**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held November 9, 2016 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  John F. Coleman, Jr.  Robert F. Powelson  David W. Sweet | |
| Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement  v.  Fair View Energy, Inc. | C-2016-2547502 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Joint Settlement Petition filed on October 7, 2016, by the Commission’s Bureau of Investigation and Enforcement (I&E) and Fair View Energy, Inc. (Fair View or the Company) (collectively, the Parties), in the above captioned proceeding. Each party also filed a Statement in Support of the Settlement. For the reasons set forth herein, we will approve the Settlement with the exception of Paragraph 40(d).

**I. Background**

Fair View is an entity which meets the definition of an electric generation supplier (EGS) that acts as broker or marketer in that from June 1, 2015, to May 26, 2016, it served as an agent or intermediary in the sale and purchase of electric energy, but did not take title to electric energy.[[1]](#footnote-1) However, during that time period, Fair View was not licensed by the Commission as a broker or marketer of electricity. Complaint at 3-4.

Pursuant to the Electricity Generation Customer Choice and Competition Act (Competition Act), 66 Pa. C.S. §§ 2801-2815, the generation of electricity is no longer regulated as a public utility function in Pennsylvania. Only the distribution of electricity is continued to be regulated as a natural monopoly subject to the direct jurisdiction of the Commission. 66 Pa. C.S. § 2802(16). Retail customers are provided direct access to the competitive market for the generation and sale or purchase of electricity. See 66 Pa. C.S. § 2802(12)-(13).

This Commission regulates EGSs acting as brokers and marketers pursuant to the Competition Act, and Commission Regulations related to EGS licensing, 52 Pa. Code §§ 54.31-54.43. Pursuant to these Regulations, brokers and marketers are required to be licensed by the Commission prior to engaging in the business of an EGS in the Commonwealth of Pennsylvania. *See* 66 Pa. C.S. § 2809 and 52 Pa. Code § 54.32(a). Also, all licensed brokers and marketers are required to comply with various regulatory requirements including the reporting of gross receipts pursuant to 52 Pa. Code § 54.39, the payment of a minimum annual assessment fee pursuant to 66 Pa. C.S. § 2809(g) and the Commission’s Order at *Implementation of Act 155 of 2014*, Docket No. M-2014-2448825 (Final Implementation Order entered April 24, 2015), and the furnishing of a bond or other financial security approved by the Commission pursuant to 52 Pa. Code § 54.40.

Pursuant to an informal investigation initiated by I&E via a letter dated February 25, 2016, it was determined that Fair View had brokered or marketed EGS service to commercial customers in all electric distribution company (EDC) service territories in Pennsylvania. I&E initiated the informal investigation as a result of receiving a complaint from a confidential source that Fair View was potentially acting as an unlicensed EGS broker. I&E’s investigation found that two of the corporate officers of Fair View were previously associated as either employees of independent contractors with other EGSs who are or were licensed by the Commission. Additionally, the I&E investigation found that Fair View is regulated by the Public Utilities Commission of Ohio (PUCO) as a “power broker,” which is defined as a person certified by PUCO who provides power brokerage. *See* Ohio Admin. Code 4901:1-21-01(CC)(2016). Complaint at 5. I&E determined that Ohio’s definition of ‘power broker” is similar to Pennsylvania’s definition of “broker” found in the Commission Regulations at 52 Pa. Code § 54.31.

On May 25, 2016, pursuant to Section 701 of the Code, 66 Pa. C.S. § 701, I&E filed a Formal Complaint (Complaint) with the Commission alleging that Fair View violated 66 Pa. C.S. § 2809 and 52 Pa. Code § 54.32(a) by brokering electric energy to commercial customers in Pennsylvania without a license. I&E averred that Fair View’s unlicensed brokering resulted in the sale of numerous commercial customer accounts to three licensed EGSs[[2]](#footnote-2) that would, in turn, provide the customers with electric supply. I&E further alleged that Fair View knew or should have known that it was required to be licensed by the Commission prior to brokering EGS service in Pennsylvania given the employment history of its corporate officers and the Company’s regulatory compliance in other jurisdictions. Complaint at 7.

For relief, I&E requested that Fair View pay a civil penalty of $200 for each of the listed 449 violations of 66 Pa. C.S. § 2809 and 52 Pa. Code § 54.32(a), as set forth in the filed Complaint[[3]](#footnote-3) for a total civil penalty of $89,900. I&E further proposed that Fair View refund the commissions paid by other EGSs and/or fees paid by commercial customers for the unlawful EGS brokering or marketing service it provided, including the refund of the gross revenues the Company earned since initiating service as an EGS broker in Pennsylvania. Also, I&E proposed that Fair View pay the minimum annual assessment fee of $350 for operating as a broker or marketer during the 2015 calendar year. Complaint at 15-16

**II. History of the Proceeding**

As noted, this Complaint was filed on May 25, 2016, by I&E, and assigned Docket Number C-2016-2547502. Fair View stopped brokering electric generation supply on the same day that the Complaint was served. Settlement at 6-7.

On June 15, 2016, Fair View timely filed an Answer and New Matter in response to the Complaint. In its Answer, Fair View admitted that it had engaged in unlicensed EGS brokering activities that generated approximately $30,000 in revenues from twenty-seven commercial customers entering into supply contracts with licensed EGSs, but denied various other averments made by I&E. Fair View noted that it collected no money from these commercial customers, but rather received commissions from the licensed EGSs pursuant to private contractual arrangements. Fair View further noted that neither the EGSs nor the commercial customers have complained about its service and that prior to the receipt of I&E’s informal investigation, the Company was not aware of Pennsylvania’s legal requirement for brokers to obtain EGS licenses. Additionally, Fair View stated that it has since begun the application process, obtained a surety bond and placed its activities on hold as it realized it requires an EGS license. Answer at 1-2, 9.

In its New Matter, Fair View averred that no party was harmed by its actions and it has been more than willing to comply with all Commission requirements. Fair View asserted that it secured a $10,000 bond on March 9, 2016, in direct response to I&E’s February 25, 2016 letter, and has completed the application and published notices in several newspapers of general circulation, as required by the Commission’s Regulations. Fair View further asserted that the requirement for brokers to hold a license in Pennsylvania is not readily apparent to laypersons, even those with experience in the energy industry. As such, Fair View asserted that the requested civil penalty is nearly three times the amount of commissions earned by the Company from licenses EGSs for these twenty-seven commercial customer enrollments. Furthermore, Fair View averred that once customers were enrolled with an EGS, its brokering activities were complete, and, as such, it is inappropriate to impose civil penalties for each account and for each ensuing month. Therefore, Fair View requested that the Complaint be dismissed with prejudice. New Matter at 22-32.

On July 5, 2016, I&E filed a Reply to Fair View’s New Matter denying all the material averments made therein. I&E disputed that the principals of Fair View lacked knowledge of the Commission’s licensing requirement as they maintained a level of awareness regarding regulatory compliance well beyond that of a layperson.

On July 18, 2016, a Secretarial Letter was served on the Parties in this proceeding advising of receipt of an *ex parte* email communication from a non-party to the proceeding, John Holmes, Chief Executive Officer (CEO) of Front Line Power Solutions, LLC. Fair View filed a Motion to Strike the *ex parte* communication on July 28, 2016, asking that the email communication from a non-party be stricken from the formal record and removed from the Commission’s website. On August 4, 2016, I&E filed a letter response noting that it did not oppose Fair View’s Motion to Strike, which is still pending before the Commission.

It should also be noted that Fair View filed an Application on July 25, 2016, docketed at A-2016-2558553, for approval to offer, render, furnish or supply EGS service as a broker/marketer to the public in the Commonwealth. A protest was filed to the Application and the matter was assigned to the Commission’s Office of Administrative Law Judge (OALJ). Fair View submitted a request to the OALJ on August 26, 2016, for the expedited scheduling of a hearing and processing of the application. OALJ expeditiously scheduled a hearing for September 26, 2016. Upon subsequent withdrawal of the protest, the OALJ issued an Order dated September 26, 2016, transferring the uncontested application to the Bureau of Technical Utility Services (TUS) where it is currently pending. By letter dated October 3, 2016, Fair View reiterated its request for expedited processing of the uncontested application. Approval of the application, if granted, would not be retroactive and thus would not include the time frame in which Fair View operated as an unlicensed EGS broker.

On October 7, 2016, I&E and Fair View submitted the Settlement. Attached to the Settlement were Proposed Ordering Paragraphs and Statements in Support of the Settlement submitted by each Party.

**III. Discussion**

Initially, we note that any issue that we do not specifically address should be deemed to have been duly considered and rejected without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally*, *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

1. **Terms and Conditions of the Settlement**

The Parties agreed to the Settlement which resolves all issues related to the above-docketed I&E Complaint proceeding. The Settlement includes three primary subject areas: (1) civil penalties; (2) payment of annual assessment fee; and (3) treatment of an *ex parte* email communication.

The settling Parties state that the Settlement represents a compromise by both I&E and Fair View of their respective litigation positions in the Complaint proceeding. Settlement ¶ 46 at 15. The Parties further state that the Settlement was achieved after conducting discovery and engaging in discussions over several months and constitutes a carefully crafted package representing negotiated compromises on the issues addressed therein. Settlement ¶ 56 at 17-18.

The Settlement consists of the Joint Settlement Petition containing the terms and conditions of the Settlement and three appendices. Appendix A contains Proposed Ordering Paragraphs, while Appendices B and C to the Settlement are the Statements in Support of the Settlement submitted by I&E and Fair View, respectively.

The essential terms and conditions of the Settlement are set forth in Section IV. Settlement ¶¶ 39-43 at 13-15. The settling Parties agreed to the following terms and conditions, with the original paragraph numbers maintained, as follows:

39. Pursuant to the Commission’s policy of encouraging settlements that are reasonable and in the public interest,[[4]](#footnote-4) the Parties held a series of discussions that culminated in this Settlement. The terms and conditions of the Settlement, for which the Parties seek Commission approval, are set forth below.

1. **SPECIFIC SETTLEMENT PROVISIONS**

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:

a. Fair View will pay a total amount of Twenty-Five Thousand Dollars ($25,000) to resolve the allegations of unlicensed EGS brokering in order to fully and finally settle all possible liability and claims of alleged violations of the Code and/or Commission regulations arising from, or related to, the unlicensed EGS brokering operation complained of herein. Fifteen Thousand Dollars ($15,000) of the total civil penalty settlement amount shall be paid within sixty (60) days of the date the Commission’s Order approving the Settlement becomes final. Ten Thousand Dollars ($10,000) of the total civil penalty settlement amount shall be paid within one hundred twenty (120) days of the date the Commission’s Order approving the Settlement becomes final. Said payments shall be made by certified check or money order payable to the “Commonwealth of Pennsylvania” and sent to:

Secretary

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

b. Within sixty (60) days of the date the Commission’s Order approving the Settlement becomes final, Fair View will pay a total amount of Three Hundred Fifty Dollars ($350) related to the annual assessment fee for EGSs serving as brokers for Fair View’s brokering operations that occurred during the 2015 calendar year. Said payment shall be made by certified check or money order payable to “Commonwealth of Pennsylvania” and sent to:

Secretary

Pennsylvania Public Utility Commission

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c. On August 26, 2016, Fair View filed a letter in its EGS license application proceeding docketed at A-2016-2558553 requesting that OALJ treat the matter expeditiously by promptly scheduling a hearing and issuing an Initial Decision shortly after the close of the evidentiary record. By Order dated September 26, 2016, OALJ transferred the application to TUS where it is pending. By letter dated October 3, 2016, Fair View reiterated its request for expedited processing of the now unprotested application. Subsequent to the filing of this Settlement Agreement, I&E agrees to file a pleading supporting the expedited treatment of the proceeding docketed at A-2016-2558553.

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.

41. Fair View fully acknowledges the seriousness of I&E’s allegations and recognizes the need to prevent the reoccurrence of unlicensed EGS brokering activities.

42. In consideration of the Company’s payment of a monetary civil penalty and annual EGS assessment fee, I&E agrees that its informal investigation relating to Fair View’s conduct as described in this Settlement Agreement and in the Complaint referenced herein shall be terminated and marked closed upon approval by the Commission of this Settlement Agreement in its entirety.

43. Upon Commission approval of the Settlement in its entirety without modification, I&E will not file any further complaints or initiate other action against the Company at the Commission with respect to Fair View’s unlicensed EGS licensing operations during the time period in question.

In addition to the specific terms to which the settling Parties have agreed, the Settlement contains certain general, miscellaneous provisions. The Settlement is conditioned upon Commission approval of the terms and conditions without modification. The Settlement establishes the procedure by which any of the Parties may withdraw from the Settlement and proceed to litigate this case, if the Commission should act to modify the Settlement. Settlement ¶ 50 at 16. In addition, the Settlement states that the Settlement does not constitute an admission against, or prejudice to any position which any of the Parties may adopt during subsequent litigation of this case, in the event the Settlement is rejected by the Commission. Settlement ¶ 54 at 17.

The settling Parties respectfully request that the Commission approve the terms of the proposed Settlement, in their entirety without modification and that the Complaint be terminated and marked satisfied. Settlement at 14, 19.

**B. Legal Standards**

This Commission has a policy of encouraging settlements. *See* 52 Pa. Code § 5.231(a); *also* 52 Pa. Code §§ 69.401 *et seq*., relating to settlement guidelines for major rate cases, and our Statement of Policy relating to the Alternative Dispute Resolution Process (Mediation), 52 Pa. Code § 69.391, *et seq*. Settlementslessen the time and expense that Parties must expend litigating a case and, at the same time, conserve administrative resources. This Commission has stated that results achieved through settlement are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401.

This Commission’s evaluation of whether to approve a settlement is not based on a “burden of proof” standard, as is utilized for contested matters. *See* I.D. at 15; *Pa. PUC, et al. v. City of Lancaster - Bureau of Water*, Docket Nos. R-2010-2179103, *et* (Order entered July 14, 2011), at 11.[[5]](#footnote-5) The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. York Water Co*., Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C.S. Water and Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC LBPS v. PPL Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009); *Pa. PUC v. Phila. Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Warner v. GTE North, Inc*., Docket No. C-00902815 (Order entered April 1, 1996); 52 Pa. Code § 69.1201.

We evaluate whether a proposed settlement satisfies the “public interest” standard by a preponderance of the evidence of benefits, and such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed. *Popowsky v. Pa. PUC*, 594 Pa. 583, 937 A.2d 1040 (2007) (*Popowsky*) (“substantial” public interest standard discussed in the context of a merger reviewed under Section 1103 of the Code, 66 Pa. C.S. § 1103). The pertinent inquiry of a reviewing court in the context of the analysis of the public interest of Section 1103 of the Code, *supra*, is stated as follows:

In summary, as indicated in [*City of York*](http://www.lexis.com/research/buttonTFLink?_m=189f8ae45877d46c6f56f559107faa6d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b594%20Pa.%20583%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=110&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b449%20Pa.%20136%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAb&_md5=5b248d8ec02e01a6a662663dd52b614a)*,* the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission’s finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

*Popowsky*, 594 Pa. at 611, 937 A.2d at 1057.

This Commission has historically defined the public interest as including ratepayers, shareholders, and the regulated community. *See* [*Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. R-00953409 (Order entered September 29, 1995).](http://www.lexis.com/research/buttonTFLink?_m=61ce868366ad7f2d1aa43dd057107ec5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2008%20Pa.%20PUC%20LEXIS%20689%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1995%20Pa.%20PUC%20LEXIS%20193%2cat%2034%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzt-zSkAz&_md5=e81fc73a633f87cfde4afd3daa047b96) What is in the public interest is decided by examining the effect of the proposed Settlement on these “stakeholder” entities. *Id*. The public interest is best served, however, by ensuring that the underlying transaction complies with applicable law. *See Dauphin County Indus. Dev. Auth. v. Pa. PUC*, 2015 WL 5238841, 2015 Pa. Commw. LEXIS 381 (September 9, 2015) (Commonwealth Court Order reversing Commission approval of a joint settlement due to the Court’s plenary review and disapproval of the Commission’s interpretation of Section 2807(f)(5) of the Act, 66 Pa. C.S. § 2807(f)(5)).[[6]](#footnote-6)

Additionally, we note that the statutory provisions of Sections 501 and 2809 of the Code, 66 Pa. C.S. §§ 501, 2809, apply to this Commission’s regulation of EGS companies. *See, e.g., Comm. of Pa., et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*).

In furtherance of the statutory provisions of the Code that are applicable to this Commission’s review of settlements, we have, as cited above, promulgated detailed Regulations which specifically identify those standards and considerations that will govern our review. Pursuant to the *Commission Settlement Guidelines*, it is noted 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 guidelines further state that “when applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” 52 Pa. Code § 69.1201(b).

**C. Positions of the Parties**

In its Statement in Support of the Settlement, I&E states that the Settlement was amicably reached after extensive negotiations and balances the duty of the Commission to protect the public interest with the interests of the Company. I&E asserts that the Settlement also seeks to safeguard Pennsylvania’s robust retail electricity market as it sends a clear message that unlicensed EGS brokering operations will not be tolerated. I&E Statement in Support at 1-2. I&E points out that subsequent to the service of the Complaint on May 26, 2016, Fair View ceased all brokering activities, applied for an EGS broker’s license and is currently complying with the Code and Commission Regulations pertaining to the licensing of EGSs. According to I&E, by applying for a license, Fair View has demonstrated a willingness to submit to the Commission’s regulatory oversight of its brokering activities. *Id.* at 6-7.

I&E states that given the inherent unpredictability of the outcome of a contested proceeding, the benefits to amicably resolving the disputed issues through settlement outweigh the risks and expenditures of continued litigation. I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and is in the public interest. As such, I&E respectfully requests that the Commission approve the Settlement without modification. *Id.* at 7. In consideration of Fair View’s payment of a monetary civil penalty, I&E avers that its informal investigation relating to Fair View’s conduct as described in the Settlement and in the Complaint referenced herein shall be terminated and marked closed upon approval by the Commission of the Settlement in its entirety. *Id.* at 8.

I&E submits that approval of the Settlement Agreement in the above-captioned matter is consistent with the Commission’s Policy Statement regarding *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* (Policy Statement), 52 Pa. Code § 69.1201; *See also* *Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc*., Docket No. C‑00992409 (Order entered March 16, 2000). The Commission’s Policy Statement sets forth ten factors that the Commission may consider in evaluating whether a civil penalty for violating a Commission Order, Regulation, or statute is appropriate, as well as whether a proposed settlement for a violation is reasonable and in the public interest. 52 Pa. Code § 69.1201. *Id.* at 9.

I&E further states that acceptance of this Settlement avoids the necessity of further administrative and potential appellate proceedings at what would have been a substantial cost to the Parties. I&E supports the Settlement as being in the public interest and respectfully requests that the Commission approve the Settlement in its entirety without modification. *Id.* at 15-16.

In its Statement in Support, Fair View states that the Settlement comprehensively addresses and resolves the issues raised in this proceeding, provides a fair and reasonable resolution of these issues and is in the public interest. Fair View states that it takes full responsibility for serving as an agent in the sale and purchase of electric energy without holding an EGS license from the Commission and commits to fully complying with the Code and regulatory requirements in the future. According to Fair View, this commitment is demonstrated by the termination of activities requiring an EGS license, by the filing of an EGS application to operate as a broker in Pennsylvania and by agreeing to pay a $25,000 civil penalty, as well as the $350 annual broker fee for 2015, under this Settlement. Fair View Statement in Support at 1-2.

Fair View submits that an application of the factors and standards set forth in the Commission’s Policy Statement at 52 Pa. Code § 69.1201 shows that the Settlement in this proceeding is in the public interest. Fair View states that while it does not dispute the seriousness of its conduct of engaging in brokering activities without an EGS license, it submits that a review of the remaining factors in the Policy Statement supports the $25,000 civil penalty agreed to in the Settlement. Also, Fair View opines that the payment plan provided by the Settlement will afford the opportunity to pay the civil penalty without adversely impacting its business operation. Fair View notes that no adverse consequences occurred or have been alleged as a result of its brokering activities and no customers have been harmed. In fact, Fair View asserts that thirty-two commercial customers elected to receive EGS service from three different licensed EGSs under terms and conditions to which they agreed and neither the commercial customers nor the licensed EGSs have complained about the services they received. Additionally, Fair View asserts that it did not intentionally engage in unlawful conduct and has taken various steps to modify its internal practices to be in compliance with the Commission’s requirements. *Id.* at 2-4.

Lastly, Fair View states that through the Settlement the Company may avoid the uncertainty and costs of formal litigation and move forward in the conduct of business in Pennsylvania. Fair View urges the Commission to find that the Settlement is in the public interest and approve it without modification. *Id.* at 6.

**D. Disposition**

To determine whether the Settlement should be approved, we must decide whether the proposed terms and conditions are in the public interest. *See, e.g.,* [*Pa. PUC v. C.S. Water and Sewer Associates*, *supra*;](http://www.lexis.com/research/buttonTFLink?_m=8f7710ade25b5eb7871173b2f3b59ffe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20173%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=4&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b74%20Pa.%20PUC%20767%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=0fa8a6e34e5ecac1bf3e1aa67a3298ef) [*Pa. PUC v. Phila. Elect. Co.*, 60 Pa. P.U.C. 1 (1985).](http://www.lexis.com/research/buttonTFLink?_m=8f7710ade25b5eb7871173b2f3b59ffe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20173%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20Pa.%20PUC%201%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=ca77a1cbe0cf8f56d36f029f1dc49a1f) Our assessment of the benefits of the terms and conditions meeting the criteria of what is in the public interest need not be quantifiable. *Popowsky*. We must, as the circumstances dictate, exercise our informed judgment and evaluate the public interest so as to take into consideration the various interests and concerns of the stakeholders involved. *Id*.

On consideration of the positions of the Parties and after a review of the Joint Settlement Petition, we shall adopt their reasoning and their conclusion that the terms and conditions of the Settlement are in the public interest with one exception. During the litigation of this matter, 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 this *ex parte* communication. These documents were placed in the documentary record and posted to the Commission’s website along with the other filings in the docket. Fair View 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 Paragraph 40.d. in Section IV – A of the Settlement that directs that the email and the Secretary’s letter be removed from the record, including the Commission’s website.[[7]](#footnote-7)

While cognizant of the negotiations that take place in order to reach a full settlement in any case, including concessions from either party, we cannot support the removal of a 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 conclusion 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, an 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.[[8]](#footnote-8)

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 Commission so rules.” We 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, we 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, we conclude, therefore, that approval of the Settlement, with the exception of Paragraph 40(d), creates overall benefits to the various stakeholders involved and represents a reasonable compromise of the litigated positions of the Parties. The Commission has promulgated a Policy Statement at 52 Pa. Code § 69.1201 that sets forth ten factors that we may consider in evaluating whether a civil penalty for violating a Commission Order, Regulation, or a 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. The Policy Statement sets forth the guidelines we use when determining whether, and to what extent, a civil penalty is warranted. In this case, application of these guidelines supports approval of the Settlement as filed.

The first factor we may consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “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.” *Id*. In this case, we find that the violations averred in the Complaint are of a serious nature in that they involve unlicensed EGS brokering service. 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 EGS application, the Commission requires applicants to provide the Commission with adequate information so that only technically and financially fit entities are licensed as suppliers. By its actions, Fair View deprived the Commission of any ability to make such a determination about Fair View prior to the time that the Company brokered EGS service to commercial customers. Additionally, licensed brokers and marketers are required to comply with various regulatory requirements. As such, we find that a higher civil penalty is warranted here.

The second factor we may consider is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* In this case, we find that no personal injury or property damage occurred as a result of the alleged violations. Furthermore, we are unaware of any consumer complaint related to Fair View’s unlicensed brokering activities. As such, we find that a lower civil penalty is warranted.

The third factor pertains to litigated cases only. 52 Pa. Code § 69.1201(c)(3). Because this proceeding was settled prior to an evidentiary hearing, this factor is not applicable to this Settlement.

The fourth factor we may consider is 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. 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). In this case, on the day that I&E’s Complaint was served in this proceeding, May 26, 2016, Fair View ceased brokering electric generation supply. In addition, Fair View filed an Application on July 25, 2016, docketed at A-2016-2558553 for approval to offer, render, furnish or supply EGS service as a broker/marketer to the public in the Commonwealth. In its Application, Fair View noted that it filed an original bond in the amount of $10,000 separately and under the seal of confidentiality. As such, we find that Fair View has taken steps to become a licensed EGS in compliance with Section 2809 of the Code, 66 Pa. C.S. § 2809, and the Commission’s Regulations related to EGS licensing at 52 Pa. Code § 54.32. Accordingly, we find that these actions support a lower civil penalty.

The fifth factor we may consider is the number of customers affected and the duration of the violation. 52 Pa. Code § 69.1201(c)(5). I&E’s investigation determined that approximately thirty-two commercial customers were enrolled with EGSs as a result of Fair View’s unlicensed brokering. Many of those customers had several commercial electric accounts that were enrolled by Fair View. Fair View’s unlicensed brokering occurred between June 1, 2015 and May 26, 2016, when Fair View ceased brokering EGS service in response to the Complaint filed by I&E. We find that this factor supports a lower civil penalty.

The sixth factor to be considered relates to the compliance history of Fair View. 52 Pa. Code § 69.1201(c)(6). An isolated incident from an otherwise compliant company may result in a lower penalty, whereas frequent, recurrent violations by a company may result in a higher penalty. *Id.* As Fair View was acting as an electricity broker without an EGS license in Pennsylvania, there does not exist any prior history of non-compliance before this Commission. As such, this factor is not applicable in this situation.

The seventh factor to be considered relates to whether the Company cooperated with the Commission’s investigation. 52 Pa. Code § 69.1201(c)(7). I&E represents that Fair View cooperated in the investigation in this matter, including cooperating in both informal and formal discovery as well as settlement discussions. I&E Statement in Support at 12. Additionally, once the Company was informed of our licensing requirement it suspended its brokering activities and began the process to receive an EGS license in Pennsylvania. In this case, we find that this factor weighs in favor of a lower civil penalty.

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). The size of the company may be considered to determine an appropriate penalty amount. *Id.* According to I&E, a civil penalty amount of $25,000, plus $350 related to the annual EGS broker fee, is substantial and sufficient to deter not only Fair View from committing future violations, but also other companies from operating as unlicensed EGS brokers. However, I&E notes that the civil penalty amount reached in this amicable settlement was not based on a precise calculation consisting of a dollar amount multiplied by a number representing the violations. Rather, I&E explained that the civil penalty settlement amount was reached by using a “black box” methodology. I&E Statement in Support at 12-13, fn. 5. We find that the $25,000 civil penalty amount is a sufficient deterrent to prevent similar future occurrences.

The ninth factor to be considered relates to past Commission decisions in similar matters. 52 Pa. Code § 69.1201(c)(9). It is important to note here that I&E opined that the instant enforcement action, which involves allegations of unlicensed EGS brokering, is a case of first impression. According to I&E, while allegations of unlicensed EGS brokering have been raised before the Commission in other matters, none have involved a Commission decision in an action to enforce the Code or Commission Regulations and imposed a civil penalty. I&E Statement in Support at 13. I&E provided the following synopsis of applicable Commission decisions:

In 2009, the Commission noted that an EGS fully disclosed on its EGS brokerage application that it had brokered EGS service to *one* commercial customer prior to being granted a license. *License Application of Energy Trust LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Broker/Marketer*, Docket No. A-2009-2134742, 2009 WL 5062385 (Pa. P.U.C.), (Order entered December 18, 2009). In granting the license, the Commission commended the company for its disclosure and for proactively seeking a license. *Id.* at 3.

In another EGS broker application proceeding, a protestant alleged that the company had been brokering EGS service without a license. *Application of J. Andrews Associates, Inc. d/b/a Seven-Utility Management Consultants, LLC for approval to supply electricity or generation services as a broker/consultant engaged in the business of supplying electricity to the public in the Commonwealth of Pennsyl-vania*, Docket No. A-2011-2241747 (Recommended Decision dated August 10, 2012; Order adopting Recommended Decision entered December 20, 2012). Following an evidentiary hearing, the presiding administrative law judge sustained the protest and denied the application, finding that the applicant was unfit to provide the requested service based, in part, on the unlicensed brokering allegations.

An EGS filed a formal complaint against several individuals claiming, *inter alia*, they arranged for the sale of energy products on behalf of more than one broker/marketer, were unlicensed and, therefore, violated the Commission’s EGS licensure requirements. *Unified Energy Alliance, LLC v. Rodger K. Walter*, *et al*., Docket No. C-2015-2492473 (Complaint filed July 2, 2015). The matter was resolved with the filing of a Certificate of Satisfaction on March 14, 2016.

I&E Statement in Support at 13-14.

Thus, I&E asserts that there are no past Commission decisions directly responsive to a similar situation such as the instant complaint proceeding, which involves an I&E investigation of unlicensed brokering activities that spanned several months. For that reason, I&E opines that this case should be viewed on its own merits. I&E Statement in Support at 14.

In its Statement in Support, Fair View states that it was not aware of a prior case involving unlicensed EGS brokering. However, Fair View cites to two prior Commission-approved settlements in the energy industry that also involved issues of first impression where the civil penalties were $25,000. Those settlements cited by Fair View are *Commonwealth of Pennsylvania, et al. v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Tentative Opinion and Order entered March 9, 2016, deemed final by its terms on March 16, 2016) and *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.* Docket No. C-2014-2427657 (Order entered June 30, 2016). Fair View Statement in Support at 5-6.

Accordingly, we find that based on our analysis of the unique relevant factors of this proceeding that are comparable to other matters involving allegations of uncertificated or unlicensed activities that are subject to the Commission’s jurisdiction, and comparing the allegations to the relief provided in the Settlement, this Settlement, with the exception of Paragraph 40(d), and the civil penalty amount is consistent with our prior Commission actions.

The tenth factor considers other relevant factors. 52 Pa. Code § 69.1201(c)(10). We believe that it is in the public interest to approve the Settlement, except for Paragraph 40(d), of this matter so as to avoid the expense of litigation and the possibility of appeals. We are cognizant of the fact that the fines and penalties, and other remedial actions resulting from a fully litigated proceeding are difficult to predict and can differ from those that result from a settlement. In addition, we believe that the Settlement with the removal of Paragraph 409d) is in the public interest because reasonable settlement terms will allow the Parties to move forward and to focus on implementing the agreed upon remedial actions.

For the reasons set forth above, after reviewing the terms of the Settlement Agreement, we find that approval of the Settlement, with the exception of Paragraph 40(d), is in the public interest and is consistent with the terms of our Policy Statement.

**IV. Conclusion**

It is the Commission’s policy to promote settlements. 52 Pa. Code § 5.231. The Parties herein have provided the Commission with sufficient information upon which to thoroughly consider the terms of the proposed Settlement. Based upon our review of the record in this case, including the Settlement and the Statements in Support thereof, we shall approve the Joint Settlement Petition, with the exception of Paragraph 40(d), filed by I&E and Fair View and mark the Formal Complaint filed by I&E as satisfied, consistent with the discussion herein; **THEREFORE**,

**IT IS ORDERED:**

1. That the Joint Settlement Petition, with the exception of Paragraph 40(d), filed on October 7, 2016, by the Commission’s Bureau of Investigation and Enforcement and Fair View Energy, Inc. is approved consistent with the discussion in this Opinion and Order.

2. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within sixty (60) days of the date this Order becomes final, Fair View Energy, Inc. shall pay Fifteen Thousand Dollars ($15,000), which consists of the first installment of the civil penalty settlement amount totaling Twenty-Five Thousand Dollars ($25,000). The second and final installment of Ten Thousand Dollars ($10,000) shall be paid one hundred and twenty (120) days of the date this Order becomes final. Said payments shall be made by certified check or money order payable to “Commonwealth of Pennsylvania” and shall be sent to:

Secretary

Pennsylvania Public Utility Commission

400 North Street

Harrisburg, PA 17120

3. That, in accordance with 66 Pa.C.S. § 2809(g) and the Commission’s Order at *Implementation of Act 155 of 2014*, Docket No. M-2014-2448825 (Final Implementation Order entered April 24, 2014), within sixty (60) days of the date this Order becomes final, Fair View Energy, Inc. shall pay Three Hundred Fifty Dollars ($350) related to the annual fee for electric generation suppliers acting as brokers for Fair View Energy, Inc.’s brokering operations that occurred during the 2015 calendar year. Said payment shall be made by certified check or money order payable to the “Commonwealth of Pennsylvania” and shall be sent to:

Secretary

Pennsylvania Public Utility Commission

400 North Street

Harrisburg, PA 17120

4. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

5. That the Secretary’s Bureau shall mark this proceeding closed upon payment of the civil penalty and annual fee as set forth in Ordering Paragraph Nos. 2 and 3.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: November 9, 2016

ORDER ENTERED: November 30, 2016

1. *See* 66 Pa.C.S. § 2803 (related to the definition of “electric generation supplier”) and 52 Pa. Code § 54.31 (related to the definitions of “broker” and “marketer”). [↑](#footnote-ref-1)
2. The EGSs are ConEdison Solutions, Inc., NextEra Energy Services Pennsylvania, LLC and SFE Energy. [↑](#footnote-ref-2)
3. In its Complaint, I&E identified how many commercial customers were enrolled by month during the period in question, by EGS and proposed a $200 “per violation” civil penalty during each month that each electricity account was served retail electric supply resulting from Fair View’s unlicensed brokering. Complaint at 8‑16. [↑](#footnote-ref-3)
4. *See* 52 Pa. Code § 5.231(a). [↑](#footnote-ref-4)
5. The burden of proof is met when the party on whom the burden is placed meets that burden by a preponderance of the evidence. A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. [*Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).](http://www.lexis.com/research/buttonTFLink?_m=470ca40ed8631ccf658db98795d0e691&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2011%20Pa.%20PUC%20LEXIS%201391%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=11&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b364%20Pa.%2045%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=11&_startdoc=11&wchp=dGLzVzt-zSkAz&_md5=3b55efab80a5f76c487e3a484311d5fd) Also, the Commission’s decision must be based on substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Dutchland Tours, Inc. v. Pa. PUC,* 337 A.2d 922 (Pa. Cmwlth. 1975). [↑](#footnote-ref-5)
6. Application for Reargument or Rehearing *En Banc* filed September 23, 2015. [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. § 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). [↑](#footnote-ref-8)