



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

IN REPLY PLEASE  
REFER TO OUR FILE  
C-2014-2431410

June 3, 2015

**Via E-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. HIKO Energy, LLC  
Docket No. C-2014-2431410

Dear Secretary Chiavetta:

Enclosed please find the Main Brief of the Bureau of Investigation and Enforcement in the above-referenced proceeding. 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 black ink, appearing to read "M. Swindler".

Michael L. Swindler  
PA Attorney ID No. 43319

Stephanie M. Wimer  
PA Attorney ID No. 207522

Wayne T. Scott  
PA Attorney ID No. 29133

Enclosure

cc: As per certificate of service  
Honorable Elizabeth H. Barnes  
Honorable Joel H. Cheskis

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|                                         |   |                           |
|-----------------------------------------|---|---------------------------|
| Pennsylvania Public Utility Commission, | : |                           |
| Bureau of Investigation and Enforcement | : |                           |
|                                         | : |                           |
| v.                                      | : | Docket No. C-2014-2431410 |
|                                         | : |                           |
| HIKO Energy, LLC                        | : |                           |

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**MAIN BRIEF OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Michael L. Swindler  
Prosecutor  
PA Attorney ID No. 43319

Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522

Wayne T. Scott  
First Deputy Chief Prosecutor  
PA Attorney ID No. 29133

Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000

Dated: June 3, 2015

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## I. STATEMENT OF THE CASE

### A. Description of the Case

The Bureau of Investigation and Enforcement (I&E) initiated an informal investigation of HIKO Energy, LLC (HIKO or Company) on March 31, 2014, as a result of customer complaints received by the Commission's Bureau of Consumer Services (BCS) related to allegations that HIKO billed rates that were higher than the rates guaranteed by the Company. (I&E St. 1 at 9). I&E's investigation focused on one particular HIKO variable rate price offering that was primarily marketed to residential electric customers in Pennsylvania, which provided that a customer enrolled in this offering would experience a guaranteed rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local electric distribution company's (EDC) price to compare (PTC) (referred to hereafter as the "Price Offering").

*Id.*

I&E's investigation entailed service of three sets of data requests to HIKO and a review of HIKO's responses to those data requests. (I&E St. 1 at 9). Included in I&E's data requests was I&E's request that HIKO provide all billing data submitted by HIKO to EDCs for electric generation service supplied by HIKO to residential customers within each EDC's service territory and billed in January, February, March and April 2014. In response, HIKO provided spreadsheets with billing data for those months pertaining to customers in the service territories of Duquesne Light Company (Duquesne Light), Metropolitan Edison Company (Met-Ed), PECO Energy Company (PECO), Pennsylvania

Electric Company (Penelec), PPL Electric Utilities (PPL) and West Penn Power (West Penn). (I&E St. 1 at 11-12; I&E Ex. 6A, 7A, 8A, 9A, 10A and 11A; N.T. 142).

I&E also requested HIKO's Welcome Letter and Disclosure Statement pertaining to the Price Offering. (I&E St. 1 at 14). HIKO issued a Welcome Letter to each customer who enrolled in this 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). HIKO also issued a Disclosure Statement to each customer who enrolled in the 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).

Upon reviewing the information contained in the billing data spreadsheets that was provided by HIKO, I&E engaged in a two-step analysis to determine whether HIKO failed to honor its Price Offering as set forth in its Welcome Letter and Disclosure Statement. Specifically, for those customer accounts enrolled in the Price Offering, I&E first examined the rate per kilowatt hour (kWh) charged to the EDC's PTC. (I&E St. 1 at 20). Then, I&E examined whether the customer was within the introductory period by comparing the service date to the start date for each account. *Id.* I&E's investigation uncovered 14,689 instances where an overcharge occurred between January and April 2014. *Id.*

On July 11, 2014, I&E filed a Formal Complaint (Complaint) against HIKO at the above docket, alleging that the Company violated the Commission's regulations at 52 Pa. Code § 54.4(a), which reads:

- (a) EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

In the Complaint, I&E alleges that over 14,000<sup>1</sup> counts of a violation of 52 Pa. Code § 54.4(a) occurred. As a result, I&E seeks relief, as revised,<sup>2</sup> including that the Commission: (1) find Respondent to be in violation of 52 Pa. Code § 54.4(a) for each of the counts set forth in the Complaint; (2) impose a cumulative civil penalty upon Respondent in the amount of Fourteen Million Six Hundred Eighty-Nine Thousand Dollars (\$14,689,000.00); (3) revoke the authority of Respondent to do business as an electric generation supplier (EGS) in Pennsylvania pursuant to 52 Pa. Code § 54.42(a)(7); (4) direct Respondent to provide a refund to each customer consisting of the difference between the amount the customer was billed and the minimum guaranteed discounted rate the customer was entitled to receive; and (5) order such other remedy as the Commission may deem appropriate.

HIKO does not dispute that it deviated from the terms of the Price Offering by charging a higher rate than allowed. (N.T. 165). HIKO was aware that it did not honor

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<sup>1</sup> In the Complaint, the total number of overcharges alleged was 14,780. This number was subsequently revised by I&E's witness, Daniel Mumford, to 14,689. (I&E St. 1-SR at 13).

<sup>2</sup> The proposed civil penalty is calculated by multiplying the number of violations by \$1,000 per violation (the maximum permitted to be assessed per violation) pursuant to 66 Pa.C.S. § 3301(a). (I&E St. 1-SR at 14).

the Price Offering when it broke the guarantee due to its belief that failing to honor the Price Offering was necessary in order to remain in business. (N.T. 165 and 193).

The price of energy on the wholesale market increased during the winter months of 2014. (HIKO Rebuttal Testimony of Charles J. Cicchetti at 11).<sup>3</sup> Between January and April 2014, HIKO solely purchased electricity on the spot market at the wholesale market price despite having marketed a price to Pennsylvania consumers that offered a guaranteed discounted rate below the local utility's PTC. (N.T. 167). It was HIKO's sole decision to market the Price Offering in Pennsylvania; no one forced HIKO to offer the price guarantee. (N.T. 162).

HIKO overbilled customers as much as 29 cents per kWh, or up to four times the EDC PTC. (N.T. 83). HIKO most likely did not notify customers prior to the increase in rates that they experienced. (N.T. 209).

HIKO made no effort to systematically and proactively provide refunds for the invoices that were overcharged. Rather, refunds were only processed for the specific customers who expressly complained or filed complaints regarding the overbilling. (N.T. 205; I&E Ex. 13). HIKO received a total of between \$1.8 and \$1.9 million dollars from overcharges between the months of January and April 2014 and actually made a profit during these months. (N.T. 214 and 219). Therefore, HIKO's actions did more than keep it in business, the Company was also profitable.

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<sup>3</sup> HIKO's Rebuttal Testimony of Charles J. Cicchetti will hereinafter be referred to as HIKO St. 2.

There has been no similar instance in Pennsylvania that has been brought to the Commission's attention where such a large number of customers were deliberately billed contrary to their disclosure statement. (N.T. 51 and 132).

Had HIKO exited the retail electric market in Pennsylvania, its customers would have been automatically and seamlessly transferred to a default service provider by the local utility and would not have been deprived of essential electricity. (I&E St. 1-SR at 15).

**B. Procedural History**

As previously mentioned, on July 11, 2014, I&E filed a Complaint against HIKO alleging that HIKO's rates did not reflect the rate guaranteed in the Price Offering between January and April 2014 for a total of 14,689 customer invoices, as revised. I&E proposes that HIKO pay a civil penalty of \$1,000 for each of the 14,689 alleged violations, provide a refund for each of the 14,689 instances where a refund has not already been provided and that HIKO's authority to do business as an EGS in Pennsylvania be revoked.

On July 31, 2014, HIKO, through counsel, filed an Answer and New Matter to I&E's Complaint. Also on July 31, 2014, HIKO filed Preliminary Objections.

On August 8, 2014, the Pennsylvania Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement formally intervening into this matter.

On August 11, 2014, I&E answered HIKO's Preliminary Objections and on August 18, 2014, I&E replied to HIKO's New Matter.

The Pennsylvania Office of Attorney General (OAG) filed a Notice of Intervention on August 18, 2014.

On August 22, 2014, a Prehearing Conference Notice was issued establishing an Initial Prehearing Conference for Monday, September 29, 2014. On August 25, 2014, a Prehearing Conference Order was issued setting forth the various procedural rules governing the Initial Prehearing Conference.

On September 2, 2014, the presiding Administrative Law Judges (ALJs) denied HIKO's Preliminary Objections.

In response to the Prehearing Conference Order, I&E, HIKO and OCA submitted Prehearing Memoranda on September 23, 2014.

On September 29, 2014, the Initial Prehearing Conference in this proceeding was held before presiding ALJs Barnes and Cheskis, at which time a schedule for the litigation of the proceeding was established. On September 30, 2014, a Scheduling Order was issued memorializing the litigation schedule.

On November 12, 2014, HIKO filed a Motion to Compel Further Responses by I&E to HIKO's First Set of Interrogatories and Document Requests. Also on November 12, 2014, HIKO filed an Application for Subpoena *Duces Tecum* addressed to BCS.

On November 24, 2014, HIKO filed a Motion to Compel 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 Responses to its Second Set of Interrogatories. Also on December 3, 2014, the Commission's Law Bureau answered HIKO's Application for Subpoena *Duces Tecum*, which was addressed to BCS.

On December 23, 2014, I&E served the Direct Testimony of Daniel Mumford.<sup>4</sup>

By order entered December 30, 2014, HIKO's Motions to Compel answers to its first and second sets of interrogatories were denied. In addition, HIKO's Application for Subpoena *Duces Tecum* was also denied.

On March 13, 2015, HIKO filed a Motion for Protective Order. A Protective Order was issued on that same day. Also on March 13, 2015, HIKO 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 Shevy Simins and Elly Bernstein, who sponsored the responses to I&E's data requests, at the evidentiary hearing in this matter.

On March 30, 2015, HIKO filed Objections to the Applications for Subpoena of Ms. Simins and Mr. Bernstein.

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.

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<sup>4</sup> By e-mail dated December 19, 2014, I&E was granted an extension of time until January 6, 2015 to serve the Exhibits that accompany the Direct Testimony of Daniel Mumford. I&E served the Exhibits by January 6, 2015.

On April 7, 2015, an Order was entered granting I&E's Applications for Subpoena of Ms. Simins and Mr. Bernstein.

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 of the two HIKO employees who sponsored the responses to I&E's data requests to testify at the evidentiary hearing.

On April 10, 2015, I&E withdrew its Motion to Strike HIKO's Direct Testimony based upon HIKO's submission of amended cover pages identifying HIKO's two submitted written statements of testimony as rebuttal testimony and not direct testimony.

On April 16, 2015, I&E requested an extension of time to file briefs on HIKO's Petition for Interlocutory Review. I&E's requested extension of time was granted by Secretarial Letter dated April 17, 2015.

The evidentiary hearing in this matter took place on April 20, 2015.

On April 21, 2015, I&E withdrew its Applications for Subpoena of Ms. Simins and Mr. Bernstein.

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 in which the presiding ALJs intend to take judicial notice.

On May 6, 2015, HIKO's Petition to Withdraw its Petition for Interlocutory Review was granted.

I&E submits this Main Brief in accordance with the briefing schedule established in the Order entered on April 22, 2015. Proposed Findings of Fact and Proposed Conclusions of Law are attached as Appendix A and Appendix B, respectively.

## II. SUMMARY OF ARGUMENT

As a licensed EGS in Pennsylvania, HIKO has a duty to comply with the Public Utility Code (Code) and the Commission's regulations. HIKO, on its own volition, offered a Price Offering to Pennsylvania consumers that provided for a guaranteed discount of 1-7% below the EDC's PTC for a 6-month introductory period with the rate becoming variable thereafter. In January 2014, extreme cold weather caused energy demand to increase and energy supplies to decrease, resulting in unusually high costs to be temporarily incurred by energy suppliers, including HIKO.

With the knowledge that it had guaranteed a discount below the EDC PTC for its customers within their Price Offering introductory period, HIKO nevertheless consciously and selfishly disregarded its obligation to bill the rate promised to those customers and charged rates up to four times the EDC PTC to cover its own misguided decision to follow a business model that relied upon the purchase of energy on an unpredictable spot market while offering a guaranteed discount to customers. HIKO gambled and lost. Each overbilling is a violation of 52 Pa. Code § 54.4(a). I&E introduced evidence of 14,689 such overbillings.

The "polar vortex" wreaked havoc on HIKO's business model. Rather than maintain the integrity of its Price Offering and guarantee to customers, HIKO, unbelievably, made the bold decision to deliberately violate the Commission's regulations and bill customers at rates over and above the discount guaranteed, in order to bail itself out and be profitable. This complete disregard for Pennsylvania consumers who enrolled in HIKO's Price Offering and relied on HIKO's discount guarantee

warrants the imposition of a monetary civil penalty. I&E avers that upon consideration of the factors and standards established in the Commission's Policy Statement at 52 Pa. Code § 69.1201, HIKO's misconduct is uncontrovertibly worthy of the imposition of the maximum civil penalty of \$1,000 for each and every invoice entry wherein I&E established by evidence of record that such overbillings occurred. As a result of HIKO's abhorrent misconduct, I&E seeks a civil penalty of \$14,689,000, in addition to refunds to customers who were overbilled, and revocation of HIKO's license to operate as an EGS in Pennsylvania.

### III. ARGUMENT

#### A. Introduction

In early 2014, many energy suppliers found themselves constrained to deal with an anomaly that became known as the polar vortex. What sets this case apart from other EGS matters is HIKO's brazen, deliberate misconduct and the extent of its selfish and deliberate actions. This is not a case where a customer enrolled in an open-ended variable rate price offering and was billed a variable rate during the months affected by the polar vortex that was merely higher than anticipated. Nor is this a case where a mere technical glitch resulted in mistaken and unintentional billing errors for one billing cycle. Rather, this proceeding against HIKO concerns a Price Offering with an obligation to provide customers a *guaranteed* introductory period discount that HIKO's management decided – after conscious internal deliberation – to blatantly and intentionally ignore and defy its own commitments, not for one billing cycle, but for as many as four consecutive billing cycles. HIKO's action resulted in 14,689 deliberate overcharges.

The variable rate Price Offering offered by HIKO to residential electric customers in Pennsylvania, which is the subject of this proceeding, provided that the 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 PTC. HIKO enrolled customers in its Price Offering in the service territories of Duquesne Light, Met-Ed, PECO, Penelec, PPL and West Penn.<sup>5</sup> (*See* I&E Ex. 1). As such, for each enrolled

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<sup>5</sup> This Price Offering was designated by HIKO in each applicable EDC service territory as follows: HK001 (Duquesne Light), METE-SAV1-7 (Met-Ed), PECE-SAV1-7 (PECO), PENE-SAV1-7 (PENELEC), PPLE-SAV1-7 (PPL) and WPPE-SAV1-7 (West Penn).

customer's first six billing cycles, HIKO guaranteed that the customer's price for electric supply from HIKO would be one to seven percent less than the EDC's PTC, or, as put by HIKO's witness, Dr. Cicchetti, no more than "99% of the price to compare." (HIKO St. 2 at 32).

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 and N.T. 143-44).<sup>6</sup> HIKO sent all 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 each customer 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 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.

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<sup>6</sup> 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).

**B. HIKO Breached the Terms of its Price Offering**

HIKO breached the terms of its Price Offering by intentionally disregarding its guaranteed discount to customers resulting in improper overbilling. HIKO does not dispute that it failed to honor the guaranteed discounted rate during the winter of 2014.

According to HIKO, the winter season of 2013-2014 brought unprecedented costs related to its wholesale purchase of energy supply to serve its customers during extended periods of extreme cold. This weather phenomenon of sustained, extreme cold weather experienced in Pennsylvania during the winter of 2014, has generally been referred to as the “polar vortex.” (I&E St. 1 at 8). As a result of the polar vortex, there was a period of time where HIKO admitted that its rates did not reflect the offer guaranteed in its Price Offering. Specifically, HIKO made a conscious decision to ignore its obligation under the terms of its Price Offering and renege on its guaranteed discount to customers enrolled in its Price Offering who were within their 6-month introductory period. (Rebuttal Testimony of Harvey Klein at 9<sup>7</sup>; HIKO St. 2 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

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<sup>7</sup> HIKO’s Rebuttal Testimony of Harvey Klein will be hereinafter referred to as HIKO St. 1.

introductory rate that was “guaranteed” at the time of each customer’s enrollment as a HIKO supply customer.

Following receipt of numerous customer complaints that were submitted to BCS regarding HIKO’s failure to honor the Price Offering, I&E conducted an exhaustive investigation, including the review of spreadsheet data provided by HIKO through the discovery process. These spreadsheets were admitted into the record as I&E Exhibits 6A through 11A. I&E presented the testimony of Daniel Mumford, Manager of the Informal Compliance and Competition Unit of BCS. Mr. Mumford is the individual responsible for receiving any compliance or enforcement matters that need to be referred to I&E and was the prosecutorial liaison between BCS and I&E in this proceeding. In his Direct Testimony, Mr. Mumford explained how the spreadsheet data was organized and reviewed. (I&E St. 1 at 18-45). Mr. Mumford testified, in part, as follows:

Q. What are the most important columns to concentrate on?

A. With the understanding that the billing data is from a certain EDC (Column 2) and is all related to the price offering in question (Column 9), then the primary columns to concentrate on are Nos. 8, 11, 13 and 14, pertaining to the rate per kWh charged, the service date as it relates to the usage covered by the invoice, the start date of service and the EDC’s price to compare, respectively.

Q. Please explain.

A. Certainly. The key is the comparison between column 8 and column 14, or, more accurately, a number that is 1% less than the rate in column 14. That is because column 14 is the EDC’s Price To Compare, and the rate guaranteed under the price offering was 1 to 7 % less (or, in other words, at least 1%) below the EDC’s Price To Compare. So, if the rate paid in column 8 is more than the number that results from the rate in column 14

multiplied by 0.099, then that is the first indication that this invoice may have been overcharged.

Q. Why do you say it “may have been” overcharged?

A. We do not yet know if there was an overcharge because there is a second step to determining whether the rate is contrary to the terms of the price offering. Specifically, the discount of 1 to 7% below the EDC’s Price To Compare was guaranteed ONLY for the first six billing cycles, also referred to as the “introductory period.” This is where columns 11 and 13 come into play. Column 13 is the date that service was initiated. As such, the service date (column 11) must be within the first six months of the start date (column 13).

(I&E St. 1 at 19-20).

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 agreed 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 then agreed, by way of walking through a sample overcharge entry on I&E Ex. 6A, with the process for determining whether an invoice entry was deemed an overcharge under the terms of the Price Offering. (N.T. 151-53). I&E counsel then concluded this analytical colloquy with Mr. Klein:

Q. And we can also then therefore conclude that this is an overcharge, and then the rate column entry is highlighted to show that overcharge.

A. Correct.

(N.T. 153).

The spreadsheet data set forth in I&E's Exhibits 6A through 11A is summarized in Appendix A, which is attached to this Main Brief.

**C. HIKO's Overbillings Violate 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 specifically 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.

Section 54.4(a) of the Commission's regulations states as follows:

- (a) EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

52 Pa. Code § 54.4(a).

By making a conscious decision to ignore its obligation under the terms of its Price Offering and renege on its guaranteed discount to customers enrolled in its Price Offering who were within their 6-month introductory period, HIKO clearly billed customers 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, 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.

**D. Each HIKO Invoice Entry that was Overcharged is a Separate and Distinct Violation of 52 Pa. Code § 54.4(a)**

HIKO committed 14,689 separate and distinct overcharges to Pennsylvania customer accounts from January through April 2014. Based on I&E's analysis of all of 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 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.

It is the position of I&E that *each* HIKO overcharge equals one violation, or, one count of a 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.

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; they are based on the number of overbillings. If one were to adopt Dr. Cicchetti’s position, if a person decided to be a bank robber and robbed 10 banks, there should only be one charge. Our system simply does not work that way. The number of overbillings is the appropriate focus regardless of the amount that was overcharged and whether a corrected bill was submitted to a customer. (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, I&E asserts that 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*, the number of HIKO's overcharges between January and April 2014 were identified by I&E and can be segregated into 14,689 discrete violations (or 14,689 counts of violating 54.4(a)), each of which is subject to a separate \$1,000 civil penalty.

**E. The Imposition of a \$1,000 Civil Penalty per Violation is Warranted**

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). Based on the evidence presented of HIKO's flagrant disregard for the terms of its Disclosure Statement and Welcome Letter distributed to customers enrolling in the Price Offering, combined with this Commission's zero tolerance of slamming and associated unauthorized business practices of EGSs in Pennsylvania, assessment of the maximum civil penalty of \$1,000 per violation pursuant to 66 Pa.C.S. § 3301(a) is warranted in this case. *See Pa. Pub. Util. Comm'n, Law Bureau Prosecutory Staff v. MXenergy Electric Inc.*, Docket No. M-2012-2201861 (Order entered December 5, 2013) at 9 (related to the Commission's zero tolerance for slamming and associated practices). The record evidence supports I&E's position that HIKO should be required to pay \$1,000 for each instance where a customer invoice was overbilled in violation of

52 Pa. Code § 54.4(a). The evidence shows 14,689 instances of overbilling which equates to 14,689 violations. Consequently, the total civil penalty sought against HIKO is \$14,689,000.

The Commission promulgated a Policy Statement<sup>8</sup> at 52 Pa. Code § 69.1201 as a guideline that sets forth ten factors that are to be considered when evaluating whether and to what extent a civil penalty for violating a Commission order, regulation or statute is warranted. While these factors are evaluated for both litigated and settled proceedings involving violations of the Code and Commission regulations, Section 69.1201(b) notes that these factors and standards are applied in a more strict fashion in a litigated proceeding and without the flexibility afforded in a settled proceeding. 52 Pa. Code § 1201(b).

The present standard for the imposition of a civil penalty was developed in *Rosi v. Bell-Atlantic -- Pennsylvania, Inc. and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000) and in *Pa. Pub. Util. Comm'n v. NCIC Operator Serv.*, Docket No. M-00001440 (Order entered December 21, 2000), where the Commission held that violations would be subject to the *Rosi* standards. Subsequently, the Commission adopted the Policy Statement at 52 Pa. Code § 69.1201, which enumerates the same standards. Through case law, the Commission has directed that litigated proceedings seeking to impose a civil penalty include an analysis of these standards. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Gholston*

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<sup>8</sup> A policy statement does not establish a “binding norm” but announces the agency’s tentative intentions for the future. *Pa. Human Relations Comm'n v. Norristown Sch. Dist.*, 374 A.2d 671, 679 (Pa. 1977).

*Paratransit Serv., LLC*, Docket No. C-2013-2354805 (Initial Decision issued May 23, 2014; Final Order entered July 24, 2014). Here, application of the factors set forth in 52 Pa. Code § 69.1201 substantiates the imposition of a \$1,000 civil penalty for each violation of 52 Pa. Code § 54.4(a). In fact, this case is a prime example of where the maximum penalty is justified.

**1. HIKO's Willful Misconduct is Serious**

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).

In this case, HIKO's conduct was willful, egregious and worthy of the maximum civil penalty. HIKO's conduct was clearly neither a mere administrative error nor 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. (N.T. 165 and 193). As Mr. Mumford testified, I&E's \$1,000 per violation 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).

Contrary to HIKO's position, one-thousand dollar civil penalties are not limited to instances of property damage or loss of life. The maximum civil penalty has been imposed when the conduct that led to the violation was willful, even if it did not result in

property damage or the loss of life. 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.” *MXenergy Order* 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) (imposing a \$1,000 civil penalty per violation where there is no indication that the alleged violations resulted in personal injury or property damage).

HIKO’s argument that its conduct in this case is not slamming and thus not as serious, is also misguided. In *William Towne v. Great American Power, LLC*, C-2012-2307991 (Order entered October 18, 2013) (*GAP Order*), this Commission considered GAP’s 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." This Commission in the *GAP* 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***.

*GAP* Order at 22 (emphasis added).

Moreover, there are other instances where the maximum monetary penalty was deemed appropriate where the matter did not involve property damage, loss of life, or changing a customer's energy supplier without authorization. The Commission has imposed a civil penalty of \$1,000 for failing to file an assessment report in cases involving relatively small assessments where the respondent was found to have committed violations of the Code. The Commission found a significant penalty was necessary to deter additional violations in the future. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. C&J Services, Inc.*, Docket No. C-2012-2335066 (Order entered May 9, 2013); *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Hathaway Specialized Hauling, Inc. t/a Fantasia Machinery Transport*, Docket No. C-2012-2325066 (Order entered March 14, 2013).

Clearly, the seriousness of HIKO's misconduct is not simply a measure of whether property was damaged, lives were lost or premeditated slamming occurred. HIKO's

defiant disregard for the terms of its price guarantee was not only a serious breach of its customers' trust, but it seriously undermined the integrity of the Commission's efforts to invigorate and revitalize the competitive retail electricity supply market within the Commonwealth. HIKO's conduct was an unconscionable disregard of its customers and dealt a setback to the success of Pennsylvania's competitive retail electric market.<sup>9</sup> In fact, HIKO's disregard of the guaranteed Price Offering destroys the entire regulatory compact between the Commission, EGS and customer. Moreover, HIKO's methods of encouraging customers to sign-up and then breaching its agreement deprived other legitimate and honest EGSs from serving those customers. Consequently, the imposition of a \$1,000 civil penalty per violation is warranted due to the serious nature of HIKO's conduct.

## **2. The Consequences of HIKO's Misconduct Are Serious**

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

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.

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<sup>9</sup> In the *Rulemaking to Amend the Provisions of 52 Pa. Code § 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Docket No. C-2014-2409385 (Order entered April 3, 2014), the Commission referred to the "significant confusion and frustration with the shopping experience" that occurred in early 2014 in response to a period of sustained cold weather as the "negative turn of events" that prompted the Commission to demand more detail from EGSs regarding price variability.

52 Pa. Code § 69.1201(c)(2). HIKO's argument that only matters involving death or destruction warrant consideration of a higher penalty is misguided. As Mr. Mumford testified:

HIKO's conduct resulted in thousands of Pennsylvanians being overcharged for electric generation service between January and April 2014. When customers shop in the retail electric marketplace, they need to be able to trust that the rates that are marketed and promised at the time of enrollment are the rates that will be charged for electric generation. Otherwise, retail electric competition will not be successful.

(I&E St. 1 at 49). As discussed regarding the first factor, HIKO's misconduct was an unconscionable disregard of its customers and dealt a serious setback to the ultimate success of Pennsylvania's competitive retail electric market.

### **3. HIKO's Misconduct 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). The record is replete with testimony in this case that proves without any doubt that HIKO purposely and by design violated the terms of the Price Offering to purportedly save itself during the polar vortex. HIKO's intentional misconduct warrants imposition of the highest civil penalty.

The "conduct at issue" here is the act of overbilling customers by charging an amount that failed to reflect the agreed upon price. That conduct was clearly intentional.

The evidence in this case unequivocally shows that HIKO's disregard for the terms of its price guarantee to customers was willful, deliberate, intentional and premeditated.

Specifically, the testimony of HIKO's Chief Executive Officer (CEO) and witness, Mr. Klein, confirms that HIKO's decision to ignore its obligation to its customers was a conscious one:

Q. At page 8 of your rebuttal testimony, you state that it was never HIKO's intent to make promises that HIKO could not keep. But here, HIKO did charge some customers more than the rate promised, did it not?

A. Correct.

Q. HIKO did charge a higher rate than allowed by the terms of the price offering?

A. Correct.

Q. When HIKO did charge a higher rate than allowed, HIKO knew it was charging a higher rate than allowed, right?

A. Correct.

Q. And as HIKO's CEO, you were aware, were you not, that HIKO was deviating from the terms of its price guarantee?

A. Yes.

Q. So you admit that there were customers who did not receive the price guarantee discount who should have received the discount, right?

A. Correct.

Q. And at page 13 of your testimony you state that HIKO had a history of honoring promises to customers prior to the polar vortex. Mr. Klein, what about during the polar vortex, did HIKO honor its promises to customers?

A. No.

(N.T. 164-66). Moreover, 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?

A. 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).

HIKO unpersuasively argues that at the time it enrolled Pennsylvania consumers in its Price Offering with guaranteed savings for the first six months, it had no plan to subsequently deviate from the terms of the Price Offering. However, I&E has never alleged that HIKO intentionally misrepresented its Price Offering *at the time of enrollment* as a guarantee that the Company actually had no intention to keep. Such premeditation is of no consequence to a determination of whether the act of overbilling

itself was intentionally carried out. Nevertheless, it is painfully obvious that HIKO's act of deviating from the terms of its price guarantee was deliberate, thought out, planned and intentional, which justifies the imposition of the maximum civil penalty per violation.

4. **HIKO Made No Attempt to Modify Its Internal Practices and Procedures to Address Its Misconduct**

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).

Based on consideration of this factor, there is no evidence to support any mitigation to the imposition of the maximum civil penalty. As Mr. Mumford testified:

Based on I&E's determination that HIKO made a conscious business decision to disregard the terms of its price offering, it is not certain that any effort to revise internal procedures can correct such activity. For example, this is not a case where a modification to a purported billing system error or a revision to marketing materials would remedy the wrongdoing.

(I&E St. 1 at 49). Certainly 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 reluctantly 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).

Q. Isn't it true that HIKO's refund initially only went to the specific customers who were expressly complaining or filing complaints?

A. Yes, I think I just said that at the beginning of my answer.

(N.T. 205).

As the spreadsheet data shows, HIKO's overbilling occurred not as a single occurrence, but over a *four month* period. In fact, ALJ Cheskis noted during the course of the evidentiary hearing that 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.

Finally, not only did top-level management not correct the Company's misconduct, HIKO's top-level management instigated it. HIKO's CEO, 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).

Without question, there was absolutely *no* attempt by HIKO to modify its internal practices and procedures to address the conduct at issue because HIKO’s conduct was – in and of itself – precisely the practice that the Company’s management intended.

**5. The Impact of HIKO’s Misconduct Was Extensive**

The fifth factor involves the number of customers affected and the duration of the violation. 52 Pa. Code § 69.1201(c)(5). The number of customers impacted by HIKO’s egregious, intentional conduct is astounding – 14,689 customer invoices overcharged in a four-month period. As Mr. Mumford testified, these overcharges extended from January of 2014 through April 2014 – a full four billing cycles. (I&E St. 1 at 50). I&E Exhibit No. 14 consists of a chart showing the number of overcharged invoices per EDC service territory during each one of the four aforementioned billing cycles.

Although Mr. Mumford admitted that the “precise” number of customers affected was not known (N.T. 84), to consider “the number of customers affected” does not necessarily require that the subset be specifically quantified. Rather, the number of customers or extent of the impact of HIKO’s conduct can be gauged from the spreadsheet data, which encompasses 14,689 violations over 1,115 pages, covering the service territories of six EDCs over four monthly billing cycles. Clearly, the number of customers affected is extensive. However, the number of violations of Section 54.4(a) of

the Commission's regulations is, as previously stated herein, based on the number of overbillings, not the number of customers. Violations of Section 54.4(a) may occur multiple times for a single customer. For purposes of this proceeding, quantification comes into play when asserting the number of violations alleged. I&E quantified the number of violations as 14,689.

6. **HIKO's Misconduct was Committed During Its Probationary Period**

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).

As Mr. Mumford testified, HIKO had only been a licensed EGS in Pennsylvania for a period of less than two years when the violations that are the subject of I&E's Complaint were committed. (I&E St. 1 at 50-51). In fact, HIKO's EGS license was still within a two-year "conditional/probation period" due to actions that the Commission's technical staff had determined occurred in another jurisdiction. The conditions imposed on HIKO's EGS license are described in *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).<sup>10</sup> 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. The Company certainly should have anticipated that its actions could seriously jeopardize its authority. Nonetheless, it decided to take that risk.

There were other instances of non-compliance. HIKO's CEO admitted on cross-examination that HIKO failed to timely submit its bond renewal to the Commission.

Mr. Klein testified:

- 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).<sup>11</sup>

Additionally, I&E contends that the violations that are the subject of this Complaint proceeding are in fact "frequent, recurrent violations" in that the 14,689 overcharges occurred over four consecutive months, thus warranting a higher penalty. I&E submits that 14,689 overbillings over a four-month period followed by the failure of

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<sup>10</sup> By Order entered April 22, 2015, the presiding ALJs indicated that they may take judicial notice of certain documents related to the proceeding regarding HIKO's Application for an EGS license as well as letters from the Commission or its staff addressed to HIKO pertaining to HIKO's surety bond.

<sup>11</sup> The Commission reviews the security level for each EGS licensee on an annual basis and can modify the security level primarily upon consideration of the licensee's reported annual gross receipts information. *See* 52 Pa. Code § 54.40(d).

the Company to timely file its bond renewal all while under its initial license probation period, warrants the highest of civil penalties as well as consideration regarding this entity's worthiness to remain licensed as an EGS in Pennsylvania. *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) (noting that a respondent's compliance history and the need to deter future violations are important considerations when weighing the amount of the civil penalty).

**7. HIKO's Cooperation Does Not Mitigate the Other Factors**

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, which is expected from any entity regulated by the Commission, is not enough to mitigate HIKO's misconduct here. As Mr. Mumford responded when asked by HIKO counsel about the mitigation effect of compliance and cooperation, "Again, given the egregious nature, I have to give those very little weight, I'm afraid." (N.T. 97). *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").

**8. A Civil Penalty of \$1,000 Per Violation is an Appropriate Deterrent**

The eighth factor is consideration of the amount of the fine or civil penalty necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). I&E understands that this determination is ultimately left to the decision maker, but it is the position of I&E 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). One should note that this deterrence factor is not simply focused on encouraging HIKO to refrain from future violations of the nature alleged in this proceeding, but is also intended to resonate within the entire EGS community.

Whether HIKO provided refunds to customers, which even HIKO admits that it did not provide to all affected customers, does not act as a sufficient deterrent or substitute for a civil penalty because it merely rightfully returns money to customers – money that HIKO was not entitled to keep in the first place. (N.T. 120). Further, the Commission’s Policy Statement at 52 Pa. Code § 69.1201 does not consider refunding money to customers as a factor in evaluating the appropriate civil penalty.

**9. There Are No 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)(emphasis added). As 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. While this is uncharted territory for the Commission, and this proceeding provides the Commission with an opportunity to set the tone for addressing such unauthorized business practices, the Commission has imposed \$1,000 per violation in the past.

(I&E St. 1 at 52). This was reiterated in cross-examination of Mr. Mumford by HIKO's counsel:

Q. Mr. Mumford, we're back. So one question I guess I still have is what you do to inform yourself of any other comparable commission enforcement actions before you came here to testify.

A. Again, I'm not aware of any comparable cases, cases that could be compared to this one. So I'm not sure what you would be referring to.

Q. Well, did you ask people, you know, do you know of a case similar to this?

A. Again, I didn't ask anyone, because, given my experience here involved in these matters for quite a number of years, I couldn't even, I could not identify any such possible case.

(N.T. 124). HIKO ignored the express language of Section 69.1201(c)(9) concerning past Commission decisions in *similar situations* in its attempts to compare the deliberate violations in this litigated matter to other, unrelated EGS cases or matters that were settled amicably between the parties. As Mr. Mumford clarified on re-direct examination:

Q. Back to the guidelines in §1201, specifically factor nine. Is that factor a consideration of simply past commission decisions, or does it say past commission decisions in similar situations?

A. It discussed similar situations.

Q. And are you aware of any similar situations like this HIKO case that have been litigated?

A. No, as I've said, I'm not aware of any previous case where this large number of customers were overcharged deliberately.

(N.T. 132).

It is not appropriate 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 (where the Commission made it clear that “we vigorously, and without equivocation, reject considering a settlement as precedent, as to *any* subsequent issue, in *any* proceeding”). HIKO’s desperate attempt to compare this litigated proceeding to prior, settled EGS matters or matters involving other utility types<sup>12</sup> is an extraneous exercise that is completely unworthy of any consideration in determining the appropriate civil penalty in this case.

The *Public Power* case referenced in the testimony of HIKO’s Dr. Cicchetti is *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*). Of course, as already noted, the most important distinction is that the civil penalty imposed in *Public Power* was the result of a settlement agreement that was amicably reached by the parties and filed on November 19, 2012.

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<sup>12</sup> For example, HIKO attempts to compare civil penalties of *settled* matters involving pipeline safety to the civil penalty requested in this proceeding. However, Section 3301(c) of the Code, 66 Pa.C.S. § 3301(c) provides a different scheme for civil penalties pertaining to gas pipeline safety violations and as such, is irrelevant to violations involving EGSs.

Moreover, 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)).

In addition, during cross-examination of Mr. Mumford, HIKO’s counsel completely mischaracterized the facts that led to the *Public Power* settlement. In *Public Power*, the EGS did not “conspire” to slam 2,937 customers. (N.T. 66). *Public Power* did not involve the deliberate falsification of documents. (N.T. 67). In fact, that 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. As further noted in Paragraph 31 of the *Public Power* Settlement Agreement, “based on I&E’s informal investigation, it appears that the conduct of both Public Power and of the vendor acting on behalf of Public Power which led to the unauthorized enrollment of the affected customers was **unintentional and inadvertent.**” Settlement Agreement at 13-14 (emphasis added). In fact, the 263 customers who were physically switched for a single 30-day billing cycle in *Public*

*Power* actually received a *lower* unit rate for energy than was being charged by their supplier of choice. See I&E Statement in Support at 3. Thus, in determining the seriousness of HIKO's conduct and the consequences of said conduct, the facts of *Public Power* could not be more dissimilar.

HIKO's attempts to compare this litigated case of 14,689 intentional overcharges to 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) is similarly misplaced since that previous case has no relevance to a determination of the requested relief sought by I&E against HIKO.

In the *Pa. Gas & Electric* matter, a single telephone sales representative (TSR), acting beyond the scope of his authority and in contravention to controls put in place by the company, 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 supply and Pa. Gas & Electric immediately severed 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. By contrast, HIKO's intentional conduct was committed at the Company's executive level and impacted far more than 108 accounts and ten customers.

Further, HIKO's reliance on the separate, 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, is also misplaced because no Commission decision concerning the settlement agreement has been entered in that proceeding.

Finally, HIKO's testimony and accompanying HIKO Exhibits 5 and 6 regarding the settlements of proceedings brought against HIKO in New York and New Jersey are completely irrelevant to the facts and circumstances of this case and should be afforded no weight in determining the outcome of this proceeding. There simply are no past Pennsylvania Commission decisions that address facts that are similar to the intentional overbilling by an EGS of 14,689 invoice entries over a four month period. HIKO's intentional disregard of the terms of its Price Offering and resulting in 14,689 overbillings is a journey into uncharted territory. Since this is a case of first impression, it is certain that others are watching to determine how this Commission handles such

blatant and egregious acts. I&E submits that this is a case where the message should be delivered loud and clear that the Pennsylvania Commission will not tolerate these types of practices.

**10. HIKO Offers No 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. As Mr. Mumford testified on re-direct:

Q. And back to the 1201 guidelines, looking at factor ten, or 1201(c)(10), does factor ten allow consideration of other factors, or other relevant factors?

A. It is, I believe, relevant factors.

Q. And in your determination of the appropriate civil penalty here, do you consider whether HIKO paid refunds or lost customers or have not marketed a product or service as relevant factors?

A. No, I do not.

(N.T. 133).

HIKO’s witness, Dr. Cicchetti, wants us to believe 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 at 36). The HIKO witness 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 at 48). Yet,

Dr. Cicchetti admitted that imposing a civil penalty and directing the payment of refunds to customers are separate actions. The HIKO witness testified on cross-examination:

Q. So based on what you just said in your discussion about a blend, is it correct that you would agree that assessing a civil penalty for noncompliance of a regulation is not the same as an action for restitution or providing refunds to customers?

A. Yes.

(N.T. 188). Dr. Cicchetti is wrong. The loss of customers may be a result of HIKO's actions, but such losses are certainly not a penalty, especially since the Company ceased marketing efforts on its own accord. (N.T. 60). There is no cause to sympathize with HIKO's self-inflicted predicament or to decrease a justified maximum penalty.

Moreover, excuses of weather conditions and the resulting spot market energy prices neither exonerate HIKO's deliberate defiance of its obligation to provide a guaranteed discount under the terms and conditions of its Price Offering nor mitigate the warranted imposition of a maximum civil penalty in this case. I&E maintains that Dr. Cicchetti's rebuttal testimony regarding weather factors such as Pennsylvania statewide average temperatures and heating degree days, Canadian regulatory orders affecting natural gas prices in the United States and Canada, TransCanada Pipeline Limited transportation rates, and quantifying the effect of the Canadian regulatory changes including the relationship between natural gas prices for Canadian hubs and electricity prices in Pennsylvania have absolutely no bearing on the violations alleged in I&E's

Complaint or the civil penalty sought by I&E as a result of those violations.<sup>13</sup> The relevance of such testimony might be plausible in a proceeding regarding the extent to which “variable rates” can be increased where the terms and conditions of the customer disclosure statement permit such increases. Such is not the case here. HIKO’s Price Offering that is the subject of this proceeding was guaranteed to enrolled customers during the introductory period regardless of any other factor. No amount of excuses can justify disregarding a guaranteed, discounted rate.

As I&E Witness Mumford explained in his Surrebuttal Testimony:

- Q. Mr. Cicchetti seems to be saying that unexpected weather and Canadian regulatory changes are mitigating factors when considering an appropriate civil penalty in this case. Do you agree?
- A. No. If I rob someone of \$100 and I am subsequently caught, it is not a mitigating factor in determining the appropriate punishment for my crime that I had a \$100 electric bill that was due tomorrow and I believed I had no other way to pay it. Why I committed the crime is not relevant.

(I&E St. 1-SR at 11).

There is no dispute that the period of the “polar vortex” brought exponential increases in wholesale energy market prices as demand increased and supply decreased.

As this Commission recently noted:

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

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<sup>13</sup> During the course of the evidentiary hearing, I&E’s motion to strike HIKO St. 2 at pages 11 through 25 was denied as pertaining to “the company’s excuse for doing what they did . . . .” Upon the Commission’s consideration of HIKO’s excuse, it should be rejected.

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. The important distinction to be made here is that HIKO did not simply increase rates to customers of variable rate offerings who took the chance that the rates would never increase to the extent that they did due to this polar vortex phenomenon. That issue was not even investigated by I&E or incorporated into I&E's Complaint against HIKO. Here, HIKO increased the rates of customers who were enrolled in a Price Offering that not only assured customers that there would be no increase during the first six months of billing, but also that there would be a *guaranteed discount* off of the EDC's PTC.

The customers associated with the invoice overcharges that are the subject of this proceeding had *absolutely no expectation* that the rate would increase above 99% of the EDC's PTC. After all, they were in a "protected" six-month introductory period. For that initial six-month period at least, these customers rightfully presumed that they were shielded from the monthly variable changes that they could anticipate upon the conclusion of the introductory period. Consequently, all of HIKO's excuses as to why they did what they did – possibly relevant to explain the extent of a variable rate increase – have no relevance where the Company intentionally breached a guaranteed discounted rate.

For all the foregoing reasons, I&E submits that a civil penalty of \$14,689,000 is appropriate upon consideration of the factors and standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201(c).

#### **IV. CONCLUSION**

This 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 electric market in Pennsylvania. The Commission has expended a considerable amount of time and effort to acclimate consumers to the idea of competitive generation – and choosing their own supplier of electricity. Just as consumers were beginning to grasp this concept of consumer choice came the polar vortex. Energy suppliers were left to decide whether to honor the pricing structures that their supply customers had entered into, often to the financial detriment of the company, or to pass some or all of their unanticipated costs to customers.

HIKO made the conscious business decision to ignore the pricing that its customers had relied upon when enrolling with the supplier. Instead, HIKO charged rates up to 4.5 times the rate the customer had been guaranteed for their first six billing cycles. However, what really sets HIKO apart from others is that HIKO decided not only to pass on costs to customers with capped or uncapped variable rates, but also to disregard an expressly guaranteed discount and increased rates to those unsuspecting customers as well.

I&E initiated an informal investigation of HIKO in March 2014, based on allegations that HIKO billed rates that were higher than the rates promised by the Company. I&E focused on one single price offering, and after gathering and pouring through HIKO's spreadsheet data, determined that HIKO had, over a four month period

from January 2014 through April 2014, committed 14,689 overcharges – billing a price that failed to reflect the agreed upon rate. Each one of these overcharges is a violation of the Commission’s regulations at 52 Pa. Code § 54.4(a). And as such, each violation warrants the imposition of a civil penalty.

The reasons and excuses offered by the Company do not exonerate it from its egregious behavior. HIKO complains that the fault lies in the extreme cold weather and Canadian regulatory changes that cut supply and caused its energy procurement costs to skyrocket. Yet, it was HIKO’s own business decision to purchase all of its energy on the volatile wholesale spot market while marketing to its customers a Price Offering that locked in a guaranteed discount. HIKO complains that it lost the majority of its customers. Yet, it admits that it voluntarily ceased marketing efforts in Pennsylvania for new customers. As for existing customers, who could blame them? HIKO complains that it has been penalized enough because it intends to make full refunds to affected customers. Yet, processing refunds to overbilled customers is nothing more than returning money that HIKO had no right to in the first place. As Shakespeare might say, HIKO was hoisted by its own petard.

For each of these violations, I&E seeks a fine of \$1,000 per violation. This total civil penalty of \$14,689,000 is warranted due to HIKO’s blatant disregard of the terms of its Price Guarantee to Pennsylvania consumers who enrolled with HIKO only to be completely blindsided by the Company’s conscious decision to renege on its discount commitment. Moreover, the Company’s actions warrant revocation of HIKO’s license to

operate as an EGS in Pennsylvania. Imposition of a severe civil penalty and revocation of HIKO's license will serve to deter not only HIKO – but all electric generation suppliers licensed to operate in Pennsylvania now or in the future – from potential future violations of the Code or Commission regulations. Failure to impose a very harsh penalty could encourage other companies who may have made promises to customers to break their promises if they become financially difficult to fulfill. There could be little doubt that such companies would use this case as precedent for lower penalties.

I&E respectfully requests that the Commission: (1) find HIKO to be in violation of 52 Pa. Code § 54.4(a) for each of the counts set forth in the Complaint; (2) impose a cumulative civil penalty upon HIKO in the amount of Fourteen Million Six Hundred Eighty-Nine Thousand Dollars (\$14,689,000.00), as revised; (3) revoke the authority of HIKO to do business as an EGS in Pennsylvania pursuant to 52 Pa. Code § 54.42(a)(7); (4) direct HIKO to provide a refund to each customer consisting of the difference between the amount the customer was billed and the minimum guaranteed discounted rate the customer was entitled to receive; and (5) order such other remedy as the Commission may deem to be appropriate.

Respectfully submitted,



Michael L. Swindler  
Prosecutor  
PA Attorney ID No. 43319  
[mwindler@pa.gov](mailto:mwindler@pa.gov)

Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522  
[stwimer@pa.gov](mailto:stwimer@pa.gov)

Wayne T. Scott  
First Deputy Chief Prosecutor  
PA Attorney ID No. 29133  
[wascott@pa.gov](mailto:wascott@pa.gov)

Pennsylvania Public Utility Commission  
Bureau of Investigation and Enforcement  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
(717) 787-5000

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# **APPENDIX A**

## PROPOSED FINDINGS OF FACT

1. HIKO is a jurisdictional EGS licensed by the Commission at Docket No. A-2012-228994 to operate in the service territories of all EDCs in Pennsylvania, including Duquesne Light, Met-Ed, PECO, PPL, Penelec and West Penn. (I&E St. 1 at 5, ln. 3-14).
2. BCS received numerous informal complaints filed by customers during the winter of 2014 indicating that HIKO had billed customers in a manner contrary to what was expressly guaranteed at the time of the customer's enrollment. (I&E St. 1 at 4, ln. 15-22; 8, ln. 10-12).
3. BCS received information alleging that HIKO breached its Price Offering of a guaranteed savings of 1-7% less than PPL's Price to Compare for the first six monthly billing cycles. (I&E St. 1 at 9, ln. 4-6).
4. BCS made a referral to I&E to initiate an informal investigation. (I&E St. 1 at 3, ln. 12-18; 4, ln. 9-10).
5. 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. (I&E St. 1 at 9, ln. 1-4).
6. 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, ln. 14-18).

7. 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, ln. 4-8).
8. 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, ln. 12-14).
9. HIKO issued a Welcome Letter to each customer 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).

10. 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 St. 1 at 13; I&E Exhibit 4; N.T. 143-144).
11. 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, ln. 7-12 and 17-20; 12, ln. 9-13; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 142).
12. The format of the spreadsheet billing data for each EDC service territory is identical. (I&E St. 1 at 18, ln. 15-16).
  13. Each spreadsheet page has 14 columns and the 14 columns are the same for each page. (I&E St. 1 at 19, ln. 1-2; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 147, ln. 22-25 and 148, ln. 1-2).
  14. Column 1 of each spreadsheet is the customer name. To maintain the confidentiality of customer names, I&E redacted the information in this column. (I&E St. 1 at 19, ln. 2-3; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A).
  15. Column 2 of each spreadsheet is the name of the utility or EDC. (I&E St. 1 at 19, ln. 3; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149, ln. 1-4).
  16. Column 3 of each spreadsheet is the invoice number. (I&E St. 1 at 19, ln. 4; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149, ln. 5-8).
  17. Column 4 of each spreadsheet is the invoice date. (I&E St. 1 at 19, ln. 4; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149, ln. 9-13).
  18. Column 5 of each spreadsheet is the category of energy or tax. (I&E St. 1 at 19, ln. 4-5; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149, ln. 14-20).
  19. 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, ln. 5-6; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149, ln. 21-23).

20. Column 7 of each spreadsheet is the amount of the invoice. (I&E St. 1 at 19, ln. 7; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 149, ln. 24-25 and 150, ln. 1-3).
21. Column 8 of each spreadsheet is the rate per kWh charged. (I&E St. 1 at 19, ln. 7; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150, ln. 4-7).
22. Column 9 of each spreadsheet is the rate class. (I&E St. 1 at 19, ln. 8; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150, ln. 8-13).
23. 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, ln. 3-8; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A).
24. Column 10 of each spreadsheet is the usage in kilowatt hours. (I&E St. 1 at 19, ln. 8; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150, ln. 14-17).
25. Column 11 of each spreadsheet is the service date that relates to the usage covered by the invoice. (I&E St. 1 at 19, ln. 9-10; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 150, ln.18-25 and 151, ln. 1-3).
26. Column 12 of each spreadsheet is the utility account number. (I&E St. 1 at 19, ln. 9-10; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 151, ln. 4-6).
27. Column 13 of each spreadsheet is the start date of the service. (I&E St. 1 at 19, ln. 10; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 151, ln. 7-9).

28. Column 14 of each spreadsheet is the EDC's price to compare. (I&E St. 1 at 19, ln. 11; I&E Exhibits 6A, 7A, 8A, 9A, 10A and 11A; N.T. 151, ln. 10-13).
29. A two-step analysis was used to determine whether an overcharge occurred. With the understanding that the customers were enrolled in the Price Offering, column 8 (regarding rate per kWh charged) was first compared to column 14 (the EDC's PTC) to determine whether the customer was 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 0.099, then that may indicate that the invoice has been overcharged. The second step to the analysis considers 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).
30. 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, ln. 6-8).
31. I&E reviewed hundreds of pages of spreadsheet data and counted one-by-one the overcharges. (I&E St. 1 at 18, ln. 10-12).
32. I&E's investigation uncovered 14,689 overcharges. (I&E St. 1 at 21, ln. 18-19).
33. I&E filed a Complaint against HIKO on July 11, 2014. (I&E St. 1 at 12, ln. 20-21).
34. I&E alleges that each overcharge is a violation of the Commission's regulations at 52 Pa. Code § 54.4(a), which requires EGS prices billed to reflect the marketed

- prices and the agreed upon prices in the disclosure statement. (I&E St. 1 at 21, ln. 19-20).
35. To arrive at the civil penalty, each overcharge was multiplied by \$1,000. (I&E St. 1 at 45, ln. 18-22; N.T. 50, ln. 17-20).
  36. The maximum civil penalty in this matter could have been \$1,000 per overcharge per each day's continuation of the overcharge. (N.T. 55, ln. 24-25 and 56, ln. 1-5).
  37. I&E assessed a \$1,000 civil penalty per overcharge, 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, ln. 23-25; N.T. at 88, ln. 1-11; N.T. 137, ln. 4-14).
  38. Any billed overcharge constitutes a violation, even if a customer used only one light bulb and was billed for 1 kWh. (I&E St. 1-SR at 19, ln. 16-21).
  39. 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, ln. 4-15).
  40. There has been no similar instance where such a large number of customers were deliberately billed contrary to their disclosure statement. (N.T. 51, ln. 19-24; N.T. 132, ln. 18-22).
  41. HIKO agrees that between January and April 2014, it billed some of its customers at a rate that was higher than the promised rate. (N.T. 161, ln. 18-21).

42. HIKO admits that it knew it was charging a higher rate than allowed and that it deviated from the terms of its Price Offering, resulting in customers not receiving the discounted guaranteed price. (N.T. 165).
43. HIKO was aware that it did not honor the Price Offering when it broke the guarantee. (N.T. 193, ln. 24-25).
44. HIKO's failure to honor the Price Offering was not the result of an administrative error or data glitch. (I&E St. 1 at 49, ln. 11).
45. It was HIKO's decision not to honor the Price Offering for at least four consecutive months – January, February, March and April 2014. (N.T. 217, ln. 1-13).
46. HIKO made a decision to remain in business rather than honor the Price Offering and beat the Price to Compare. (I&E St. No. 1-SR at 17, ln. 3-11).
47. It was HIKO's choice to offer the Price Offering in Pennsylvania and no one forced HIKO to offer the price guarantee. (N.T. 162, ln. 15-20).
48. HIKO's refunds to customers initially only were given to the specific customers who expressly complained or filed complaints. (N.T. 205, ln. 5-7).
49. HIKO did not describe any Company effort to proactively refund monies to all overcharged customers, regardless of whether they filed a complaint. (I&E St. 1-SR at 5, ln. 22 and 6, ln. 1).
50. Whether HIKO made or plans to make refunds to its customers does not act as an adequate deterrent to HIKO from committing future violations because the

Company is merely returning money that it should not have had in the first place.  
(N.T. 102, ln. 24-25 and 103, ln. 1-9; I&E St. 1-SR at 7).

51. HIKO overbilled customers as much as 29 cents per kWh, or up to four times the EDC PTC. (N.T. 83).
52. The average overcharge that HIKO billed customers was \$124. (N.T. 210, ln. 16-23).
53. The consequences of HIKO's overcharges are serious in that this kind of conduct breaches the public trust and undermines the Commission's Customer Choice model. (I&E St. 1-SR at 16, ln. 10-17).
54. HIKO received a total of \$1.8 or \$1.9 million dollars between January and April 2014 as a result of overcharges. (N.T. 219, ln. 1-6).
55. Between January and April of 2014, HIKO made a profit. (N.T. 214, ln. 9-15).
56. Between January and April of 2014, HIKO solely purchased electric in the wholesale spot market. (N.T. 167, ln. 11-16).
57. If HIKO exited the retail electric market in Pennsylvania, HIKO customers would be automatically and seamlessly transferred to default service provided by the local EDC and would not be deprived of essential electricity. (I&E St. 1-SR at 15, ln. 9-17).
58. HIKO offers a "One Month Free" benefit to every HIKO customer for each period of 12 consecutive months he or she has been a HIKO customer. Once a customer reaches the 12-month eligibility period, the customer can send to HIKO the supply portion of any utility bill during the year. (HIKO St. 1 at 6).

59. HIKO does not remind customers of their eligibility for the free month of energy supply. (N.T. 164; I&E Cross Exhibit 1).
60. Only four percent of eligible customers take advantage of the offer. (N.T. 164; I&E Cross Exhibit 1).
61. HIKO's surety bond was due to the Commission in December of 2014, but was provided after March 2015. (N.T. 170, ln. 8-25 and 171, n. 1-14; Docket No. A-2012-2289944).
62. HIKO's EGS license was subject to a two-year "conditional/probation period," based on actions that the Commission's technical staff discovered in another jurisdiction. 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-2012-22289944. (I&E St. 1 at 50, ln. 18-22 and 51, ln. 1-5).
63. HIKO's failure to honor the Price Offering occurred before HIKO completed its two-year probation period. (I&E St. 1 at 51, ln. 5-6).

# **APPENDIX B**

## PROPOSED CONCLUSIONS OF LAW

1. HIKO Energy, LLC is an electric generation supplier licensed by the Pennsylvania Public Utility Commission at Docket No. A-2012-228994 to operate in the service territories of all electric distribution companies in Pennsylvania.
2. 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. § 501(c).
3. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 501.
4. The Bureau of Investigation and Enforcement bears the burden of proof in this proceeding. 66 Pa.C.S. § 332(a).
5. "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).
6. I&E has met its burden of proof in this proceeding. 66 Pa.C.S. § 332(a).
7. EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement. 52 Pa. Code § 54.4(a).

8. 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).
9. 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).
10. The Commission has promulgated a Policy Statement that sets forth ten specific factors and standards that will be considered when evaluating whether and to what extent a civil penalty for violating a Commission order, regulation or statute is warranted. 52 Pa. Code § 69.1201.
11. A civil penalty of \$1,000 per overbilling is appropriate upon consideration of the ten factors and standards. 52 Pa. Code § 69.1201(c)(1)-(10).
12. HIKO committed 14,689 violations in that HIKO overbilled customer invoices on 14,689 instances. 52 Pa. Code § 54.4(a).
13. A civil penalty of \$14,689,000, or \$1,000 for each violation, is lawful. 66 Pa.C.S. § 3301(a).

# APPENDIX C

**Main Brief of the Bureau of Investigation and Enforcement  
C-2014-2431410**

**APPENDIX C:**

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

**Duquesne**

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

**Met-Ed**

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

**PECO**

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

**Penelec**

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

**PPL**

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

**West Penn**

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

|                        |               |
|------------------------|---------------|
| <b>Combined Totals</b> | <b>14,689</b> |
|------------------------|---------------|

## 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:

Vincent E. Gentile, Esq.  
Drinker Biddle & Reath  
105 College Road East, Suite 300  
P.O. Box 627  
Princeton, NJ 08542

Motty Shulman, Esq.  
William Marsillo, Esq.  
Andrew Dressel, Esq.  
Boies, Schiller & Flexner, LLP  
333 Main Street  
Armonk, NY 10504

Ginene A. Lewis, Esq.  
Drinker Biddle & Reath  
One Logan Square, Suite 2000  
Philadelphia, PA 19103-6996  
(service by electronic mail only)

Candis A. Tunilo, Esq.  
Kristine E. Robinson, Esq.  
Office of Consumer Advocate  
555 Walnut Street, 5<sup>th</sup> Floor Forum Place  
Harrisburg, PA 17101-1923

John M. Abel, Esq.  
Nicole R. DiTomo, Esq.  
Office of Attorney General  
Bureau of Consumer Protection  
Strawberry Square, 15<sup>th</sup> Floor  
Harrisburg, PA 17120



Michael L. Swindler  
Prosecutor  
PA Attorney ID No. 43319

Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
Phone: (717) 787-5000

Dated: June 3, 2015