



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

July 5, 2016

**Via Electronic Filing**

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation  
and Enforcement v. Fair View Energy, Inc.  
Docket No. C-2016-2547502

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Reply of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission to the New Matter of Fair View Energy, Inc. in the above referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Step M Wimer", is written over a light blue horizontal line.

Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522

Kourtney L. Myers  
Prosecutor  
PA Attorney ID No. 316494

Enclosures

cc: As per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	C-2016-2547502
	:	
Fair View Energy, Inc.,	:	
Respondent	:	

**REPLY OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT  
TO THE NEW MATTER OF FAIR VIEW ENERGY, INC.**

NOW COMES, the Bureau of Investigation and Enforcement (“I&E” or “Complainant”) of the Pennsylvania Public Utility Commission (“Commission”) by and through its prosecuting attorneys, and files this Reply to the New Matter of Fair View Energy, Inc. (“Fair View” or “Company” or “Respondent”), pursuant to 52 Pa. Code § 5.63. In support thereof, I&E avers as follows:

**I. INTRODUCTION**

On May 25, 2016, I&E filed proprietary and non-proprietary versions of a Formal Complaint against Fair View at Docket No. C-2016-2547502, alleging that the Company violated the Public Utility Code (“Code”) and Chapter 54 of the Commission’s regulations pertaining to electricity generation customer choice, 52 Pa. Code §§ 54.1, *et seq.*, by operating as an electric generation supplier (“EGS”) broker without a license granted by the Commission. I&E avers that it notified Fair View by letter dated February 25, 2016 that it had initiated an informal investigation of the Company as a result of receiving a complaint from a confidential source that Fair View is acting as an unlicensed

EGS broker in the Commonwealth of Pennsylvania. I&E avers that its investigation determined that Fair View began acting as an unlicensed EGS broker in Pennsylvania in 2015, with its first sale occurring on June 1, 2015, and that it brokers EGS service to commercial customers in all electric distribution company (“EDC”) service territories. I&E alleges that between June 2015 and March 2016, Fair View earned at least \$31,331.63 in gross intrastate operating revenues from its unlawful brokering activities. I&E further alleges that Fair View’s corporate officers knew or should have known of the EGS licensing requirement due to their professional work experience in the EGS industry and the fact that Fair View is regulated by the Public Utilities Commission of Ohio. Additionally, I&E avers that Fair View continues to act as an EGS broker without Commission approval and in spite of the initiation of I&E’s informal investigation.

Accordingly, I&E seeks appropriate relief, including that the Commission: (1) find Respondent to be in violation of 66 Pa.C.S. § 2809 and 52 Pa. Code § 54.32(a), which prohibits EGSs from marketing or offering to provide retail electricity or electric generation service until being granted a license by the Commission; (2) impose a cumulative civil penalty upon Fair View in the amount of Eighty-Nine Thousand Eight Hundred Dollars (\$89,800); (3) direct Respondent to provide refunds for the money it received in exchange for the unlawful brokerage service it rendered; (4) pay the minimum annual assessment fee of \$350 for Fair View’s brokering operations during the 2015 calendar year; and (5) order such other relief as the Commission may deem to be appropriate.

On June 15, 2016, Respondent, through counsel, filed an Answer and New Matter at the above docket.<sup>1</sup> In its pleading, Fair View admits that it is not licensed by the Commission, unconvincingly claims ignorance with regard to the requirement that EGSs be licensed in Pennsylvania and requests that a smaller civil penalty be imposed if any penalty is imposed at all.

For the reasons stated herein, I&E contends that Respondent's Answer and New Matter are without merit and should be denied, and I&E's Complaint should be sustained.

## **II. REPLY TO NEW MATTER**

57. Denied. To the extent that Respondent attempts to incorporate any and all assertions made in Paragraphs 1-56 as "New Matter," this is denied. Pursuant to 52 Pa. Code § 5.62, affirmative defenses must be set forth under the heading of "New Matter." New matter is limited to material facts that are not merely denials of the averments of the preceding pleadings. 52 Pa. Code § 5.62(b). Respondent cannot avoid this requirement by incorporating all paragraphs of its Answer as "New Matter." I&E rejects this attempt and denies all allegations made in Paragraphs 1-56 of Respondent's Answer.

58. Denied. Upon reasonable investigation, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, the General Assembly

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<sup>1</sup> During the course of I&E's informal investigation, Fair View requested that the amount of revenues it earned from brokering EGS service be designated as confidential. Accordingly, I&E maintained the revenue amount in confidence and filed proprietary and non-proprietary versions of its Formal Complaint. However, with Fair View's voluntary, deliberate and public disclosure of its revenues in its Answer and New Matter dated June 15, 2016, Fair View has waived the confidential treatment of such information that I&E had heretofore agreed.

has determined that EGS brokers *must* be licensed.<sup>2</sup> Consistent with the authority conferred upon it by the General Assembly, the Commission promulgated EGS licensing regulations to protect consumers by requiring that EGSs apply for and be granted licenses prior to rendering service. In the application, the Commission requires applicants to “provide the Commission with adequate information so that *only* technically and financially fit entities are licensed as suppliers.”<sup>3</sup> Fair View deprived the Commission of any ability to make such a determination about Fair View prior to the time that the Company brokered service to commercial customers. Moreover, this Commission has held that I&E is “not required to present evidence of actual injury or harm because the unlawful conduct by its nature was injurious to the public.”<sup>4</sup>

59. Denied. I&E is charged with enforcing the Commission’s regulations. Fair View violated the Code and Commission regulations by operating as an unlicensed EGS broker and did not stop such unlawful activity in spite of being notified of the initiation of I&E’s informal investigation.<sup>5</sup> These factors demonstrate a continuing lack of good faith on the part of Fair View and a lack of respect for the Commission’s authority. Therefore, Fair View’s claims of being “willing to comply” are without merit.<sup>6</sup>

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<sup>2</sup> See 66 Pa.C.S. § 2809.

<sup>3</sup> *Re: Licensing Requirements for Electric Generation Suppliers; 52 Pa. Code Chapter 54 and § 3.551*, Docket No. L-00970129, 1998 WL 456720 (Pa. P.U.C.) (Final Rulemaking Order entered April 24, 1998) (emphasis added) (hereinafter referred to as the *EGS Licensing Rulemaking Order*).

<sup>4</sup> *Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Uber Technologies, Inc., et al.*, Docket No. C-2014-2422723 (Opinion and Order entered May 10, 2016) at 53 (hereinafter referred to as *Uber*), citing *Pa. Pub. Util. Comm’n v. Israel*, 52 A.2d 317, 321 (Pa. 1947).

<sup>5</sup> See Paragraph 26 of I&E’s Complaint.

<sup>6</sup> See Paragraph 59 of Fair View’s New Matter.

60. Upon reasonable investigation, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

61. Admitted in part and denied in part. I&E admits that it alleges that Fair View knew or should have known that an EGS broker's license was needed to lawfully operate in Pennsylvania. It is denied that Fair View was unaware of the EGS licensing requirement in Pennsylvania. It is also expressly denied that Fair View was willing to comply with the Commission's regulations because it continued to operate without a license after I&E notified the Company that it had initiated an investigation.

62. Upon reasonable investigation, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Mr. Snyder and Mr. McCormick maintained a level of awareness regarding regulatory compliance well beyond that of a layperson as evidenced by the fact that they have prior experience working for licensed EGSs.

63. Upon reasonable investigation, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Mr. Snyder and Mr. McCormick maintained a level of awareness regarding regulatory compliance well beyond that of a

layperson as evidenced by the fact that they have prior experience working for licensed EGSs. Moreover, it is well settled that ignorance of the law is no excuse.<sup>7</sup>

64. Denied. The statutory requirement for EGS brokers to hold licenses granted by the Commission is written in plain English, readily apparent, and easily discernable. I&E relies upon Section 2809 of the Code, which provides, in pertinent part, the following:

- (a) **License requirement.** – No person or corporation, . . . brokers and marketers, aggregators and other entities, shall engage in the business of an electric generation supplier in this Commonwealth unless the person or corporation holds a license issued by the commission.

66 Pa.C.S. § 2809(a).

65. Denied. The title of the EGS license application form on the Commission’s website clearly states, in pertinent part, as follows: “EGS license application for parties wishing to offer, render, furnish or supply electricity or electric generation services to the public in Pennsylvania as a supplier or *broker/marketer*.”<sup>8</sup> Further, the home page for EGSs on the Commission’s website announces that the Commission collects an annual \$350 fee on licensed brokers and marketers.<sup>9</sup> While the Commission’s website is not a substitute for the law, the obvious and unambiguous information on the website should have alerted Fair View, or did in fact alert Fair View, that EGS brokering is an activity

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<sup>7</sup> See *Application of Kenneth Scott Cobb t/a Kenny's Cab, for the right to transport, as a common carrier, by motor vehicle, persons upon call or demand, from points in the Counties of Dauphin, York, Cumberland and Adams*, Docket No. A-00123917, 2009 WL 347489 (Pa. P.U.C.) (Order entered February 5, 2009).

<sup>8</sup> (Emphasis added). The application can be accessed at the following link:

[http://www.puc.pa.gov/filing\\_resources/electric\\_online\\_forms.aspx](http://www.puc.pa.gov/filing_resources/electric_online_forms.aspx)

<sup>9</sup> [http://www.puc.pa.gov/filing\\_resources/online\\_forms.aspx](http://www.puc.pa.gov/filing_resources/online_forms.aspx)

that requires a license granted by the Commission. Contrary to Fair View's assertions, the Commission's regulations related to EGS licensing specifically refer to brokers. *See* 52 Pa. Code § 54.31 (related to "Definitions," which provides for a definition of "broker" and states, in pertinent part, that a broker is "[a]n entity, licensed by the Commission, that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy" and cites to Section 2803 of the Code, which provides the same definition of "broker." 66 Pa.C.S. § 2803. Additionally, Section 54.31 of the Commission's regulations defines "electric generation supplier," in pertinent part, as "*brokers* and marketers, aggregators or any other entities, . . . that purchase, *broker*, arrange or market electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an EDC." 52 Pa. Code § 54.31 (emphasis added)).

66. Admitted in part and denied in part. It is admitted that Mr. Snyder and Mr. McCormick are experienced professionals in the EGS industry. With regard to the remaining averments of Paragraph 66, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

67. Denied. It is denied that Fair View was unaware of the EGS licensing requirement in Pennsylvania. Additionally, I&E's letter dated February 25, 2016, clearly notified Fair View that it was being investigated for potentially violating the Code and Commission regulations and that depending on the outcome of I&E's investigation, formal action could be taken against the Company. It is specifically denied that I&E's

letter could be reasonably characterized as an offer to assist Fair View in complying with the law.

68. Denied. It is specifically denied that Fair View's conduct in operating as an unlicensed EGS broker when it is regulated in at least one other jurisdiction and its corporate officers are experienced professionals in the EGS industry was "unintentional." The implication that Fair View earned only \$30,000 from its unlawful brokerage operations is also denied; Fair View's data responses provided revenue earned through March 2016 and the Company continued to operate without a license thereafter. With regard to the remaining averments of Paragraph 68, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

69. The allegations of this paragraph contain conclusions of law to which no response is required. With regard to the averments set forth in Paragraph 69 that do not contain conclusions of law, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

70. Denied. It is denied that non-binding statements made to the media by the Commission's Press Secretary, Nils Hagen-Frederiksen, which merely summarized the allegations of I&E's Complaint, impermissibly commingle prosecutorial and adjudicatory functions. *See* Section 334(b) of the Code, which prohibits an "officer, employee or agent engaged in the performance of investigative or prosecuting functions for the commission" from participating or advising in "the decision, recommended decision or

commission review . . . .” 66 Pa.C.S. § 334(b). As the Commission’s Press Secretary, Mr. Hagen-Frederiksen acts neither in a prosecutorial nor an adjudicatory role, he did not participate in I&E’s investigation and subsequent prosecution and has no decision making authority. Therefore, his statements were entirely consistent with his duties as a Press Secretary and did not violate the prohibition on the commingling of prosecutorial and adjudicatory functions.

71. Denied. I&E hereby incorporates its response to Paragraph 70. By way of further answer, the General Assembly has determined that EGS brokers *must* be licensed.<sup>10</sup> Consistent with the authority conferred upon it by the General Assembly, the Commission promulgated EGS licensing regulations to protect consumers by requiring that EGSs apply for and be granted licenses prior to rendering service. In the application, the Commission requires applicants to “provide the Commission with adequate information so that *only* technically and financially fit entities are licensed as suppliers.”<sup>11</sup> Fair View deprived this Commission of any ability to make such a determination about the Company prior to the time that it brokered service to commercial customers. Moreover, this Commission has held that I&E is “not required to present evidence of actual injury or harm because the unlawful conduct by its nature was injurious to the public.”<sup>12</sup>

72. Admitted in part and denied in part. It is admitted that I&E seeks to impose a civil penalty upon Fair View for each month that a commercial customer account was

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<sup>10</sup> See 66 Pa.C.S. § 2809.

<sup>11</sup> *EGS Licensing Rulemaking Order* (emphasis added).

<sup>12</sup> *Uber* at 53; *Israel*, 52 A.2d at 321.

enrolled to be served and/or was served by another EGS as a result of Fair View's unlicensed brokering. An on-going monthly civil penalty is warranted due to the fact that customer accounts continued to be served and Fair View continued to receive revenue from its unlawful brokerage operation. Pursuant to Section 3301(b) of the Code, the Commission may impose a civil penalty of up to \$1,000 *for each day* of a continuing offense. 66 Pa.C.S. § 3301(b)(emphasis added). Any implication that it is impermissible for I&E to seek such a civil penalty is denied.

73. Denied. It is denied that the Commission's assessment of the civil penalty in *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) (*HIKO*) must support the civil penalty that I&E seeks in the instant matter because the two cases are distinguishable. In *HIKO*, the Commission imposed a civil penalty for each bill in which a customer account was found to have been overcharged by the company. Here, however, responses provided by Fair View to I&E's data requests demonstrate that Fair View customers continued to receive supply from the EGS as a result of Fair View's unlicensed brokering and Fair View received revenues for each month in which a customer continued to be served by the EGS. Simply stated, Fair View's unlicensed brokering continued for each month that each commercial customer account was served and Fair View profited from the continued service.

74. The allegations of this paragraph contain conclusions of law to which no response is required. To the extent that a response is deemed to be required, it is denied that the Commission's Policy Statement at 52 Pa. Code § 69.1201 does not support the

civil penalty that I&E seeks. A proposed civil penalty of \$200 per violation on a scale of \$0 to \$1,000 has more than generously considered all of the factors set forth in 52 Pa. Code § 69.1201. Many factors support the imposition of a larger civil penalty, including, but not limited to that: (1) the corporate officers of Fair View knew or should have known of the EGS licensing requirement in Pennsylvania due to their professional work experience in the EGS industry and the fact that Fair View is regulated by the Public Utilities Commission of Ohio; (2) service was actually obtained by customers through Fair View's unlicensed brokering; (3) Fair View deprived this Commission of any ability to make a determination with regard to the Company's technical and financial fitness prior to the time that it brokered service to commercial customers; (4) Fair View continued its unlicensed brokering operation despite being notified of the initiation of I&E's informal investigation into such conduct; and (5) it is not incumbent upon I&E to prove that actual harm occurred; unlawful conduct is *per se* injurious.<sup>13</sup>

75. Denied. The Commission is authorized to direct EGSs to provide refunds for rendering unlawful service. *See* Sections 501, 2802, 2807, 2809 and 3309 of the Code, 66 Pa.C.S. §§ 501, 2802, 2807, 2809 and 3309. Indeed, the Commission has directed that refunds be issued to customers when an EGS did not bill in accordance with its disclosure statement, which is a private contract between an EGS and a customer. *See HIKO* (citing to *Cmwlth. of Pa. v. HIKO Energy, LLC*, Docket No. C-2014-2427625 (Order entered December 3, 2015)). *See also Herp v. Respond Power LLC*, Docket No.

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<sup>13</sup> *See Israel*, 52 A.2d at 321.

C-2014-2413756 (Order entered January 28, 2016) and *Werle v. Respond Power LLC*, Docket No. C-2014-2429158 (Order entered February 23, 2015) (concluding that the Commission's plenary authority under Section 501(a) of the Code, 66 Pa.C.S. § 501(a), includes directing an EGS to issue a refund in appropriate circumstances). The purpose of refunds, if for no other reason, is to ensure that Fair View and every other entity under the jurisdiction of this Commission clearly understands that its ill-gotten gains received from actions in complete disregard of the Commission's established regulations will not be retained by the offending party.

76. The allegations of this paragraph contain conclusions of law to which no response is required.

77. The allegations of this paragraph contain conclusions of law to which no response is required. To the extent that a response is deemed to be required, Fair View misconstrues the Commission's holding in *DuBois Manor Motel v. Blue Pilot Energy, LLC*, Docket No. C-2014-2433817 (Order entered June 9, 2016) wherein the Commission held that determining whether a breach of contract occurred and awarding relief in the form of damages and specific performance are matters beyond the Commission's jurisdiction. Conversely, this Commission has consistently held that it has plenary authority to direct an EGS to provide a refund to customers for billing in excess of the rate that it agreed to charge customers. *See Cmwlth. of Pa. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) at 17 (holding that the Commission has broad authority to carry out consumer protections that are applicable to electric generation supply service, including ordering an EGS to provide refunds when an

EGS fails to comply with the Commission's regulations). I&E hereby incorporates its response to Paragraph 75.

78. The allegations of this paragraph contain conclusions of law to which no response is required. By way of further answer, I&E hereby incorporates its response to Paragraph 75.

**WHEREFORE**, for all the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that the Office of Administrative Law Judge and the Commission dismiss Respondent's New Matter and find Respondent to be in violation of each and every count set forth in the Complaint.

Respectfully submitted,



Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522

Kourtney L. Myers  
Prosecutor  
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Dated: July 5, 2016

PENNSYLVANIA PUBLIC UTILITY  
COMMISSION, BUREAU OF  
INVESTIGATION AND ENFORCEMENT,  
Complainant

v.

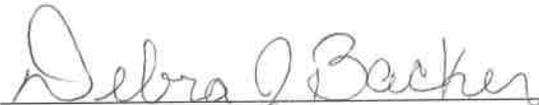
FAIR VIEW ENERGY, INC.,  
Respondent

DOCKET NO. C-2016-2547502

**VERIFICATION**

I, Debra J. Backer, Fixed Utility Financial Analyst, Energy Division, Bureau of Technical Utility Services, hereby state that the facts above set forth are true and correct to the best of my knowledge, information, and belief and that I expect the Bureau will be able to prove the same at any hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: July 5, 2016



Debra J. Backer, Fixed Utility Financial Analyst  
Energy Division  
Bureau of Technical Utility Services  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Pennsylvania Public Utility  
Commission, Bureau of Investigation  
and Enforcement,  
Complainant

v.

Fair View Energy, Inc.,  
Respondent

Docket No. C-2016-2547502

### CERTIFICATE OF SERVICE

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

Service by First Class Mail and Electronic Mail:

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*Counsel for Fair View Energy, Inc.*



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Stephanie M. Wimer  
Prosecutor  
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Dated: July 5, 2016