**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement :

:

v. : C-2014-2431410

:

HIKO Energy, LLC :

**INITIAL DECISION**

Before

Elizabeth H. Barnes

Administrative Law Judge

Joel H. Cheskis

Administrative Law Judge

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I. INTRODUCTION

The Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (I&E)[[1]](#footnote-2) filed a Complaint against an electric generation supplier (EGS)[[2]](#footnote-3) on July 11, 2014, averring that the EGS billed an unspecified number of customers from January – April, 2014, not in accordance with their welcome letters or disclosure statements in violation of Section 54.4(a) of the Commission’s regulations, 52 Pa.Code § 54.4(a), 14,780 times.[[3]](#footnote-4) I&E requested a civil penalty in the amount of $1,000 per violation for a total civil penalty of $14,780,000;[[4]](#footnote-5) refunds to customers enrolled in a 1-7% guaranteed savings plan during the months of January – April, 2014; and a revocation of the EGS’ license to operate in Pennsylvania. This decision grants the Complaint in part and denies in part. Specifically, the EGS is directed to pay a civil penalty in the amount of $1,836,125 (which is a $125 penalty multiplied by 14,689 occurrences).

Complainant’s request for refunds is denied as moot because the relief requested is essentially being granted under a concurrent, yet separate Initial Decision we are entering today *ad seriatim* in Commonwealth of Pa. *et al.* v. HIKO Energy, LLC, Initial Decision dated August 21, 2015, at Docket No. C-2014-2427652. (OAG/OCA case). In the OAG/OCA case, we are approving a Settlement between the Office of Attorney General and Office of Consumer Advocate (OAG/OCA), the Office of Small Business Advocate (OSBA), and the EGS. This Settlement has a “refund pool” provision which provides the same customers enrolled in the 1-7% guaranteed savings plan during the months of January – March, 2014, with a 3.5% savings from their respective price to compare (PTC) rates for the time period of January – March, 2014. A 3.5% refund is an average savings the customers would have received during the time period of January – March, 2014, had HIKO charged rates in accordance with its verbal sales representations, welcome letters and disclosure statements. The 3.5% savings is more than 1% guaranteed savings, which is the minimum savings promised the customers during their respective introductory periods of their agreements with HIKO.

Although we note the two forms of requested relief vary slightly in that time periods and the percentage of refund relief differ slightly, [[5]](#footnote-6) we believe the fact that those customers will realize approximately a 3.5% savings under the OAG/OCA case Settlement rather than a 1% savings in the instant case means that essentially the refund relief requested in this proceeding is adequately addressed and satisfied in the concurrent Initial Decision at C-2014-2427652.

Complainant’s request for a revocation of license is denied because this would be inconsistent with our approval of the proposed Settlement in the OAG/OCA case, which includes directing injunctive relief in the form of a moratorium of variable rate sales activities until June, 2016 in Pennsylvania, and numerous sales and marketing corrective actions. As the EGS is showing a willingness to correct its business practices, and comply with regulations in the future regarding its retail market activities, the EGS shall retain its conditional authority to operate in Pennsylvania provided the EGS brings itself into compliance and remains compliant with the Public Utility Code, Commission regulations, and Commission Orders regarding retail electricity markets.

II. HISTORY OF THE PROCEEDING

On February 21, 2012, pursuant to 52 Pa.Code §§ 54.31-54.43, HIKO Energy, LLC’s (HIKO or the Company) Application to be an Alternative Retail Electric Supplier in Pennsylvania (Application) was filed at the Commission at Docket No. A-2012-2289944.

On June 7, 2012, the Commission entered a Tentative Order, In re: License Application of HIKO Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2012-2289944, (Tentative Order entered June 7, 2012, Final Order entered July 2, 2012), which tentatively and conditionally approved HIKO’s EGS license to supply electric generation supplier services to residential, small commercial (25 kw and under demand), large commercial (over 25 kw demand), industrial and governmental customers in all electric distribution company service territories, within the Commonwealth subject to certain reporting requirements to Commission Staff regarding its sales and marketing practices as well as complaint resolution reports. Id. at 6. The conditions applied “for a term of 18 months [sic] from the start of the Company’s marketing activities in the State.” Id. at 6.

Because no adverse comments to the Tentative Order were filed, the Tentative Order became a Final Order on July 2, 2012, by operation of law, the Application was granted and a conditional License For Electric Generation was issued effective July 7, 2012. Final Order at 1-3.[[6]](#footnote-7) HIKO Energy, LLC began marketing in Pennsylvania in December, 2012.[[7]](#footnote-8) The conditions on its EGS license applied during the months of December 2012 through and including June 2014.

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG), and Tanya J. McCloskey, Acting Consumer Advocate (OCA) (collectively referred to as “OAG/OCA”) filed with the Commission a formal Joint Complaint including eight counts against HIKO, at Docket Number C‑2014-2427652. OCA/OAG averred that they had received numerous contacts and complaints from consumers related to variable rates charged by HIKO. The Joint Complainants averred eight separate counts against HIKO, including: 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 statements; 7) failing to follow purchase of receivables program parameters; and 8) failure to comply with the Telemarketer Registration Act. OCA/OAG made several requests for relief, including providing restitution, prohibiting deceptive practices in the future, and the revocation of HIKO’s EGS license. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate (OSBA) intervened in that proceeding.

On July 11, 2014, I&E filed the instant, separate complaint at Docket No. C-2014-2431410. This case has not been consolidated with OCA/OAG’s cause of action because I&E objected to the consolidation of the two cases at an Initial Prehearing Conference held on September 29, 2014 at Docket No. C-2014-2427652. The Complaint averred that HIKO overbilled customers in violation of 52 Pa.Code § 54.4(a) a total of 14,780 times during the months of January – April, 2014. The number of violations per electric distribution company (EDC) service territory were disaggregated as follows: 264 violations in Duquesne Light’s (Duquesne Light) territory, 1,637 in Metropolitan Edison Company’s territory; 1,598 in PECO Energy Company’s (PECO) territory; 1,800 in Pennsylvania Electric Company’s (Penelec) territory; 8,059 violations in PPL Electric Utilities’ (PPL) service territory; and 1,422 violations in West Penn Power’s territory. Complaint Attachment A.

I&E requested the following relief: 1) a civil penalty in the amount of $14,780,000 ($1,000 multiplied by each of the 14,780 violations); 2) 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) a revocation of the EGS license. Complaint at 27.

On July 31, 2014, HIKO filed an Answer and New Matter (Answer) as well as Preliminary Objections admitting and denying various averments in the Complaint. HIKO admitted it began enrolling customers in EDC service territories in Pennsylvania as follows: 1) in the service territories of Duquesne Light Company, Metropolitan Edison Company, PECO Energy Company, and PPL Electric Utilities, HIKO began offering service on December 31, 2012; and 2) in the service territories of West Penn Power and Pennsylvania Electric Company, HIKO began offering service on August 15, 2013. Answer at 3. HIKO denied violating 52 Pa.Code § 54.4(a); however, it admitted it marketed a variable rate plan to residential customers in Pennsylvania “until or about January, 2014.” Answer at 3. HIKO further admitted “due to anomalous and unforeseen market forces beyond HIKO’s control during the winter of 2013 and 2014, certain electric bills of the months of January-April, 2014 sent to HIKO customers included rates that were higher than the PTC.”[[8]](#footnote-9) Answer at 5-6. In its New Matter, HIKO averred I&E cannot enforce regulations against HIKO that are inherently vague, ambiguous and susceptible to multiple interpretations. HIKO contends the Commission lacks authority to regulate HIKO’s prices under variable rate agreements. HIKO contends its disclosure statement was approved by the Commission and that it accurately disclosed rate and pricing information. Further HIKO asserts its prices were in conformity with its disclosure statement, and to the extent that for a limited period of time they were not in conformity, that was due to unforeseen and anomalous causes beyond HIKO’s control, including the polar vortex winter of 2013-2014. Answer at 33. HIKO contended the Commission lacks authority to award restitution to HIKO’s customers. Further, the requested civil penalty relief and revocation of license are disproportionate to said violations of law.

In its Preliminary Objections, HIKO contended the doctrine of *lis pendens* effectively barred the instant cause of action because a similar cause of action was already pending against the company filed by Commonwealth of Pennsylvania (OCA/OAG case).

On August 8, 2014, OCA filed a Notice of Intervention and Public Statement. Also on August 8, 2014, a Motion for Admission *Pro Hac Vice* of Vincent E. Gentile, Esquire on behalf of HIKO was filed. On August 11, 2014, I&E filed an Answer to Preliminary Objections. On August 18, 2014, I&E filed a Reply to New Matter. Also on August 18, 2014, OAG filed a Notice of Intervention.

On August 22, 2014, a Prehearing Conference Notice was issued scheduling a prehearing conference for September 29, 2014, and assigning the instant case to us as presiding officers. On August 25, 2014, we issued a Prehearing Conference Order.

On September 2, 2014, we issued an Order Denying Preliminary Objections finding the complaint is not barred by the doctrine of *lis pendens* and that the Commission has the jurisdictional authority to direct HIKO to issue refunds if appropriate. On September 29, 2014, a prehearing conference was held. On September 30, 2014, a Scheduling Order was issued establishing a litigation schedule and scheduling an evidentiary hearing on April 20-22, 2015.

On November 12, 2014, HIKO filed a Motion to Compel Further Responses by I&E to HIKO’s First Set of Interrogatories and Request for Production of Documents. Also on November 12, 2014, HIKO filed an application for subpoena *duces tecum* addressed to the Director of BCS. The Notice to Plead was addressed to I&E instead of Law Bureau, the bureau charged with representing BCS pursuant to 52 Pa.Code § 5.421(c). Law Bureau was granted an extension of time until December 3, 2014, within which time to respond to the application on the Director of BCS’s behalf. On November 24, 2014, HIKO file a Motion to Compel Further Responses by I&E to HIKO’s Second Set of Interrogatories. On December 2, 2014, I&E filed its Answer to HIKO’s Motion to Compel Further Responses to its First Set of Interrogatories. On December 3, 2014, I&E filed its Answer to HIKO’s Motion to Compel Further Responses to HIKO’s Second Set of Interrogatories. Also on December 3, 2014, the Commission’s Law Bureau on behalf of the Director of BCS, filed an Objection of the Bureau of Consumer Services to HIKO Energy, LLC’s Application for Subpoena *Duces Tecum*.

On December 23, 2014, I&E pre-served the direct written testimony of its witness, Daniel Mumford. On December 30, 2014, an Order Denying HIKO Energy LLC’s Motions To Compel, Denying An Application For Subpoena *Duces Tecum*, and Granting a Motion For Admission *Pro Hac Vice* was entered. On March 13, 2015, HIKO filed an unopposed Motion for Protective Order, which was granted and a Protective Order was entered on the same day.

Also on March 13, 2015, HIKO pre-served what was initially identified as “Direct Testimony of Harvey Klein” and “Direct Testimony of Charles J. Cicchetti.”

On March 18, 2015, I&E filed two Applications for Subpoena to secure the attendance of Ms. Shevy Simins and Mr. Elly Bernstein, respectively, at the evidentiary hearing in this matter. These were the persons who sponsored and verified the responses to I&E’s data requests. On March 30, 2015, HIKO filed Objections to the Applications for Subpoena of Ms. Simins and Mr. Bernstein, arguing the Commission cannot extend its *in personum* jurisdiction to issue a subpoena to Mr. Bernstein and Ms. Simins as they reside outside the borders of Pennsylvania. On April 1, 2015, I&E filed a Motion to Strike the Direct Testimony of Harvey Klein and Charles J. Cicchetti, which was presented at the rebuttal phase of this proceeding.

On April 7, 2015, an Order Granting Applications For Subpoenas was issued reasoning that since Shevy Simins, Regulatory Supervisor and Elly Bernstein, Director of Operations, regularly transacted business in Pennsylvania in their managerial capacities as employees of HIKO, they should reasonably anticipate being hailed into a hearing before the Commission to answer inquiries pursuant to a complaint proceeding initiated by I&E. Since the company was vague about who could replace the two as a witness, and since the applications for subpoenas were sufficiently specific regarding the scope, relevance and materiality of the testimonies, we ruled it was not unduly burdensome for them to appear on April 20-22, 2015 as they would be paid the same fees and mileage as paid for like services in the courts of common pleas of Pennsylvania. 52 Pa.Code § 5.421(e).[[9]](#footnote-10)

On April 9, 2015, I&E served the Surrebuttal Testimony of Daniel Mumford. Also on April 9, 2015, HIKO filed a Petition for Interlocutory Review and Answer to a Material Question concerning the granting of I&E’s Applications for Subpoena for the two HIKO employees. On April 10, 2015, I&E withdrew its Motion to Strike HIKO’s Direct Testimony. The evidentiary hearing took place on April 20, 2015. On April 21, 2015, I&E sent us a letter advising it was satisfied with the testimony provided by Harvey Klein, and would neither seek to enforce the Subpoenas against Ms. Simins and Mr. Bernstein nor seek application of new subpoenas for any other HIKO representatives. On April 22, 2015, the Subpoenas expired, as they only compelled attendance on the hearing dates April 20-22, 2015. On April 22, 2015, HIKO filed a Petition to Withdraw its Petition for Interlocutory Review concerning the subpoenas. Also on April 22, 2015, an Order was entered establishing a briefing schedule and notifying the parties of certain public documents the ALJs intended to take judicial notice of. By Secretarial Letter dated May 6, 2015, the Commission granted HIKO’s Petition to Withdraw its Petition for Interlocutory Review. On May 26, 2015, HIKO filed Proposed Transcript Corrections including the notation that Exhibits 1 and 2 to Dr. Charles Cicchetti’s Rebuttal Testimony were admitted into the record. There being no objection, by Order dated June 3, 2015, in accordance with 52 Pa.Code § 5.253(f), the proposed corrections were granted and the transcript was corrected to reflect the corrections.

I&E’s main brief was timely submitted on June 3, 2015 and HIKO’s reply brief was timely submitted on June 24, 2015. OCA/OAG did not file briefs. The record closed on June 24, 2015. This matter is ripe for a decision.

III. FINDINGS OF FACT

1. The Complainant is the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (I&E) authorized under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code §§ 1.8 *et seq*. to prosecute the instant complaint against Respondent.
2. Respondent is HIKO Energy, LLC, a limited liability company established in the State of New York on January 14, 2010. At all relevant times, HIKO Energy has maintained a principal place of business at 12 College Road, Monsey, New York, 20952. HIKO Answer to Complaint. HIKO Rebuttal Testimony of Harvey Klein at 2.[[10]](#footnote-11)
3. Intervenor Kathleen G. Kane, Attorney General, is the chief law officer of the Commonwealth of Pennsylvania and is authorized to intervene in this action pursuant to 52 Pa.Code § 5.72 and Article IV § 4.1 of the Pennsylvania Constitution and the Commonwealth Attorneys Act, 71 P.S. § 732-204.

1. Intervenor Tanya J. McCloskey, is the Acting Consumer Advocate who is authorized by law to represent the interests of utility consumers before the Commission pursuant to 71 P.S. § 309-1, *et seq.* and is authorized to intervene in this action pursuant to 52 Pa.Code § 5.72.
2. On July 2, 2012, HIKO was licensed by the Commission at Docket No. A-2012-2289944 to be an electric generation supplier (EGS) that supplies electric generation service to residential, small commercial, large commercial, industrial, and governmental consumers in the service territories of various electric distribution companies (EDCs) including: Duquesne Light. Met-Ed, PECO, PPL, Penelec and West Penn.
3. HIKO’s EGS license was subject to an 18-month “conditional/probation period” from December, 2012 until June, 2014, based on the high number of complaints that the Commission’s technical staff discovered in New York. The conditions imposed on HIKO’s EGS license are set forth in a Commission Tentative Order that was entered on June 7, 2012 at Docket No. A-2012-2289944. I&E St. 1 at 50-51.
4. Daniel Mumford is the Manager of the Informal Compliance and Competition Unit of the Pennsylvania Public Utility Commission, Bureau of Consumer Services (BCS), and he is the prosecutorial liaison between BCS and I&E in this proceeding. I&E St. 1 at 1‑2.
5. Mr. Mumford monitors the informal complaints filed by consumers to detect possible regulatory compliance and customer service issues and he refers more serious violations and cases involving public health and safety to I&E. I&E St. 1 at 2-3.
6. HIKO’s expert witness, Charles J. Cicchetti, Ph.D., is a Senior Advisor to Navigant Consulting, Inc. as an Independent Consultant with an extensive background in economics and utility regulation. HIKO St. 2-R at 3-5. Exhibit HIKO-Cicchetti-1.
7. Harvey Klein has been the Chief Executive Officer (CEO) and President of HIKO Energy, LLC since November, 2011. HIKO St. 1-R at 2.
8. Respondent is an electric generation supplier (EGS) authorized by the Commission as of July 7, 2012, to provide electric generation supply service in the Commonwealth of Pennsylvania. I&E St. 1 at 5.
9. HIKO conducts interstate commerce in several states including: Pennsylvania, Connecticut, New York, New Jersey, Maryland, Ohio and Illinois. HIKO St. 1-R at 3.
10. HIKO’s business model is to buy energy on the spot market through a third-party energy trading firm (Enhanced Energy Services), then market its energy supply to retail customers through third-party marketing vendors using telemarketing and door-to-door solicitations. HIKO St. 1-R at 2-5.
11. At all relevant times, HIKO advertised, marketed, offered for sale, and sold electric generation service to retail customers in Pennsylvania through door-to-door solicitations, telephone solicitations, and the HIKO website on the Internet. HIKO St. 1-R at 5.
12. HIKO delivers its energy to customers through the local utilities. HIKO St. 1-R at 3.
13. HIKO began enrolling customers in Pennsylvania in variable rate plans on December 31, 2012. HIKO St. 1-R at 5.
14. Beginning in August, 2013, HIKO offered a variable rate product that included a six-month introductory price guarantee to be at least 1-7% less than the PTC of the customer’s local utility. After the first six months, the customer would be enrolled in HIKO’s standard variable rate program. HIKO St. 1-R at 5.
15. HIKO offered a concurrent “One Free Month” benefit to every HIKO customer for every 12 consecutive months the customer was a HIKO customer as long as the customer initiated the request for the free month at the end of his/her 12-month period. HIKO St. 1-R at 6. HIKO-Klein Exhibit 2.
16. HIKO does not remind customers of their eligibility for the free month of energy supply. N.T. 164; I&E Cross Exhibit 1.
17. Only four percent of eligible customers take advantage of the offer of a free month of energy supply. N.T. 164; I&E Cross Exhibit 1.
18. In January, 2014, wholesale market prices for energy supply increased dramatically in part due to a period of sustained cold weather popularly referred to as a “polar vortex” [[11]](#footnote-12) resulting in an increased use of electricity in Pennsylvania and the PJM Interconnection LLC (PJM) service area. HIKO St. 2-R at 11-12; I&E St. 1 at 8; N.T. at 76.
19. Also during the winter of 2014, natural gas prices in Canada increased due to a change in regulation on the TransCanada Pipeline (TCP), and this indirectly contributed to the demand and prices for natural gas in Pennsylvania to increase. HIKO St. 2-R at 16-22; Exhibit HIKO-Cicchetti-2.
20. Prior to the polar vortex, PJM sales of electricity to HIKO were approximately $0.08 per kWh. The price increased approximately 300% to $0.227 per kWh in January, 2014, and remained at or above $0.138 per kWh until in the end of March, 2014. HIKO St. 2-R at 29; Exhibit HIKO-Cicchetti-2.
21. During the winter of 2013-2014, HIKO experienced an unexpected increase in the price of purchasing spot market wholesale electricity and HIKO found it difficult to obtain electric power supply except at exorbitant rates as supply costs tripled or quadrupled for HIKO. HIKO St. 1-R at 8.
22. HIKO’s CEO, Mr. Klein, personally guaranteed a loan of over $20 million so that HIKO could satisfy its obligations with PJM in order to prevent PJM from migrating HIKO’s customers in all states in which HIKO had customers back to the local utilities in those states, including Pennsylvania. HIKO St. 1-R at 9.
23. HIKO’s CEO determined it was impossible for the company to stay in business while honoring the 1% less price to compare introductory rate guarantee; thus, the CEO and HIKO’s management made the business decision to intentionally overbill approximately 5,700 customers enrolled in the guaranteed savings plan during the months of January – April, 2014. HIKO St. 1-R at 9. HIKO St. 2-R at 49; N.T. 193-195.
24. Approximately 5,700 customers enrolled in the guaranteed savings plan were billed an aggregate sales revenue amount of $3.29 million, approximately $1.8 million of which pertained to the relevant overcharges not in accordance with their disclosure statements. HIKO St. 2-R at 49; N.T. 189-190, 219.
25. HIKO overbilled customers as much as 29 cents per kWh, or up to 400% the EDCs’ PTC. N.T. 83.
26. The average overcharge that HIKO billed customers was $124. N.T. 210.
27. HIKO voluntarily ceased marketing its variable rate plan offerings through door-to-door and telemarketing solicitations in Pennsylvania by February, 2014. HIKO St. 1-R at 9.
28. Since January, 2014, HIKO’s number of customers in Pennsylvania has decreased from approximately 10,000 to less than 3,000 across the State. HIKO St. 1-R at 10. HIKO St. 2-R, Chart 7 at 36; N.T. 192.
29. In January, 2014, HIKO began receiving a large volume of telephone calls and electronic mail from customers complaining about their bills which overwhelmed HIKO’s customer service department. In response, HIKO hired an additional 11 people for its customer service department and enlisted a call center based in Florida to respond to customer complaints from all of the states it had customers. HIKO St. 1-R at 12; N.T. 168.
30. HIKO voluntarily refunded approximately $160,000 to some of its complaining customers in Pennsylvania beginning in February, 2014. HIKO St. at 12; HIKO-Klein Exhibit 3.
31. HIKO has recently instituted some changes to its business model and now purchases some energy under longer contracts (i.e. 6-months), hedging against sudden wholesale price increases. N.T. 167.
32. HIKO no longer offers the guaranteed savings introductory plan with its variable rate service; however, HIKO’s CEO indicated a willingness to move forward with the plan in the future. HIKO St. 1 at 13. N.T. 167-168.
33. HIKO complied with I&E’s investigation regarding data requests. I&E St. 1 at 51; N.T. at 96.
34. On May 1, 2015, HIKO joined with the OAG/OCA and OSBA in filing a Joint Settlement Agreement in a separate pending case (OAG/OCA case) which provides for 3.5% savings from the PTC in refunds to customers enrolled in the guaranteed 1-7% savings plan, no civil penalty, a contribution to EDCs’ Hardship Funds, and numerous corrective actions.

1. During the winter of 2014, the Commission’s Bureau of Consumer Services (BCS) received numerous informal complaints from HIKO’s customers complaining that HIKO had billed them in a manner contrary to what was expressly guaranteed at the time of enrollment. I&E St. 1 at 4.
2. BCS heard complaints alleging that HIKO breached its Price Offering of a guaranteed savings of 1-7% less than PPL’s Price to Compare (PTC) for the first six monthly billing cycles. I&E St. 1 at 9.
3. Mr. Mumford made a referral to I&E to initiate an informal investigation into HIKO’s business practices because an unusually large number of customers were informally complaining that they were being overcharged by significant amounts contrary to the terms of their enrollment agreements with HIKO. I&E St. 1 at 3-4, 8-9.
4. On March 31, 2014, I&E initiated an informal investigation of HIKO as a result of customer complaints received by BCS related to allegations that HIKO billed rates that were higher than the rates promised by the Company. Specifically, these were customers in PPL’s service territory. I&E St. 1 at 9.
5. I&E’s investigation included service of three sets of data requests and a review of HIKO’s responses. Data Request Set I was served by letter dated April 2, 2014. Data Request Set II was served by letter dated May 21, 2014 and Data Request Set III was served by letter dated May 27, 2014. I&E St. 1 at 9.
6. In marketing electric supply to potential customers, HIKO offered several variable rate EGS Price Offerings to customers in Pennsylvania and no fixed rate EGS price offerings. One variable rate price offering provided that a customer would experience a guaranteed rate for “the first six monthly billing cycles” (the introductory period) that would be “1-7% less” than the local EDC’s price to compare (referred to hereafter as the “Price Offering”). I&E St. 1 at 10.
7. The Price Offering was offered in all six EDC service territories in which HIKO is licensed as an EGS in Pennsylvania. I&E St. 1 at 10.
8. HIKO issued a Welcome Letter to customers who enrolled in its Price Offering which stated:

**Guaranteed Savings!** You have been enrolled onto a variable rate, which is guaranteed to be 1-7% less than your local Utility’s price to compare, for the first six monthly billing cycles. After the six-month introductory rate plan, you will be automatically rolled over onto a competitive variable rate, which will be determined by HIKO Energy, based on numerous key factors, including current market conditions and climate. The variable rate can change regularly.

I&E St. 1 at 13; I&E Exhibit 3; N.T. 144-145.

1. HIKO issued a Disclosure Statement to customers who enrolled in its Price Offering, which provided that the rate is the “price stated at sign-up and confirmed in your written Welcome Letter from HIKO.” I&E St. 1 at 13; I&E Exhibit 4; N.T. 143-144.
2. In response to I&E’s data requests, HIKO provided billing data for electric generation service supplied by HIKO to residential customers within each EDC service territory in which it operates and billed in January, February, March and April 2014. I&E St. 1 at 11-12; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 142.
3. The format of the spreadsheet billing data for each EDC service territory is similar. I&E St. 1 at 18.
4. The heading at Column 1 of each spreadsheet is Customer Name; however, in order to maintain the confidentiality of customer names, I&E redacted the names in this column. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A.
5. Column 2 of each spreadsheet is the name of the utility or EDC. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149.
6. Column 3 of each spreadsheet is the invoice number. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149.
7. Column 4 of each spreadsheet is the invoice date. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149.
8. Column 5 of each spreadsheet is the category of energy or tax. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149.
9. Column 6 of each spreadsheet is the charge type and notes whether the charge constituted an energy charge or a state tax charge. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149.
10. Column 7 of each spreadsheet is the amount of the invoice. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149-150.
11. Column 8 of each spreadsheet is the rate per kWh charged. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150.
12. Column 9 of each spreadsheet is the rate class. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150.
13. The rate class column demonstrates whether a particular customer was eligible for the Price Offering. The Price Offering was designated by HIKO in the billing data for each EDC service territory as follows: HK001 in the Duquesne Light service territory, METE-SAV1-7 in the Met-Ed service territory, PECE-SAV1-7 in the PECO service territory, PENE-SAV1-7 in the Penelec service territory, PPLE-SAV1-7 in the PPL service territory and WPPE-SAV1-7 in the West Penn service territory. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A.

1. Column 10 of each spreadsheet is the usage in kilowatt hours. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150.
2. Column 11 of each spreadsheet is the service date that relates to the usage covered by the invoice. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150-151.
3. Column 12 of each spreadsheet is the utility account number. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 151.
4. Column 13 of each spreadsheet is the start date of the service. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 151.
5. Column 14 of each spreadsheet is the EDC’s price to compare. I&E St. 1 at 19; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 151.
6. In calculating its requested relief, I&E first determined if the customers were enrolled in the Price Offering, indicated in column 8 (regarding rate per kWh charged), then the EDC’s PTC rate was compared to the rate they were charged by HIKO, to determine whether the customer was properly charged 1% less than the EDC’s PTC. If the rate paid in column 8 is more than the number that results from the rate in column 14 multiplied by 0.99, then that indicates that the invoice has been overcharged. The second prong of the test is whether the customer was within the first six billing cycles of enrollment, or the “introductory period.” Column 11, the service date, must be within the first six months of column 13, the start date. I&E St. 1 at 20.
7. If the information in columns 5 and 6 of the spreadsheet states “tax,” then the charge was not a charge related to energy and was not considered. I&E St. 1 at 20.
8. In response to Mr. Cicchetti’s rebuttal testimony, in instances whereby there was zero usage, even if the rate was higher than the PTC, then this was not considered to be a violation and Mr. Mumford revised his statement on April 10, 2015, by removing 68 zero usage violations from his total number of alleged violations. N.T. 38 and 68. I&E St. 1 (as revised on 4/10/2015).
9. I&E’s investigation ultimately uncovered 14,689 overcharges. I&E St. 1 at 21 (revised on 4/10/15). N.T. 38-39.
10. To arrive at the civil penalty requested, I&E multiplied each overcharge by $1,000. I&E St. 1 at 45; N.T. 50.
11. I&E proposed that a $1,000 civil penalty per overcharge be assessed, including bills that were initially mailed to customers and were subsequently corrected on “re-bills” because on both occasions, HIKO sent out a bill for a charge that was contrary to what HIKO had promised them in violation of 52 Pa.Code § 54.4(a). N.T. at 87-88, 137.
12. I&E based its civil penalty by the number of violations or overcharges and not by the number of customers because a single customer could have experienced numerous violations. N.T. 131.
13. Between January and April 2014, HIKO billed some of its customers at a rate higher than the promised rate in its welcome letter and disclosure statement. N.T. 142-155, 161-165. I&E Exhibits 3 and 4.
14. HIKO intentionally charged a higher rate than offered or agreed upon in its welcome letter and disclosure statement during the months of January – April, 2014, resulting in customers not receiving the discounted guaranteed price. N.T. 165, 217.
15. HIKO was aware that it did not honor the Price Offering when it broke the guarantee. N.T. 193.
16. HIKO’s failure to honor the Price Offering was not the result of negligence, an administrative error, or data glitch. I&E St. 1 at 49.
17. HIKO made a decision to remain in business rather than abandon its Pennsylvania EGS license and HIKO decided to charge in excess of the Price Offering at enrollment. I&E St. No. 1-SR at 17; N.T. 165.
18. HIKO voluntarily bound itself by its competitive Price Offering in Pennsylvania to a rate of at least 1% less the EDCs’ price to compare rate for the first six months introductory period and no person or governmental entity forced HIKO to offer that price guarantee. N.T. 162.
19. HIKO’s refunds to customers initially were given to only those customers who complained to HIKO or filed complaints at governmental enforcement agencies. N.T. 205.
20. HIKO did not proactively refund monies to all overcharged customers, regardless of whether they filed a complaint. I&E St. 1-SR at 5.
21. Between January and April of 2014, HIKO solely purchased electricity in the wholesale spot market and marked up the wholesale rate to its end user customers; however, there is insufficient evidence to show HIKO made an overall profit or loss in 2014. N.T. 213-214.
22. During the months of January - March, 2014, HIKO’s surety bond was expired and HIKO did not submit proof of a new surety bond continuation certificate to the Commission until April, 2015. N.T. 170- 171; Secretarial Letter dated February 20, 2015 at Docket No. A-2012-2289944.
23. HIKO’s reported annual gross receipts in 2014 were approximately $7,500,000 because the security requirement (10% of gross receipts) increased to $750,000 at the end of December, 2013. N.T. 171.
24. If HIKO exited the retail electric market in Pennsylvania, HIKO customers would have been transferred to default service provided by the local EDCs and would not be deprived of essential electricity. I&E St. 1-SR at 15.
25. HIKO’s failure to honor the Price Offering occurred while HIKO’s license was subject to conditions as outlined in the Commission’s Tentative Order entered on June 7, 2012 and while its surety bond was expired. I&E St. 1 at 51; N.T. 170-171.

IV. DISCUSSION

**A. Parties’ Positions**

**1. I&E’s Position**

I&E contends HIKO’s actions in 2014 constituted brazen, selfish, deliberate, and egregious misconduct in that HIKO expressly, unambiguously, and clearly guaranteed an introductory period discount, after which HIKO’s management decided not to honor its promises for as many as four consecutive billing cycles from January through and including April, 2014. I&E avers that HIKO’s action resulted in 14,689 deliberate overcharges and violations of 52 Pa.Code § 54.4(a); thus, I&E requests relief in the form of: 1) a civil penalty in the amount of $1,000 per overcharge for a total civil penalty of $14,689,000; 2) a revocation of HIKO’s EGS license pursuant to 52 Pa.Code § 54.42(a)(7); 3) refunds for all of the customers enrolled in the price guarantee plan in the amount of the difference between their billed rate and 99% multiplied by the price to compare rate of the default service provider; and 4) any other penalty the Commission deems appropriate. I&E Main Brief.

Specifically, I&E offers the following table in Appendix C, attached to its Main Brief to show how it calculated the number of violations.

**A Summary of the Spreadsheet Data Established in I&E Exhibits 6A Through 11A**

**Duquesne**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2014** | **Price to Compare/kwh** | **Maximum Under Price Offering** | **Amount Charged by HIKO** | **No. of Overcharges** |
|  |  |  |  |  |
| Jan | $.0659 | $.06524 | $.1090-0.1690 | 12 |
| Feb | $.0659 | $.06524 | $.1690-0.2990 | 96 |
| Mar | $.0659 | $.06524 | $.2990 | 92 |
| Apr | $.0659 | $.06524 | $.1090-0.2990 | 64 |
|  |  |  | **Total** | **264** |

**Met-Ed**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2014** | **Price to Compare/kwh** | **Maximum Under Price Offering** | **Amount Charged by HIKO** | **No. of Overcharges** |
|  |  |  |  |  |
| Jan | $.08184 | $.08102 | $.0990-.1290 | 267 |
| Feb | $.08184 | $.08102 | $.1290-.2890 | 919 |
| Mar | $.08184 | $.08102 | $.1290-.2890 | 438 |
|  |  |  | **Total** | **1624** |

**PECO**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2014** | **Price to Compare/kwh** | **Maximum Under Price Offering** | **Amount Charged by HIKO** | **No. of Overcharges** |
|  |  |  |  |  |
| Jan | $.08184 | $.08102 | $.0990-.1290 | 437 |
| Feb | $.08184 | $.08102 | $.1290-.2890 | 1162 |
|  |  |  | **Total** | **1599** |

**Penelec**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2014** | **Price to Compare/kwh** | **Maximum Under Price Offering** | **Amount Charged by HIKO** | **No. of Overcharges** |
|  |  |  |  |  |
| Jan | $.07172 | $.0710 | $.0797-.1190 | 463 |
| Feb | $.07172 | $.0710 | $.1190-.2840 | 513 |
| Mar | $.07172 | $.0710 | $.0890-.2840 | 500 |
| Apr | $.07709 | $.0763 | $.1190-.2840 | 306 |
|  |  |  | **Total** | **1782** |

**PPL**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2014** | **Price to Compare/kwh** | **Maximum Under Price Offering** | **Amount Charged by HIKO** | **No. of Overcharges** |
|  |  |  |  |  |
| Jan | $.08754 | $.08667 | $.0990-.1190 | 1636 |
| Feb | $.08754 | $.08667 | $.1190-.2990 | 3161 |
| Mar | $.08754 | $.08667 | $.1190-.2990 | 2163 |
| Apr | $.08754 | $.08667 | $.1290-.1790 | 1058 |
|  |  |  | **Total** | **8018** |

**West Penn**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **2014** | **Price to Compare/kwh** | **Maximum Under Price Offering** | **Amount Charged by HIKO** | **No. of Overcharges** |
|  |  |  |  |  |
| Jan | $.05610 | $.05554 | $.0599-.0990 | 321 |
| Feb | $.05610 | $.05554 | $.0990-.1990 | 418 |
| Mar | $.05610 | $.05554 | $.1350-.1990 | 454 |
| Apr | $.04932 | $.04883 | $.0790-.1350 | 209 |
|  |  |  | **Total** | **1402** |

|  |  |
| --- | --- |
| **Combined Totals** | **14,689** |

Appendix C is consistent with I&E Exhibit 14-Revised, which was admitted into the record on April 20, 2015.

**2. HIKO’s Position**

HIKO claims in its reply brief that the sole issue before us is the appropriate civil penalty to be assessed in accordance with the standards set out in 52 Pa.Code § 69.1201. HIKO admits it issued invoices to certain customers with rates higher than certain guarantees set forth in its disclosure statement. However, even if this was done approximately 14,689 times, there is no case law precedence for the enormous civil penalties I&E seeks. HIKO requests the Commission consider its excuses and other mitigating factors before imposing a civil penalty. Primarily, HIKO contends it only failed to bill in accordance with disclosure statements because it was facing a dire financial situation as a result of the polar vortex and related market anomalies, which caused its costs for purchasing wholesale energy to “skyrocket.” HIKO requests we consider the fact that the average overcharge was only $124, and that 70% of its overcharges were less than $100. Further, the company attempted to mitigate any financial hardship to its customers by voluntarily refunding approximately $160,000 to customers and by entering into a settlement agreement with OAG/OCA which provides for a further $1.67 million “refund pool” for the guaranteed savings plan customers that are the subject of this Complaint. HIKO Reply Brief.

The Company contends it has ceased marketing its variable rate products in Pennsylvania since the end of January, 2014, and currently none of the approximately 3,000 remaining customers are on the guaranteed price offering plan. The company has agreed in the OAG/OCA case to perform many corrective actions to its business practices, including changes to its disclosure statement, and changes to its sales and marketing practices. The company contends it has already lost approximately 7,000 customers since January, 2014 and has sustained enough hardship to act as deterrence from repeating these violations in the future without the necessity of a civil penalty. Alternatively, the company requests a minimal civil penalty as there is no precedence for the substantial civil penalty I&E requests in this case. Finally, HIKO claims the revocation of its license is unwarranted. HIKO Reply Brief.

**3. OAG/OCA’s Position**

Although they are Intervenors, neither the OAG nor the OCA filed any testimony or briefs in this proceeding.

**B. Disposition**

I&E has the authority pursuant to Section 701 of the Public Utility Code, [66 Pa.C.S. § 701](http://www.lexis.com/research/buttonTFLink?_m=c1330c68f122704f4bc70bb15f3873f8&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1999%20Pa.%20PUC%20LEXIS%2065%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=1&_butInline=1&_butinfo=66%20PACODE%20701&_fmtstr=FULL&docnum=69&_startdoc=61&wchp=dGLbVtb-zSkAl&_md5=9f34c50029c3c0de0277e4a8f896f51a), to file the instant complaint against HIKO for violation of any section of the Code, or any Regulation or Order of the Commission. See also Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11).

Because I&E is the complainant in this proceeding, it bears the burden of proof. 66 Pa.C.S. § 332(a). The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950), the Pennsylvania Supreme Court held that the term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party. Additionally, the Commission must ensure that the decision is supported by substantial evidence in the record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Railway Co. v. Pa. PUC, 489 Pa. 109, 413 A.2d 1037 (1980); Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

As this is a fully litigated proceeding, a two-prong test applies. Coupled with the burden of proving by a preponderance of evidence that HIKO is responsible for the alleged misconduct described in the Complaint, I&E must also present evidence to support the relief it seeks. See Pa. Pub. Util. Comm’n v. Gary Polzot, t/a Airport Exec. Car Serv., Docket No. C-2011-2271305 (Final Order entered Oct. 31, 2013). First, each element of alleged violation must be proven and the evidence must support a finding that Section 54.4(a) of the Commission’s regulations was violated in 14,689 separate occurrences as alleged. Second, if the violations and occurrences are established, the penalty needs to be supported, and an analysis must be made considering the factors set forth in the Policy Statement at 52 Pa.Code § 69.1201. Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Scott A. Dechert t/a Distinctive Limousine Service, Docket No. C-2013-2334904, (Opinion and Order entered October 17, 2013) at 7-9. The Commission has directed that litigated proceedings seeking to impose a civil penalty include an analysis of the appropriate standards. Id.at 7-8.

Section 69.1201 of the Commission’s regulations provides a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201. The Policy Statement notes that “these factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.” 52 Pa.Code § 69.1201(a). These factors and standards are as follows under Section 69.1201(c):

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission’s investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa.Code § 69.1201(c); see also, Rosi v. Bell Atlantic-Pa., Inc. and Sprint CommunicationsCompany, Docket No. C-0092409 (Final Order entered February 10, 2000).

**1. Violations of 52 Pa.Code § 54.4(a)**

In dispute is whether there was one violation of a Commission regulation in the decision to overcharge customers enrolled in the Guaranteed Savings Plan during their 6-month introductory period, four violations (one for each month HIKO billed in excess of its promised rate), 5,700 violations (one per customer), 14,689 violations (one per overbilling), or whether some other appropriate number of violations is appropriate. Section 54.4(a) of the Commission’s regulations states in pertinent part:

1. EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

52 Pa.Code § 54.4(a).

Pursuant to Sections 2807 and 2809 of the Public Utility Code, 66 Pa.C.S.

§§ 2807, 2809, the Commission has subject matter jurisdiction to regulate certain aspects of the services provided by EGSs. Under Section 2809, EGSs are required to abide by the Commission’s regulations. 66 Pa.C.S. § 2809. “For EGSs serving residential customers, this includes abiding by the Commission’s Chapter 54 Regulations on bill format, disclosure statements, marketing and sales activities, and contract expiration notices.” Herp v. Respond Power, LLC, Docket No. C-2014-2413756, 2014 Pa. PUC Lexis 697 at 19-20 (Initial Decision issued December 17, 2014).

Moreover, the Commission has recently held it has subject matter jurisdiction to regulate EGSs concerning issues involving Sections 54.4(a) and 54.5(a) of Title 52, Pennsylvania Code. In the case of Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, *LLC*, C-2014-2427655, (Opinion and Order entered December 11, 2014), the Commission addressed an interlocutory question by stating it has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS's disclosure statement regarding pricing.

Recently, on July 14, 2015, the Commonwealth Court reiterated that this Commission has authority to “bend” competition for good reason under the Choice Act[[12]](#footnote-13) in order to protect the public, and especially low-income residential consumers during this transition to a more competitive retail market place. Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania; the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia and Tanya J. McCloskey, Acting Consumer Advocate v. Pa.PUC*,* Nos. 445 C.D. 2014 and 596 C.D. 2014, (Slip Opinion filed July 14, 2015)(CAUSE/OCA cases).

Specifically, the Commonwealth Court held, “[t]he General Assembly has reserved with the PUC the authority to ‘bend’ competition to further other important aspects of the Code, including the Choice Act, where it provides substantial reasons why the restriction on competition is necessary (i.e. there are no reasonable alternatives.)” Id. Slip Opinion at 35. Notably, the Commonwealth Court stated that the Choice Act may have had an “overarching goal” of competition through deregulation of the energy supply industry, which was generally thought would lead to reduced electricity costs for consumers. However, the Court also held that this “scheme does not demand absolute and unbridled competition.” Slip Opinion at 26.

The Choice Act envisions Commission regulation of EGS companies for the protection of the public as stated in Section 2802(14), which provides in pertinent part:

(14) . . . The generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter. Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the Commission deems necessary for the protection of the public.

66 Pa.C.S. § 2802(14).

Section 2809(f) provides the Commission shall ensure that brokers, marketers and aggregators comply with 52 Pa.Code Chapter 56. 66 Pa.C.S. § 2809(f).

The Commission’s authority is also derived from Section 501 of the Public Utility Code, which sets forth the general powers of the Commission.

(a) Enforcement of provisions of part. – In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof, and shall have the power to rescind or modify any such regulations or orders.

\* \* \* \*

(c) Compliance. – Every public utility, its officers, agents, and employees, and every other person or corporation subject to the provisions of this part, affected by or subject to any regulations or orders of the commission or of any court, made, issued, or entered under the provisions of this part, shall observe, obey and comply with such regulations or orders, and the terms and conditions thereof.

66 Pa.C.S. §§ 501(a) and (c).

Section 501 grants the Commission authority to enforce the Public Utility Code and the Commission’s regulations and Orders. 66 Pa.C.S. § 501. EGSs are considered public utilities for the purposes describe in Section 2809 of the Public Utility Code. 66 Pa.C.S. §§ 102, 2809; see also *Delmarva Power & Light Co. v. Pa. PUC,* 870 A.2d 901, 909-10 (Pa. 2005). Section 2809(e) of the Public Utility Code states:

**Form of regulation of electric generation suppliers**. – The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to … assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.

66 Pa.C.S. § 2809(e). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. In addition to imposing requirements to assure that EGSs maintain standards and billing practices consistent with Chapter 56, Chapter 54 of the Commission’s regulations also relate to EGSs’ billing practices. See 52 Pa. Code Ch. 54, 56.

In the years since the Choice Act became effective in 1997, the restructured market underwent a “stress test” when wholesale market rates spiked in the winter months of January – March, 2014. Some EGSs were able to absorb most of the unanticipated increased costs without passing those costs through to their customers. Others did not.

It is not entirely unforeseeable that although a company may be seeing relatively stable and elastic market prices historically for 18 months, given 100% of its power purchases were being made on the spot market, this practice assumed certain risks regarding the volatility of the wholesale market price. Even giving HIKO witness Klein the benefit of the doubt that he did not foresee at the time of enrollment of customers in the 1-7% guaranteed savings plans the high risk HIKO or its variable rate customers were assuming because of the impending on-the-spot wholesale market price increases that were about to occur in January, 2014, the surprise does not justify the fact that the end-user customers enrolled in guaranteed savings plans are shouldering a substantial portion of the burden of the increase in wholesale rates.

By making a conscious decision to not honor its obligation under the terms of its Price Offering to customers who were within their 6-month introductory period, HIKO billed approximately 5,700 customers[[13]](#footnote-14) in a manner contrary to what was expressly guaranteed at the time of the customer’s enrollment. As shown by the summary of spreadsheet data in Appendix C as referenced above, HIKO failed to bill prices to reflect the marketed prices and the agreed upon prices in the Disclosure Statement – those prices being the guaranteed discount set forth in the referenced Welcome Letter.

HIKO made 14,689 separate and distinct overcharges to 5,708 Pennsylvania customer accounts from January through April 2014. Based on the invoice entries set forth in I&E Exhibits 6A through 11A, and as summarized in I&E Exhibit 14, the evidence shows a total of 14,689 overcharges disaggregated as follows: 264 in Duquesne Light service territory, 1,624 in Met-Ed service territory, 1,599 in PECO service territory, 1,782 in Penelec service territory, 8,018 in PPL service territory and 1,402 in West Penn service territory.

We question two inconsistencies in I&E’s exhibits. First, I&E Exhibit 14 Revised shows that the total number of overcharged invoices under rate class [EDC] E-SAV1-7 increased by one instead of remaining the same, or decreasing. The reason given for the revision was that Mr. Mumford was removing 68 violations from his prior calculation of number of violation occurrences due to “zero usage.” Thus, we do not understand why this total would increase by 1. We further question the fact that approximately sixty times, there were two entries in the I&E Exhibit 8A, both labeled as “energy charges” for the same account, for the same time period, with the same rates and PTC, but with differing invoice numbers, amounts, and usage. It could be that there were two invoices issued and that neither one was a re-bill, but it is not entirely clear whether these violations should be viewed as one violation for that one time period, or two violations for that same time period. An illustrative example of two times we questioned the charges is in the following table.

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| Amount | Rate | Usage | Service Dates | Utility Account No. | Utility PTC | page no. |
| $31.94 | .1090 | 293 | 12/18/13-1/16/14 | 2271656012 | .09770 | 54 |
| $93.09 | .1090 | 854 | 12/18/13- 1/16/14 | 2271656012 | .09770 | 54 |
| $27.03 | .1090 | 248 | 12/18/13-1/21/14 | 5108801203 | .09770 | 65 |
| $77.50 | .1090 | 711 | 12/18/13-1/21/14 | 5108801203 | .09770 | 65 |

In Exhibits 6A, 7A, 9A, 10A and 11A, the number of violations appears to be accurately highlighted. Where there is a re-bill in these exhibits, it is clearly marked “Rebilled Energy Charge” and these charges do not appear to be highlighted or included in the total number of violations, i.e. Exhibit 7A, at 1. However the PECO exhibit does not have any line-itemed re-bill charges expressly stating such. Mr. Cicchetti testified as follows:

There were a lot of overcharges where, if you look at the data, there were probably at least 300 instances where it was one of these bills dated one day, and then two days later it was modified and it was another bill. And I’m not sure the customer even saw that. It may have just been between HIKO and the utility.

N.T. 211.

Mr. Cicchetti was unspecific about which line items were incorrectly included in the calculations. He also seemed unsure whether the customer was billed the re-bill or not. As his testimony contains conjecture, we find I&E carried its burden of proving 14,689 violations did occur during the four month period in question.

We are persuaded by I&E’s argument that each HIKO overcharge equates to one violation. I&E St. 1 at 45. Specifically, each instance where a customer’s invoice entry was overbilled is a violation of the Commission’s regulation at 52 Pa.Code § 54.4(a). That regulation states that “*EGS prices billed* must reflect the marketed prices and the agreed upon prices in the disclosure statement.” N.T. 131. (Emphasis added). Here, what was marketed and “agreed to” as set forth in HIKO’s Welcome Letter and Disclosure Statement for this Price Offering was the discount of 1 to 7% off of the EDC’s PTC.

Generally, HIKO issued a Disclosure Statement to each customer who enrolled in its Price Offering, which provided that the rate is the “price stated at sign-up and confirmed in your written Welcome Letter from HIKO.” I&E Ex. 4, N.T. 143-44.[[14]](#footnote-15) HIKO sent customers who enrolled with any of its offers the same Customer Disclosure Statement. I&E St. 1 at 15; I&E Ex. 5.

HIKO also issued a Welcome Letter to customers enrolled in its Price Offering which stated:

**Guaranteed Savings!** You have been enrolled onto a variable rate, which is guaranteed to be 1-7% less than your local Utility’s price to compare, for the first six monthly billing cycles. After the six-month introductory rate plan, you will be automatically rolled over onto a competitive variable rate, which will be determined by HIKO Energy, based on numerous key factors, including current market conditions and climate. The variable rate can change regularly.

I&E Ex. 3. (Emphasis in original). The term “guaranteed savings” is in bold. N.T. 145. When a customer was first enrolled in the Price Offering, HIKO was obligated to put the customer on an introductory rate for the first six months of service. After the first six months, the rate automatically changed to the Company’s standard variable rate.

HIKO does not dispute that it failed to honor the guaranteed discounted rate during the winter of 2014. HIKO St. 1-R at 9; HIKO St. 2-R at 33, 39, 49, 59; N.T. 164-66, 191, 193, 195 and 197. HIKO admits that from January 2014 through April 2014, HIKO billed a large number of customers within the service territories of Duquesne Light, Met-Ed, PECO, Penelec, PPL and West Penn a unit rate for electricity supply during the customers’ introductory periods that exceeded, and sometimes far exceeded, the discounted introductory rate that was guaranteed at the time of each customer’s enrollment as a HIKO supply customer.

I&E Exhibits 6A through 11A show the highlighted number of violations. HIKO’s witness, Mr. Klein, confirmed that the spreadsheets were true and correct business records representing billing data for HIKO customers of this price guarantee for January through April 2014 in each EDC service territory. N.T. 147. Mr. Klein testified that each row of data set forth in the spreadsheets represents a single invoice entry. N.T. 148. Mr. Klein confirmed the meaning of each column heading. N.T. 148-151. Mr. Klein confirmed the process for determining whether an invoice entry was deemed to be an overcharge under the terms of the Price Offering. N.T. 151-53.

The testimony of I&E’s witness Daniel Mumford, Manager of the Informal Compliance and Competition Unit of BCS, is persuasive and supports a finding that these spreadsheets show 14,689 occurrences of HIKO’s overbilling over 99% of the price to compare rate of the EDC in six EDCs’ territories. Although we note that in the PECO Exhibit 8A there are approximately 60 highlighted charges that appear to involve thirty double billings (the same account number, the same time period, and different usage amounts and billed amounts), since the line items are labeled Energy Charge instead of Rebilled, we are willing to accept these also as violations of 52 Pa.Code 54.4(a).

The law does not require HIKO to tariff its rate in Pennsylvania. There was no specific statutory price cap placed on HIKO’s variable rates. N.T. 185. However, through its service offerings, welcome letter and disclosure statement, the evidence supports a finding that HIKO did essentially “cap” its own variable rate during a six-month introductory period. Thus, it was obligated to make good on its promise to customers to provide service at a rate at least 1% lower than the EDCs’ PTC rate during this introductory period. 54 Pa.Code § 54.4(a). The evidence shows approximately 5,700 customers affected may have sustained less of a financial loss had the EGS notified its customers in advance of the price increases, or had HIKO notified customers of its intention to abandon service in Pennsylvania. The customers then would have had an opportunity to shop for another supplier, or would have been transferred back to their local utilities (EDCs). N.T. 171-172.

Many residential customers in Pennsylvania are low income customers. We accept as credible Dr. Cicchetti’s testimony that most of the customers were residential customers and that some of the overcharges were for less than a dollar. N.T. 211. Although the parties agree that the average overcharge was $124 per bill, we do not find any amount of overcharge to be a *de minimus* amount negating the finding of a violation, for it is unknown the financial detriment these account holders sustained during the winter. Although we did not hear from any consumer witnesses in this case, it is reasonable to infer that a customer might have had to borrow money, spend less, or pay fewer bills in order to weather the polar vortex storm.

Mr. Mumford’s testimony is persuasive that each overbilling, as he has subtracted the 68 violations when there was zero usage, is a reasonable way of defining an “instance”. N.T. 38-39, 136-137. However, we are also persuaded by the testimony of Mr. Cicchetti that consideration should be given to the amount of the overcharge and any actions HIKO may have done to mitigate financial harm to its customers. N.T. 211. These mitigating factors will be discussed further below when applying the factors found in Section 69.1201.

The Commission’s regulation at 52 Pa.Code § 54.4(a) provides that the EGS must bill in accordance with statements made in its welcome statements, disclosure statements, and the verbal assurances and offers given by their sales representatives to customers. Once an EGS offers an introductory variable rate for a set period at a capped amount, that is a self-imposed cap on the rate, and charging above that rate without proper prior notice to customers is unlawful. HIKO’s argument that the regulations prohibit an EGS from abandoning service in Pennsylvania with less than 90 days notice to EDCs and customers in support of its actions is without merit, as an EGS can always petition the Commission for a waiver of the 90-day notice requirement. The EGS could have elected to charge in conformity with its price offering, and sustain whatever temporary loss it needed to at the time.

HIKO not only overcharged these customers by approximately $1.8 million during a four month period, but it possibly made a profit during 2014. The evidence supports a finding that the company at least charged its customers more than what it paid for the wholesale rate in order to cover its operating costs during the period in question, and there was no evidence to show these operating costs were reduced in anyway. N.T. 214. In fact the company increased operational costs by hiring 11 additional customer service representatives and contracting with a call center in Florida to handle the increase in consumer complaints.

The record evidence in this proceeding reflects 14,689 overcharges. Contrary to Dr. Cicchetti’s claim that I&E’s penalty assessment is exaggerated “for what was essentially a single business decision ,” HIKO St. 2 at 49, violations of Section 54.4(a) are not based on the number of business decisions; rather, they are based on the number of overbillings. As I&E argued in its Brief, if one were to adopt Dr. Cicchetti’s position, then a person robbing 10 different banks should only be charged once for having violated the Crimes Code. The number of overbillings is the appropriate focus regardless of the amount that was overcharged. N.T. 88, 137. On each occasion, HIKO submitted a bill for a charge that was contrary to what HIKO had promised. N.T. 87-88.

Further, the imposition of a civil penalty for each overcharge is lawful and appropriate because each overbilling can be feasibly segregated into a discrete violation. See Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm’n, 531 A.2d 85 (Pa.Cmwlth. 1987) (holding that Section 3301 of the Code authorizes the Commission to impose a civil penalty of up to $1,000 for each and every discrete violation, regardless of the number of violations occurred). In Newcomer, the carrier’s certificate prohibited it from transporting the goods of more than one consignor on one truck at any time. Newcomer was found to have violated its certificate restriction 184 times on 128 separate days. The Commonwealth Court affirmed the Commission’s Order and found that since 184 unlawful shipments were identified, each shipment constituted a violation. The Court disagreed with the carrier’s argument that the shipments could be characterized as a continuing offense of an ongoing nature because the shipments could be feasibly segregated into discrete violations so as to impose separate penalties. *Id.* at 87.

Consistent with the Commonwealth Court’s determination regarding the number of unlawful shipments in Newcomer, we find the number of HIKO’s overcharges between January and April 2014 constitute 14,689 discrete violations, each of which is subject to a separate civil penalty. Had each of the 5,700 consumers affected by HIKO’s actions filed their own complaints, HIKO could have been liable in each individual case. The fact that the violations are being raised in one complaint does not minimize HIKO’s liability.

**2. Civil Penalty Analysis**

Section 3301 provides in pertinent part:

**§ 3301. Civil penalties for violation.**

1. General rule. – If any public utility or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, such public utility, person or corporation . . . shall forfeit and pay to the Commonwealth a sum not exceeding $1,000 to be recovered by an action of assumpsit instituted in the name of the Commonwealth.

66 Pa.C.S. § 3301(a).

Section 3301(a) of the Code authorizes the Commission to impose a civil penalty of up to $1,000 per violation of the Code, Commission regulation or Commission order. 66 Pa.C.S. § 3301(a).

Section 102 of the Public Utility Code defines public utilities and provides in pertinent part:

(1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:

(i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.

\* \* \* \*

(2) The term does not include:

\* \* \* \*

(vi) Electric generation supplier companies, except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue neutral reconciliation).

66 Pa.C.S. § 102.

An electric generation supplier (EGS) is defined under Section 2803 of the Public Utility Code as follows:

A person or corporation . . . that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company.

66. Pa.C.S. § 2803.

The Choice Act envisions Commission regulation of EGS companies for the protection of the public as stated in Section 2802(14), which provides in pertinent part:

(14) . . . The generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter. Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the Commission deems necessary for the protection of the public.

66 Pa.C.S. § 2802(14).

Section 2809(f) provides the Commission shall ensure that brokers, marketers and aggregators comply with 52 Pa. Code Chapter 56. Given the definition of an EGS under Section 2803 as being “a person or corporation,” we find that an EGS may be directed to pay civil penalties pursuant to Section 3301(a), which specifically authorizes the Commission to issue civil penalties against a person or corporation violating provisions of the Public Utility Code. *See*, 66 Pa.C.S. § 3301(a); see also, 66 Pa.C.S. §§ 102 (defining public utility), 2803 (defining electric generation supplier).

While we agree HIKO is not a “public utility” except in certain limited circumstances, the Commission has clearly held that in order for vigorous retail competition to occur, customers must be protected and EGSs must be held to certain standards and regulated conduct. In fact, the Commission was charged by the General Assembly under Section 2807(d) to establish regulations requiring EGSs to provide adequate and accurate information to enable customers to make informed choices regarding the purchase of electricity. 66 Pa.C.S. § 2807(d)(2). The Commission was directed to ensure EGSs comply with Chapters 54 and 56 of the *Pennsylvania Code*. 66 Pa.C.S. §§ 2809(f) and (e). Further, the Commission has the authority to ensure EGSs “comply with such other requirements concerning service as the Commission deems necessary for the protection of the public.” 66 Pa.C.S. § 2801(12). The Commission’s general powers pursuant to 66 Pa.C.S. § 501 include regulatory authority over public utilities and “every other person or corporation” subject to the Public Utility Code. 66 Pa.C.S. § 501(a)(b) and (c). HIKO certainly falls under the catch-all definition of “every other . . . corporation” if not first a “public utility.” Therefore, the Commission has the authority to direct HIKO to pay civil penalties for violations of Commission regulations. There is no provision in the OCA/OAG case Settlement for the imposition of a civil penalty. We consider the following ten factors in determining the appropriate civil penalty in the instant case.

**First Factor - HIKO’s Conduct**

The first factor for consideration is whether the conduct at issue was of a serious nature. Section 69.1201(c)(1) states:

Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

52 Pa.Code § 69.1201(c)(1).

It is undisputed that HIKO’s misconduct was serious, which results in a higher civil penalty. HIKO’s conduct was intentional rather than negligent and it was neither a mere administrative error nor a technical glitch. Rather, HIKO made a conscious decision to disregard the express terms of its Price Offering in order to “stay in business” during the polar vortex despite the ramifications this decision had on its end user retail customers. N.T. 165, 193. As Mr. Mumford testified, I&E’s proposed civil penalty was “based on the egregious nature of the violation. It was a pretty blatant violation of what these customers were promised.” N.T. 50.

**Second Factor - Consequences of HIKO’s Conduct**

The second factor is whether the resulting consequences of HIKO’s conduct at issue were of a serious nature. Section 69.1201(c)(2) states:

Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

52 Pa.Code § 69.1201(c)(2).

HIKO’s argument that since the allegations do not involve the consequences of death, personal injury, or property damage, no or a low penalty is warranted. As an example, HIKO cites as authority for its position,PUC v. UGI Penn Natural Gas, Inc., Docket No. M-2013-2338981 (Order entered Sept. 26, 2013), wherein after repeated violations of gas safety regulations spanning the course of nearly five years, with consequences that included many deaths and substantial property damage, the largest civil penalty imposed on UGI Utilities, Inc. (“UGI”) was only $1,000,000. It is difficult to compare settled outcomes involving natural gas explosions with the instant case. We have no way of knowing whether the violations alleged in the UGI cases would have been proven by a preponderance of the evidence. A settlement is an amicable resolution to a dispute, which carries less precedential weight than fully litigated decisions.

Focusing on the instant case, it would be unreasonable given the magnitude of the number of overcharges in violation of 52 Pa.C.S. § 54.4(a) to not direct any penalty at all. Further, it is unknown the hardship the approximately 5,700 customers experienced, even if their average monthly overcharge was only $124. If the EGS’s price to compare rate increased by 400% without prior notice and without the expectation for the occurrence, we infer that there was some financial hardship experienced by the customers and, therefore, the consequences of HIKO’s actions were of a serious nature. I&E St. 1 at 49. We accept as credible Dr. Cicchetti’s testimony that some of the overcharges were for less than a dollar. N.T. 211. This fact and the fact that the conduct complained of is not “slamming” may warrant less than the maximum penalty per occurrence; however, the conduct is serious as evidenced by the number of informal complaints BCS received regarding the company, the number of total violations as depicted in Appendix C to I&E’s Main Brief, and the number of customers that cancelled their agreements with HIKO from January – April, 2014.

**Third Factor – Whether HIKO’s Conduct Was Intentional**

The third factor is whether the conduct at issue was deemed intentional or negligent. Section 69.1201(c)(3) provides:

Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

52 Pa.Code § 69.1201(c)(3). “Intentional” is defined as “done by intention or design.” *Merriam-Webster’s Collegiate Dictionary* 609 (10th ed. 1999).

There is insufficient evidence to show that HIKO intended prior to January, 2014, to violate the Commission’s regulation at 52 Pa.C.S. § 54.4(a) by not honoring the self-imposed guaranteed introductory rate of one percent (1%) less than the EDCs’ price to compare during the months of January – April, 2014. However, we find sufficient evidence to support a finding that in January – April 2014 HIKO made the deliberate and intentional business decision to violate the terms of its agreements with customers enrolled in the 1-7% guaranteed savings plan 14,689 times from January – April, 2014, four consecutive months. The act of overbilling customers by charging an amount that failed to reflect the agreed upon price was intentional.

These decisions appear to have come from HIKO’s top executive and management, rather than the actions of subordinate employees. Mr. Klein, testified that as CEO he was aware that the Company was deviating from the terms of its price guarantee. N.T. 165. As HIKO’s expert testified, “I don’t think it was something that happened with HIKO being unaware that they were doing it” and “. . . you heard from Mr. Klein that he admitted that it was a mistake. And therefore he knew that it was happening when it happened.” N.T. 193. Dr. Cicchetti continued that “Mr. Klein and his advisors and other members of management . . . made the decision in January [2014] when they realized that they just couldn’t stay in business.” N.T. 195. Specifically, the testimony of HIKO’s witness, Mr. Klein, supports this finding. N.T. 164-66.

Additionally, HIKO’s witness, Dr. Cicchetti, testified as follows:

HIKO, in effect, decided the duty to provide supply service trumped the six-month “Guaranteed Savings” aspect of its enrollments. HIKO St. 2 at 33-4.

. . . HIKO made a single business decision to stay in business and cover its collateral, margins, and purchases from PJM even though it meant breaching the price guarantee. HIKO St. 2 at 39.

I don’t think that the decision to charge the variable rate and ignore the guarantee was an accident . . . . In fact, I think you heard from Mr. Klein that he admitted it was a mistake. And therefore he knew that it was happening when it happened. N.T. 193.

Q. . . .So, again, you agree that HIKO made a conscious decision and they knew what they were doing when they breached the price guarantee terms?

I’d agree with that. N.T. 195.

Q. Would you agree then that [in] each of those 14,689 instances HIKO billed a price that was not the price reflected in the guarantee discount?

A. I think the number 14,000, I could quibble about things like penny billings and multiple billings in the period. But the general notion that you’re getting across, I agree that each time they exceeded 99 percent of the price to compare, that was an action that resulted in failing to live [up] to the guarantee, and therefore a price that was charged that exceeded what HIKO offered its customer. N.T. 197.

We find that the actions to violate Section 54.4(a) were intentional as supported by Mr. Klein’s testimony admitting, “it was simply impossible for us to stay in business while continuing to beat the price to compare.” N.T.165. Mr. Klein, CEO and President of HIKO, personally secured a $20 million loan in order to satisfy HIKO’s load obligations with PJM and stay in business in all of the states it operates and this was an intentional decision.

Alternatively, HIKO could have petitioned for a waiver of the Commission’s Tentative Ordering paragraph regarding the 90-day notice requirement, and a waiver from the Commission’s regulations at 52 Pa.Code § 54.41 (regarding transfer or abandonment of license). The process for exiting the market in Pennsylvania is more streamlined for an EGS than it is for a provider of last resort (POLR) or EDC. Although it is true that Section 54.41 requires a notice of abandonment of service be given at least 90 days in advance to the customers of the EGS, the Commission, and the default service providers (DSPs) and EDCs in whose territories the EGS operates, the company could have petitioned for a waiver of the 90 day requirement and could have explained its exigent circumstances to the Commission. We note there was no evidence to suggest the company was in such a dire financial position that it ever considered, much less filed, a bankruptcy petition under Chapter 11 or 7 of the Bankruptcy Code.

The decision to stay in business in Pennsylvania and overcharge customers during the January – April 2014 time period was voluntary and intentional on the part of the Company’s management. No person or governmental entity forced HIKO to offer the price guarantee for an introductory period of six months. N.T. 163-165. There is no Commission-approved tariff involved in this case. The Commission neither approved nor reviewed the rate offering prior to its issuance. The decision to offer the introductory price for 6 months beating the price to compare rate of the local utility was purely HIKO’s marketing decision, which ended up becoming regulatory violations when the company decided not to honor the Price Offer. HIKO St. 2-R at 36. HIKO’s intentional conduct warrants a higher civil penalty.

**Fourth Factor - HIKO’s Modifications of Internal Practices and Procedures**

The fourth factor considers whether HIKO made any effort to modify internal practices and procedures to address the conduct at issue. Section 69.1201(c)(4) states:

Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

52 Pa.Code § 69.1201(c)(4).

It appears from the record that in the early phases of HIKO’s overbilling, the Company made no effort to voluntarily cease the overbilling. I&E Exhibits 12 and 13 show that only once customers filed informal complaints with BCS, did HIKO take action to refund overcharged amounts to customers. I&E Exhibits 12 and 13 are further supported by the testimony of HIKO’s expert:

Q. Dr. Cicchetti, do you know if with regard to this proceeding whether HIKO had any specific remedial plan to provide refunds to the affected customers?

A. I know before this proceeding began that they were dealing with customer complaints, and that they made refunds to specific customers who complained.

N.T. 204.

As the spreadsheet data shows, HIKO’s overbilling occurred not as a single occurrence, but over a four-month period. There were at least four separate decisions to continue HIKO’s pattern of overbilling – one for each of the January, February, March and April 2014 billing cycles. N.T. 217. Taking this same logic even further, the spreadsheet data contained in Column 4 titled “Invoice Data” in I&E Exhibits 6A through 11A shows multiple invoice dates for each month, suggesting that the decision to continue its scheme of overbilling could have been confirmed prior to each and every invoice date.

HIKO ceased offering the guaranteed rate in February, hired 11 additional customer service representatives, and contracted with an answering service in Florida to handle the numerous customer complaints from several States. Mr. Klein testified that HIKO now also purchases hedges regarding power supply, i.e. 6-month contracts. However, whether that alone is sufficient risk management to ensure that HIKO’s variable rate prices do not exceed its guaranteed savings plans remains to be seen. There is no evidence the company modified its internal practices or procedures to address the conduct at issue. Of particular concern is that Mr. Klein testified he still intends to offer the 1% guaranteed rate. N.T. 167-168. Thus, it appears the guaranteed savings plan is still a goal and part of the business model.

The company has agreed to modify certain internal procedures as part of its Settlement as outlined in the concurrent decision at C-2014-2427652. This factor supports a finding that less than the maximum penalty is warranted.

**Fifth Factor - The Impact of HIKO’s Conduct**

The fifth factor involves the number of customers affected and the duration of the violation. 52 Pa.Code § 69.1201(c)(5). Although Mr. Mumford admitted that the precise number of customers affected was not known (N.T. 84), we accept as credible Dr. Cicchetti’s rebuttal testimony wherein he states, “More importantly from a Pennsylvania perspective, of the 5,708 customer accounts that are alleged to have overcharges in Pennsylvania, 78.1% have “dropped” HIKO as their EGS.” HIKO St. 2-R at 36.

Thus, as the overcharges are admitted by HIKO, we infer from this testimony that approximately 5,700 customers (consisting of primarily residential and some small business customers) were affected by the overcharge, rounding down because some customers may have held more than one account. N.T. 211-212. Chart 7 on p. 36 of Dr. Cicchetti’s testimony depicts HIKO’s customers count over the time period of May, 2013 through November 25, 2014. From this chart, we infer that the guaranteed savings program offering beginning in August, 2013, resulted in a sharp increase in customers (from 5,000 in August, 2013 to over 10,000 in January, 2014). HIKO doubled its customer base in Pennsylvania within 6 months after offering its 1-7% guaranteed savings. Chart 7 indicates that from January – April, 2014, HIKO’s customers decreased from over 10,000 to 5,000. Thus, a large number of customers switched suppliers or returned to their DSP during the same time period, which indicates the customers were adversely affected by the violations.

**Sixth Factor - HIKO’s Compliance History**

The sixth factor addresses the compliance history of HIKO. 52 Pa.Code

§ 69.1201(c)(6). Section 69.1201(c)(6) provides:

An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

52 Pa.Code § 69.1201(c)(6).

On February 21, 2012, HIKO’s Application was successfully filed at the Commission at Docket No. A-2012-2289944. On June 7, 2012, the Commission entered a Tentative Order In re: license Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power. Docket No. A-2012-2289944, (Tentative Order entered June 7, 2012, Final Order entered July 2, 2015), which found HIKO to be a foreign limited liability company, organized in the State of New York as of January 14, 2010, and registered to do business in Pennsylvania as of December 14, 2011. The Tentative Order noted that HIKO supplied information regarding its operations in New York, which showed a high number of complaints compared to other energy service companies in New York (79 complaints in 2011 and 98 complaints in the first four months of 2012). Tentative Order at 4-5. Therefore, the Commission tentatively and conditionally approved HIKO’s EGS license to supply electric generation supplier services to residential, small commercial (25 kw and under demand), large commercial (over 25 kw demand), industrial and governmental customers in all electric distribution company service territories, within the Commonwealth subject to certain reporting requirements to Commission Staff regarding its sales and marketing practices as well as complaint resolution reports. Id. at 6. The conditions applied “for a term of 18 months [sic] from the start of the Company’s marketing activities in the State.” Id. at 6.

Because no adverse comments to the Tentative Order were filed, the Tentative Order became a Final Order on July 2, 2012, by operation of law, the Application was granted, and a conditional License For Electric Generation was issued effective July 7, 2012. Final Order at 1-3. HIKO began marketing in Pennsylvania in December, 2012.[[15]](#footnote-16) Therefore, the Commission’s conditions on HIKO’s EGS license applied during the months of December 2012 through and including June, 2014. Thus, we determine that during the time period the alleged violation(s) took place (between the months of January-April, 2014), these conditions as outlined in the Tentative Order applied to HIKO’s license to operate in Pennsylvania.

We agree with I&E that the evidence shows HIKO committed these violations while its EGS license was conditional. I&E St. 1 at 50-51. The conditions appear to have been placed upon the EGS license because HIKO had a prior history of a high number of customer complaints indicative of compliance issues in New York at the time it applied for an EGS license in Pennsylvania. *License Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2012-2289944 (Tentative Order entered June 7, 2012).[[16]](#footnote-17) It is noteworthy for purposes of setting an appropriate penalty as well as assessing the worthiness of retaining its EGS authority that while HIKO was intentionally overbilling 14,689 invoices, HIKO’s EGS license was still in conditional status.

Further, HIKO was noncompliant with Section 54.40, 52 Pa.Code § 54.40, in that Mr. Klein admitted on cross-examination that HIKO’s surety expired at the end of December, 2014, and HIKO failed to timely submit its bond renewal to the Commission.

Mr. Klein testified:

Q. Are you aware of any written communication between the Commission or a Commission Bureau and HIKO with regard to the surety renewal information being required to be provided by December of 2014?

A. I do know there was an issue where they wanted a certain bond increased from $250,000 to $750,000. I think there was a time lapse because of the increase that they wanted. And that’s what took longer time.

Q. So would you be able to agree that the Commission advised HIKO that surety renewal or bond renewal was due by December of 2014, but that HIKO did not provide it until after March of 2015?

A. I think the original $250,000 bond could have been renewed in time. I think that was an increase that they asked for, and that’s why it took longer.

(N.T. 171).[[17]](#footnote-18)

The fact that the EGS overcharged approximately 5,700 customers over four consecutive months, 14,689 times, while the EGS held a conditional license, and during a period when it had not provided proof that a bond or other approved security amount directed by the Commission had been obtained, warrants a higher civil penalty. See Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Concord Coach USA, Docket No. C-2014-2435227 (Order entered May 19, 2015). A respondent’s compliance history and the need to deter future violations are important considerations when weighing the amount of the civil penalty.

Although there is no evidence to suggest the Commission initiated any separate disciplinary action for the lapse in surety coverage, Mr. Klein’s testimony is further evidence of non-compliance, and we are not convinced that the failure to timely file proof of surety was an inadvertent error. Mr. Klein testified that they could have renewed at $250,000, but could not initially meet $750,000 in December, 2014. The purpose of a bond or security is to assure compliance with the Public Utility Code, to assure the payment of gross receipts tax as required by Section 2810 of the Public Utility Code, 66 Pa.C.S. § 2810, and to ensure the supply of electricity at retail in accordance with contracts, agreements or arrangements. 52 Pa.Code § 54.41(f)(2). Should the EGS suddenly leave the market after overcharging its customers and not paying its gross receipts taxes, the surety bond may be acted upon by the Commission in order to pay gross receipts taxes due and owing Pennsylvania Department of Revenue. The evidence of noncompliance weighs in favor of a higher civil penalty.

**Seventh Factor - HIKO’s Cooperation With Investigation**

The seventh factor addresses whether HIKO cooperated with I&E’s investigation. 52 Pa.Code § 69.1201(c)(7). As I&E’s witness testified, the Company did cooperate with I&E. I&E St. 1 at 51; N.T. 96. However, mere cooperation, although a mitigating factor, is not enough to warrant a minimal civil penalty. See Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Columbia Gas of Pa., Inc., Docket No. M-2014-2306076 (Order entered December 18, 2014) at p. 14 (where the Commission modified a settlement agreement because the mitigating factors were deemed by the Commission to “not act as a sufficient deterrent against possible future violations”).

**Eighth Factor – Amount of Civil Penalty Necessary to Deter Future Violations**

The eighth factor is consideration of the amount of the fine or civil penalty necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount. 52 Pa.Code § 69.1201(c)(8). I&E argues that the maximum civil penalty of $1,000 per violation remains the appropriate penalty in this case. I&E St. 1 at 51. Mr. Mumford testified on cross-examination as follows:

Q. What did you do to determine what amount would be enough to deter HIKO, if anything?

A. I thought the amount in the proposed penalty [$14.7 million] would pose a significant deterrence to both HIKO and to other entities in the market to prevent future occurrences.

N.T. 100.

Therefore, it appears the deterrence level pertains to HIKO, the company that violated the regulation. Whether the civil penalty will deter other EGSs from the same misconduct is not a factor for consideration before us because the Commission did not expressly define the deterrence level to include such a consideration. Therefore, we are not considering the level of civil penalty necessary to deter other EGSs from violating 52 Pa.Code § 54.4(a).

This factor states that the Commission may consider the size of the utility to determine an appropriate amount. It is difficult to determine the size of HIKO Energy, LLC. We do not find the company to be “small” as it purports to be. Although the evidence shows the Company had a maximum of 11,000 EGS customers in Pennsylvania in January, 2014, and this number is small in comparison with the EDCs’ respective customer counts, the size of the EGS is dependent upon more than just the number of customers it had at one point in time.

We infer from Mr. Klein’s testimony that the company had approximately $7,500,000 in reported annual Pennsylvania gross receipts in 2014 because the Commission’s regulations at 52 Pa.Code § 54.40(d) provides for the maintenance of security at 10% reported annual gross receipts. Revenues may be a factor in determining the size of a company. This revenue level is not indicative of a small company. Thus, while we are not persuaded to find that the company is a “small” company within the meaning of the policy statement as HIKO purports to be, we believe a total civil penalty of $1,836,125 represents approximately one-quarter (25%) of HIKO’s gross receipts for 2014, which is a reasonable deterrence of future misconduct. It is unknown the rate of return the company charged during the polar vortex winter; however, there is evidence in the record that the company did have income during that time period. We believe the penalty is sufficient enough to deter future misconduct on the part of HIKO and other EGSs. Additionally, the total amount is also more closely reflective of the actual overcharge of $1.8 million than the proposed $14.69 million I&E proposed.

It is undisputed the Company holds a natural gas supplier license in Pennsylvania, and also sells electric generation supply and natural gas supply in other States including: New York, New Jersey, Maryland, Massachusetts, Connecticut, Illinois, and Ohio. HIKO may hold ownership interests in other active EGSs or NGSs operating in Pennsylvania or other States. HIKO has a large imprint in this region of the country. The company engages in interstate commerce across the borders of several states in this region. The potential number of customers an EGS can have is much larger than an EDC or natural gas distribution company (NGDC). This coupled with the fact that the company also has a license to provide alternative natural gas supply in Pennsylvania and other States, leads us to determine that the company is not small.

HIKO’s loss of customers and its provision of $160,000 in refunds to customers to date is not a sufficient deterrence. However, a civil penalty of $1.84 million in addition to $160,000 in refunds and HIKO’s agreement to provide an additional $1.67 million in refunds to the same customer class as the instant case is a more reasonable deterrence. Additionally, we are approving the Settlement which provides for injunctive relief and corrective action on the part of HIKO going forward, which will also act as a deterrent.

**Ninth Factor - Past Commission Decisions in Similar Situations**

The ninth factor calls for a consideration of past Commission decisions in similar situations. 52 Pa.Code § 69.1201(c)(9). Mr. Mumford testified:

To my knowledge, there have been no previous decisions or orders entered by this Commission regarding a situation similar to the egregious, willful, flagrant overcharges by an EGS or the sheer quantity of overcharges that are the subject of this proceeding.

N.T. 124.

We note at the outset that there are not many fully litigated cases specifically regarding Section 54.4(a) of the Commission’s regulations. Nonetheless, we are guided by several recent decisions regarding issues that are pertinent to this case.

The caselaw I&E cites in support of its position for a maximum penalty of $1,000 per violation are distinguished from the instant case in that they involved a “slamming” or unauthorized switch of a customer to the EGS. In Pa. Pub. Util. Comm’n, Law Bureau Prosecutory Staff v. MXenergy Electric Inc., Docket No. M-2012-2201861 (Order entered May 3, 2012), MXenergy allegedly switched, or “slammed,” twenty-two consumers to its generation service without proper authorization. There, the Commission rejected a settlement agreement that assessed a civil penalty equal to $500 per incident, noting that it did not believe such penalty, “even when combined with corrective actions, is enough to remedy this situation or to deter potential future violations of the Code or our regulations by an EGS.” MXenergyOrder at 5. The MXenergy Order continued, “[t]his Commission has made it clear on numerous occasions that it will not tolerate unlawful activity that threatens to harm Pennsylvania consumers and thereby the burgeoning retail electricity market in Pennsylvania.” Id. See also Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. ResCom Energy LLC, Docket No. M-2013-2320112 (Order entered November 13, 2014). The Commission approved a $1,000 per violation civil penalty against MXenergy for allegedly switching, or “slamming,” 22 consumers to its generation service without the consumers’ consent. MXenergy Order at 2. I&E initiated an informal investigation of MXenergy after learning of a federal lawsuit involving allegations against the company for engaging in slamming “with the intent to confuse and deceive” consumers. *Id.* Hence, the allegations against MXenergy involved premeditated intent to deceive customers into enrolling into its service. In the instant case, the evidence shows HIKO enrolled Pennsylvania consumers into the Price Guarantee program beginning in August 2013 through January 2014 and did honor the introductory rate until January, 2014. Unlike in MXenergy, there is no evidence to support a finding that HIKO intended in its August offering to defraud customers initially or in advance of the offering. I&E St.1 at 8. Rather, the testimony is convincing that the company based its offering upon an 18-month historical data which showed price elasticity and stability in the spot market.

In William Towne v. Great American Power, LLC, C-2012-2307991 (Order entered October 18, 2013) (Towne Order), the Commission considered Great American Power’s (GAP) conduct of contacting the Complainant fourteen times over a twenty-six day period despite repeated requests by the Complainant to stop calling to be reason to increase the ALJ’s recommended civil penalty against GAP from $5,000 to $10,000. Importantly, the Commission found “the conduct of GAP to be potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania’s retail electric market.” The Commission in the Towne Order, in a similar vein to its MXenergy Order, stated:

As we have stated in prior cases, we strongly believe the competitive market can provide consumers with a variety of electric supply products and services, and the consumers do bear some responsibility to make choices that are appropriate for their individual circumstances. However, for those market forces to work, this Commission ***must continue to send a clear message*** to EGSs that the ***egregious and deliberate behavior*** utilized in this case, including the use of potentially misleading statements that could result in slamming ***will not be tolerated***.

Towne Order at 22 (emphasis added).

William Towne was an individual complainant who alleged that GAP engaged in aggressive telemarketing and enrollment practices, including slamming. Towne Order at 2. The Commission assessed approximately a $714 civil penalty per telephone call which attempted to slam the customer in the Towne case.

HIKO cites to several Commission decisions wherein the total civil penalty levied against another EGS or utility was $1,000,000 or less. Generally, the Commission has recognized that “the parties in settled cases should be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” Pa. Pub. Util. Comm’n Law Bureau Prosecutory Staff v. UGI Utilities, Inc., 2009 Pa. PUC LEXIS 1867, M-2009-2031571 (Order entered October 1, 2009), citing the Commission’s Policy Statement at 52 Pa.Code § 69.1201(b). The Commission has held that it is inappropriate to consider a settlement, which is intended to be an amicable resolution of disputed claims, as precedent in any subsequent proceeding. See Pa. Pub. Util. Comm’n, v. Bell Telephone Co. of Pa., Docket No. R-811819, 1988 Pa. PUC Lexis 572\* (Order entered November 10, 1988) at \*19. Although the public interest is considered in evaluating a settled case, there is not always substantial evidence in the record to support the remedies and civil penalties outlined in the settlement agreement between the parties. In a settled case, there may be a civil penalty even though the respondent does not admit to any wrongdoing or any violations.

HIKO cites as authority for its position Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Public Power, LLC, Docket No. M-2012-2257858 (Order entered December 19, 2013) (Public Power). That case was the result of a settlement agreement that was amicably reached by the parties and filed on November 19, 2012. In Public Power, the EGS did not premeditate a conspiracy to slam 2,937 customers. Rather, the case involved the transmission by a third-party vendor of mistaken enrollments. The inadvertent error is explained in Paragraph 12 of the Public Power Settlement Agreement:

Public Power contacted [its third party vendor] regarding the issue and it was determined that [the third party vendor] had mistakenly uploaded an incorrect file to Public Power’s EDI database which was then transmitted to PECO on or about July 19, 2011.

Settlement Agreement at 4. The misconduct was unintentional in that case. Id. at 13-14.

Similarly, in Pa. Pub. Util. Comm’n Bureau of Investigation and Enforcement v. IDT Energy, Inc., M-2013-2314312 (Opinion and Order entered October 17, 2013) (IDT 2013 Order), the Commission approved a settlement between I&E and IDT Energy, LLC. That case was initiated after an informal investigation which identified thirty-nine violations among twenty-one Bureau of Consumer Services (BCS) complaints between 2010 and 2012. In three instances, an agent or agents of the Company failed to obtain direct oral confirmation or written authorization from the customer to change the EGS, resulting in physically switching the electric generation supplier of those accounts without authorization of the consumer or without proper verification. The Commission directed IDT to pay a civil settlement amount of $39,000 to the Commonwealth General Fund.

Similarly, the settlement reached in Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric and U.S. Gas & Electric, Inc. d/b/a Pa. Gas & Electric, Docket No. M-2013-2325122 (Order entered October 2, 2014) involved a single telephone sales representative (TSR), acting beyond the scope of his authority and in contravention to controls put in place by the company when he began the process of switching 319 accounts of ten commercial customers to receive electric or natural gas supply from Pa. Gas & Electric, without the customers’ consent. Of these 319 accounts, a total of 108 were fully transferred. Therefore, 211 accounts were not switched to Pa. Gas & Electric and the EGS took action to terminate any business relationship with the TSR upon learning of the incident.

I&E and Pa. Gas & Electric initially filed a settlement agreement containing a civil penalty in the amount of $75,000. The Commission determined that $75,000 was insufficient to act as a deterrent and rejected the settlement agreement. Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric and U.S. Gas & Electric, Inc. d/b/a Pa. Gas & Electric, Docket No. M-2013-2325122 (Order entered March 4, 2014). The parties submitted a revised settlement agreement containing an increased civil penalty in the amount of $150,200, which was accepted by the Commission as being in the public interest. The facts as averred in that case may be distinguished by our findings of fact in the instant case. HIKO’s misconduct was intentionally committed at the Company’s executive level and impacted far more than 108 accounts and ten customers. In the PaG&E case settlement, a civil penalty of $25,000 was assessed in addition to a contribution to EDC Hardship Funds of $25,000. Additionally, in the October, 2014 Order, the Commission found a civil penalty of $1,000 for the 108 accounts physically switched to PaG&E without customer consent, for a total of $108,000 was appropriate. This amount was similar to the Commission’s decision in cases involving slamming intentional in nature where $1,000 civil penalties per account switched were imposed. Pa. Pub. Util. Comm’n v. ACN Energy Inc., Docket No. M-00021618 (Tentative Order approving settlement entered June 14, 2002, made final by operation of law on July 22, 2002); Pa. Pub. Util. Comm’n, Law Bureau Prosecutory Staff v. MXenergy Electric, Inc., Docket No. M-2012-2201861 (August 29, 2013); Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Public Power, LLC Docket No. M-2012-2257858 (December 19, 2013) (penalties less than $1,000 per account were levied for accounts not yet physically switched, but in the process).

Further, HIKO relies on the pending settlement agreement in Commonwealth of Pa., et al. v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric, Docket No. C-2014-2427656. An Initial Decision was issued on June 30, 2015, approving the settlement in its entirety; however, no final order has been issued by the Commission in that proceeding. Exceptions have been filed by an Intervenor, Mr. Thomas Sobiech, and his exceptions are pending at the Commission. Further, we approved one term of settlement ($25,000 civil penalty) taking into consideration the other injunctive relief, refunds to customers, and contributions PaG&E agreed to provide to EDCs’ Hardship Funds.

Recently, in the case of Stephen Kiback, Jr. v. IDT Energy, Inc., Docket No. C-2014-2409676, (Opinion and Order entered August 20, 2015), the Commission held that its plenary authority under Section 501(a) of the Code includes directing an EGS to issue a credit or refund for an over bill in violation of 52 Pa. Code § 54.4(a) and a violation of the Commission’s Interim Guidelines, Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981 (Order entered November 5, 2010) (2010 Interim Guidelines). The Commission found substantial evidence supported a decision that Section 54.4(a) and these Interim Guidelines had been violated; accordingly, a civil penalty in the amount of $2,000 and refunds in the amount of the difference between the price billed and the DSP’s price-to-compare in effect for the months of January through February, 2014, were warranted. Id. at 35.

In Herp v. Respond Power, LLC*,* Docket No. C-2014-2413756, 2014 Pa. PUC Lexis 697 (Initial Decision issued December 17, 2014)(Herp case), the ALJ acknowledged and exercised the Commission’s authority under Section 501 of the Public Utility Code, in directing an EGS to issue refunds because the EGS was found to be in violation of Section 54.4(a), 52 Pa.Code §54.4(a) among other regulations. Mr. Herp was awarded a refund in the amount of the difference between the rate he was charged by the EGS, and the price to compare rate that he would have been charged by his default service provider, West Penn Power, during the months of January – April, 2014. The Herp decision also directed the EGS pay a $10,000 civil penalty for having violated 9 regulations and a Licensing Order, an average of $1,000 penalty per violation of a regulation or order for this one customer over a period of 3-4 months. However, the ALJ neither revoked nor suspended the EGS’ license given this was one of the first fully litigated variable rate complaints against the EGS at the Commission. The Commission has not rendered a final decision in the Herp case.

HIKO’s misconduct in the instant case is not slamming, but rather overcharging customers, more similar to the Herp case. False and deceptive marketing and sales activities were the primary allegations, and the ALJ found 52 Pa.Code § 54.4(a) had been violated. The ALJ did not specifically assess a $1,000 penalty for each overcharge during consecutive months in 2014. Rather, the ALJ stated the primary purpose of the civil penalty was to deter future misconduct.

In William MacLuckie v. PALMCO Energy PA, LLC, C-2014-2402558, (Opinion and Order entered December 4, 2014),(Initial Decision on Remand dated April 30, 2015), (Final Order entered June 30, 2015)(MacLuckie case), the Commission remanded an initial decision to dismiss Mr. MacLuckie’s complaint, reasoning that a *pro se* complainant’s cause of action against an alternative natural gas supplier (NGS) should proceed to hearing because remedies of law including but not limited to civil penalties, 66 Pa.C.S. § 3301, as well as license suspension or revocation were available to the Commission given the facts averred in the Complaint.

The ALJ’s Initial Decision on Remand then sustained Mr. MacLuckie’s complaint on April 30, 2015. This decision became final by operation of law and Final Order entered on June 20, 2015. Specifically, the ALJ held that the statement of the supplier’s representative during the sales call that the rate for natural gas would be “competitive” following the expiration of the guaranteed introductory rate was misleading and deceptive in violation of 52 Pa.Code §§111.12 and 62.114(e). Therefore, the actions of the supplier’s representative were found to violate two Commission regulations which prohibit deceptive or misleading statements, and a civil penalty of $2,000 was imposed against the supplier.

Finally, we consider the proposed settlement in Commonwealth of Pa. *et al.* v. HIKO Energy, LLC, Initial Decision dated August 21, 2015, at Docket No. C-2014-2427652. (OAG/OCA case). As these two decisions involve similar parties/intervenors, overlapping facts, allegations, and requests for relief, neither decision is being made in a vacuum without consideration for the impact each case has upon the other. Although the cases were never consolidated due to the request from I&E that they remain severed, we believe the rulings should be consistent and in the public interest as a whole. Thus, the reasonableness of a lack of civil penalty in the Settlement is evaluated considering the fully litigated record in the instant case including expert testimony of Daniel Mumford for I&E, Dr. Charles J. Cicchetti for HIKO, as well as the testimony of Harvey Klein, CEO of the Company. This factor weighs in favor of a moderate per occurrence/violation civil penalty, but a substantial total civil penalty higher than $1,000,000 in the instant case given the high number of admitted intentional occurrences of overcharging.

**Tenth Factor - Other Relevant Factors** **.**

Lastly, the Commission’s Policy Statement considers “other relevant factors.” 52 Pa.Code § 69.1201(c)(10). It is important to note that the Commission’s consideration is relegated to factors deemed “relevant” to the matter at hand, and is not intended to include a potpourri of miscellaneous information.

HIKO asks us to consider the relevant factor of the polar vortex winter. HIKO’s witness, Dr. Cicchetti testified that the market has already penalized HIKO through the loss of customer accounts and that “further penalties [in the form of a monetary civil penalty] are not necessary.” HIKO St. 2-R at 36. He further testified that another mitigating factor is that “HIKO intends to make a full refund for all customers at issue in this proceeding . . . .” HIKO St. 2-R at 48. The loss of customers alone is an insufficient deterrence to this type of misconduct.

We find that the polar vortex weather condition, the increase in natural gas prices due to the Canadian regulatory change, the increase in demand because of the weather, PJM’s operational requirements, and/or the resulting spot market energy prices do not constitute a good excuse for HIKO’s business decision to not honor a guaranteed discount under the terms and conditions of its Price Offering nor mitigate the warranted imposition of a civil penalty in this case.

There is no evidence to suggest that HIKO’s disclosure statement or welcome letter indicated to the customer that its introductory rate would be dependent upon any of these aforementioned factors. The company had other variable rate plan customers not on the guaranteed savings plan during those months. The relevance of such testimony might be plausible in a proceeding regarding the extent to which those variable rates could have increased given the terms and conditions of those disclosure statements. However, that is not the case here.

There is no dispute that the polar vortex brought exponential increases in wholesale energy market prices as demand increased and supply decreased. The Commission recently acknowledged this fact and stated:

As a result of these high PJM energy market prices, many electric generation suppliers (EGSs) serving Pennsylvania customers with variable-priced retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014. In many cases, EGSs voluntarily absorbed losses during this period in order to maintain long term contractual relationships with their customers. However, not all EGSs acted to mitigate the financial hardship experienced by their customers. In particular, retail rates under some variable priced contracts appear to have passed the full impact of record wholesale costs on to Pennsylvania retail customers.

Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Markets, Docket No. M-2014-2406134 (Order entered March 4, 2014), at 2. However, the polar vortex alone does not constitute good cause for violating 52 Pa.Code § 54.4(a).

We acknowledge that certain external factors beyond HIKO’s control contributed to a price increase in the spot market for electricity. However, there are many internal factors within the control of the company including, but not limited to: 1) the language contained in the welcome letter and disclosure statement regarding the guaranteed savings plan; 2) the decision on purchasing 100% of its energy supply on the spot wholesale market; 3) the decision to borrow $20 million to satisfy PJM requirements and stay in business; 4) the decision to mark-up wholesale prices for guaranteed savings plan customers and other variable rate customers in Pennsylvania and other States; 5) the decision to pass through increased costs and overcharge the customers in the guaranteed savings plan; and 6) the decision to refund or not refund customers. Consequently, we find little merit to HIKO’s excuses regarding external factors.

We consider the settlements that HIKO has reached with Attorney Generals in Pennsylvania, New York, and New Jersey as an additional relevant factor when evaluating I&E’s proposed civil penalty. These matters have a significant bearing on the case at hand as they involve similar allegations involving a guaranteed savings plan offering during the same time period. We accept as credible Mr. Cicchetti’s testimony that HIKO has fewer customers in Pennsylvania than they have in New York. He estimated HIKO had ten times more customers in New York and “maybe two or three times” more customers in New Jersey. N.T. 213. Therefore, it is relevant to note the outcomes in our neighboring States.

First, in Pennsylvania, HIKO’s proposed settlement with OAG and OCA involves an agreement to pay $2,025,383.85 into a refund pool, which reflects the total refund amount minus $159,320.15 in refunds provided by the Company to date. Specifically regarding the group of customers enrolled in HIKO’s guaranteed 1%-7% savings program, all customers will receive a refund reflecting 3.5% savings as compared to the applicable Price to Compare for January, February, and March, 2014 after taking into account any refunds a customer may have already received from HIKO. This amount totals $1,672,523.10 of the Refund Pool, and reflects $1,789,704.00 of refunds minus $117,180.90 in refunds provided by the Company to date.

The amount of $352,860.75 from the Refund Pool shall be allocated as refunds for HIKO’s customers not enrolled in HIKO’s 1%-7% guaranteed savings program, which reflects $395,000.00 of refunds minus $42,139.25 in refunds provided by the Company to date to this group of customers. Refunds shall be provided to all HIKO customers in this group that were on variable rate plans in January, February or March 2014. OAG/OCA case.

HIKO also agrees to pay up to $50,000 of the costs and expenses related to administering the refunds, and a $25,000 contribution to the EDCs’ hardship fund. HIKO agrees to honor its commitments regarding the one-free month program whether or not the customer has received a refund. HIKO has also agreed not to market any variable rate product to Pennsylvania consumers until July 1, 2016 and to implement a broad range of consumer protections in its operations and marketing procedures. See Commonwealth of Pa., et al. v. HIKO Energy, LLC, Docket No. C-2014-2427652, Joint Petition for Approval of Settlement (May 1, 2015), Initial Decision dated August 21, 2015.

In John J. Hoffman, Acting Attorney of the State of New Jersey, The New Jersey Board of Public Utilities, and Steven C. Lee, Acting Director of the New Jersey Division of Consumer Affairs v. HIKO Energy, LLC et al., the Superior Court of New Jersey, Chancery Division, Mercer County entered a Final Consent Judgment on January 5, 2015, at Docket No. MER-C-32-14. The Court directed HIKO to “not include the six months savings guarantee in the HIKO contract and then fail to provide the guaranteed pricing.” Slip op. at 17. The parties agreed to a settlement in the amount of $2,100,000, consisting of $1,850,000 in restitution and $100,000 in civil penalties, and $150,000 in attorneys’ fees and investigative costs. Id. at 21-22. HIKO-Cicchetti Exhibit 5 at 17, 21-22.

In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of New York, of HIKO Energy, LLC, Respondent, Case No. AOD#14-069, an Assurance of Discontinuance Pursuant to Executive Law §63(15) was issued on or about July 6, 2014. This Assurance contains the relief agreed to between the New York Attorney General and HIKO. One term of the relief was that HIKO pay $1,250,000 for restitution to certain then current and former HIKO customers and the administrative costs involving said restitution. HIKO-Cicchetti Exhibit 6 at 28.

These cases show governmental enforcement agencies have investigated HIKO’s practices in Pennsylvania, New York, and New Jersey and have found misconduct. The provisions HIKO agreed to in Pennsylvania are similar to the terms in the New York and New Jersey settlements. However, the New York and New Jersey decisions are designed to protect only the customers in New York and New Jersey, and are not controlling that there be a lower civil penalty issued in the instant fully litigated case.

**3. Whether Suspension/Revocation of HIKO’s Licenses is Warranted**

Section 54.42(a) provides that a license may be suspended or revoked and fines may be imposed against the licensee for failure to comply with applicable requirements of the Public Utility Code and Commission regulations and orders. 52 Pa. Code § 54.42(a). In addition to its requests for civil penalties, I&E further proposes that HIKO’s license to do business as an EGS in Pennsylvania be rescinded. The vast majority of the Brief submitted by I&E, however, pertained to civil penalties and primarily includes a request to revoke HIKO’s license only as part of the requested relief. In contrast, HIKO provided argument in its Brief why its license should not be revoked, in addition to the argument in its Brief why there should be no, or a low, civil penalty. Although we agree with I&E that the conduct is egregious, we are denying this requested relief only because the Company has agreed with OAG/OCA and the Office of Small Business Advocate (OSBA) to substantial consumer relief in a separate, but concurrent decision, *ad seriatim* in Commonwealth of Pa. et al. v. HIKO Energy, LLC, Initial Decision dated August 1, 2015, at Docket No. C-2014-2427652. (OAG/OCA case).

In the OAG/OCA case, the Settlement has a “refund pool” provision which provides the same customers enrolled in the 1-7% guaranteed savings plan during the months of January – March, 2014, with a 3.5% savings from their respective price to compare rates for the time period of January – March, 2014. A 3.5% refund is an average savings the customers would have received during the time period of January – March, 2014, had HIKO charged rates in accordance with its verbal sales representations, welcome letters and disclosure statements. The 3.5% savings is more than 1% guaranteed savings, which is the minimum savings promised the customers during their respective introductory periods of their agreements with HIKO.

Although we note the two forms of requested relief vary slightly in that time periods and the percentage of refund relief differ slightly,[[18]](#footnote-19) we believe the fact that those customers will realize approximately a 3.5% savings under the OAG/OCA case Settlement rather than a 1% savings in the instant case means that essentially the refund relief requested is adequately addressed and satisfied in the concurrent Initial Decision at C-2014-2427652. These factors, along with the other provision in that settlement, warrant not revoking HIKO’s license in this case.

Additionally, on October 2, 2014, the Commission approved a settlement agreement between I&E and PaG&E involving allegations pertaining to the unauthorized switching of commercial electric and natural gas accounts to receive supply service provided by PaG&E.[[19]](#footnote-20) *See*, Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric and U.S. Gas and Electric d/b/a Pennsylvania Gas and Electric, Docket No. M-2013-2325122 (Order entered October 2, 2014) (October, 2014 Order). As noted above, in that decision, PaG&E paid a $150,200 civil penalty, and refunded the entire electric generation or natural gas supply portion of the bill for the period of time the 10 customers with 108 slammed accounts were served by PaG&E. Id. at 3. The Commission ordered the Company to directly issue the refunds on the 108 slammed accounts, rather than through a third-party administrator. The Company issued refunds in excess of $67,000 in that case. Id. at 5.

Additionally, on or about June 8, 2015, we issued an Initial Decision in the PaG&E case approving a similar settlement, which provided for an EGS paying approximately $6 million into a “refund pool” to be administered by a third-party administrator, selected by Joint Complainants but paid for by the EGS up to a capped amount of $100,000 in administrative fees.

In neither of these cases was the EGS’s license revoked. Nor do we find such action necessary here. The ruling today is consistent with our prior Initial Decision in the PaG&E case.

IV. CONCLUSION

EGSs are in a unique position to market their energy supplies in multiple States across the country to a much larger customer base than a traditional EDC without as much regulatory oversight regarding the justness or reasonableness of their rates. While this is an enticing business opportunity, at the same time, a business decision to stay in the retail electricity market while violating 54 Pa.Code § 54.4(a) regarding 5,708 customer accounts over a 4-month period warrants an unprecedented total civil penalty of $1,836,125, calculated by multiplying a civil penalty of $125 by 14,689 violations, when applying the factors articulated in Section 69.1201 and Rosi to the facts of this case. Although we agree with I&E’s calculation of the number of violations of Section 54.4(a), there are certain factors which mitigate the maximum $1,000 penalty per violation. These factors include : 1) HIKO’s refund of $160,00 in addition to an agreement with the OAG, OCA and OSBA to provide an additional $1.67 million in refunds for these customers; 2) HIKO’s moratorium on offering a variable rate product until June, 2016; 3) HIKO’s agreement to correct business practices; 4) these violations do not involve slamming; 5) a $125 per violation penalty is reflective of the average overcharge in each of the 14,689 violations; 6) the civil penalty is consistent with a civil penalty issued in Herp, which also involved the violation of Section 54.4(a); and 7) the civil penalty will act as a deterrent to HIKO as it represents 25% of HIKO’s reported annual gross receipts for 2014. Although $125 per violation is substantially less than the $1,000 per violation requested by I&E, the total of $1,836,125 is certainly substantial. When considering all of the relevant factors as applied to the facts of this case, we believe this amount is supported by substantial record evidence and in the public interest.

But for the EGSs’ agreement with the OAG, OCA and OSBA, which provides for substantial customer relief ($1.67 million refunds) to the same customer class in a concurrent decision, we would also revoke the EGS’s license. However, revocation or suspension of a license would be inconsistent with our approval of the proposed Settlement in the OAG/OCA case, which includes directing injunctive relief in the form of a moratorium of variable rate sales activities until June, 2016 in Pennsylvania, and numerous sales and marketing corrective actions. As HIKO is showing a willingness to correct its business practices, and comply with regulations in the future regarding its retail market activities, HIKO shall retain a conditional authority to operate in Pennsylvania provided the EGS brings itself into compliance and remains compliant with the Public Utility Code, Commission regulations, and Commission Orders regarding retail electricity markets. This compliance includes but is not limited to compliance with the timely, continuous and uninterrupted provision of proof of security as well as the timely filing of annual reports at the Commission and the payment of gross receipts taxes to the Pennsylvania Department of Revenue.

V. CONCLUSIONS OF LAW

1. The Pennsylvania Public Utility Commission is an agency empowered to regulate public utilities and electric generation suppliers operating within the Commonwealth pursuant to the Public Utility Code, 66 Pa.C.S. §§ 101, *et seq.*

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 501.
2. The Complainant is the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement (I&E) authorized under 66 Pa.C.S. §§ 308 and 701 as well as 52 Pa.Code §§ 1.8 *et seq*. to prosecute the instant complaint against Respondent. See Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11).
3. Respondent is an electric generation supplier (EGS) authorized by the Commission as of July 7, 2012, to provide electric generation supply service in the Commonwealth of Pennsylvania. In re: license Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power. Docket No. A-2012-2289944, (Tentative Order entered June 7, 2012, Final Order entered July 2, 2015),
4. HIKO Energy, LLC, as a licensed provider of electric generation service for compensation, is subject to the power and authority of the Commission and must observe, obey and comply with the Commission’s regulations and orders. 66 Pa.C.S. §§ 102; 501(c); 2809-2810.
5. The Bureau of Investigation and Enforcement bears the burden of proof in this proceeding. 66 Pa.C.S. § 332(a).
6. “Burden of proof” means the duty to establish one’s case by a preponderance of the evidence, which requires that the evidence be more convincing by even the smallest amount, than the evidence presented by the other side. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (1990), *alloc. den.*, 602 A.2d 863 (1992).
7. I&E has met its burden of proof in this proceeding in part. 66 Pa.C.S. § 332(a).
8. EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement. 52 Pa.Code § 54.4(a).
9. The Commission is authorized to impose a civil penalty of up to $1,000 per violation of the Public Utility Code, Commission regulation or Commission order. 66 Pa.C.S. § 3301(a).
10. A separate civil penalty for each violation is appropriate when each violation can be feasibly segregated into distinct and discrete violations. *Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm’n*, 531 A.2d 85 (Pa.Cmwlth. 1987).
11. A civil penalty of $125 per overbilling is appropriate upon consideration of the ten factors and standards. 52 Pa.Code §§ 69.1201(c)(1)-(10). 66 Pa.C.S. § 3301(a).
12. HIKO committed 14,689 violations in that HIKO overbilled customer invoices on 14,689 instances. 52 Pa.Code § 54.4(a).
13. To satisfy the burden of proof, I&E must establish its case by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. denied, 602 A. 2d 863 (Pa. 1992).
14. Decisions of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. Norfolk & Western Ry. Co v. Pa. Pub. Util. Comm’n, 413 A.2d 1037 (Pa. 1980).
15. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm., Dept. of Public Welfare, White Haven Center, 85 Pa. Commonwealth Ct. 23, 480 A.2d 382 (1984).
16. Section 69.1201 of the Commission’s regulations provides a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201.
17. The factors in the Policy Statement assist the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest. 52 Pa.Code § 69.1201(a).
18. The Commission has plenary authority under Section 501 of the Public Utility Code to direct an electric generation supplier to issue a credit or refund for an over bill. Commonwealth of Pa, *et al*. v. IDT Energy, Inc., Docket No. C-2014-2427657 (Opinion and Order entered Dec. 18, 2014).
19. In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders or otherwise, all and singular, the provisions of this part, and the full intent thereof. 66 Pa.C.S. § 501.
20. If any public utility or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited, or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, the utility, person or corporation shall forfeit and pay to the Commonwealth a sum not exceeding $1,000 to be recovered by an action of assumpsit instituted in the name of the Commonwealth. 66 Pa.C.S. § 3301(a).

VI. ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint filed by the Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement against HIKO Energy, LLC at Docket No. C-2014-2431410, is hereby granted in part and denied in part as follows.
2. That HIKO Energy, LLC is directed to pay the Commonwealth of Pennsylvania a civil penalty in the amount of $1,836,125, due within thirty (30) days from the date of entry of the Commission’s Final Order, made payable to “The Commonwealth of Pennsylvania” and addressed to:

Secretary

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

1. That no amount of the civil penalty shall be passed-through as an additional charge to HIKO Energy, LLC’s customers in Pennsylvania.
2. That Complainant’s request for revocation or suspension of HIKO’s license is denied, except that if HIKO Energy, LLC fails to make the payments required by the Ordering Paragraph above in Ordering Paragraph No. 3, then the Electric Generation Supply License held by HIKO Energy, LLC at Docket No. A-2012-2289944 shall be revoked without further action by this Commission.
3. That a copy of this Order shall be served upon the Bureau of Technical Utility Services, the Office of Competitive Oversight, and the Bureau of Consumer Services.
4. That after HIKO Energy, LLC remits $1,836,125 as required by Ordering Paragraph No. 3, the Secretary’s Bureau shall mark Docket No. C-2014-2431410 closed.
5. That the Bureau of Investigation and Enforcement’s request for customers’ refunds is denied as moot in accordance with our concurrent Initial Decision at C-2014-2427652 issued on August 21, 2015.
6. That HIKO Energy, LLC is enjoined from violating the Pennsylvania Public Utility Code, Commission regulations, and Commission Orders regarding retail electricity markets.

Date: August 21, 2015 /s/

Elizabeth H. Barnes

Administrative Law Judge

/s/

Joel H. Cheskis

Administrative Law Judge

1. The Pennsylvania Public Utility Commission (Commission) is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate public utilities within the Commonwealth. 66 Pa. C.S. § 301. The Commission has delegated its authority to initiate proceedings which are prosecutory in nature to the Bureau of Investigation and Enforcement (I&E) and other bureaus with enforcement responsibilities. 66 Pa. C.S. § 308; 52 Pa. Code §§ 1.8 *et seq*. Pursuant to that delegated authority and Section 701 of the Public Utility Code, 66 Pa. C.S. § 701, I&E filed the instant formal complaint against HIKO. [↑](#footnote-ref-2)
2. An EGS is a person or corporation, generator, broker, marketer, aggregator or any other entity licensed by the Commission that sells electricity to retail customers, using the transmission or distribution facilities of an electric distribution company (EDC). Consumer Dictionary for Electric Competition a/k/a Electric Competition Dictionary. <http://www.papowerswitch.com/glossary>. [↑](#footnote-ref-3)
3. In its Complaint, I&E alleged the total number of violations was 14,780. This figure was subsequently reduced by the testimony of I&E’s witness, Daniel Mumford, to 14,689. (I&E St. 1-SR at 13). [↑](#footnote-ref-4)
4. The proposed penalty is calculated by multiplying the number of violations by $1,000 (the maximum penalty permitted by the Pennsylvania Public Utility Code to be assessed per violation. 66 Pa. C.S. § 3301(a)). The originally requested relief of a $14,780,000 civil penalty was also reduced by the testimony of I&E witness Daniel Mumford to $14,689,000. (I&E St. 1-SR at 14). [↑](#footnote-ref-5)
5. The OAG/OCA case covers the months of January – March, 2014, and the instant case covers those months the customers were billed from January – April, 2014. [↑](#footnote-ref-6)
6. On July 19, 2012, HIKO Energy, LLC received a conditional Natural Gas Supplier (NGS) license at Docket No. A-2012-2298532. [↑](#footnote-ref-7)
7. HIKO Answer to Complaint dated July 31, 2014. [↑](#footnote-ref-8)
8. Price To Compare (PTC) is the price per kilowatt-hour (kWh) a consumer uses to compare prices and potential savings among electric generation suppliers. In the instant case, the PTC is the price the electric distribution company (EDC), also known as default service provider (DSP) or provider of last resort (POLR) is charging the same customer class in the service territory for electric generation supply. POLR is the company providing generation services to those who do not choose another supplier, are unable to find a supplier willing to serve them, or for some reason no longer receive service from another supplier. Electric Competition Dictionary, <http://www.papowerswitch.com/glossary>. [↑](#footnote-ref-9)
9. I&E chose not to serve the subpoenas. Instead I&E called Harvey Klein, CEO of HIKO as a hostile witness on direct examination during the hearing on April 20, 2015. [↑](#footnote-ref-10)
10. HIKO’s rebuttal testimony of Harvey Klein will hereinafter be referred to as “HIKO St. 1-R” and HIKO’s rebuttal testimony of Charles Cicchetti shall be referred to as “HIKO St. 2-R.” [↑](#footnote-ref-11)
11. A polar vortex is a system of upper-level winds that circle around one of the poles. In the northern hemisphere, the arctic polar vortex interacts extensively with the polar jet stream and may affect weather patterns at mid-latitudes. When the arctic polar vortex is strong, it acts to contain the coldest air masses in the polar regions favoring periods of milder winter temperatures in northern North America, Europe and Asia. When the winds of the polar vortex weaken, however, or interact with high-amplitude wave patterns in the jet stream, the shape of the vortex may become distorted. The circulation pattern around the pole may become increasingly asymmetrical, elongated and, in more extreme cases, may even split into two or more patterns. When this happens large incursions of arctic air may follow southward pointing lobes of the jet stream into mid-latitudes causing a period of colder than normal winter temperatures. http://climatechange.cornell.edu/what-is-a-polar-vortex. [↑](#footnote-ref-12)
12. Electricity Generation Customer Choice and Competition Act, 1996, Dec. 3, P.L. 802, No. 138, § 4, effective January 1, 1997, 66 Pa. C.S. §§ 101-3316. [↑](#footnote-ref-13)
13. Although Mr. Mumford testified he did not know the number of customers overcharged, we accept as credible Dr. Cicchetti’s rebuttal testimony that states, “More importantly from a Pennsylvania perspective, of the 5,708 customer accounts that are alleged to have overcharges in Pennsylvania, 78.1% have “dropped” HIKO as their EGS.” HIKO St. 2 at 36. Thus we infer from this testimony that approximately 5,700 customers were affected by the overcharge, reasoning some customers may hold more than one account. [↑](#footnote-ref-14)
14. HIKO’s applicable Welcome Letter and Disclosure Statement were marked “Confidential” when originally provided by the Company in response to I&E’s data requests. However, at the outset of the April 20, 2015 evidentiary hearing, HIKO counsel confirmed that it would not be necessary to treat the Welcome Letter and Disclosure Statement as proprietary for the purpose of admitting the documents into evidence in this proceeding. N.T. 34. [↑](#footnote-ref-15)
15. HIKO Answer to Complaint dated July 31, 2014. HIKO St. 1-R at 5. [↑](#footnote-ref-16)
16. By Order entered April 22, 2015, we indicated that we may take judicial notice of certain documents related to the proceeding regarding HIKO’s Application for an EGS license as well as public documents from the Commission or its staff addressed to HIKO pertaining to HIKO’s surety bond. [↑](#footnote-ref-17)
17. After the first year that the license is in effect, the security level for each licensee will be reviewed annually and modified primarily based on the licensee’s reported annual gross receipts information. The security level will be 10% of the licensee’s reported gross receipts. 52 Pa.Code § 54.40(d). [↑](#footnote-ref-18)
18. The OAG/OCA case covers the months of January – March, 2014, and the instant case covers those months the customers were billed from January – April, 2014. [↑](#footnote-ref-19)
19. Unauthorized switching is also known as “slamming.” [↑](#footnote-ref-20)