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May 21, 2015

VIA ELECTRONIC FILING

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 v. HIKO ENERGY,
LLC, Docket No. C-2014-2427652**

Dear Secretary Chiavetta:

Enclosed for filing please find HIKO Energy, LLC's Response to the Bureau of Investigation and Enforcement's Motion to Hold in Abeyance Consideration of the Joint Settlement Petition in the above-referenced proceeding.

Copies of the Response 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: Administrative Law Judge Elizabeth Barnes (via email and First Class mail)
Administrative Law Judge Joel Cheskis (via email and First Class mail)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by
Attorney General KATHLEEN G. KANE,
Through the Bureau of Consumer
Protection, TANYA J. McCLOSKEY,
Acting Consumer Advocate,
Complainants,

Docket No. C-2014-2427652

v.

HIKO ENERGY, LLC.
Respondent.

**HIKO ENERGY, LLC'S RESPONSE TO THE MOTION OF THE BUREAU OF
INVESTIGATION AND ENFORCEMENT TO HOLD IN ABEYANCE
CONSIDERATION OF THE JOINT SETTLEMENT PETITION**

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

HIKO Energy, LLC ("HIKO"), by and through its counsel, pursuant to 52 Pa. Code 5.103(c), hereby responds to the Pennsylvania Public Utility Commission's ("Commission"), Bureau of Investigation and Enforcement's ("I&E") request to hold in abeyance any ruling on the Joint Settlement Petition submitted by the Pennsylvania Attorney General's Bureau of Consumer Protection ("OAG") and Office of Consumer Advocate ("OCA") (collectively, "Joint Complainants") 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"). I&E's motion ("Motion") is simply an attempt to subordinate the interests of Pennsylvania consumers in receiving prompt and full restitution to I&E's parochial interest in recovering the maximum possible civil penalty amount. I&E's motion is not supported by any authority. Nor is there any good reason to grant its motion, given I&E's prior refusal to consolidate its action with the Joint Complainants' action, I&E's

lack of interest in joining any of the discussions the parties had concerning the terms of the proposed Settlement of the Joint Complainants' Action, and I&E's failure to raise its purported concerns regarding that Settlement even though it repeatedly was provided copies of the Settlement for months prior to the hearing before Your Honors on April 20. Accordingly, HIKO respectfully request that I&E's Motion be denied and the Joint Settlement Petition be considered on an expedited basis.

I. BACKGROUND

A. The OAG/OCA Proceeding

1. On June 20, 2014, Joint Complainants filed with the Commission a formal Complaint against HIKO. The Joint Complaint contains eight counts alleging, among other things, that HIKO violated Pennsylvania law and Commission regulations and Orders by engaging in misleading and deceptive acts or practices. In particular, Count I of the Joint Complaint avers that HIKO "promised guaranteed savings over the PTC" as inducement to consumers and ultimately failed to honor this promise, thereby violating Section 54.43(f) of the Commission's regulations. (Joint Complaint ¶¶ 22-24.) Joint Complainants also allege that HIKO violated Section 54.4(a) for purportedly failing to bill consumers the agreed-upon price in the Company's disclosure statement and deceiving customers about the rates they would be charged. (Joint Complaint ¶¶ 44, 48.)

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

3. On July 30, 2014, HIKO responded to the Joint Complaint by filing an Answer and New Matter. I&E filed a Notice of Intervention on the same day.

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

5. On September 29, 2014, the presiding Administrative Law Judges (“ALJs”) entered a scheduling order in the Joint Complainants’ action and in the I&E proceeding. I&E did not object to either scheduling order or indicate that it desired to have its action resolved first.

6. In addition, I&E refused to move to consolidate its action with the Joint Complainants’ Action and opposed HIKO’s request that the matters be consolidated.

7. During the course of discovery in the OAG/OCA proceeding, HIKO and the Joint Complainants engaged in settlement discussions and drafts of proposed settlement terms repeatedly were circulated to I&E during the months prior to March 20, 2015.

8. I&E never indicated that it would insist that any settlement be approved only after its own action had been resolved by the presiding officers and otherwise refused to engage in any reasonable settlement discussions with HIKO.

9. On March 20, 2015, the Joint Complainants and HIKO advised the ALJs during an off-the-record telephone conference that a settlement-in-principle had been reached. Subsequently, the Evidentiary Hearing scheduled for March 23 through March 27, 2015 was cancelled and a prehearing conference was set for April 8, 2015.

10. At no time did I&E advise Joint Complainants, HIKO or the ALJs that it would oppose entry of any order approving the settlement before its own action was determined.

11. At the prehearing conference held on April 8, 2015, I&E indicated that it would not join the Joint Settlement Petition, but that it would not oppose it either, provided that nothing in the settlement would preclude I&E from moving forward with its own matter. I&E then confirmed the timing of the hearing schedule of its case with the ALJs.

12. On March 18, 2015, I&E filed a petition seeking a subpoena for two HIKO witnesses to provide hearing testimony, which the ALJs’ granted.

13. By Order entered on April 8, 2015, the procedural schedule for the OAG/OCA proceeding was suspended and May 1, 2015 was the date established for filing the Joint Settlement Petition and individual parties' Statement in Support. The Evidentiary Hearing for I&E's proceeding against HIKO, however, remained scheduled to go forward on April 20.

14. Following HIKO's filing of a petition seeking interlocutory review of the ALJs' order granting the application for the subpoenas, on April 16, 2015, I&E submitted a letter request to Secretary Chiavetta for an extension of time to respond to HIKO's petition after the April 20 Evidentiary Hearing.

15. An Evidentiary Hearing was held in the I&E matter on April 20, 2015.

16. During the hearing, I&E requested a continuation of the hearing to determine whether to insist on production of the subpoenaed witnesses.

17. At the conclusion of the hearing, the ALJs set a schedule for post-hearing briefs and explained the likely timing of a decision. At this particular time, I&E failed to raise any objection to the schedule or timing of a decision, even though it knew the schedule and timing for the approval of the Joint Settlement Petition.

18. On May 1, 2015, the Joint Settlement Petition and accompanying documents were filed in the above-captioned matter. The Joint Complainants and HIKO requested that the Settlement be approved on an expedited basis in order to get prompt and full refunds distributed to Pennsylvania consumers.

19. I&E did not join the Joint Settlement Petition, but provided a letter of non-opposition to the settlement agreement. The I&E letter did not raise any issue with the timing of the approval of the Joint Settlement Petition.

20. I&E raised an issue about the timing of the approval of the Joint Settlement Petition for the first time when it filed its motion on May 1, 2015.

B. The I&E Proceeding

21. On July 11, 2014 — three weeks after the Joint Complaint had been filed — I&E filed a formal Complaint against HIKO. Similar to the proceeding brought by Joint Complainants, I&E alleged that HIKO violated Section 54.4(a) of the Commission’s regulations by purportedly failing to bill customers the agreed-upon price in the disclosure statement. In the Complaint, I&E seeks several forms of relief, including a civil penalty against HIKO in the amount of \$14,780,000,¹ an order directing HIKO to provide refunds to customers who were promised a guaranteed discount rate, and revocation of HIKO’s approval to operate as an EGS.

22. On July 31, 2014, HIKO filed an Answer and New Matter to I&E’s Complaint as well as Preliminary Objections.

23. Specifically, in its Preliminary Objections, HIKO argued, among other things, that I&E’s Complaint should be dismissed pursuant to the doctrine of *lis pendens* because it involved the same parties, alleged the same wrongdoing, and sought the same relief as alleged in Joint Complainants’ action.

24. In its Answer, I&E stated that Joint Complainants’ Complaint had no relevance to I&E’s Complaint, which “specifically requests 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.” (I&E’s Answer to HIKO’s Prelim. Objections at ¶ 24, Docket No. C-2014-2431410.)

¹ This amount was later revised to \$14,689,000 after I&E’s witness, Daniel Mumford, corrected the total number of alleged overcharges from 14,780 to 14,689.

25. By Order entered on September 2, 2014, the presiding ALJs denied HIKO's Preliminary Objections.²

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

27. On March 13, 2015, HIKO served the Rebuttal Testimony of Harvey Klein and Charles J. Cicchetti.³

28. I&E's Surrebuttal Testimony of Daniel Mumford was submitted on April 9, 2015.

29. As previously noted, an Evidentiary Hearing was held in this matter on April 20, 2015.

30. 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. The Joint Settlement Petition Should Not be Subordinated to I&E's Proceeding

31. In its Motion, I&E incorrectly contends — without any support — that the Joint Settlement Petition should be “subordinated to [its] fully litigated proceeding concerning the 1-7% guaranteed discounted rate that HIKO promised to customers” because “[t]he Joint Complaint is “devoid of any reference to the guaranteed rate” and “[t]he Joint Complainants did not plead any allegation even remotely related to HIKO's failure to honor the 1-7% guaranteed discount rate.” (I&E's Motion at ¶¶ 31, 33-34.)

² Prior to this Order, I&E filed an answer to HIKO's New Matter and the OAG filed a Notice of Intervention.

³ This testimony was initially identified as “direct testimony.” However, HIKO subsequently submitted amended cover pages identifying this submission as “rebuttal testimony.”

32. I&E offers no authority to support its argument that its proceeding must be resolved before an independent action brought by Joint Complainants and filed before I&E's own action. There is no such provision in the Code. Moreover, I&E had the opportunity to propose a schedule that would have allowed for an earlier resolution of its proceeding but failed to raise this concern to the parties or the ALJs at any time prior to its Motion. *See* 52 Pa. Code §5.221 (providing the opportunity to resolve matters on an expedited basis).

33. In addition, I&E is wrong about the allegations in the Joint Complaint — the Joint Complaint on its face plainly covers the very allegations I&E has brought. In Count I of the Joint Complaint, the Joint Complainants averred that HIKO “promised guaranteed savings over the PTC” as inducement to consumers and ultimately failed to honor this promise. (Joint Complaint ¶¶ 22-24.) Joint Complainants also alleged that HIKO violated Section 54.4(a) — the same Commission regulation that I&E relies on for the sole basis of its Complaint — for purportedly failing to bill consumers the agreed-upon price in the disclosure statement and deceiving customers about the rates they would be charged. (Joint Complaint ¶¶ 44, 48.)

34. Hence, the Joint Complaint is not “devoid” of any reference to HIKO's guaranteed savings plan. Indeed, the proposed Settlement provides for full restitution to the HIKO customers who were subject to the guarantees underlying I&E's penalty action. I&E was well aware of this for several months but did nothing to raise its concerns to the ALJs or the parties. I&E does not explain why it believes that the interests of justice are disserved if the Joint Settlement Petition is decided before its own action. I&E does not—and cannot—explain why the proposed Settlement of the Joint Complaint, along with the substantial relief it would provide to Pennsylvania consumers, should take a back seat to I&E's interest in recovering the maximum civil penalty amount from HIKO. I&E does not cite to a single authority to support this startling

proposition. I&E obviously prefers that HIKO spend its limited resources in payment of civil penalties than for restitution to consumers.

B. Holding the Joint Settlement Petition in Abeyance Delays Prompt and Substantial Refunds to Pennsylvania Consumers

35. I&E contends that holding the Joint Settlement Petition in abeyance is “just and prudent” because it would allow the presiding ALJs to fully consider I&E’s litigated claims. According to I&E, “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.” (I&E’s Motion at ¶35.) But what I&E really means is that it fears the approval of the Settlement would be inconsistent with its arguments for the huge civil penalties it seeks. That is not a basis for granting its Motion.

36. I&E’s problem is one of its own creation. It could have—but repeatedly did not—raise this concern at many points during the life of this case and the Joint Complainants’ action. It chose not to oppose the Joint Settlement Petition. It chose to concentrate its own action very narrowly on a single claim, which was one that was also covered in the Joint Complainants’ action. It chose not to consolidate its action with the Joint Complainants’ action, arguing that the claims of violations and rights asserted in both proceedings were not the same. It chose to limit its proofs during the evidentiary hearing solely to those that supported its calculation of the maximum civil penalty amount. It did not seek any additional restitution or submit any additional proofs in support of its baseless claim that HIKO’s license should be revoked. Only now, when the determination of the Joint Settlement Petition is about to be rendered, has I&E decided to argue that Joint Complainants’ action creates a risk to its own litigation interests. Those interests do not support the relief it seeks and should in no way trump finalizing the Settlement and allowing for customers to get the full reimbursement per its terms.

37. I&E recognizes that the ALJs must necessarily conduct an evaluation of the factors articulated in *Rosi v. Bell Atlantic – Pennsylvania, Inc.*, 94 Pa. P.U.C. 103 (2000), when considering the Joint Settlement Petition. Simply put, I&E would like to avoid the risk that such an evaluation would hamper its chances of success in its civil penalty action.

38. Granting I&E's motion to hold the Joint Settlement Petition in abeyance based on this perceived "inconsistent result" allows I&E to put its parochial litigation interest before that of the general public and, more importantly, the consumers whose individual complaints provided the very basis for I&E's action. Over the past six months, HIKO has fully cooperated with OAG, OCA, I&E, and OSBA to implement better business practices and provide relief to Pennsylvania consumers. Until now, HIKO believed that all the parties (including I&E) had a common interest in getting refunds to consumers promptly. Indeed, much of the discussion during the April 8, 2015 prehearing conference focused on the triggering events and dates in the settlement providing for the distribution of refunds from a Refund Pool to consumers. However, I&E's Motion would essentially frustrate this public interest and delay the refund process for several more months pending the conclusion of its own lawsuit.

39. Moreover, I&E ignores the substantial prejudice to customers in the event the Joint Settlement Petition is held in abeyance. I&E attempts to characterize this request as a brief or short stay, noting that the schedule for post-trial briefs concludes on June 24, 2015. However, even after I&E and HIKO submit their closing briefs, the ALJs are allotted time to issue a recommended or initial decision and then the parties have a right to appeal this decision to the Commission and, ultimately, the Commonwealth Court of Pennsylvania.

40. Finally, to stress what must surely be an obvious point, I&E's Motion poses an even graver risk. As I&E's witness, Daniel Mumford noted, I&E is not concerned with HIKO's

ability to bear the \$14,689,000 in civil penalties or to remain in business if it cannot pay them. Thus, the unreasonable and outrageous civil penalties I&E seeks, if awarded even in part, would threaten HIKO's ability to remain in business at all, much less pay restitution to consumers.

III. CONCLUSION

Based on the foregoing, HIKO respectfully requests that the I&E Motion to hold in abeyance consideration of the Joint Settlement Petition be denied and that the Joint Settlement Petition be considered on an expedited basis.

Dated: May 21, 2015

Respectfully Submitted,

DRINKER BIDDLE & REATH, LLP



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Counsel for HIKO Energy, LLC

CERTIFICATE OF SERVICE

I, Ginene A. Lewis, hereby certify that on this day I caused a true and correct copy of the foregoing document to be served upon the presiding officers and parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant).

VIA FIRST CLASS MAIL AND E-MAIL

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