



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

IN REPLY PLEASE
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April 1, 2015

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. HIKO Energy, LLC
Docket No. C-2014-2431410
(Motion to Strike HIKO Direct Testimony)

Dear Secretary Chiavetta:

Enclosed for filing is the Motion to Strike on behalf of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced matter. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please feel free to contact me.

Sincerely,

Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Enclosure

cc: As 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.	:	C-2014-2431410
	:	
HIKO Energy, LLC,	:	
Respondent	:	

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**MOTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO STRIKE THE DIRECT TESTIMONY OF HIKO ENERGY, LLC**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES ELIZABETH H. BARNES AND JOEL H. CHESKIS:

The Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.103, files this Motion respectfully requesting that presiding Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis (presiding ALJs) strike the entirety of the direct testimony of Harvey Klein and Charles J. Cicchetti, submitted on behalf of HIKO Energy, LLC (HIKO, Company or Respondent), which was presented at the rebuttal phase of this proceeding. If not stricken in its entirety, I&E moves in the alternative that, first, HIKO be directed to relabel its testimony as rebuttal testimony and, second, that the presiding ALJs strike portions of HIKO's statements of testimony of Harvey Klein and Charles J. Cicchetti that attempt to improperly expand the permissible scope of this proceeding by introducing testimony that is unrelated and irrelevant to the direct testimony submitted by I&E's witness, Daniel Mumford.

I. BACKGROUND

1. I&E initiated an informal investigation of HIKO on March 31, 2014, as a result of customer complaints received by the Commission's Bureau of Consumer Services (BCS) related to allegations that HIKO billed rates that were higher than the rates promised by the Company. The I&E investigation focused on one particular HIKO *variable rate price offering to residential electric customers in Pennsylvania*, which provided that a customer enrolled in this offering would experience a guaranteed rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local electric distribution company's (EDC) price to compare (PTC) (referred to hereafter as the "Price Offering").

2. HIKO enrolled customers in its Price Offering in the service territories of Duquesne Light Company (Duquesne Light), Metropolitan Edison Company (Met-Ed), PECO Energy Company (PECO), Pennsylvania Electric Company (Penelec), PPL Electric Utilities (PPL) and West Penn Power (West Penn). As such, for each enrolled customer's first six billing cycles, HIKO guaranteed that the customer's price for electric supply from HIKO would be one to seven percent less than the EDC's PTC.

3. On July 11, 2014, I&E filed a Formal Complaint (Complaint) against HIKO at Docket No. C-2014-2431410, alleging that Respondent violated the Commission's regulations at 52 Pa. Code § 54.4(a), which reads:

- (a) EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

4. I&E's Complaint focuses on a single and narrow subject matter – the repeated violation of HIKO's failure to honor the Price Offering set forth in the Company's Disclosure Statement.

5. As a result, I&E seeks appropriate relief in its Complaint, including that the Commission: (1) find Respondent to be in violation of 52 Pa. Code § 54.4(a) for each of the 14,780 counts set forth in the Complaint; (2) impose a cumulative civil penalty upon Respondent in the amount of Fourteen Million Seven Hundred Eighty Thousand Dollars (\$14,780,000.00);¹ (3) rescind the authority of Respondent to do business as an EGS in Pennsylvania; (4) direct Respondent to provide a refund to each customer consisting of the difference between the amount the customer was billed and the guaranteed discounted rate the customer was entitled to receive; and (5) order such other remedy as the Commission may deem to be appropriate.

6. On September 29, 2014, the Initial Prehearing Conference in this proceeding was held in person in Harrisburg before the presiding ALJs. During the Prehearing Conference, the parties agreed upon the following procedural schedule:

Service of I&E Direct Testimony	December 23, 2014
Service of HIKO Rebuttal Testimony	March 6, 2015
Service of I&E Surrebuttal Testimony	April 2, 2015
Evidentiary Hearings	April 20-22, 2015

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

7. HIKO did not request to serve direct testimony in this proceeding, did not object to the agreed-upon procedural schedule and did not seek to modify the agreed upon procedural schedule.

8. On September 30, 2014, the presiding ALJs entered a Scheduling Order which memorialized the agreed-upon procedural schedule established at the Initial Prehearing Conference regarding the due dates for service of I&E's direct testimony, HIKO's rebuttal testimony and I&E's surrebuttal testimony and the dates to hold the hearing.

9. Subsequent to the entry of the ALJs' Scheduling Order, HIKO made no request to deviate from or make modifications to the schedule for the service of testimony as directed therein.

10. On December 23, 2014, I&E served the direct testimony of Daniel Mumford.²

11. By email dated February 24, 2015, HIKO directed the following request to the presiding ALJs:

HIKO requests an additional week to submit its *written rebuttal testimony* (from March 6 to March 13) and would agree to extend I&E's time (from April 2 to April 9). Mike Swindler has no objection to these new dates. The scheduled hearing dates (April 20-22) would remain unchanged. Please us know whether Your Honors would agree to this slight modification of the September 30, 2014 scheduling order or whether you require a formal application from us to determine whether to adjust the dates. (Emphasis added.)

12. By email dated February 24, 2015, ALJ Barnes responded to HIKO's request:

² By e-mail dated December 19, 2014, I&E was granted an extension of time until January 6, 2015 to serve the Exhibits that accompany the Direct Testimony of Daniel Mumford. I&E served the Exhibits on or before January 6, 2015.

Your requests for an extension of time to file *written rebuttal testimony* (from March 6 to March 13) and surrebuttal testimony (from April 2 to April 9) is [sic] granted. As the scheduled hearing dates of April 20-22 remain unchanged, there will not be a follow up amended order to this email. (Emphasis added.)

13. On March 13, 2015, HIKO served what was identified as “Direct Testimony of Harvey Klein” and “Direct Testimony of Charles J. Cicchetti.” HIKO’s “direct testimony” does not comport with the procedural schedule that was directed by the Scheduling Order. Moreover, these statements of testimony contain material that goes beyond the scope of the direct testimony of I&E’s witness and include matters that are not relevant or related to the allegations in this proceeding.

14. I&E raises this Motion to Strike at this juncture in the proceeding due to HIKO’s clear deviation from the presiding ALJs’ Scheduling Order.

15. Due to the fact that I&E’s surrebuttal testimony is due on or before April 9, 2015, I&E respectfully requests an expedited answer period and expedited ruling on the instant Motion.

II. MOTION TO STRIKE

A. HIKO Disregarded The Scheduling Order By Serving Direct Testimony During The Rebuttal Phase

16. The Direct Testimony of Harvey Klein and Direct Testimony of Charles J. Cicchetti should be stricken because HIKO impermissibly served direct testimony during the rebuttal phase of this proceeding, which occurred more than two months after I&E served its direct testimony. Prior to serving its direct testimony, HIKO did not seek any leave to amend the Scheduling Order, which required it to serve rebuttal testimony on or before March 13, 2015, as amended by the email of ALJ Barnes.

17. The presiding ALJs' Scheduling Order specifically directed the Company to serve written rebuttal testimony after the service by I&E of its direct testimony. No other testimony was anticipated to be submitted by HIKO pursuant to the Scheduling Order.

18. HIKO's statements of direct testimony include matters that are beyond the scope of the direct testimony of I&E's witness, Mr. Mumford, which narrowly focuses on HIKO's failure to honor its Price Offering by billing customers who enrolled in that offering a rate that exceeded 1-7% less than the local EDC's PTC. The portions of HIKO's testimony that impermissibly expand the scope of the proceeding by introducing issues that are not relevant have been identified under Subheading C, *infra*.

19. For the reasons set forth above, the statements of direct testimony of HIKO witnesses Harvey Klein and Charles J. Cicchetti should be stricken in their entirety.

B. In the Alternative, if Not Stricken In Their Entirety, HIKO's Statements of Direct Testimony Should Be Properly Marked as Rebuttal Testimony

20. As stated above, the presiding ALJs' Scheduling Order specifically directed the Company to serve written rebuttal testimony after the service by I&E of its direct testimony. No other testimony was anticipated to be submitted by HIKO pursuant to the Scheduling Order.

21. As stated above, by electronic correspondence between HIKO counsel and the presiding ALJs on February 24, 2015, HIKO requested and the presiding ALJs granted a one week extension to submit written rebuttal testimony.

22. Pursuant to the Scheduling Order, at the very least, HIKO's submitted testimony should be correctly marked and identified as rebuttal testimony rather than direct testimony.

C. Portions of HIKO's Submitted Statements of Testimony, Even When Correctly Marked and Identified as Rebuttal Testimony, Should be Stricken

23. Portions of HIKO's statements of direct testimony are beyond the permissible scope of rebuttal testimony and not relevant to this proceeding and should be stricken. Section 5.403 of the Commission's regulations, 52 Pa. Code § 5.403, grants presiding officers "all necessary authority to control the receipt of evidence," including "[r]uling on the admissibility of evidence" and "[c]onfining the evidence to the issues in the proceeding." ALJs have employed this power to exclude evidence that is outside the permissible scope of a proceeding and, in that way, to focus the evidence on the matters properly at issue. *See Re Gas Cost Rate No. 5*, Docket No. M-78050055, 57 Pa. P.U.C. 158 (Order entered May 13, 1983) ("The testimony stricken by the ALJ addresses, in part, matters broader than the scope of the instant proceeding"). *See also Re Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, 2000 Pa. PUC LEXIS 59 (September 28, 2000) at *7-9 (affirming the ALJ's decision to exclude certain evidence as "beyond the scope of the proceeding.")

24. The allegations in I&E's Complaint, as well as the Direct Testimony of I&E's Witness, Daniel Mumford, narrowly focus on HIKO's intentional failure to honor the Price Offering of 1-7% less than the local utility's PTC that HIKO guaranteed in its Welcome Letter and Disclosure Statement, and the number of residential customers

affected by HIKO's breach of the guaranteed rate and resulting overcharges. I&E alleges that HIKO's actions violate 52. Pa. Code § 54.4(a), which states, "EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement." Mr. Mumford's testimony also supports I&E's requested civil penalty by analyzing the factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations pursuant to the Commission's policy statement at 52 Pa. Code § 69.1201(c)(1)-(10). Thus, the scope of this proceeding is narrowly defined.

25. The statements of testimony of Harvey Klein and Charles J. Cicchetti, in particular Mr. Cicchetti's testimony, provide great detail on how HIKO purchases its energy and the impact of, among other things, the price of energy due to weather events and Canadian regulatory actions. The direct testimony of Mr. Cicchetti also discusses collateral requirements imposed on HIKO by PJM during the Polar Vortex and introduces a discussion of recent regulatory actions involving HIKO in New York and New Jersey. Such matters are clearly not relevant to the scope of this proceeding.

26. The application of HIKO's guaranteed Price Offering of 1-7% less than the local utility's PTC, as established in its Welcome Letter and Disclosure Statement, is not dependent upon consideration of extraneous factors such as weather events, Canadian regulatory actions or any other matter affecting the cost to HIKO of energy. Purely and simply, HIKO offered customers a guaranteed discounted rate for an introductory period without any conditions. Further, actions taken by regulatory authorities in other

jurisdictions are not relevant to HIKO's conduct in Pennsylvania and I&E's allegations that HIKO violated the Commission's regulations.

27. HIKO's statements of testimony improperly expand the scope of this proceeding by introducing issues unrelated and irrelevant to the allegations that HIKO billed rates that were higher than the rates promised by the Company to its customers as set forth in I&E's Complaint and as stated in the written direct testimony of I&E's witness, Mr. Mumford. As such, the following portions of HIKO's testimony should be stricken:

Direct Testimony of Harvey Klein

- Page 2, line 17 – page 3, line 2 (discussing how HIKO obtains the energy it supplies to customers)
- Page 3, line 10 – page 4, line 12 (comparing HIKO's business model to that of a local utility and discussing how HIKO purchases its energy)
- Page 7, lines 1-6 (discussing HIKO's "one free month" program)

Direct Testimony and Exhibits Sponsored by Charles J. Cicchetti

- Page 11, line 12 - page 25, line 14; page 59, lines 3-21; EX-HIKO-Cicchetti 2; EX-HIKO-Cicchetti-3 (discussing the impact of the Polar Vortex and Canadian regulatory orders on energy demand and prices)
- Page 28, line 14 - page 31, line 9 (discussing collateral requirements imposed by PJM)
- Page 33, lines 7-18 (comparing HIKO's obligations to that of a regulated utility)
- Page 54, lines 8-12; page 57, line 18 – page 58, line 16; EX-HIKO-Cicchetti-5; EX-HIKO-Cicchetti-6 (regarding claims brought by the Attorney Generals of the States of New York and New Jersey in an attempt to use those actions as a mitigating factor to any civil penalty that would be imposed by the Commission)

28. Should the presiding ALJs determine that such objections to HIKO's written testimony are better left to be addressed during the evidentiary hearing, I&E reserves the right to raise such objections at that time.

III. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully requests that the presiding Administrative Law Judges grant this Motion and issue an Order striking the statement of direct testimony submitted by HIKO Energy, LLC in their entirety. Alternatively, if not stricken in their entirety, I&E requests that the presiding ALJs issue an Order directing that HIKO properly mark for identification its written statements of testimony as rebuttal testimony. I&E further requests that the presiding ALJs strike the above-referenced portions of HIKO's testimony or, alternatively, preserve I&E's right to raise these objections to HIKO's testimony at the time that such testimony is offered into evidence at hearing. I&E respectfully requests an expedited answer period and ruling to preserve I&E's surrebuttal testimony due date, as amended, of April 9, 2015.

Respectfully submitted,



Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

Johnnie E. Simms
Chief Prosecutor
PA Attorney ID No. 33911

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000
mwindler@pa.gov
stwimer@pa.gov

Dated: April 1, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Email and First Class Mail:

Ginene A. Lewis, Esquire
Drinker Biddle & Reath
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996

Vincent E. Gentile, Esq.
Drinker Biddle & Reath
105 College Road East, #300
Princeton, NJ 08540

John M. Abel, Esquire
Nicole R. Ditomo, Esquire
Office of Attorney General
Bureau of Consumer Protection
Strawberry Square, 15th Floor
Harrisburg, PA 17120

Candis A. Tunilo, Esquire
Kristine E. Robinson, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor Forum Place
Harrisburg, PA 17101-1923

Motty Shulman, Esquire
William Marsillo, Esquire
Andrew Dressel, Esquire
Boies, Schiller & Flexner, LLP
333 Main Street
Armonk, NY 10504

Honorable Joel Cheskis
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105

Honorable Elizabeth J. Barnes
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105



Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
717.787.5000
mwindler@pa.gov

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