

COMMONWEALTH OF PENNSYLVANIA



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May 21, 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 in Opposition to the Motion of the Bureau of Investigation and Enforcement to Hold Joint Settlement Petition in Abeyance, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

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 IN
OPPOSITION TO THE MOTION OF THE BUREAU OF INVESTIGATION AND
ENFORCEMENT TO HOLD JOINT SETTLEMENT PETITION IN ABEYANCE

Pursuant to Section 5.61(a)(1) of the Public Utility Commission’s (Commission) regulations, 52 Pa. Code § 5.61(a)(1), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (BCP or OAG) and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (together Joint Complainants) provide this Answer to the Motion of the Bureau of Investigation and Enforcement (I&E) to Hold in Abeyance Consideration of the Joint Settlement Petition (I&E Motion). Joint Complainants oppose the I&E Motion and respectfully request that the I&E Motion be denied and the Joint Petition be considered on an expedited basis, as requested in the Joint Petition for Approval of Settlement.

I. INTRODCUTION.

On June 20, 2014, Joint Complainants filed a Joint Complaint against HIKO Energy, LLC (HIKO or Company) 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).¹ The Joint Complaint includes eight separate counts as follows: (1) misleading and deceptive promises of savings; (2) slamming; (3) lack of good faith handling of complaints; (4) failing to provide rate information; (5) failing to provide accurate pricing information; (6) prices nonconforming to disclosure statement; (7) failing to follow POR program parameters; and (8) failure to comply with the Telemarketer Registration Act. With respect to relief, Joint Complainants requested that the Commission find that HIKO violated the Public Utility Code, the Consumer Protection Law, the TRA, and the Commission's regulations and Orders; provide restitution to HIKO's customers; impose a civil penalty; order HIKO to make various modifications to its practices and procedures; and revoke or suspend HIKO's EGS license, if warranted. On July 10, 2014, the Office of Small Business Advocate (OSBA) intervened in this action. I&E intervened in this action on July 30, 2014.

On July 11, 2014, I&E filed a Formal Complaint against HIKO at Docket No. C-2014-2431410 (I&E Complaint). In its Formal Complaint, I&E asserted that as a result of an informal investigation I&E initiated on March 31, 2014, I&E determined that HIKO "failed to bill prices to reflect the marketed prices and the agreed upon prices in the Disclosure Statement." See I&E Complaint at ¶¶ 11, 22. Specifically, I&E alleged that HIKO enrolled customers into a program

¹ A comprehensive procedural history of Joint Complainants' action against HIKO can be found in the Joint Petition for Approval of Settlement filed on May 1, 2015.

in which prices were guaranteed to be 1% - 7% below the applicable Price to Compare (PTC) for the first six monthly billing cycles, but HIKO did not provide the guaranteed savings on 14,780 bills issued to customers in Pennsylvania. See I&E Complaint at ¶¶ 22, 129. By way of relief, I&E requested: (1) “that HIKO pay a civil penalty of \$1,000 for each of the 14,780 violations set forth in this Complaint for a total civil penalty” of \$14,780,000; (2) “that HIKO provide a refund to each of the 14,780 customer accounts to which a refund has not already been provided, consisting of the difference between the amount each customer was billed and the minimum guaranteed discounted rate the customer was entitled to receive;” and (3) that HIKO’s “authority to do business as an [Electric Generation Supplier (EGS)] in Pennsylvania be rescinded.” See I&E Complaint at ¶¶ 129-131.

Early in the pendency of the Joint Complainants’ Complaint and I&E’s Complaint, HIKO raised the issue of consolidation of the two separate actions. Specifically, in Preliminary Objections to the I&E Complaint, HIKO asserted that because the Joint Complainants’ Complaint and the I&E Complaint raised the same issues and sought the same relief, the doctrine of *lis pendens* mandated the dismissal of the I&E Complaint or in the alternative, a stay of the I&E Complaint or consolidation with the Joint Complainants’ Complaint. See gen’ly HIKO POs (Docket No. C-2014-2431410). In its Answer to HIKO’s Preliminary Objections, I&E stated that the Joint Complainants’ Complaint “is *not* the same as I&E’s Complaint, does not involve the same parties and does not request the same relief” and the rights asserted are not the same. See I&E Ans. to POs at 2, ¶ 32 (Docket No. C-2014-2431410). I&E also stated that “it is admitted that the Complaint of OAG and OCA substantially contains the information presented,” such information has no “relevance to the I&E Complaint which charges HIKO with 14,780

specific violations of flagrant disregard for the terms of its price offering to customers ...” See I&E Ans. to POs at ¶¶ 10, 12-17 (Docket No. C-2014-2431410). I&E further stated:

It is denied that the relief sought by the I&E Complaint is “identical” to the relief sought in the Complaint filed by OAG and OCA. I&E specifically requests, *inter alia*, that HIKO pay a civil penalty for each violation of 52 Pa. Code § 54.4(a) uncovered by I&E’s investigation and review of HIKO’s data request responses.

See I&E Ans. to POs at ¶ 24 (Docket No. C-2014-2431410). See also I&E Ans. to POs at ¶¶ 26 (Docket No. C-2014-2431410). I&E continued: “the I&E Complaint is limited to HIKO’s violation of 52 Pa. Code § 54.4(a) related to a *single* HIKO price offering,” that is the program wherein HIKO guaranteed 1% to 7% off the PTC for the first six billing cycles. See I&E Ans. to POs at ¶ 32 (Docket No. C-2014-2431410).

The Joint Complainants did not take a position on consolidation. In their Order Denying Preliminary Objections, Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs) rejected HIKO’s request for dismissal of the I&E Complaint and directed the parties to be prepared to argue the merits of consolidation at the Prehearing Conferences scheduled for both complaint dockets on September 29, 2014. See I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Order Denying Preliminary Objections at 8 (Sept. 2, 2014). Thereafter, the ALJs denied consolidation of the complaint dockets. See OAG/OCA v. HIKO Energy, LLC, Docket No. C-2014-2427652, Prehearing Conf. Tr. at 6 (Sept. 29, 2014).

Pursuant to the partial litigation schedule adopted in the Joint Complainants’ Complaint docket, Joint Complainants served the direct testimony of approximately 98 consumer witnesses on December 5, 2014. Hearings for cross-examination of Joint Complainants’ consumer witnesses were scheduled for March 23-27, 2015. Joint Complainants engaged in extensive discovery related to their Joint Complaint and participated in several discovery meetings, both in person and telephonically. The parties in this proceeding fully participated in settlement

negotiations. Joint Complainants, HIKO and OSBA reached a settlement of all the issues in the Joint Complainants' Complaint and notified the ALJs thereof via teleconference on March 20, 2015. During this teleconference, I&E notified the ALJs that there were elements of relief in the Joint Complainants' Settlement with HIKO that were important to I&E, that I&E was concerned about how the Settlement would affect the I&E Complaint and that I&E would have to carefully review the Settlement, specifically the release language in the Settlement, before deciding if I&E would oppose the Settlement.

During a Status Conference convened on April 8, 2015 and by stipulation of the parties, the Joint Complainants moved redacted versions of their consumer testimony into the record in support of their Complaint. Additionally, I&E stated that they would not be a signatory party to Joint Complainants' Settlement with HIKO, but I&E would not oppose the Settlement as long as it did not interfere with I&E's Complaint proceeding. Pursuant to the ALJs' Order Suspending Procedural Schedule dated April 8, 2015, Joint Complainants, HIKO and OSBA filed the Joint Petition for Approval of Settlement (Joint Petition) with accompanying Statements in Support and I&E filed a letter of non-opposition to the Settlement on May 1, 2015.

In support of its Complaint, I&E moved testimony and exhibits of Daniel Mumford into the record at hearings on April 20, 2015. The testimony and exhibits supported the number of violations of 52 Pa. Code § 54.4(a) and the amount of civil penalty requested, as alleged in the I&E Complaint.

Also on May 1, 2015, I&E filed the I&E Motion requesting that the Joint Petition for Approval of Settlement be held in abeyance pending the issuance of an Initial or Recommended Decision in the I&E Complaint Docket. Joint Complainants submit this Answer in Opposition to I&E's Motion.

II. ANSWER.

In the I&E Motion, I&E asserts that holding the Joint Petition in abeyance is just and prudent because (1) the Joint Complainants do not allege HIKO's failure to honor the price guarantee in the 1% to 7% savings program; (2) I&E has already litigated the facts pertaining to the 1% to 7% savings program set forth in the Joint Petition; (3) Joint Complainants and HIKO should not be permitted to benefit from the information gathered by I&E, settle and possibly jeopardize I&E's fully litigated proceeding; (4) ruling on the Joint Petition before issuing an Initial or Recommended Decision in the I&E Complaint Docket could yield inconsistent results; and (5) Joint Complainants and HIKO will not be prejudiced by a delayed ruling on the Joint Petition. See gen'ly I&E Motion.

- A. Holding the Joint Petition in abeyance will delay providing substantial relief to consumers, without prejudice to I&E.

The Joint Complainants submit that ruling on the Joint Petition would not have any negative impact as expressed by I&E. The Joint Petition states that it:

shall not be deemed an admission by HIKO as to any of the allegations in the Joint Complaint. The Settlement is presented without prejudice to any position which any of the parties may have advanced and without prejudice to the position any of the parties may advance in the future on the merits of the issues in future proceedings except to the extent necessary to effectuate the terms and conditions of the Settlement. This Settlement does not preclude the parties from taking other positions in other proceedings involving the marketing and billing practices of Electric Generation Suppliers or Natural Gas Suppliers or other aspects of the competitive market.

See Joint Petition at ¶ 37.

As such, I&E may pursue its position in the I&E Complaint, and the Joint Petition will not affect I&E's position. Joint Complainants further submit that it would be prudent and just to move forward with the Joint Petition because the facts established in the consumer testimony, the Stipulation of Facts attached as Exhibit B to the Joint Petition, and independent discovery

support the Joint Petition. Additionally, delay of consideration of the Joint Petition would prejudice the resolution of Joint Complainants' Complaint, as the Joint Petition contains time-sensitive obligations for HIKO regarding, *inter alia*, its product offering and training of agents and representatives. Finally, delay of consideration of the Joint Petition would delay refund payments to HIKO's affected customers, many of whom testified regarding the financial hardships that HIKO's high charges placed on them.

B. Joint Complainants do allege HIKO's failure to provide adequate price disclosure and failure to provide a guaranteed savings.

Regarding I&E's assertion in the I&E Motion that Joint Complainants do not make specific allegations of HIKO's failure to honor a price guarantee, in their Joint Complaint, Joint Complainants alleged the following regarding promised savings that were not provided:

21. Of the referenced 254 consumer complaints against Respondent received by the Attorney General, 73 or nearly 29% of the complainants indicated that Respondent's salespeople promised guaranteed savings over the Price to Compare (PTC) as inducement for complainants to switch to Respondent. These complainants then received bills from Respondent that were at least two or three times more than the PTC.

22. Of the referenced 9 customers that provided written correspondence and information to the OCA, 3 or approximately 33% stated that Respondent's salespeople promised guaranteed savings over the PTC as inducement for complainants to switch to Respondent. These complainants then received bills from Respondent that were at least two or three times more than the PTC.

23. Of the referenced 8 Formal Complaints filed at the Commission against Respondent and reviewed by the OCA to date, at least 4 or 50% of the complainants averred that Respondent's salespeople promised guaranteed savings over the PTC as inducement for complainants to switch to Respondent. These complainants then received bills from Respondent that were at least two or three times more than the PTC.

* * *

48. It is averred, upon information and belief, that Respondent has violated and continues to violate the Consumer Protection Law and the

Commission's regulations and orders by failing to provide adequate price disclosures to customers and deceiving customers about the rate they would be charged by Respondent.

See Joint Complaint at ¶¶ 21-23, 48.

Although Joint Complainants did not make allegations regarding a specific savings program in the Joint Complaint, Joint Complainants made allegations that HIKO did not honor its promises of guaranteed savings to its customers.² These allegations were made in support of Joint Complainants' allegation of violations of Commission's regulations prohibiting fraudulent, deceptive or other unlawful marketing or billing acts by its employees, agents and representatives; HIKO's failure to adequately train and monitor its salespeople; HIKO's failure to bill prices that reflected its marketed prices and the agreed-upon prices in the Disclosure Statement; and the failure of HIKO's advertised prices to reflect the prices in its Disclosure Statement and billed prices. See 52 Pa. Code §§ 54.43(f), 111.4, 111.5, 54.4(a), and 54.7(a).

Joint Complainants submit that the refund provisions, as well as certain injunctive provisions, in the Joint Petition are appropriate to resolve the allegations in the Joint Complaint. Further, the Joint Petition is supported by the consumer testimony in the record, extensive formal and informal discovery, and information exchanged during settlement negotiations.

C. The Joint Petition does not benefit from materials filed in the I&E Docket.

With regard to I&E's assertions that it has already litigated facts pertaining to HIKO's guaranteed savings program and Joint Complainants and HIKO should not be permitted to benefit therefrom, Joint Complainants submit that it is of no consequence that I&E has litigated facts pertaining to the 1% to 7% guaranteed savings program, and the Joint Petition does not

² Joint Complainants learned of the specifics of HIKO's guaranteed savings program through discovery in their proceeding. I&E, however, performed discovery pursuant to its investigative powers prior to filing the I&E Complaint, wherein it learned the specifics of HIKO's guaranteed savings program.

impact I&E's testimony or presentation of evidence in support of the I&E Complaint. HIKO has not disputed or otherwise denied the allegations related to the failure to provide the savings promised in the Company's 1% to 7% savings program (or any other guaranteed savings program) to customers in either complaint docket. See e.g. HIKO New Matter to Joint Complainants' Complaint at ¶ 5.³ Additionally, I&E's evidence submitted into the record supports I&E's calculation of the number of violations of Section 54.4(a) from January through April 2014 and calculation of the appropriate civil penalty. See I&E v. HIKO Energy, LLC, Docket No. C-2014-2431410, Direct Testimony of Daniel Mumford (as updated Apr. 10, 2015) (Admitted into record Apr. 20, 2015). Further, as already stated Joint Complainants have adequately alleged that HIKO did not provide savings that the Company guaranteed it would provide to customers and moved evidence into the record supporting these allegations. As such, I&E's assertion that Joint Complainants have benefitted in their Joint Complaint Docket from the record in the I&E Complaint Docket is without merit or foundation.

D. Joint Petition does not interfere with I&E's action and will not cause inconsistent results.

Joint Complainants submit that the same arguments that I&E raised in opposition to consolidation of the Joint Complainants' and I&E's dockets apply in this instance. The claims of violations and rights asserted are not the same in these dockets. For instance, the Attorney General is authorized to bring an action to restrain unfair methods of competition and unfair or deceptive acts or practices in trade or commerce within the Commonwealth. See 73 P.S. § 201-4. The Consumer Advocate represents the interests of utility consumers before the Commission as provided in 71 P.S. § 309-1, *et seq.* I&E represents the public interest in actions before the

³ Specifically, HIKO averred: "HIKO's prices conformed to its Disclosure Statement and, to the extent that for a limited period they did not, any non-conformance was due to unforeseen and anomalous causes beyond HIKO's control, including the polar vortex in the winter of 2013 and 2014."

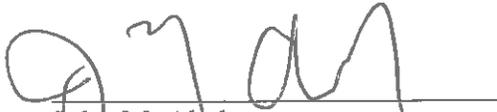
Commission. See 66 Pa. C.S. § 306(b)(1). Additionally, the Joint Complainants allege various violations of, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28, and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, in the Joint Complaint. See gen'ly Joint Complaint. I&E's allegations are limited to violations of one Commission regulation, 52 Pa. Code § 54.4(a). See I&E Complaint at 28.

The Joint Petition is tailored to the specific allegations in the Joint Complainants' Complaint and is supported by the evidence of record in the Joint Complainants' Docket. Further, the Joint Complainants and HIKO requested that the Joint Petition be considered on an expedited basis because there are time-sensitive obligations contained therein regarding, *inter alia*, HIKO's product offering and training of its representatives. Joint Complainants and HIKO were mindful of I&E's pending action in crafting the release language in the Joint Petition. Additionally, I&E filed a letter of non-opposition to the Joint Petition, presumably after I&E reviewed the release language and determined it did not impede I&E's ability to move forward with its Complaint, as stated at the March 20, 2015 teleconference and the April 8, 2015 Status Conference. Joint Complainants submit that the Joint Petition does not and will not interfere with I&E's pursuit of its requested remedy of civil penalties. Further, the Joint Petition does not and will not interfere with I&E's pursuit of refunds for customers. Consequently, there is no potential for inconsistent results in these actions. As such, there is no reason to delay a decision on the Joint Petition or the receipt of refunds by affected HIKO customers. Joint Complainants respectfully request that I&E's Motion be denied.

III. CONCLUSION.

WHEREFORE, Joint Complainants respectfully request that the I&E Motion to hold the Joint Petition in abeyance be denied and that the Joint Petition be considered on an expedited basis.

Respectfully submitted,



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May 21, 2015

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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
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 in Opposition to the Motion of the Bureau of Investigation and Enforcement to Hold Joint Settlement Petition in Abeyance, in the manner and upon the persons listed below:

Dated this 21st day of May 2015.

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