

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG PENNSYLVANIA 17120**

**Pennsylvania Public Utility Commission
Bureau of Investigation & Enforcement**

v.

Fair View Energy, Inc.

**Public Meeting November 9, 2016
2547502-OSA**

Docket No. C-2016-2547502

MOTION OF COMMISSIONER DAVID W. SWEET

Before the Commission is the staff recommendation to approve a Joint Petition for Settlement between the Commission's Bureau of Investigation & Enforcement (I&E) and Fair View Energy, Inc., of all issues raised in the Complaint filed by I&E. In short, the Settlement resolves all issues raised by the Complaint regarding Fair View Energy's practice as a broker without first obtaining proper licensing from this Commission. During the litigation, an email was sent to the Commission's Secretary from a person not a party to the case, and the Secretary issued a letter purporting to cure an *ex parte* communication. These were placed in the documentary record and posted to the Commission's website along with the other filings in the docket. Fair View Energy filed a motion to strike this email as well as the Secretary's letter, and the non-party filed a responsive letter. This motion was not addressed during the litigation, and the parties seek to dispose of it by including a paragraph in the Settlement which directs that the email and the Secretary's letter be removed from the record, including the Commission's website.¹

While cognizant of the negotiations that take place in order to reach a full settlement in any case, including concessions from either party, I cannot support the removal of a

¹ 40. I&E and Fair View, intending to be legally bound and for consideration given, desire to fully and finally conclude this litigation and agree to stipulate as to the following terms solely for the purposes of this Settlement Agreement:

* * *

d. Upon entry of the Commission's Order approving the Settlement, the July 18, 2016 Secretarial letter and accompanying *ex parte* email communication received in this proceeding shall be stricken, removed from the formal record in this proceeding and unpublished from the Commission's website at the docket number for this proceeding, if the Commission so rules.

document of record in a case without a compelling reason. The email at issue was not penned by either party and is neither a pleading nor evidence in the case. However, having been placed into the documentary record of the case by the Commission's Secretary, it has become a part of that documentary record and should not be removed. The documentary record is intended to reflect all actions that have taken place in a docket. Removal of any portion will alter a Commission record, which the Commission is charged with keeping completely and honestly.

This motion is consistent with the treatment of stricken evidence in a litigated case. When striking testimony that is being presented as evidence during a litigated case, for example, the ALJ will direct that the written testimony be stricken, either by the court reporter if oral testimony, or by the presenting party, if it is prepared testimony. In either event, the record will still contain that testimony, along with the notation that it was stricken. This shows both the action and the decision that the stricken evidence is not competent to support a finding or conclusion of the Commission. The directions for this action appear in the Commission's regulations at 52 Pa.Code § 5.412a.²

This regulation is a clear indication that a full record will show the actions taken. Here, in recognition of that fact, the Settlement provision in question ends with the words, "if the

² § 5.412a. Electronic submission or pre-served testimony.

(2) *Electronic submission of testimony modified at hearing.* Pre-served testimony submitted to the Commission must match exactly the version of testimony the presiding officer has required to be submitted to the court reporter at hearing. When a presiding officer requires a party to make hand-marked modifications to testimony during the hearing before submitting the testimony to the court reporter, the pre-served testimony electronically submitted to the Commission shall be marked to reflect the modifications. When a presiding officer does not require a party to make modifications to testimony at hearing before submitting the testimony to the court reporter, the pre-served testimony electronically submitted to the Commission may not be marked. Testimony not admitted into the record during a hearing may not be electronically submitted to the Commission.

(i) *Electronic submission of testimony stricken at hearing.* Pre-served testimony which was stricken at hearing shall be revised to reflect that which was stricken by containing hand-marked strikethroughs or electronic strikethroughs on the testimony. A party may not completely electronically delete testimony which was stricken at hearing.

52 Pa.Code § 5.412a (in pertinent part)

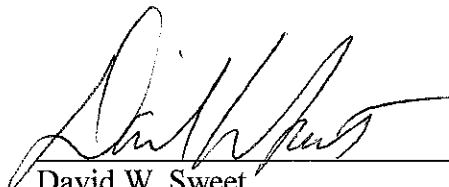
Commission so rules." I understand this term to mean that the parties will not withdraw from the Settlement if the Commission declines to order the removal of the email in question from the documentary record. As the Settlement involves the disposition of specific allegations and the agreement of the parties, the email in question is simply not integral to the substantive terms of the Settlement.

As further evidence that removal of the email is not integral to the Settlement, I note that the proposed ordering paragraphs for the final Commission order, attached to the Settlement as Appendix A, do not include a directive to the Secretary to carry out the removal terms of Paragraph 40(d).

Consistent with that regulation and the requirement that the documentary record contain all filings made during the case, I move:

1. That the Commission approve the Settlement with the exception of Paragraph 40(d).
2. That the Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

Dated: November 9, 2016



David W. Sweet
Commissioner