



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

IN REPLY PLEASE
REFER TO OUR FILE

May 1, 2015

Via E-Filing

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

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 electronic filing is the Motion of the Bureau of Investigation and Enforcement to Hold in Abeyance Consideration of the Joint Settlement Petition in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink that reads "Stephanie M. Wimer".

Stephanie M. Wimer
Prosecutor
PA Attorney I.D. No. 207522

Enclosure

cc: Honorable Elizabeth H. Barnes
Honorable Joel H. Cheskis
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**


Commonwealth of Pennsylvania, by	:	
Attorney General Kathleen G. Kane,	:	
through the Bureau of Consumer	:	
Protection, and Tayna J. McCloskey,	:	
Acting Consumer Advocate	:	
Complainant	:	
	:	
v.	:	Docket No. C-2014-2427652
	:	
HIKO Energy, LLC,	:	
Respondent	:	

NOTICE TO PLEAD

You are hereby advised that, pursuant to 52 Pa. Code §§ 5.61(a)(1) and 5.103(c), you may answer the enclosed Motion within twenty (20) days after the date of service. All pleadings, such as answers to motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned prosecutors.



Stephanie M. Wimer, Prosecutor
PA Attorney ID No. 207522

Michael L. Swindler, Prosecutor
PA Attorney ID No. 43319

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

stwimer@pa.gov
mwindler@pa.gov
Dated: May 1, 2015

**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	:	
Complainant,	:	
	:	
v.	:	C-2014-2427652
	:	
HIKO Energy, LLC,	:	
Respondent	:	

**MOTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
(I&E) TO HOLD IN ABEYANCE CONSIDERATION OF THE JOINT
SETTLEMENT PETITION PENDING THE ISSUANCE OF AN INITIAL OR
RECOMMENDED DECISION IN I&E'S COMPLAINT PROCEEDING**

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, hereby requests that any ruling related to the merits of Joint Settlement Petition filed in the above-captioned proceeding be held in abeyance pending the issuance of an Initial or Recommended Decision in *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (the I&E proceeding). The instant matter and the I&E proceeding are two concurrent enforcement proceedings against HIKO Energy, LLC (HIKO or Company) before the Commission. The facts pled, relief sought and parties involved in each case differ. However, the majority of the settlement amount in the Joint Settlement

Petition is based on the sole violation prosecuted by I&E in the I&E proceeding. I&E respectfully submits that since its matter is a fully litigated case, supported by record evidence and legal argument that will be set forth in I&E's brief, the Joint Settlement Petition in the instant matter should be held in abeyance until Your Honors issue an Initial or Recommended Decision in the I&E proceeding. In support of this Motion, I&E states as follows:

I. BACKGROUND

A. The OAG and OCA v. HIKO Matter

1. On June 20, 2014, the Pennsylvania Attorney General through its Bureau of Consumer Protection (OAG) and the Office of Consumer Advocate (OCA) (collectively referred to as the Joint Complainants) filed with the Commission a formal Complaint (Joint Complaint) against HIKO. The Joint Complaint contains eight counts alleging that HIKO violated Pennsylvania law and Commission regulations and Orders by engaging in misleading and deceptive acts or practices, switching customers to receive its electric generation supply service without their authorization, failing to handle customer complaints in good faith, failing to provide rate information, failing to provide accurate pricing information, charging prices that did not conform to the Company's disclosure statement, failing to follow Purchase of Receivables (POR) program parameters and failing to comply with the Telemarketer Registration Act. The Joint Complaint seeks various forms of relief including restitution, the imposition of a civil penalty and the revocation of HIKO's license to operate as an electric generation supplier (EGS) in Pennsylvania.

2. On July 10, 2014, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention.

3. After receiving an extension of time to respond to the Joint Complaint, HIKO filed an Answer and New Matter on July 30, 2014.

4. Also on July 30, 2014, I&E filed a Notice of Intervention.

5. On August 19, 2014, the Joint Complainants replied to HIKO's New Matter.

6. On March 20, 2015, the Joint Complainants and HIKO advised the presiding Administrative Law Judges (ALJs) during an off-the-record telephone conference that a settlement-in-principle had been reached.

7. On April 8, 2015, a further prehearing conference was held for the purpose of outlining the terms of the settlement-in-principle, to enter stipulated evidence into the record and to establish a deadline for submitting the Joint Settlement Petition.

8. At the prehearing conference, I&E indicated that it would not join the Joint Settlement Petition, but would not oppose it provided that nothing in the settlement precludes I&E from separately prosecuting its formal Complaint in the I&E proceeding. OAG affirmed this understanding.

9. By Order entered on April 8, 2015, the procedural schedule was suspended and May 1, 2015 was the date established for filing the Joint Settlement Petition and individual parties' Statements in Support.

10. On May 1, 2015, a Joint Settlement Petition and accompanying documents were filed in the above-captioned matter. The Joint Complainants and HIKO request that the Joint Settlement Petition be approved on an expedited basis.

11. I&E did not join the Joint Settlement Petition, but provided a letter of non-opposition to the settlement agreement.

12. While I&E does not oppose the Joint Settlement Petition, I&E asserts that any consideration of the Joint Settlement Petition should occur subsequent to the issuance of an Initial or Recommended Decision in the I&E proceeding, for the reasons set forth below.

B. The I&E Proceeding

13. 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 related to allegations that HIKO billed rates that were higher than the rates promised by the Company. I&E's 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").

14. HIKO enrolled customers in its Price Offering in the service territories of Duquesne Light Company, Metropolitan Edison Company, PECO Energy Company, Pennsylvania Electric Company, PPL Electric Utilities and West Penn Power. 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.

15. On July 11, 2014, I&E filed a formal Complaint (Complaint) against HIKO at Docket No. C-2014-2431410, alleging that the Company 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.

16. The I&E proceeding 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.

17. In its Complaint, I&E alleges that over 14,000¹ counts of a violation of 52 Pa. Code § 54.4(a) occurred. As a result, I&E seeks appropriate relief, including that the Commission: (1) find HIKO to be in violation of 52 Pa. Code § 54.4(a) for each of the counts set forth in the Complaint; (2) impose a cumulative civil penalty upon HIKO in the amount of Fourteen Million Six Hundred Eighty-Nine Thousand Dollars (\$14,689,000.00), as revised;² (3) rescind the authority of HIKO to do business as an EGS in Pennsylvania; (4) direct HIKO to provide a refund to each customer consisting of the difference between the amount the customer was billed and the guaranteed discounted

¹ In the Complaint, the total number of overcharges alleged was 14,780. This number was subsequently revised by I&E's witness, Daniel Mumford, to 14,689.

² The proposed civil penalty is calculated by multiplying the number of violations by \$1,000 per violation, pursuant to 66 Pa. C.S. § 3301.

rate the customer was entitled to receive; and (5) order such other remedy as the Commission may deem to be appropriate.

18. On July 31, 2014, HIKO filed an Answer and New Matter to I&E's Complaint. Also on July 31, 2014, HIKO filed Preliminary Objections to I&E's Complaint arguing, among other things, that the Complaint should be dismissed because it is barred by the doctrine of *lis pendens*.

19. On August 8, 2014, OCA filed a Notice of Intervention.

20. On August 11, 2014, I&E responded to HIKO's Preliminary Objections arguing that the I&E proceeding does not involve the same case, the same parties and does not request the same relief as the Joint Complaint.

21. On August 18, 2014, I&E filed a Reply to HIKO's New Matter.

22. Also on August 18, 2014, OAG filed a Notice of Intervention.

23. By Order entered on September 2, 2014, the presiding ALJs rejected, among other things, HIKO's claim of *lis pendens* because the parties to the I&E proceeding and Joint Complaint proceeding are not the same in that they do not represent the same interests and the relief sought is not identical.

24. On December 23, 2014, I&E served the Direct Testimony of Daniel Mumford.³

25. After receiving an extension of time to submit its rebuttal testimony, on March 13, 2015, HIKO served what was initially identified as "Direct Testimony of

³ 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.

Harvey Klein” and “Direct Testimony of Charles J. Cicchetti.” HIKO subsequently submitted amended cover pages identifying HIKO’s two written statements of testimony as rebuttal testimony and not direct testimony.

26. After receiving an extension of time, I&E submitted the Surrebuttal Testimony of Daniel Mumford on April 9, 2015.

27. An evidentiary hearing was held in this matter on April 20, 2015.

28. By Order entered April 22, 2015, a briefing schedule was established. I&E’s main brief is due on or before June 3, 2015, and all reply briefs are due on or before June 24, 2015.

II. ARGUMENT

A. Standards for Holding Proceedings in Abeyance

29. Presiding officers have the authority “to regulate the course of the proceeding.” 52 Pa. Code § 5.483(a).

30. The Commission’s Rules of Administrative Practice and Procedure “shall be liberally construed to secure the *just*, speedy and inexpensive determination of every action or proceeding to which it is applicable.” 52 Pa. Code § 1.2 (regarding “Liberal construction”) (emphasis added).

B. Holding the Joint Settlement Petition in Abeyance is Just and Prudent

31. The Joint Complaint is devoid of any reference to the guaranteed rate of “1-7% less” than the local EDC’s PTC for the first six monthly billing cycles that HIKO promised to customers who enrolled in this Price Offering. This Price Offering constitutes the sole focus of I&E’s case.

32. Rather, the Joint Complaint avers that 26 customers “indicated that they were not told that their rate was a variable rate” and 11 customers provided written correspondence or “sign-up” documents to the OCA evidencing that a price for the first month of service was not established. *See* ¶¶ 40-41 of the Joint Complaint. The Joint Complainants aver that this constitutes a violation of Section 54.4(a) of the Commission’s regulations, which requires that the EGS prices billed reflect the marketed prices and agreed-upon prices in the disclosure statement. *See* ¶ 44 of the Joint Complaint.

33. The Joint Complainants did not plead any allegation even remotely related to HIKO’s failure to honor the 1-7% guaranteed discounted rate that HIKO promised to customers who enrolled in the Price Offering. Nevertheless, the vast majority of the monetary relief in the Joint Settlement Petition consists of refunds for customers who were entitled to a guaranteed discounted rate of at least 1-7% off the EDC’s PTC for the first six monthly billing cycles. Specifically, \$1,672,523.10 of the \$2,025,383.85 of total refunds are associated with a failure to honor the Price Offering. *See* ¶ 23(a) of the Joint Settlement Petition.

34. Although the Joint Settlement Petition consists of a substantial overlap of issues, many of these issues were not plead by the Joint Complainants, but were thoroughly plead and fully litigated by I&E. In essence, I&E has already litigated the very facts pertaining to the Price Offering that are set forth in the Joint Settlement Petition. Therefore, the Joint Settlement Petition should be subordinate to I&E’s fully litigated proceeding concerning the 1-7% guaranteed discounted rate that HIKO promised

to customers who enrolled in the Price Offering, as the I&E proceeding entailed extensive discovery, the presentation of expert witnesses and their sworn testimony, the admission of thousands of pages of billing data as evidence into the record and an extensive argument for an appropriate civil penalty related to HIKO's failure to honor the Price Offering.

35. The Joint Complainants and HIKO should not be permitted to benefit from the information gathered by I&E, settle first on those very same facts and potentially for less, and possibly jeopardize I&E's fully litigated proceeding. While OAG confirmed its understanding that the Joint Settlement Petition is not intended to preclude I&E from separately prosecuting the claims set forth in its case, the Company has remained silent on this issue. Further, the Joint Complainants and HIKO have requested that the Joint Settlement Petition be reviewed on an expedited basis. Although the parties do not explain the reason for this request, the logical conclusion is so that a decision will be rendered on the merits of the Joint Settlement Petition prior to the issuance of any ruling in I&E proceeding.

36. Any ruling on the merits of the Joint Settlement Petition that occurs prior to the issuance of an Initial or Recommended Decision in the I&E proceeding could yield inconsistent results. For example, I&E seeks relief in the form of customer refunds related to the Price Offering not only for January, February and March 2014, but also for April 2014, which is not addressed in Joint Settlement Petition. In addition, the Joint Settlement Petition does not contain a civil penalty. Therefore, it is in the public interest

for the Joint Settlement Petition to be considered at the very least simultaneously with, if not subsequent to, any ruling in the I&E proceeding.

37. The Joint Complainants and HIKO will not be prejudiced by a delayed ruling on the Joint Settlement Petition. The evidentiary hearing in the I&E proceeding has already occurred and all briefs will be filed by June 24, 2015. Moreover, judicial economy will be served if Your Honors have both the complete record from this proceeding and the Joint Settlement Petition to consider instead of addressing both proceedings at different times.

38. Accordingly, a consideration of the Joint Settlement Petition should, as a matter of prudence, be held in abeyance pending the issuance of an Initial or Recommended Decision in the I&E proceeding.

III. CONCLUSION

Based on the foregoing, consideration of the Joint Settlement Petition filed in the Joint Complaint proceeding at the instant docket should be held in abeyance pending the issuance of an Initial or Recommended Decision in *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410.

Respectfully submitted,



Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

Michael L. Swindler
Prosecutor
PA Attorney ID No. 43319

Wayne T. Scott
First Deputy Chief Prosecutor
PA Attorney ID No. 29133

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

Dated: May 1, 2015

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).

Service by First Class Mail and Email:

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


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

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

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

Vincent E. Gentile, Esq.
Drinker Biddle & Reath
105 College Road East, Suite 300
P.O. Box 627
Princeton, NJ 08542

Sharon Webb, Esq.
Office of Small Business Advocate
Suite 202
300 North Second Street
Harrisburg, PA 17101



Stephanie M. Wimer
Prosecutor
PA Attorney I.D. No. 207522

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 772-8839
stwimer@pa.gov

Date: May 1, 2015