are included in the consumer statement.

D. ALJs Should Not Strike Vague or Incomplete Responses.

20. Joint Complainants engaged in an intensive effort within the time allowed to ensure that the written testimony submitted in support of the Joint Complaint substantially

complied with Commission and the ALJs' requirements, with the objective to conserve the Commission's and the parties' resources that would have otherwise been expended in scheduling hearings in various parts of the state or receiving oral direct questions and answers telephonically. Joint Complainants submit further that had HIKO had an issue with the legibility or completeness of the consumer statements, as it now asserts, it could have engaged in informal or formal discovery -- or at least could have raised the issue sooner than ten days prior to the hearings in this proceeding, in light of the fact that they were served with the testimonies ninety-eight days prior to filing the Motion. With earlier notice, Joint Complainants could have attempted to make clearer what the Respondent refers to "vague and incomplete responses." Motion at 7. None of the specific OAG/OCA statements listed by the Respondent in Paragraph 20 should be stricken.

a. Joint Complainants' Consumer Witness *Isabel Santiago*, Vol. 1, Page 31. HIKO asserts that Ms. Santiago failed to provide a response to Questions 7 and 11, concerning her interactions with the HIKO sales representative and her understanding of how the rate would be set. As stated above, HIKO had plenty of time to have engaged in informal or formal discovery to clarify Ms. Santiago's responses to these questions. HIKO will have the ability to address any concerns during cross-examination.

b. Joint Complainants' Witness *Nancy Williams*, Vol. 2, Page 317. For all of the same reasons asserted in Paragraph 20.a. above, Respondent's motion to strike and declare Ms. Williams' testimony inadmissible should be denied.

c. Joint Complainants' Witness *Barbara Gabello*, Vol. 2, Page 344. Respondent presumes that Ms. Gabello's response to several questions with the notation "?" indicates her inability to recount communications that she alleges took place with a HIKO

representative. Counsel for Respondent is entitled to explore the consumers' perception and recollection of the interaction with the salesperson on cross-examination. For all of the same reasons asserted in Paragraph 20.a. above, Respondent's motion to strike and declare Ms. Gabello's testimony inadmissible should be denied.

21. Denied. For all the same reasons asserted in Paragraph 20 above, Respondent's motion to strike and declare the testimony provided by Ms. Santiago, Ms. Williams, and Ms. Gabello inadmissible should be denied.

III. CONCLUSION.

On the basis of the foregoing, Joint Complainants respectfully request that the Administrative Law Judges deny the HIKO Motion to Strike Pre-Served Consumer Direct Testimony.



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CERTIFICATE OF SERVICE

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Through the Bureau of Consumer Protection, :
: :
And :
: :
TANYA J. McCLOSKEY, Acting Consumer :
Advocate, :
Complainants : Docket No. C-2014-2427652
v. :
: :
HIKO ENERGY, LLC, :
Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Answer of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate to HIKO Energy, LLC, Motion to Strike Consumer Direct Testimony, in the manner and upon the persons listed below:

Dated this 17th day of March 2015.

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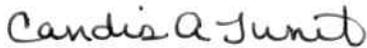
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