

Law Offices

One Logan Square, Ste. 2000
Philadelphia, PA
19103-6996

(215) 988-2700 phone
(215) 988-2757 fax
www.drinkerbiddle.com

CALIFORNIA
DELAWARE
ILLINOIS
NEW JERSEY
NEW YORK
PENNSYLVANIA
WASHINGTON D.C.
WISCONSIN

June 24, 2015

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pa. Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed for filing please find the Reply Brief of HIKO Energy, LLC ("HIKO") 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.

Respectfully,



Ginene A. Lewis

GAL
Enclosure

cc: As per Certificate of Service
Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement,

Complainant

v.

HIKO ENERGY, LLC,

Respondent

Docket No. C-2014-2431410

REPLY BRIEF OF HIKO ENERGY, LLC

Vincent E. Gentile, Esq.
Ginene A. Lewis, Esq.
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700
Facsimile: (215) 988-2757
Email: vincent.gentile@dbr.com
Email: ginene.lewis@dbr.com

Motty Shulman, Esq.
William Marsillo, Esq.
Andrew Dressel, Esq.
BOIES, SCHILLER & FLEXNER, LLP
333 Main Street
Armonk, NY 10504
Phone: (914) 749-8200
Facsimile: (914) 749-8300
Email: mshulman@bsflp.com
Email: wmarsillo@bsflp.com
Email: adressel@bsflp.com

Counsel for HIKO Energy, LLC

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE.....	1
A. INTRODUCTION	1
B. FACTUAL BACKGROUND	1
II. SUMMARY OF THE ARGUMENT	8
III. ARGUMENT	9
A. I&E Has Not Supported Its Proposed Civil Penalty Because It Has Failed to Consider or Has Not Properly Considered The Penalty Factors in 52 Pa. Code § 69.1201	9
B. I&E Failed to Meet Its Burden of Proof as to Each of the Penalty Factors	11
C. Rescission of HIKO's Authority to Do Business in Pennsylvania is Not Warranted.....	34
IV. CONCLUSION.....	36
APPENDIX A — Proposed Findings of Fact	
APPENDIX B — Proposed Conclusions of Law	

TABLE OF AUTHORITIES

Page(s)

STATUTES

66 Pa.C.S. § 308.2(b) 11

66 Pa. C.S. § 332(a) 10

RULES AND REGULATIONS

52 Pa. Code § 54.42(a)..... 34

52 Pa. Code § 69.1201 1, 9, 11, 36

52 Pa. Code § 69.1201 (3) 31

52 Pa. Code § 69.1201(8) 25

52 Pa. Code § 69.1201(c)(1) 12

52 Pa. Code § 69.1201(c)(2) 14

52 Pa. Code § 69.1201(c)(3) 17

52 Pa. Code § 69.1201(c)(4) 18

52 Pa. Code § 69.1201(c)(5) 20

52 Pa. Code § 69.1201(c)(6) 20

52 Pa. Code § 69.1201(c)(7) 23

52 Pa. Code § 69.1201(c)(9) 27, 28

CASES

Litten v. Jonathan Logan, Inc.,
286 A.2d 913 (Pa. Super. Dec. 13, 1971) 18

Lyness v. State Bd. of Med.,
605 A.2d 1204 (Pa. 1992) 11

Norfolk & Western Ry. Co. v. Pa. PUC,
413 A.2d 1037 (Pa. 1980).....10

Samuel J. Lansberry, Inc. v. Pa. PUC,
578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992).....10

COMMISSION ORDERS

Commonwealth of Pa., et al. v. Energy Services Providers, Inc. d/b/a/ Pa. Gas & Electric, Docket No. C-2014-2427656, Joint Petition for Approval of Settlement (March 24, 2015)30

Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities,
Docket No. M-00940593 (Order entered Sept. 2, 1994).....11

Final Omitted Rulemaking Order to Amend the Provisions of 52 Pa. Code Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers,
Docket No. L-2014-2409385 (entered April 3, 2014)4, 17, 21

Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations, Docket No. M-00051875 (Order entered Nov. 30, 2007).....26

In re Licensing Requirements for Elec. Generation Suppliers,
Docket No. L-00970129 (Apr. 24, 1998)34

Herp v. Respond Power LLC,
Docket No. C-2014-2413756 (Initial Decision entered Dec. 17, 2014)34

Joseph A. Rosi v. Bell Atlantic-Pa, Inc. and Sprint Communications, L.P.,
Docket No. C-00992409 (Order entered March 16, 2000).....11

Licensing Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity Generation Services as a Supplier of Retail Electric Power, Docket No. A-2012-228994 (Final Order entered July 2, 2012)2

Pa. P.U.C., Bureau of Investigation & Enforcement v. MXenergy Elec. Inc.,
Docket No. 2012-2201861 (Order entered May 3, 2012).....13

Pa. P.U.C., Bureau of Investigation and Enforcement v. Columbia Gas of Pa., Inc.,
Docket No. M-2014-2306076 (Order entered Dec. 18, 2014).....24, 25

Pa. P.U.C., Bureau of Transp. & Safety v. Blue & White USA, Inc.,
Docket No. C-2011-2244990 (Initial Decision entered Dec. 3, 2012)26

<i>Pa. P.U.C. v. Total Gas & Elec. Inc.,</i> Docket No. M-0011529 (Order entered Sept. 26, 2001)	30
<i>Pa. PUC, Bureau of Investigation & Enforcement v. Steven J. Butts,</i> Docket No. C-2012-2325083 (Order entered Sept. 12, 2013)	11
<i>Pa. PUC, Bureau of Investigation and Enforcement v. Public Power, LLC,</i> Docket No. M-2012-2257858 (Order entered Dec. 19, 2013)	29
<i>Pa. PUC, Bureau of Investigation v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric ("PaG&E"),</i> Docket No. M-2013-2325122 (Order entered June 5, 2014)	28
<i>Pa. PUC, Bureau of Investigation v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric ("PaG&E"),</i> Docket No. M-2013-2325122 (Order entered Mar. 4, 2014)	28
<i>Pa. PUC v. Gary Polzot, t/a Airport Exec. Car Serv.,</i> Docket No. C-2011-2271305 (Order entered Oct. 31, 2013)	10, 11
<i>Pa. PUC v. UGI Utilities, Inc.,</i> Docket No. M-2008-2036549 (Order entered Nov. 6, 2008)	15
<i>Pa. PUC v. UGI Utilities, Inc.,</i> Docket No. M-2009-2031571 (Order entered Jan. 14, 2010)	15
<i>Patterson v. Bell Tel. Co. of Pa.,</i> Docket No. F-8966524 (Order entered Feb. 8, 1990)	10
<i>PUC v. UGI Penn Natural Gas, Inc.,</i> Docket No. M-2013-2338981 (Order entered Sept. 26, 2013)	15
<i>PUC v. UGI Utilities, Inc.,</i> Docket No. C-2012-2295974 (Order entered Mar. 29, 2013)	15
<i>PUC v. UGI Utilities, Inc.,</i> Docket No. C-2012-2308997 (Order entered Feb. 19, 2013)	15
<i>William Towne v. Great American Power,</i> Docket No. C-2012-2307991 (Order entered Oct. 18, 2013)	13

STATEMENT OF THE CASE

A. INTRODUCTION

HIKO Energy, LLC (“HIKO” or the “Company”) submits this post-hearing brief to identify the relevant findings of fact and conclusions of law and to elaborate on the pertinent issues in this civil penalty proceeding. The sole issue before the presiding Administrative Law Judges is the appropriate civil penalty to be assessed in accordance with the standards set out in 52 Pa. Code § 69.1201. There is no dispute that HIKO issued invoices to certain customers with rates higher than certain guarantees set forth in its disclosure statement. There is also no precedent for the enormous and unprecedented civil penalties I&E seeks. What is disputed is whether HIKO’s conduct was the product of HIKO’s dire financial straits as a result of the Polar Vortex and related market anomalies, and whether the aberrational nature of those external forces and the remediation of the economic harm to HIKO’s customers through HIKO’s voluntary actions and the proposed settlement with the Office of the Consumer Advocate and Attorney General, along with the other mitigating factors introduced into evidence, warrant any civil penalty at all.

B. FACTUAL BACKGROUND

HIKO is an electric generation supplier (“EGS”) headquartered at 12 College Road in Monsey, New York. (HIKO Rebuttal Testimony of Harvey Klein at 2:8-16.¹) HIKO first began operations in New York and since then has expanded its operations into several other states, including Connecticut, New York, New Jersey, Pennsylvania, Maryland, Ohio, and Illinois. (HIKO St. 1 at 3:4-6.) Since it began operations, HIKO’s business model is to supply energy under variable rate contracts at or below the rates charged by the customer’s traditional utility. (HIKO St. 1 at 5:11-13.)

¹ HIKO’s rebuttal testimony of Harvey Klein will hereinafter be referred to as “HIKO St. 1”.

On July 2, 2012, HIKO became a licensed EGS in all electric distribution company (“EDC”) service territories within the Commonwealth of Pennsylvania. *See Licensing Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2012-228994 (Final Order entered July 2, 2012) (hereinafter referred to as “HIKO License”). Under the terms of its license, HIKO is required to officially notify the Commission 90 days prior to ceasing operations. *See Application Form for Parties Wishing to Offer, Render, Furnish, or Supply Electricity Generation Services to the Public in the Commonwealth of Pennsylvania* (hereinafter referred to as “EGS License Application”) at 13. Another condition of its license requires HIKO to maintain membership in the PJM Interconnection (“PJM”), as well as maintain a contractual arrangement with a registered PJM Load Servicing Entity to facilitate HIKO’s retail electricity services. (*See HIKO’s License at 3-4; see also EGS License Application at 11.*)

Because HIKO is a small company that does not have significant financial resources like an EDC or investor-owned utility (“IOU”), it must satisfy certain PJM collateral requirements. Specifically, PJM requires small companies like HIKO to post collateral in the form of cash collateral, letter of credit, guaranty, and/or by satisfying a PJM credit worthiness evaluation. (HIKO St. 1 at 4:1-6; HIKO Rebuttal Testimony of Charles J. Cicchetti at 28:6-15.²) During the January-March 2014 period at issue in this action, HIKO was required to post collateral with the PJM equal to the three highest consecutive weeks of total PJM bills during two semiannual time periods ending in early April and October. (HIKO St. 1 at 4:3-4; HIKO St. 2 at 28:16-29:12.)

Starting at the end of December 2012, HIKO began enrolling Pennsylvania consumers into its standard variable rate program in which the customer agreed to be billed based on a variety of factors, including wholesale market conditions at the PJM. (HIKO St. 1 at 5:11-13;

² HIKO’s rebuttal testimony of Charles J. Cicchetti will hereinafter be referred to as “HIKO St. 2”.

I&E Ex. 4 at ¶ 3.) HIKO's variable rates were at or below those of each local EDC for most months during 2013. (HIKO St. 1 at 6:3-5). Based on its research and analysis of its energy purchases over an 18 month period and its history of meeting or beating the PTC over that period, HIKO decided in August 2013 to begin offering a new variable product, which included an introductory six month billing cycle with a price guaranteed to be at least 1% - 7% (the "Price Guarantee") less than the Price to Compare ("PTC") of the customer's local utility. (HIKO St. 1 at 6:2-5; N.T. at 169:25-170:7.) Once the Price Guarantee period expired, the customer automatically would be enrolled in HIKO's standard variable rate program. (HIKO St. 1 at 5:11-21.) For customers who enrolled in the Price Guarantee up until January 2014, HIKO was able to offer a variable rate that was at least 1% below the PTC of the local utility. (HIKO St. 1 at 6:8-10; Klein Ex. 1.)

Since it has begun operations in Pennsylvania, HIKO has also provided its customers with additional savings through its "One Free Month" benefit. This benefit is offered to every HIKO customer for each period of 12 consecutive months he or she has been a HIKO customer. In other words, 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, even the highest month. Through the One Month Free benefit, HIKO has provided its customers with substantial savings, including more than \$90,000 in total One Free Month payments to gas and electric customers, with over \$80,000 of that going to electric customers. (HIKO St. 1 at 6:13-21; HIKO-Klein Ex. 2.)

It was only in the winter of 2014, when the unprecedented occurrence known as the "Polar Vortex" created a significant disruption to wholesale and retail energy prices, that HIKO began to have difficulty in keeping its prices in line with those set by the local public utilities and meeting its Price Guarantee. (HIKO St. 1 at 8:11-9:22; HIKO St. 2 at 29:13-31; I&E Direct

Testimony of Daniel J. Mumford at 8:10-12.³) Indeed, even the Commission acknowledged that, during this time period, Pennsylvania experienced an unprecedented and unanticipated period of sustained, extreme cold weather, which created “unprecedented price spikes in the wholesale electricity market.” (*Final Omitted Rulemaking Order to Amend the Provisions of 52 Pa. Code Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Docket No. L-2014-2409385 (entered April 3, 2014) (hereinafter referred to as “April 3, 2014 Final Omitted Order”) at 7; HIKO St. 2 at 11-12; I&E St. 1 at 8: 5-6; N.T. at 76:21-25.) The Commission determined that “sharp increases in [customer’s] monthly bills during the early months of 2014” were due to the “demands of the winter heating season and unprecedented price spikes in the wholesale electricity market.” (April 3, 2014 Final Omitted Order at 7.)

In addition to the abnormally cold conditions during the winter of 2014, natural gas prices in Canada increased due to an unexpected and abrupt change in the regulation of the TransCanada Pipeline (TCP). (HIKO St. 2 at 16:11-17.) A new Canadian regulatory change called Unfettered Price Discretion granted TCP the unconstrained right to bid to sell short term firm service and interruptible transportation service without any price limits. (*Id.* at 16:18-21.) This regulatory change caused sharp increases in natural gas commodity prices at natural gas hubs that were connected to the TCP, including those that served and provided natural gas to Pennsylvania. (HIKO St. 2 at 16-22.) Because the natural gas and electricity markets have significant interdependence, Pennsylvania’s increased demand and use of natural gas caused additional increases on electricity demand. (HIKO St. 2 at 15:9-16:10.) During the winter of

³ I&E’s direct testimony of Daniel J. Mumford will hereinafter be referred to as “I&E St. 1”.

2013/2014, prices for both natural gas and electricity surged to unanticipated and unexpected levels. (HIKO St. 2 at 21:19-22:2.)

PJM's operational struggles during the extremely cold winter of 2014 also contributed to the unanticipated spike in electricity prices. During January 2014, PJM reported tight operational conditions and a significantly higher number of forced generator outages due to extreme weather, mechanical problems, and natural gas market inflexibility. (HIKO St. 2 at 23:6-9.) PJM also concluded "eight of the ten highest winter demands for electricity on the PJM system occurred in January 2014" and that "January 2014 total net billings to PJM members were one-third of the entire year's total net billings in 2013." (HIKO St. 2 at 24:1-15.)

Each of these issues contributed to the unprecedented surge in electricity prices, which was felt by all EGSs and their customers in Pennsylvania. HIKO, in particular, faced severe financial difficulty in satisfying PJM's collateral calls and meeting its ongoing monthly electricity purchase requirements. HIKO had to pay nearly three times as much in January 2014 and close to twice as much for the remainder of the winter 2014 for electricity than it had been paying at wholesale during any prior period. (HIKO St. 2 at 30:12-19.) Prior to the Polar Vortex, PJM sales of electricity to HIKO were about \$0.08 per kWh. The price jumped nearly 300% to \$0.227 per kWh in January 2014 and remained at or above \$0.138 per kWh until the end of March 2014. (HIKO St. 2 at 29:16-19.) Additionally, the Company had to satisfy PJM's collateral requirements, which (as a result of the extraordinary spike in wholesale electricity prices) were doubling and tripling every week. (HIKO St. 2 at 30-32.) Had HIKO failed to satisfy PJM's increasing collateral calls, HIKO would have been banned from participating in any PJM market activities and lost all of its customers in every state in which it operated. (HIKO St. 2 at 30.) Further, HIKO's failure to satisfy its PJM requirements also would have

caused the Company to violate its EGS license requirements, which required that HIKO maintain PJM membership. (*See* HIKO's License at 3-4.)

In order to keep the company afloat, HIKO's CEO and President personally guaranteed a \$20 million loan and risked significant personal assets. (HIKO St. 1 at 9:7-12.) Larger utility providers such as EDCs and IOUs, on the other hand, were insulated from these severe financial constraints because of long term energy purchase contracts and creditworthiness. (HIKO St. 2 at 30, 35.) While HIKO passed along some of these cost increases to variable rate customers, HIKO could not have survived had it continued to honor the Price Guarantee during the aberrational months of the Polar Vortex period. (HIKO St.1 at 8-9; HIKO St. 2 at 31.) But even if HIKO had chosen to commit what amounted to financial suicide, it could not have done so easily because its EGS license required it to provide 90 days notice to the Commission. (*See* EGS License Application at 13.) And had HIKO exited the retail electric market in Pennsylvania, customers would have experienced a complicated and uncertain period in terms of billing and other services. (N.T. at 171: 24-172:1-4, 207:2-5.) While HIKO did not want to breach its Price Guarantee, faced with these options the Company essentially had no choice. (HIKO St. 1 at 8:11-9:2; HIKO St. 2 at 30:20-31:6.)

However, at the same time HIKO decided that the Polar Vortex made it impossible to meet its Price Guarantee, it also considered other ways to mitigate any potential harm to its customers and the general public which were likely to result from this business decision. Indeed, before any regulatory action was initiated, HIKO started making changes to its business practices and marketing efforts. (HIKO St. 1 at 9:13-22.) *First*, in January 2014 HIKO voluntarily stopped marketing the Price Guarantee and suspended all marketing efforts in Pennsylvania. As HIKO's CEO and President, Harvey Klein, testified, the Company was not in the business of

making promises to Pennsylvania consumers that it knew it could not keep. (HIKO St. 1 at 9:15-22.) During this period of suspended marketing, HIKO's customer base plummeted from about 10,000 to about 3,000. (HIKO St. 1 at 10:19-21; HIKO St. 2 at 36:2-4). This significant loss of customers, coupled with the growing financial burdens of staying afloat has resulted in significant financial losses to HIKO. (N.T. 214:9-32.)

Second, HIKO hired additional people to handle the enormous volume of customer complaints, bringing on new customer service representatives and enlisting a call center based in Florida to help the Company respond to customers. (HIKO St. 1 at 12:1-4; N.T. 168:13-16.)

Third, as early as February 2014, HIKO voluntarily started issuing refunds to Price Guarantee customers who were billed more than the relevant PTC. (HIKO St. 1 at 12:19-21.) To date, HIKO has paid out approximately \$160,000 to Pennsylvania customers (HIKO St. 1 at 13:7-8.) More important, as Harvey Klein testified, HIKO intends to make full restitution to all of its Pennsylvania customers for when it did not satisfy the Price Guarantee. (HIKO St. 1 at 13:11-14.)

Fourth, HIKO has instituted changes to its energy purchasing program and now purchases some energy under long term contracts, hedging against sudden wholesale price increases, especially during the winter months. (N.T. 167:5-10). By hedging its purchase program, and thereby putting additional safeguards in place, HIKO is better prepared for another Polar Vortex-type of event should it ever occur in the future. (*Id.*)

On March 31, 2014, I&E initiated an informal investigation of HIKO as a result of customer complaints received by the Pennsylvania Public Utility Commission's Bureau of Consumer Services ("BCS") related to allegations that HIKO billed rates that were higher than the rates promised by the Company. (I&E St. 1 at 8:21-10:8.) I&E's investigation included

service of three sets of data requests and a review of HIKO's responses. (I&E St. 1 at 9:14-18.) I&E admits that HIKO promptly responded to I&E's data requests during the informal investigation, and that HIKO fully cooperated with I&E's investigation. (I&E St.1 at 51:10-11; N.T. at 96:12-97:1.)

On July 11, 2014, I&E filed a Complaint against HIKO, alleging that HIKO overbilled 14,780 customer accounts and proposing a maximum penalty of \$1,000 for each of the alleged 14,780 overcharges for a total civil penalty of \$14,780,000. (I&E St. 1 at 12:20, 21:18-21.) HIKO also requested that the Commission rescind HIKO's license to do business as an EGS in Pennsylvania and direct HIKO to provide refunds to each Price Guarantee customer that billed over the Price to Compare. (I&E Compl. ¶¶ 130-131.) After HIKO pointed out that I&E's penalty calculation included invoices for which there was zero electric consumption (HIKO St. 2 at 42:10-17), I&E subsequently removed 68 accounts from its penalty calculation, bringing the amended proposed penalty to \$14,689,000. (I&E Surrebuttal Testimony of Mr. Mumford at 22:9-17⁴; N.T. 38: 7.)

I&E admits that all of the customer complaints against HIKO that provide the sole basis of its Complaint involve customer bills that were received during the Polar Vortex. (I&E St. 1 at 8:10-12.) I&E is not aware of any complaint from HIKO customers involving HIKO's services before or after the Polar Vortex. (I&E St.1 at 8:10-12; N.T. at 95:1-12).

SUMMARY OF ARGUMENT

In proposing that the presiding Administrative Law Judges ("ALJs") impose one of the largest — if not the largest — civil penalties assessed by the Commission against an EGS (or, indeed, any company), I&E offers no support for why such a penalty is both just and in the public interest. Instead, I&E (through the only witness who supports its position — Daniel J.

⁴ I&E's surrebuttal testimony of Mr. Mumford will hereinafter be referred to as "I&E St. 1-SR".

Mumford) suggests that the ALJs disregard the many mitigating circumstances surrounding HIKO's failure to honor its Price Guarantee and employ an oversimplified and myopic assessment of the Company's alleged violations based on a single source of information — the customer invoice data originally furnished by HIKO before the Complaint was filed. (N.T. at 50:25-51:1.) Contrary to the Commission's standards in 52 Pa. Code § 69.1201, I&E argues that the ALJs should impose a civil penalty that neither considers nor reflects the following: (a) that HIKO's alleged violations occurred during an aberrational period marked by an unprecedented and unanticipated spike in energy prices due to the Polar Vortex and regulatory changes in Canada; (b) HIKO's financially crippling PJM requirements which were doubling and tripling every few weeks; (c) HIKO's efforts to mitigate the harm to its customers, such as providing refunds, increasing its investment in customer service needs due to high call volumes, and continuing to offer substantial savings through its One Free Month benefit; (d) HIKO's compliance history and cooperative efforts during I&E's informal investigation and this complaint proceeding; and (d) Commission precedent, including recent Commission decisions approving significantly lower civil penalties against regulated companies for alleged misconduct that the Commission has considered to be more egregious and detrimental to public safety.

In light of these mitigating factors, which must be properly considered before approving a civil penalty pursuant to 52 Pa. Code § 69.1201, the ALJs should reject I&E's recommended penalty and impose no penalty at all, or at most, no more than a minimal penalty.

ARGUMENT

A. I&E Has Not Supported Its Proposed Civil Penalty Because It Has Failed to Consider or Has Not Properly Considered The Penalty Factors in 52 Pa. Code § 69.1201

As the complainant in this proceeding, I&E bears the burden of proof. 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy this burden, I&E must show that HIKO is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Tel. Co. of Pa.*, Docket No. F-8966524 (Order entered Feb. 8, 1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). Additionally, the Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).

Coupled with the burden of proving that HIKO is responsible for the alleged misconduct described in the Complaint, I&E must also present evidence to support the relief it seeks. *See Pa. PUC v. Gary Polzot, t/a Airport Exec. Car Serv.*, Docket No. C-2011-2271305 (Order entered Oct. 31, 2013) (finding that I&E did not meet its burden where it "did not present evidence concerning the civil penalty amount that should be imposed in this case or any testimonial or documentary evidence regarding the factors set forth in [the Commission's] Policy Statement."). Where the relief sought is a civil penalty for violations of the Commission's directives and regulations, I&E must present evidence regarding each of the following factors:

1. Whether the conduct at issue was of a serious nature;
2. Whether the resulting consequences of the conduct at issue were of a serious nature;
3. Whether the conduct at issue was deemed intentional or negligent;

4. Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future;
5. The number of customers affected and the duration of the violation;
6. The compliance history of the regulated entity which committed the violation;
7. Whether the regulated entity cooperated with the Commission's investigation;
8. The amount of the civil penalty or fine necessary to deter future violations;
9. Past Commission decisions in similar situations; and
10. Other relevant factors.

See 52 Pa. Code § 69.1201 (hereinafter referred to as the “Penalty Factors”); *see also Joseph A. Rosi v. Bell Atlantic-Pa, Inc. and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000). In evaluating these factors, the presiding ALJ may take judicial notice of a material fact not appearing in the record and/or rely solely on the evidence that the parties present during the hearing. *Polzot Order at 8.*

The Commission has indicated that litigated proceedings handled by the Office of Administrative Law Judge must address these same factors, and has remanded cases where the analysis of these factors did not take place. *See Pa. PUC, Bureau of Investigation & Enforcement v. Steven J. Butts*, Docket No. C-2012-2325083 (Order entered Sept. 12, 2013).⁵

⁵ The Commission has explained that this requirement is consistent with the need to ensure that there are appropriate “walls of division” between its prosecutory and adjudicatory arms and its prohibition on the commingling of functions. *See* 66 Pa.C.S. § 308.2(b); *Lyness v. State Bd. of Med.*, 605 A.2d 1204(Pa. 1992); *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered Sept. 2, 1994).

B. I&E Failed to Meet Its Burden of Proof as to Each of the Penalty Factors

Here, I&E requests that the ALJs impose an unprecedented civil penalty of \$14,689,000 against HIKO for its failure to honor the Price Guarantee. Contrary to the Commission's mandate, I&E did not consider the many mitigating circumstances surrounding HIKO's alleged violation, including the unexpected period of sustained, extreme cold weather during the winter of 2014 which created unprecedented spikes in the wholesale electricity market and caused HIKO to face severe financial constraints that nearly put the Company out of business. A review of each of the Penalty Factors demonstrates that this draconian civil penalty is unreasonable and excessive on its face.

1. Factor One — The Nature of HIKO's Conduct

The first factor to be considered under the Policy Statement is whether the alleged actions were of a serious nature, such as willful fraud or misrepresentation, or were merely administrative or technical errors. 52 Pa. Code § 69.1201(c)(1). The Commission explains that "conduct of a serious nature . . . such as willful fraud or misrepresentation" warrants a higher penalty; and that "less egregious conduct, *such as* administrative filing or technical errors" warrant a lower penalty. *Id.* (emphasis added).

HIKO does not dispute the seriousness of its failure to honor the Price Guarantee. However, I&E's \$1,000 per violation civil penalty is not supported by recent Commission decisions and entirely unreasonable given the extenuating circumstances here. Indeed, I&E fails to cite to a single case in which the Commission approved a maximum civil penalty of \$1,000 per violation where the licensed entity was faced with an unprecedented and unanticipated occurrence such as the Polar Vortex. Nor does the penalty policy exclude such considerations. The Commission gave only two examples of what could constitute "less egregious conduct"

(administrative filing or technical errors). Clearly, HIKO's conduct was not "willful fraud or misrepresentation," particularly in view of its consistent practice of meeting the Price Guarantee in the months prior to the Polar Vortex, and then promptly suspending its marketing of the Price Guarantee once the Polar Vortex hit.

Moreover, the cases I&E relies upon are clearly distinguishable from the instant matter. In *Pa. P.U.C., Bureau of Investigation & Enforcement v. MXenergy Elec. Inc.*, Docket No. 2012-2201861 (Order entered May 3, 2012), the Commission approved a \$1,000 per violation civil penalty against MXenergy for allegedly switching, or "slamming," 22 consumers to its generation service without the consumers' consent. *MXenergy* Order at 2. I&E initiated an informal investigation of MXenergy after learning of a federal lawsuit involving allegations against the company for engaging in slamming "with the intent to confuse and deceive" consumers. *Id.* Hence, the allegations against MXenergy involved premeditated intent to deceive customers into enrolling into its service. Here, at the time HIKO enrolled Pennsylvania consumers into the Price Guarantee program and up until the Polar Vortex, HIKO honored its promise. In other words, unlike in *MXenergy*, HIKO did not have any premeditated intent to defraud consumers. Indeed, Mr. Mumford testified that "almost all of the HIKO customers who filed complaints with BCS during the time period in question were complaining about bills they had received in the wake of the polar vortex." (I&E St.1 at 8:10-12.)

I&E's reliance on the Commission's settlement approval in *William Towne v. Great American Power*, Docket No. C-2012-2307991 (Order entered Oct. 18, 2013), is similarly misplaced. That case was brought by an individual complainant who alleged that Great American Power engaged in aggressive telemarketing and enrollment practices, including slamming. *Towne* Order at 2. Again, the allegations at issue here do not involve any attempt by

HIKO to deceive and confuse consumers into enrolling into its services or to slam them. Not only did HIKO honor the Price Guarantee before the Polar Vortex but it voluntarily ceased its marketing efforts in January 2014 when it recognized that the Polar Vortex made it impossible to honor the Price Guarantee. The irrefutable evidence shows that HIKO did not intend to make false promises to consumers.

Yet, I&E argues that HIKO's conduct was egregious because it chose economic survival rather than decide to honor the Price Guarantee and risk the collapse of its entire business. (I&E St.1-SR at 15:1-7; N.T. at 79:1-8.) I&E offers no support for this unreasonable position. Moreover, prior to HIKO's rebuttal testimony, I&E did not even bother to consider or inquire about the dire financial straits HIKO faced, or the market disruption caused by the Polar Vortex, or even the condition in HIKO's license requiring 90 days notice before ceasing to do business (which meant that HIKO would have violated the Commission's rules even if it had done as Mr. Mumford suggests).

2. Factor Two – The Consequences of HIKO's Conduct

The second factor to be considered under the Policy Statement is whether the resulting consequences of the actions were of a serious nature. 52 Pa. Code § 69.1201(c)(2). The Commission describes "consequences of a serious nature" as including personal injury or property damage. *Id.*

Contrary to I&E's contention, HIKO does not argue that only matters involving death or destruction of property warrant a maximum civil penalty. (I&E Closing Br. at 26.) HIKO only contends that had I&E done the most minimal research to confirm the appropriateness of its \$14,689,000 penalty demand, it would have known that the Commission has never approved

such an enormous civil penalty even where egregious conduct has resulted in death, personal injuries, and substantial property damage.

For example, even after repeated violations of gas safety regulations spanning the course of nearly five years, with consequences that included many deaths and substantial property damage, the largest civil penalty imposed on UGI Utilities, Inc. (“UGI”) was only \$1,000,000. *See PUC v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order entered Sept. 26, 2013) (noting that “UGI’s conduct placed the public safety at great risk” and its “compliance history [was] indicative of a pattern of allegations regarding gas safety violations.”). Tellingly, the Commission imposed civil penalties that escalated with each successive incident, starting with a \$40,000 payment into the Operation Share Hardship Fund in 2008 to settle a 2006 explosion that destroyed a single home. *See Pa. PUC v. UGI Utilities, Inc.*, Docket No. M-2008-2036549 (Order entered Nov. 6, 2008). In 2010, the Commission approved a settlement between UGI and I&E for an \$80,000 civil penalty, in addition to an \$80,000 payment into the Low Income Usage Reduction Program, for a 2006 explosion that destroyed four homes and resulted in one personal injury. *See Pa. PUC v. UGI Utilities, Inc.*, Docket No. M-2009-2031571 (Order entered Jan. 14, 2010). Three years later, UGI settled two additional cases, one resulting in five deaths and both causing substantial property damage, for \$500,000 and \$200,000, respectively. *See PUC v. UGI Utilities, Inc.*, Docket No. C-2012-2308997 (Order entered Feb. 19, 2013) (civil penalty of \$500,000); *PUC v. UGI Utilities, Inc.*, Docket No. C-2012-2295974, (Order entered Mar. 29, 2013) (civil penalty of \$200,000). Reflecting its sense of how the Penalty Factors should apply in such circumstances, I&E recommended a settlement that included a \$386,000 civil penalty for the explosion that killed five people, a civil penalty that the Commission rejected, explaining: “There is no question that the consequences in this matter are tragic and of a

serious nature.” *UGI* Order, dated February 19, 2013, at 30. Compared to HIKO, UGI is a much larger, publicly held company with annual revenues of nearly \$8.3 billion, which could readily absorb a \$500,000 civil penalty.⁶

Certainly, there is no comparison between UGI’s repeated gas safety violations leading to multiple deaths, serious personal injuries and millions of dollars in property damage and HIKO’s overbilling of customers during, and as a result of, an extraordinary and unforeseeable complex of conditions brought about by the Polar Vortex. Mr. Mumford was forced to concede: “Well, of course, someone dying is a more serious matter than someone being overcharged on an electric bill.” (N.T. at 55:3-4.) Yet, neither he nor I&E considered Commission precedent and I&E’s own prior recommendations in those more serious circumstances before coming up with the excessive penalty that I&E now proposes.

Even more disturbing is the admission that I&E came up with its proposed civil penalty before considering *any* prior civil penalty amounts approved by the Commission in any other circumstances. On cross-examination, Mr. Mumford admitted that he did not know the highest penalty assessed by I&E or the Commission against a company, (N.T. at 52:11-13), and that, even after I&E filed its Complaint and he became aware of certain mitigating information, such as HIKO’s refund efforts, he did not re-evaluate the basis for I&E’s nearly \$15 million penalty, (N.T. at 58:11-20). I&E’s mechanical approach (simply multiplying \$1,000 times the number of HIKO bills to guarantee customers containing a rate more than 99% of the PTC) grossly overstates the seriousness of the financial harm to HIKO’s customers. Indeed, I&E would impose the identical maximum civil penalty of \$1,000 on every overbilled invoice, irrespective

⁶ Thus, two years ago I&E took the position that a course of non-compliance and regulatory violations by a significantly larger company that threatened public safety and culminated in an incident that killed five people merited only a \$386,000 civil penalty. It cannot explain why it believes that HIKO’s conduct deserves a civil penalty that is 38 times greater.

of the amount charged. In other words, invoices for less than \$25 would still be subject to a \$1,000 civil penalty. Given that the average overcharge to each customer account was only \$124, this proposed penalty calculation is entirely unwarranted. Viewed in the context of the much lower civil penalties imposed upon UGI for its much more egregious violations that caused much more serious harms, I&E's proposed penalty is absurdly disproportionate.

3. Factor Three — Whether HIKO's Conduct Was Intentional

The third factor to be considered under the Policy Statement is whether the alleged conduct was intentional or negligent. 52 Pa. Code § 69.1201(c)(3).

HIKO admits that it breached its Price Guarantee during January 2014 through April 2014. However, the basis for I&E's unprecedented penalty cannot rest on this breach alone, especially where the Commission's Penalty Factors require the presiding ALJs to consider mitigating circumstances, such as the unanticipated Polar Vortex and HIKO's track record of honoring the Price Guarantee prior to this time period. Here, I&E is requesting that the presiding ALJs impose the largest civil penalty ever assessed by the Commission against an EGS for an act that did not involve a crime or fraud. HIKO's inability to honor its Price Guarantee resulted from outside circumstances that even the Commission characterized as "unprecedented" and "unforeseeable." (April 3, 2014 Final Omitted Order at 7, 22.)

Moreover, during this same time HIKO struggled with maintaining its responsibilities to its customers, the Commission, and the PJM, and other Pennsylvania regulatory and governmental agencies also grappled with the market anomalies and overwhelming consumer complaints regarding energy service. The economic duress facing HIKO should be considered in judging HIKO's culpability. Mr. Klein testified that HIKO's Price Guarantee offering was not intended to defraud consumers and, indeed, the record shows that HIKO met its promises until

the Polar Vortex essentially forced it to breach those promises. (HIKO St. 1 at 8:11-9:1-2.) That is surely not “premeditation” as Mr. Mumford himself recognized. (I&E St. 1-SR at 17:1-3.) In these circumstances, HIKO’s “intent” is more akin to a company who is compelled by economic duress or business compulsion to take some action it would not have ordinarily taken when faced with the threat of serious financial loss. *See generally Litten v. Jonathan Logan, Inc.*, 286 A.2d 913, 917 (Pa. Super. Dec. 13, 1971) (explaining that a “threat of financial loss,” including the threat of bankruptcy or loss of business, may be sufficient to constitute economic duress.)

Further, at the time HIKO marketed the Price Guarantee and enrolled customers into the program, it fully intended to meet its contractual promise. (HIKO St. 1 at 8:1-3; N.T. at 165:11-13.) And, though HIKO acknowledges that it was unable to fulfill the Promise Guarantee during the Polar Vortex period, it still intended to provide customers with substantial savings through the One Free Month program. Indeed, HIKO customers received the One Free Month benefit even during the Polar Vortex period. (HIKO St. 1 at 6:13-21; HIKO-Klein Ex. 2.)

4. Factor Four – HIKO’s Efforts to Modify Practices

The fourth factor to be considered under the Policy Statement is whether HIKO made efforts to change its practices and procedures to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). These modifications may include activities such as training and improving company techniques and supervision, as well as the amount of time it took the company to correct the conduct once it was discovered and the involvement of top-level management in addressing this issue. *Id.*

In its Closing Brief, I&E disregards concrete examples of HIKO’s remediation efforts. Instead, the Bureau disingenuously states that “there was absolutely *no* attempt by HIKO to modify its internal practices and procedures to address the conduct at issue.” (I&E Closing Br. at

31.) (emphasis in original). Yet again, I&E is simply proposing that the ALJs disregard uncontradicted record evidence that undermines I&E's penalty demand. The record demonstrates that HIKO has made substantial changes to its practices and procedures to ensure that it is able to deal with certain financial constraints and market exposure should another unforeseeable event such as the Polar Vortex occur in the future.

First, as soon as HIKO recognized that it was unable to honor the Price Guarantee, it voluntarily ceased marketing efforts in Pennsylvania. This business decision was made in January 2014, well before any regulatory agency (including I&E) initiated any investigation or formal action against HIKO, and has resulted in significant financial hardship given that its customer base has dropped by 70%. Second, even when HIKO decided that it was unable to honor the Price Guarantee; it remained committed to addressing its customers' concerns. To date, HIKO has provided over \$160,000 in refunds to its Pennsylvania customers, including over \$117,000 to customers in the Price Guarantee program. HIKO also increased the number of customer service representatives to handle the volume of customer calls. Third, HIKO has instituted changes to its energy purchasing program and now purchases some energy under long term contracts, hedging against sudden wholesale price increases especially during the winter months. Fourth, HIKO has entered into a settlement agreement with Pennsylvania's Office of the Consumer Advocate ("OCA") and Office of Attorney General ("OAG"), which provides for full restitution to guarantee customers between January and March 2014, substantial restitution to variable rate customers in the same time period, payment into the EDC Hardship Funds, further suspension of customer enrollment, and substantial changes to its operations and marketing that will provide further protections to Pennsylvania consumers. In a gross abdication of its duty to apply the Penalty Factors, I&E failed to consider any of these circumstances.

5. Factor Five – Customers Affected and the Duration of HIKO’s Conduct

The fifth factor to be considered under the Policy Statement relates to the number of customers affected by the Company’s actions and the duration of its violations. 52 Pa. Code § 69.1201(c)(5).

I&E does not offer any evidence on the number of customers affected, arguing that this number does not matter. Yet, I&E fails to offer any legal support for this proposition.

Moreover, simply basing HIKO’s penalty on the total number of overcharged invoices ignores the fact that more than 70% of these overcharges were less than \$100. (HIKO St. 2 at 47:4-5.)

I&E also fails to address the fact that HIKO’s alleged violation occurred during a short, four month period which Mr. Mumford described as “an extended period of cold weather” and “unprecedented spikes in the price of electricity.” (I&E St. 1 at 8:5-6.) Notably, this four month period affected not only impact HIKO and its customers but the entire state of Pennsylvania. Variable rate customers throughout the state experienced sharp increases in their electricity bills and EGSs struggled to stay afloat with the increased costs in the wholesale market. In the midst of it all, HIKO remained committed to mitigating its financial constraints and meeting customers’ needs by providing over \$160,000 in refunds, ceasing marketing efforts given its financial difficulties, and changing its internal business practices to shield against market disruptions in the future.

6. Factor Six – HIKO’s Compliance History

The sixth factor to be considered is the company’s compliance history. 52 Pa. Code § 69.1201(c)(6). Where the conduct alleged is an isolated incident from an otherwise compliant company, as opposed to frequent and recurrent, a lower penalty is warranted. *Id.*

This case involves an isolated incident that occurred during a time when HIKO was financially constrained by unusually high electricity prices and growing PJM collateral requirements. Even the Commission acknowledged the unusual circumstances during this particular time period when explaining that the sharp increases in customers' monthly bills during the early months of 2014 stemmed from the "demands of the winter heating season and unprecedented price spikes in the wholesale electricity market." (April 3, 2014 Final Omitted Order at 7; *see also Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Joint Motion of Vice Chairman John H. Coleman, Jr. and Commissioner James H. Cawley, Docket No. 2406134-CMR (dated Feb. 20, 2014) (noting that Pennsylvania consumers' high electricity bills reflected "wholesale energy market volatility resulting from the very cold weather that the region has endured over the last two months.").)

Like HIKO, the Commission was not prepared for the market anomalies resulting from this abnormally cold winter and, in turn, had to re-evaluate and strengthen its existing directives and regulations to protect the Pennsylvania market against similar instances should they ever occur in the future. (See April 3, 2014 Final Omitted Order at 6 (stating that, in light of sharp price increases resulting from price fluctuations in the wholesale and retail electricity markets, it was necessary that the Commission strengthen its existing guidelines concerning customer disclosure statements and codify these changes as expeditiously as possible).) Hence, HIKO's alleged violations occurred at a time when an entire region was grappling with unprecedented issues that it was not prepared to handle and had no immediate solution to offer. To keep its business from crumbling, HIKO was forced to act with haste and uncertainty, ultimately deciding to stay in business and forego the Price Guarantee until its financial calamities passed. However, even during this difficult time, HIKO strived to meet its customers' needs as best as

possible by providing refunds to customers who were promised the Price Guarantee, hiring additional staff to address the overwhelming number of customer complaints, and strengthening its business practices to protect the company against similar events in the future.

Again, ignoring any evidence that explains why HIKO was unable to honor its Price Guarantee, I&E suggests that a higher penalty is warranted since HIKO's alleged violation occurred while its license was still within a conditional/probation period. This point is unpersuasive. The record evidence overwhelmingly demonstrates that HIKO had no control over the events that ultimately led to its dire circumstance. Hence, it is only by happenstance that HIKO's alleged violation occurred while its license was still in conditional status. For much of the year prior to the Polar Vortex, HIKO was able to meet its Price Guarantee. Moreover, I&E is not aware of any complaint from HIKO customers concerning HIKO's service before or after the Polar Vortex. Mr. Mumford also testified that the alleged failure to meet the Price Guarantee by overbilling customer accounts was the first known violation by HIKO in Pennsylvania. HIKO's positive compliance history compares favorably to repeat offenders like PaG&E and UGI, which have paid civil penalties of \$500,000 or less for more egregious violations.

Without question, these facts do not support the higher penalty which the Commission reserves for recurrent and frequent violations. The alleged violation at issue here was HIKO's decision to breach the Price Guarantee. The fact that this single decision ultimately impacted thousands of HIKO customers does not make HIKO's alleged violation frequent and recurrent. HIKO did not engage in a pattern or practice of overbilling customers, but rather made a single business decision to discontinue a particular contractual commitment that became impossible for the Company to maintain. Indeed, HIKO's track record demonstrates that it actually had a

pattern or practice of honoring its Price Guarantee and, but for the unprecedented and unanticipated market anomalies stemming from the Polar Vortex, it still would have been able to offer its customers this benefit.

As a final point, I&E's attempt to now point to HIKO's inadvertent failure to comply with its surety bond requirements is unavailing. First, until now, I&E never considered HIKO's surety bond requirements when evaluating the appropriate relief for the conduct alleged in its Complaint. The only sources of information considered when coming up with I&E's proposed civil penalty was customer data sheets. (N.T. at 50:25-51:3.) Moreover, Mr. Mumford indicated that he was not aware of any negative incidents in HIKO's compliance background. (N.T. at 96:9.) To now suggest that HIKO's inadvertent failure to file its surety bond by the required deadline supports its excessive penalty is absurd. I&E should not be able to support an unprecedented civil penalty by pointing to information it never considered when reaching its penalty determination. Second, HIKO's failure to comply with its surety bond requirements was due to an oversight and was promptly rectified without prejudice to the Commission and consumers. (N.T. at 171:3-17.) The Commission did not initiate any disciplinary action against HIKO for this inadvertent failure, I&E did not raise it as a compliance issue, and Mr. Mumford did not even mention it in his testimony. The temporary and inadvertent surety bond oversight thus has no bearing on the civil penalty.

7. Factor Seven – HIKO's Cooperation with Investigation

The seventh factor to consider is whether the regulated entity cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty. *Id.*

Here, it is undisputed that HIKO fully cooperated with I&E. HIKO promptly complied with I&E's multiple document requests during the informal investigation. HIKO also provided I&E with information both formally and informally during this litigation and settlement efforts in a parallel proceeding initiated by OAG and OCA. *Commonwealth of Pa, et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652, Joint Petition for Approval of Settlement (May 1, 2015). Beyond its cooperative efforts with I&E, HIKO is actively committed to improving its business operations and satisfying its contractual commitments. Before I&E initiated its informal investigation and filed the instant Complaint, HIKO provided refunds to customers enrolled in the Price Guarantee program and hired additional staff to assist with customer service. Despite its efforts to address the alleged conduct and avoid similar incidents in the future, I&E contends that HIKO's cooperative efforts merit no consideration. (I&E Closing Br. at 34.)

Interestingly, I&E relies on a recent Commission Opinion and Order concerning a proposed settlement between I&E and Columbia Gas of Pennsylvania, Inc. ("Columbia Gas") to suggest that HIKO's alleged conduct was so egregious that "mere cooperation" with the Bureau is not enough to mitigate HIKO's conduct. (I&E Closing Br. at 34) But this recent settlement with Columbia Gas involved alleged violations of gas safety regulations, similar to the UGI cases previously discussed, and events that presented grave risks to public safety. *See Pa. P.U.C., Bureau of Investigation and Enforcement v. Columbia Gas of Pa., Inc.*, Docket No. M-2014-2306076 (Order entered Dec. 18, 2014). In deciding that Columbia Gas' cooperative efforts did not mitigate its failure to comply with gas safety laws, the Commission explained, "The conduct investigated by I&E involves multiple incidents, including valve inspection procedures, excessive pipeline pressures and related Company protocols, excavation damage and related Company response protocols, and lack of pressure regulation devices . . . as a

consequence of the actions of Columbia Gas and its Contractor, the public was put at greater risk of injury.” *Columbia Gas* Order at 14. Hence, the Commission’s decision to discount or entirely disregard Columbia Gas’ cooperative efforts was due to the grave nature of its conduct, which put the public at risk of serious injury. Moreover, I&E proposed a civil penalty of only \$110,000 for Columbia Gas’ recurrent violations of gas safety regulations that threatened public safety. When this civil penalty was denied by the Commission as insufficient and amended to \$200,000, I&E subsequently filed an appeal to reduce the penalty back down to \$110,000, arguing, among other things, that the regulated entity’s conduct did not rise to a level that would justify an increased civil penalty. *Id.* at 10. I&E’s proposed civil penalty in this case cannot be reconciled with I&E’s position in more egregious cases.

8. Factor Eight – Whether Deterrence Is Appropriate and Necessary

The eighth factor to be considered is whether the proposed civil penalty is “*necessary* to deter future violations.” 52 Pa. Code § 69.1201(8) (emphasis added). The Commission’s Policy Statement further provides that “[t]he size of the utility may be considered to determine an *appropriate* penalty amount.” *Id.* (emphasis added). Hence, this factor focuses on whether the proposed civil penalty is both necessary and appropriate. I&E has failed to meet its burden on either element.

First, an appropriate civil penalty must bear some relationship to the violating entity’s ability to pay. In its Final Policy Statement regarding the civil penalty factors, the Commission concurred with OCA’s comment “that in determining whether a penalty will have a sufficient deterrent effect, review of the size of the utility, as measured by the utility’s annual revenues, may be relevant. A fine that may seem like a rounding error for a major electric or telecommunications company may be significant enough to deter a small water or sewer

company.” *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No. M-00051875 (Order entered Nov. 30, 2007). Likewise, a civil penalty that may appropriately deter a publicly-traded and financially resourceful EDC may cause a much smaller company, such as HIKO, to go bankrupt. Mr. Mumford admitted he did not consider HIKO’s size or revenues in setting the penalty (N.T. at 100:24 -101:2.). In fact, Mr. Mumford did not even know what HIKO’s revenues were and made no attempt to find out. (N.T. at 101:1-4.) The appropriate penalty for HIKO must be viewed in light of the civil penalties that I&E and the Commission have deemed appropriate for much larger EDCs (like UGI) for more egregious conduct resulting in more serious consequences. Against those precedents, HIKO deserves at most a minimal penalty.⁷

Second, an appropriate civil penalty is one that is actually necessary to deter the regulated company from repeating its bad behavior. Deterrence is not a significant factor when there is no evidence that the violator is a habitual offender or lacks the ability and intent to comply with Commission regulations. *See Pa. P.U.C., Bureau of Transp. & Safety v. Blue & White USA, Inc.*, Docket No. C-2011-2244990 (Initial Decision entered Dec. 3, 2012) at 7 (giving minimal weight to the deterrence factor where the violating entity “has been made aware of the Commission’s regulatory requirements, has a good compliance history, and exercised good faith in rectifying the violation.”). The fact that HIKO’s alleged misconduct occurred during the aberrational months of the Polar Vortex cannot be ignored when deciding whether a civil penalty is necessary and appropriate. I&E does not offer any evidence suggesting that HIKO engaged in any misconduct before or after the Polar Vortex nor does it refute HIKO’s evidence demonstrating its efforts to rectify the violation as early as January 2014 when voluntarily

⁷ By way of comparison, the \$500,000 civil penalty assessed against UGI after its repeated public safety violations leading to the explosion that killed five people and destroyed substantial property represents 0.006% of its 2014 revenues.

suspending its marketing efforts in Pennsylvania. Thus, it does not appear that a civil penalty is needed at all to deter HIKO from committing future violations.

Third, an appropriate civil penalty reflects collateral consequences, also having deterrent value, which result from the violating entity's action. Mr. Mumford agreed that the commencement of an enforcement action, loss of customers and potential revenues, and payment of refunds to customers would have a deterrent effect on a regulated company. (N.T. at 101:21-103:9, 104:2.) Yet, while Mr. Mumford refused to consider these additional factors, the significant financial burden HIKO has already suffered is more than enough to deter the company from engaging in the same conduct. HIKO has lost approximately 70% of its customers since voluntarily suspending its marketing efforts, endured market stigma related to its failed contractual commitment, and paid out significant attorney's fees in defending against multiple regulatory proceedings and related class actions stemming from the same underlying conduct. Further, by virtue of its pending settlement with the OAG and OCA in a parallel proceeding, HIKO will also incur increased levels of expenses through operational and marketing changes to its business, administration and settlement costs, and payment to a hardship fund. HIKO also intends to make full restitution to all of its Pennsylvania customers. Accordingly, an additional civil penalty is neither appropriate nor necessary given these substantial costs to HIKO's business.

9. Factor Nine - Past Commission Decisions

Notwithstanding the Policy Statement's instruction to consider past Commission decisions in similar matters (52 Pa. Code § 69.1201(c)(9)), I&E failed to do any research, consult any authority or review any prior Commission decision. (N.T. at 50:25-51:3; 124:13-125:9; 125:10.) Mr. Mumford did not know of any other civil penalty against any entity comparable in

size to the nearly \$15 million it seeks from HIKO. (N.T. at 52:1-4; 125:10-13.) He stated only that he was unaware of any decisions or orders entered by the Commission regarding a similar number of customers and invoices in excess of the price disclosure. (*Id.*) Recent Commission decisions involving “egregious” conduct, which should have been considered by Mr. Mumford, show that I&E’s proposed penalty has no basis.

For example, in *Pa. PUC, Bureau of Investigation v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric* (“PaG&E”), Docket No. M-2013-2325122 (Order entered June 5, 2014), the Commission approved a \$150,200 civil penalty for slamming allegations among the “most egregious” ever investigated by I&E. *PaG&E* Order, dated June 5, 2014, at 3, n.2. While this matter was settled, the Commission found that had I&E “litigated this matter, it would have alleged that an agent of PaG&E, along with an accomplice who falsified verifications, attempted to illegally switch 319 accounts.” *Id.* at 4. In its closing brief, I&E attempts to distinguish the PaG&E case from the instant matter by oversimplifying the alleged misconduct as stemming from the actions of “a single, telephone sales representative (TSR), acting beyond the scope of his authority and in contravention to controls put in place by the company.” (I&E Closing Br. at 39). According to I&E, because HIKO’s conduct was committed at the Company’s executive level, the *PaG&E* case is not relevant. But I&E’s earlier attempt to discount PaG&E’s accountability was rejected by the Commission. In evaluating the seriousness of PaG&E’s conduct, the Commission explained, “we acknowledge[] that any supplier could be the victim of a rogue employee or agent. However, we stated that the apparent lack of any internal controls in place to prevent the alleged volume of slamming incidents was troubling.” *Pa. PUC, Bureau of Investigation v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric* (“PaG&E”), Docket No. M-2013-2325122 (Order entered Mar. 4, 2014) at 7.

In another slamming case, the Commission approved a civil penalty of \$64,450 against an EGS for switching thousands of Pennsylvania customers without prior authorization. *Pa. PUC, Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Order entered Dec. 19, 2013). Again, trying to distinguish similarly egregious conduct from the allegations at issue here, I&E argues that the *Public Power* case involved the transmission by a third-party vendor of “mistaken” enrollments. (I&E Closing Br. at 38 (emphasis in the original).) I&E goes so far as to state that HIKO’s counsel mischaracterized the facts of *Public Power* when asking Mr. Mumford whether he knew that this case involved the “deliberate falsification of documents” where a third-party marketer “conspired with someone else to slam almost 2,400 customers.” (N.T. at 66:12-14; 67:20-21.) But even the Commission describes the *Public Power* case as a “matter involve[ing] fraudulent, deceptive acts involving a third party vendor representing Public Power, resulting in enrollments to change the EGS of a number of customers in PECO’s service territory without the customer’s authorization. The result was the initiation of the process of switching the EGS on 2,397 customer accounts without proper authorization.” *Public Power* Order at 8.

Thus, these decisions involving allegations of highly egregious, willful, and flagrant conduct affecting hundreds and even thousands of consumers should have guided I&E when evaluating whether a \$14,689,000 civil penalty was reasonable and appropriate. Mr. Mumford’s reluctance to say that slamming was conduct more egregious than HIKO’s overbilling demonstrated the weakness of I&E’s premise for its proposed penalty. (N.T. at 71:11-72:6.) Unlike a knowing attempt to switch a customer’s supplier without authorization, HIKO did not set out to defraud consumers by marketing the Price Guarantee. Although the Commission has

deemed slamming to be “egregious” and has declared its “zero tolerance” for this conduct,⁸ the Commission has not made any similar pronouncements in a case involving overbilling by an EGS company. And there is no reason to believe that it would when the overbilling was the result of the aberrational market conditions arising from the Polar Vortex. HIKO submits that the civil penalties levied against PaG&E and Public Power in these slamming cases should serve as a benchmark to evaluate the maximum range of civil penalties against HIKO.

Even crediting Mr. Mumford’s explanation of why he did no research into other similar actions by an EGS company, I&E cannot harmonize its own recent action against PaG&E with its position in this case. I&E cannot explain how the \$25,000 civil penalty it proposed in a similar case against PaG&E arising out of the Polar Vortex is consistent with the \$14,689,000 penalty it seeks here. *See Commonwealth of Pa., et al. v. Energy Services Providers, Inc. d/b/a/ Pa. Gas & Electric*, Docket No. C-2014-2427656, Joint Petition for Approval of Settlement (March 24, 2015). In the *PaG&E* case (now awaiting Commission approval), OCA and OAG alleged that PaG&E had promised rates lower than or equal to the Price to Compare and overcharged its customers during the Polar Vortex. *See Commonwealth of Pa., et al. v. Energy Services Providers, Inc. d/b/a/ Pa. Gas & Electric*, Docket No. C-2014-2427656, Complaint at ¶¶ 22-31, 63-67. In recommending a \$25,000 civil penalty as appropriate under the Commission’s penalty policy, I&E noted that the substantial restitution PaG&E was paying in the settlement should be sufficient deterrence for future violations. (*See* I&E’s Statement in Support of Joint Petition for Approval of Settlement, Appendix C at 7-8.) Mr. Mumford professed to be unfamiliar with the *PaG&E* settlement or I&E’s position on it. (N.T. at 110:9-23;

⁸ *See, e.g., Pa. P.U.C. v. Total Gas & Elec. Inc.*, Docket No. M-0011529 (Order entered Sept. 26, 2001) at 5 (stating that “[it] does not trivialize allegations of unauthorized enrollment of customers, or ‘slamming,’ and seeks to deter such conduct by instituting firm retaliatory measures for violations of the Commission’s regulations with respect to enrollment of customers.”)

115:2-3.) There is no dispute that I&E did not take into account HIKO's proposed settlement with OCA and OAG and the substantial restitution to be made thereunder in evaluating the appropriate civil penalty in this case. Mr. Mumford also acknowledged that PaG&E had a worse compliance history than HIKO, given I&E's prior action against PaG&E involving slamming or attempted slamming of 319 customers in 2013. (N.T. at 116:9-21.)

I&E contends that the *PaG&E* case — and, indeed, every case that was resolved in a settlement — is not relevant here because the action against HIKO is not being amicably resolved by settlement. However, the Commission's Policy Statement explicitly states that the Penalty Factors evaluated in a litigated proceeding are the very same factors that are considered in a settled proceeding.⁹ Mr. Mumford confirmed this point:

Q. But nevertheless, the ten penalty factors, as we've been calling them, it would be necessary to consider each of those ten penalty factors in a settlement case, except for factor number three?

A. Yes they can be considered for both settled and litigated cases.

(N.T. at 134:16-21.)

Just as a settlement is not *carte blanche* for the Commission to accept a pittance for conduct that the Commission has considered to be egregious conduct, the fact that a case is litigated is no justification for the Commission to impose a grossly disproportionate penalty. I&E may not disregard these past Commission decisions simply because they involved settlements.

⁹ The only factor that does not apply in settled proceedings is factor three, which considers whether the regulated entity's conduct was intentional or negligent. *See* 52 Pa. Code § 69.1201 (3) ("This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty")

10. Factor Ten - Other Relevant Factors

The final factor to be considered is a “catch-all” category that includes any other relevant factors that may be necessary to effectively consider whether a civil penalty is necessary and appropriate. In support of the Commission’s proposed Policy Statement, the OCA commented that “this broad category will work well when the Commission encounters factual situations that do not fit into a prescribed mold, such as natural disasters, national or political unrest, *macroeconomic conditions, and other events that are external to the regulatory process.*” *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No. M-00051875 (Order entered Nov. 30, 2007) (Emphasis added). The Polar Vortex—from which all of the violations at issue arise—would clearly fall within this category.

Further, HIKO’s agreement to settle earlier filed regulatory actions brought in Pennsylvania, New York, and New Jersey is an additional relevant factor that the ALJs should consider when evaluating I&E’s proposed civil penalty. These settled and soon-to-be settled matters have a significant bearing on the case at hand as they involve similar allegations during the same time period (i.e., the Polar Vortex).

First, HIKO’s proposed settlement with OAG and OCA demonstrates that other regulatory bodies charged with protecting Pennsylvania consumers and maintaining the integrity of the competitive market believe that HIKO can continue to do business in Pennsylvania with appropriate remedial measures. The OAG/OCA settlement involves detailed and comprehensive procedures that will improve HIKO’s business practices, including but not limited to its internal operations, marketing efforts, disclosures statements, and customer services. Further, the settlement is driven by the agencies’ interest in providing prompt and full refunds to

Pennsylvania consumers. Accordingly, upon approval, HIKO has agreed to pay \$2,025,383.85 (including the amount of its prior refunds) into a Refund Pool, up to \$50,000 of the costs and expenses related to administering the refunds, and a \$25,000 contribution to the EDCs' hardship fund. HIKO has also agreed not to market any variable rate product to Pennsylvania consumers until July 1, 2016 and to implement a broad range of consumer protections in its operations and marketing procedures. *See Commonwealth of Pa., et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652, Joint Petition for Approval of Settlement (May 1, 2015).

Notably, I&E refused to consolidate its action with the OAG/OCA action and refused to participate in settlement discussions with OAG, OCA, or HIKO. Rather than attempting to negotiate a reasonable settlement of its penalty action in the context of a global resolution, I&E insisted on pursuing its separate action for draconian civil penalties in an amount that—as shown herein—is orders of magnitude higher than any penalty that has ever been recovered by the Commission against a regulated entity. HIKO has invested a significant amount of time and resources to mitigate the harm to its customers and work with the OAG and OCA to implement operational procedures and policies that will restore goodwill and prevent the alleged violations from recurring in the future. Disregarding the Penalty Factors and its prior position in other similar cases, I&E has refused to consider these efforts.

Second, HIKO's approved settlements with the Attorney Generals of the States of New York and New Jersey is also relevant as evidence that other regulatory agencies believe that HIKO does not need to be penalized with a \$14 million fine or put out of business. I&E contends that these settled proceedings are not relevant to the instant matter simply because they involve allegations that took place outside of Pennsylvania. That does not explain why I&E has studiously avoided dealing with the OCA/OAG settlement (which it has not opposed).

C. Rescission of HIKO's Authority to Do Business in Pennsylvania is Not Warranted

In addition to its requests for draconian civil penalties, I&E further proposes that HIKO's license to do business as an EGS in Pennsylvania be rescinded. (Compl. ¶ 131.) This drastic measure is unwarranted. *See Herp v. Respond Power LLC*, Docket No. C-2014-2413756 (Initial Decision entered Dec. 17, 2014) (Barnes, J.) (finding that license suspension for EGS's alleged violations, which occurred during the Polar Vortex period, was a "drastic measure" since the matter was one of the first variable rate complaint cases to be fully litigated).

First, rescinding HIKO's license to do business as an EGS in Pennsylvania is inconsistent with due process. *See* 52 Pa. Code § 54.42(a) (stating that license revocation or suspension must be "[c]onsistent with due process"). Indeed, due process requires that the ALJs consider the nature of HIKO's alleged violation, including the unanticipated events which caused HIKO's alleged violation as well as its efforts to mitigate the resulting harm to consumers. *See In re Licensing Requirements for Elec. Generation Suppliers*, Docket No. L-00970129 (Apr. 24, 1998) ("We note that we have clearly stated that our actions under these provisions will be [c]onsistent with due process' . . . and arguments involving the nature of the alleged violation may be raised by a licensee in its defense.") It is undisputed that, at the time HIKO enrolled Pennsylvania consumers into the Price Guarantee program and up until the Polar Vortex, HIKO honored its promise. The Company was unable to meet the Price Guarantee during the aberrational months of the Polar Vortex due to the unprecedented spikes in energy prices and growing collateral requirements with the PJM. The decision to ultimately breach its Price Guarantee was not premeditated or planned, but rather the only viable option for the Company to pursue.

Second, there is no record evidence suggesting that HIKO's conduct cannot be cured. In fact, HIKO's pending settlement with OAG and OCA show the opposite to be true. Similar to

I&E, OAG and OCA serve the public interest and strive to protect Pennsylvania consumers from fraudulent and deceptive marketing behavior. Yet, both of these governmental bodies believe that HIKO can continue to do business in Pennsylvania with appropriate remedial measures. The OAG/OCA settlement incorporates operational and marketing changes that will make HIKO a better EGS company and will require that it make restitution to its Price Guarantee customers affected during the Polar Vortex. Additionally, the Attorney Generals of New York and New Jersey also believe that HIKO's conduct can be cured with appropriate remedial measures; and the settlement reached with these states require HIKO to implement similar changes to its internal business practices and marketing efforts.

Third, HIKO continues to add value as an effective competitor in Pennsylvania's energy market. HIKO currently serves approximately 3,000 Pennsylvania consumers, none of which have complained to BCS or I&E about HIKO's energy prices or services before or after the Polar Vortex. HIKO continues to provide its customers with substantial savings, including more than \$90,000, through its One Free Month program. Prior to the Polar Vortex, HIKO met its Price Guarantee and delivered savings to thousands of Pennsylvania consumers for many months. It was only during the aberrational months of the Polar Vortex and related market anomalies that HIKO was unable to meet its promised savings. Yet, even during these financially difficult times, HIKO strived to meet its customers' needs as best as possible.

I&E's narrow focus on HIKO's failure to honor its Price Guarantee is completely unreasonable and therefore should be rejected. This is not a case where a company sets out to deceive and confuse customers into enrolling into its service. Nor is this a case where a company's actions, or inaction, threatens public safety or offends public interest. Here, HIKO was faced with an unprecedented and unanticipated chain of events, including a severe and

abnormally cold winter, sharp increases in wholesale energy prices, and financially crippling collateral requirements. While these circumstances left the Company unable to meet its contractual commitment (i.e., the Price Guarantee), HIKO remained committed to providing its customers with substantial savings through the One Free Month program. HIKO also offered relief to its customers when issuing refunds as early as February 2014. HIKO does not dispute the seriousness of its failure to meet its promised savings. However, the record evidence shows that the proposed civil penalty and request for license revocation is entirely unwarranted. Moreover, I&E's failure to consider HIKO's mitigating circumstances is contrary to the Commission's Policy Statement and inconsistent with recent precedent. Accordingly, I&E's excessive and unreasonable request for relief should be denied.

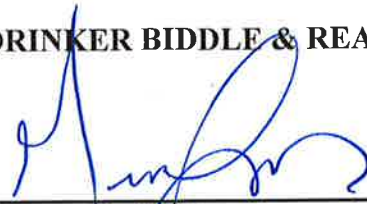
CONCLUSION

For all of the foregoing reasons, HIKO submits that I&E has failed to meet its burden of proof to support a civil penalty of \$14,689,000. In light of the factors and standards set forth in 52 Pa. Code § 69.1201, HIKO submits that no civil penalty is warranted or, alternatively, that only a minimal civil penalty should be imposed. HIKO further submits that the rescission of its authority to do business as an EGS in Pennsylvania is unwarranted.

Dated: June 24, 2015

Respectfully Submitted,

DRINKER BIDDLE & REATH, LLP



Vincent E. Gentile, Esq.
Ginene A. Lewis, Esq.
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
Phone: (215) 988-2700
Facsimile: (215) 988-2757
Email: vincent.gentile@dbr.com
Email: ginene.lewis@dbr.com

Motty Shulman, Esq.
William D. Marsillo, Esq.
Andrew Dressel, Esq.
BOIES, SCHILLER & FLEXNER, LLP
333 Main Street
Armonk, NY 10504
Phone: (914) 749-8200
Facsimile (914) 749-8300
Email: mshulman@bsflp.com
Email: wmarsillo@bsflp.com
Email: adressel@bsflp.com

Counsel for HIKO Energy, LLC

APPENDIX A

PROPOSED FINDINGS OF FACT

1. HIKO Energy, LLC (“HIKO” or the “Company”) is headquartered at 12 College Road in Monsey, New York. (HIKO St. 1 at 2:15-16.)
2. HIKO is an energy supplier to the retail market. It is commonly known as an Electric Generation Supplier (“EGS”), namely an entity that provides an alternative to local utilities for the supply of gas and electric power to residential and commercial customers. (HIKO St. 1 at 2:8-13.)
3. HIKO first began its operations in New York and since 2010 has expanded its operations into several other states, including Connecticut, New York, New Jersey, Pennsylvania, Maryland, Ohio, and Illinois. (HIKO St. 1 at 3:4-6.)
4. On July 2, 2012, HIKO became a licensed EGS in all electric distribution company (“EDC”) service territories within the Commonwealth of Pennsylvania. (*See Licensing Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2012-228994 (Final Order entered July 2, 2012) (hereinafter referred to as “HIKO License”).)
5. Under the terms of its license, HIKO is required to officially notify the Commission 90 days prior to ceasing operations. (*See Application Form for Parties Wishing to Offer, Render, Furnish, or Supply Electricity Generation Services to the Public in the Commonwealth of Pennsylvania* (hereinafter referred to as “EGS License Application”) at 13.)
6. HIKO also must maintain membership in the PJM Interconnection (“PJM”), as well as maintain a contractual arrangement with a registered PJM Load Servicing Entity to

facilitate HIKO's retail electricity services. (See HIKO's License at 3-4; see also EGS License Application at 11.)

7. Because HIKO is a small company that does not have significant financial resources like an EDC or investor-owned utility ("IOU"), it must satisfy certain PJM requirements. Specifically, PJM requires small companies like HIKO to post collateral in the form of cash collateral, letter of credit, guaranty, and/or by satisfying a PJM credit worthiness evaluation. (HIKO St. 1 at 4:1-6; HIKO St. 2 at 28:6-15.)
8. HIKO is required to post collateral to the PJM equal to the three highest consecutive weeks of total PJM bills during two semiannual time periods ending in early April and October. (HIKO St. 1 at 4:3-4; HIKO St. 2 at 28:16-29:12.)
9. In early December 2012, HIKO began marketing its electricity services in Pennsylvania. (HIKO St. 1 at 5:2.) During the time in which it engaged in marketing in Pennsylvania, HIKO primarily relied on third-party independent contractors for telemarketing and door-to-door sales services. (HIKO St. 1 at 5:5-7.)
10. On December 31, 2012, HIKO began enrolling Pennsylvania consumers in its products and services. (HIKO St. 1 at 4:2-3.)
11. Until recently, HIKO purchased energy exclusively on the spot market. (HIKO St. 1 at 3:15-17; N.T. at 167:5-10.). The Company used a third party energy trading firm, Enhanced Energy Services ("Enhanced Energy") in Texas, to purchase energy. (HIKO St. 1 at 2:18-3:2.)
12. Enhanced Energy is very experienced and used by a number of EGSs and many other larger industrial corporations because of its sophisticated expertise in procuring energy through the PJM Interconnection real time or day ahead of wholesale markets. (HIKO St.

1 at 2:18-3:2; *see also* Enhanced Energy Services, available at <http://enhancedenergyservices.com/>)

13. In purchasing energy on the spot market, HIKO (and any other company that purchases on the spot market) historically has been far more exposed to significant price changes in energy than a company with the financial resources to purchase long term energy contracts. (HIKO St. 1 at 4:1-2.)
14. Starting at the end of December 2012, HIKO began enrolling Pennsylvania consumers into its variable rate electric program in which the customer agreed to be billed based on a variety of factors, including wholesale market conditions at the PJM. (HIKO St. 1 at 5:11-13; I&E Exhibit 3 at ¶ 3.)
15. In August of 2013, HIKO offered a variable product that included an introductory six month billing cycle with a price guaranteed to be at least 1% - 7% (the “Price Guarantee”) less than the Price to Compare (“PTC”) of the customer’s local utility. Once the Price Guarantee period expired, the customer automatically would be enrolled in HIKO’s standard variable rate program. (HIKO St. 1 at 5:11-21.)
16. HIKO decided to offer a Price Guarantee program based on its analysis of its energy purchases over an 18 month period and its history of meeting or beating the PTC over that period. (HIKO St. 1 at 6:2-5; N.T. at 169:25-170:7.)
17. For most months during calendar year 2013, HIKO was able to offer a variable rate that was generally competitive with or below the PTC of the local utility. (HIKO St. 1 at 6:8-10; HIKO-Klein Exhibit 1.)
18. Since it has begun serving Pennsylvania consumers, HIKO has offered a “One Free Month” benefit to every HIKO customer for each period of 12 consecutive months he or

she has been a HIKO customer. In other words, 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, even the highest month. HIKO has honored the One Month Free benefit and has provided a number of its customers with substantial savings, including more than \$90,000 in total One Free Month payments to gas and electric customers, with over \$80,000 of that going to electric customers. (HIKO St. 1 at 6:13-21; HIKO-Klein Exhibit 2.)

19. It was only in the winter of 2014, when the unprecedented occurrence known as the “Polar Vortex” created a sharp and unexpected spike in energy prices, that HIKO began to have difficulty in satisfying its Price Guarantee. (HIKO St. 1 at 8:11-9:2; HIKO St. 2 at 28-32; I&E St. 1 at 8:10-12.)
20. During the winter of 2014, Pennsylvania experienced an unprecedented and unanticipated period of sustained, extreme cold weather, which created “unprecedented price spikes in the wholesale electricity market.”(*Final Omitted Rulemaking Order to Amend the Provisions of 52 Pa. Code Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding Notices of Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Docket No. L-2014-2409385 (entered April 3, 2014) (hereinafter referred to as “April 3, 2014 Final Omitted Order”) at 7; (HIKO St. 2 at 11-12; I&E St. 1 at 8: 5-6; N.T. at 76:21-25.)
21. The Commission determined that “sharp increases in [customer’s] monthly bills during the early months of 2014” were due to the “demands of the winter heating season and

unprecedented price spikes in the wholesale electricity market.” (April 3, 2014 Final Omitted Order at 7.)

22. In addition to the abnormally cold conditions during the winter of 2014, natural gas prices in Canada increased due to an unexpected and abrupt change in regulation on the TransCanada Pipeline (TCP). (HIKO St. 2 at 16:11-17.) A new Canadian regulatory change called Unfettered Price Discretion granted TCP the unconstrained right to bid to sell short-term firm service and interruptible transportation service without any price limits. This regulatory change caused sharp increases in natural gas commodity prices at natural gas hubs that were connected to the TCP, including those that served and provided natural gas to Pennsylvania. (HIKO St. 2 at 16-22.)
23. Because the natural gas and electricity markets have significant interdependence, Pennsylvania’s increased demand and use of natural gas caused additional increases on electricity demand. (HIKO St. 2 at 15:9-16:10.) During the winter of 2013/2014, both prices for natural gas and electricity surged together to unanticipated and unexpected levels. (HIKO St. 2 at 21-22.)
24. PJM’s operational struggles during the extremely cold winter of 2014 also contributed to the unanticipated spike in electricity prices. During January 2014, PJM reported tight operational conditions and a significantly higher number of forced generator outages due to the extreme weather, mechanical problems, and natural gas market inflexibility. (HIKO St. 2 at 23-24.) PJM also concluded “eight of the ten highest winter demands for electricity on the PJM system occurred in January 2014” and that “January 2014 total net billings to PJM members were one-third of the entire year’s total net billings in 2013.” (HIKO St. 2 at 24:1-15.)

25. This unprecedented surge in electricity prices was felt by all EGS customers in Pennsylvania. (*See* April 3, 2014 Final Omitted Order at 7.)
26. HIKO faced severe financial difficulty in satisfying PJM's collateral requirement and meeting its ongoing monthly electricity purchase requirements. HIKO had to pay nearly three times as much in January 2014 and close to twice as much for the remainder of the winter 2014 for electricity than it had been paying at wholesale during any prior period. (HIKO St. 2 at 30:12-19.) Prior to the Polar Vortex, PJM sales of electricity to HIKO were about \$0.08 per kWh. The price jumped nearly 300% to \$0.227 per kWh in January 2014 and remained at or above \$0.138 per kWh until the end of March 2014. (HIKO St. 2 at 29:16-19.)
27. Additionally, HIKO had to post millions of dollars in additional collateral calls to satisfy its PJM requirements. Due to the extraordinary spike in wholesale electricity prices, these collateral requirements were doubling and tripling every week. (HIKO St. 2 at 30-32.)
28. Had HIKO failed to satisfy PJM's increasing collateral calls, HIKO would have been banned from participating in any PJM market activities and lost all of its customers in every state in which it operated. (HIKO St. 2 at 30.)
29. HIKO's failure to satisfy its PJM requirements also would have caused the Company to violate its EGS license requirements, which required that HIKO maintain PJM membership. (HIKO License at 3-4.)
30. In order to keep the company afloat, HIKO's CEO and President personally guaranteed a \$20 million loan and risked significant personal assets. (HIKO St. 1 at 9:7-12.) Larger utility providers such as EDCs and IOUs were insulated from these severe financial

constraints because of long term energy purchase contracts and creditworthiness. (HIKO St. 2 at 30, 35.) These financial pressures put HIKO at peril of losing its entire business if it complied with the terms of its Price Guarantee program. (HIKO St.1 at 8-9; HIKO St. 2 at 31.)

31. Had HIKO elected to satisfy the Price Guarantee and, in turn, go out of business, it could not have done so easily because its EGS license required it to provide 90 days notice to the Commission. (*See* EGS License Application at 13.)
32. And had HIKO exited the retail electric market in Pennsylvania, customers would have experienced a complicated and uncertain period in terms of billing and other services. (N.T. at 171: 24-172:1-4; 207:2-5.)
33. HIKO did not want to breach its Price Guarantee but it essentially had no choice. (HIKO St. 1 at 8:11-9:2; HIKO St. 2 at 30:20-31:6.)
34. Before any regulatory action was initiated, HIKO started making changes to its business practices and marketing efforts. (HIKO St. 1 at 9.) The Company was not in the business of making promises to Pennsylvania consumers that it knew it could not keep. (HIKO St. 1 at 9:15-22.)
35. In January 2014, HIKO voluntarily stopped marketing the Price Guarantee and suspended all marketing efforts in Pennsylvania. During this period of suspended marketing, HIKO's customer base has plummeted from about 10,000 to about 3,000. (HIKO St. 1 at 10:19-21; HIKO St. 2 at 36).
36. HIKO hired additional people to staff its customer service department and enlisted a call center based in Florida to help the Company respond to the increase in customer complaints caused by the Polar Vortex. (HIKO St. 1 at 12:1-4; N.T. at 168.)

37. As early as February 2014, HIKO voluntarily started issuing refunds to Price Guarantee customers who were billed more than the relevant PTC. (HIKO St. 1 at 12:19-21.) To date, HIKO has paid out approximately \$160,000 to Pennsylvania customers (HIKO St. 1 at 13:7-8.) HIKO intends to make full restitution to all of its Pennsylvania customers for when it did not satisfy the Price Guarantee. (HIKO St. 1 at 11-14.)
38. HIKO has instituted changes to its energy purchasing program and now purchases some energy under long term contracts, hedging against sudden wholesale price increases, especially during the winter months. (N.T. 167:5-10.) By hedging its purchase program, and thereby putting additional safeguards in place, HIKO is better prepared for another Polar Vortex-type of event should it ever occur in the future. (*Id.*)
39. HIKO no longer offers the Price Guarantee program and there are no customers currently enrolled in this program. (HIKO St. 1 at 13:20-22.)
40. Due to its losses resulting from the Polar Vortex, HIKO did not make a profit during 2014. (N.T. 214:9-32.)
41. When enrolling customers into its Price Guarantee program, HIKO intended to honor the Price Guarantee. (HIKO St. 1 at 8:1-3; N.T. at 165:11-13.)
42. Many HIKO customers likely paid less than the corresponding Price to Compare in most months leading up to the Polar Vortex, which likely offset some of the overcharges from the failed Price Guarantee. (HIKO St. 2 at 56:14-15.)
43. On March 31, 2014, I&E initiated an informal investigation of HIKO as a result of customer complaints received by the Pennsylvania Public Utility Commission's Bureau of Consumer Services ("BCS") related to allegations that HIKO billed rates that were higher than the rates promised by the Company. (I&E St. 1 at 9:1-4.) I&E's

investigation included service of three sets of data requests and a review of HIKO's responses. (I&E St. 1 at 9:14-18.)

44. I&E admits that HIKO promptly responded to I&E's data requests during the informal investigation, and that HIKO fully cooperated with I&E's investigation. (I&E St.1 at 51:10-11; N.T. at 96:18, 97:1.)
45. On July 11, 2014, I&E filed a Complaint against HIKO, alleging that HIKO overbilled 14,780 customer accounts and proposing a maximum penalty of \$1,000 for each of the 14,780 overcharges for a total civil penalty of \$14,780,000. (I&E St. 1 at 12:20, 21:20-21.) I&E also requested that the Commission rescind HIKO's license to do business as an EGS in Pennsylvania and direct HIKO to provide refunds to each Price Guarantee customer that billed over the Price to Compare. (I&E Compl. ¶¶ 130-131.)
46. I&E admits that it does not know the number of customers affected by HIKO's alleged violation. (N.T. at 83:1-2.)
47. After HIKO pointed out that I&E's penalty calculation included invoices for which there was zero electric consumption (HIKO St. 2 at 42:10-17), I&E subsequently removed 68 accounts from its penalty calculation, bringing the amended proposed penalty to \$14,689,000. (I&E St. 1-SR at 22:9-17; N.T. 38: 7.)
48. I&E included in its proposed penalty calculation duplicate invoices and invoices that have been sent in error and later corrected (I&E St. 1-SR at 19:1-10; N.T. at 88:9.)
49. I&E would impose the maximum civil penalty \$1,000 per violation on each invoice, irrespective of the amount of the charge. (N.T. at 87:18-22.)
50. Nearly 75% of overcharges to customer accounts were less than \$100. (HIKO St. 2 at 47:1-10; N.T. at 87:10-17.)

51. 80% of overcharges to customer accounts were less than \$500. (HIKO St. 2 at 48:1-12.)
52. 93% of overcharges to customer accounts were less than \$1,000. (HIKO St. 2 at 50:1-11.)
53. The average overcharge to each HIKO customer was approximately \$124. (N.T. at 210:116-20.)
54. I&E's sole witness, Daniel J. Mumford, calculated I&E's proposed civil penalty of \$14,780,000 (later amended to 14,689,000). (N.T. at 50:11-16.)
55. Mr. Mumford did not look at a single customer bill when calculating the proposed civil penalty. (N.T. at 85:15-22.)
56. Mr. Mumford did not know what amount of refunds HIKO had made to customers affected by the Price Guarantee. (N.T. at 58:3-13.)
57. Mr. Mumford did not learn that HIKO made refunds to customers affected by the Price Guarantee until after HIKO submitted the written testimony of Harvey Klein. (N.T. at 58:11-13.)
58. Mr. Mumford did not know the terms of the proposed settlement between HIKO and OCA/OAG or the fact that HIKO agreed to make full refunds for all invoices subject to the Price Guarantee between January 2014 and March 2014. (N.T. at 61:21-62:5.)
59. Mr. Mumford admits that all of the customer complaints against HIKO that were filed with BCS, and which provides the basis of I&E's Complaint, involve customer bills that were received during the Polar Vortex. (I&E St. 1 at 8:10-12.)
60. Since April 2014, I&E is not aware of any complaint from HIKO customers about HIKO's service. (I&E St.1 at 8:10-12; N.T. at 95.)

61. Mr. Mumford does not know the highest penalty assessed by I&E or the Commission against a company. (N.T. at 52:12.)
62. Mr. Mumford does not know of any precedent for a civil penalty of \$14,689,000 against any company. (N.T. at 57:4-58:1.)
63. I&E failed to do any research, consult any authority or review any prior Commission precedent. (N.T. at 50:25-51:3; 124:17-25; 125:10.)
64. At the time I&E reached the decision to propose the civil penalty of \$14,689,000, it only considered the customer invoice data from excel spreadsheets provided by HIKO to I&E during the informal investigation. (N.T. at 50:25-51:3.)
65. I&E's proposed civil penalty does not consider or reflect the following mitigating factors:
 - a. The unprecedented and unanticipated spike in energy prices due to the Polar Vortex (I&E St. 1-SR at 11:3-10; N.T. at 75:12-15, 82:11-14.)
 - b. The Canadian regulatory changes that contributed to the unprecedented spike in energy prices (I&E St. 1-SR at 10:11-17; 11:3-10.);
 - c. HIKO's growing collateral requirements with the PJM during the Polar Vortex (N.T. 78:6-21.)
 - d. HIKO's actions before the Polar Vortex, including its track record of meeting or beating the PTC (N.T. at 51:8-10, 72:12-19, 74:8-9.)
 - e. HIKO's decision to stop marketing the Price Guarantee and suspend all marketing efforts in Pennsylvania (N.T. at 60:2-17.)
 - f. Restitution provided by HIKO to Pennsylvania customers (I&E St. 1-SR at 6:1-9, 8:17-19, 20:1-18; N.T. at 51:11-13, 58:16-20, 91:2.)

- g. HIKO's efforts to ameliorate the consequences of its failed promise (N.T. at 88:12-14.)
- h. HIKO's compliance history (I&E St. 1-SR at 20:21-21:6; N.T. at 97:5-12.)
- i. The number of customers affected by HIKO's alleged violation (N.T. at 83:1-20.)
- j. The amount each customer had to pay as a result of the overcharge (N.T. at 87:6-9.)
- k. HIKO's loss of customers and goodwill (I&E St. 1-SR at 7:3-15.)
- l. HIKO's size and revenues (N.T. at 62:6-11, 63:12-14, 101: 18-20.)
- m. HIKO's license requirements (N.T. at 80:19-21.)
- n. Past Commission decisions involving hundreds and thousands of customers being slammed (N.T. at 64:11-18.)
- o. Past Commission decisions involving violations that have resulted in personal injury and substantial property damage (N.T. at 127:17-22.)
- p. I&E's pending settlement petition, docketed at C-2014-2427656, in which it supports a \$25,000 civil penalty in a similar case against Pa.G&E arising out of the Polar Vortex and involving similar allegations concerning promised savings (N.T. at 110-115.)
- q. The highest civil penalty assessed by I&E or the Commission against a company (N.T. at 52:12.)
- r. The highest civil penalty assessed by I&E or the Commission against an EGS (N.T. at 57:7-58:1.)
- s. HIKO's proposed settlement with Pennsylvania's Office of Attorney General ("OAG") and the Office of Consumer Advocate ("OCA") (N.T. at 61:1-2.)

- t. HIKO's approved settlements with the Attorney Generals of New York and New Jersey (I&E St. 1-SR at 21:8-11.)
66. Mr. Mumford believed that HIKO should have gone out of business if it could not meet the Price Guarantee. (N.T. at 79:1-8.)
67. In a parallel proceeding initiated by OAG and OCA, the Joint Complaint alleged violations of 52 Pa. Code 54.4(a) — the only claim brought by I&E — based on HIKO's alleged failure to honor its "promised guaranteed savings over the PTC" and bill rates that conform to its disclosure statement. *Commonwealth of Pa., et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652, Joint Complaint ¶¶ 22-24, 44, 48 (June 20, 2014).
68. OAG, OCA, and HIKO recently submitted a Joint Petition for Approval of Settlement. *See Commonwealth of Pa., et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652, Joint Petition for Approval of Settlement (May 1, 2015) ("OAG/OCA Settlement").
69. The proposed settlement involves detailed and comprehensive procedures that will improve HIKO's business practices, including but not limited to its internal operations, marketing efforts, disclosures statements, and customer service. OAG/OCA Settlement at 8-25 (Injunctive Relief). Upon approval, HIKO has agreed to pay \$2,025,383.85 (including the amount of its prior refunds), up to \$50,000 of the costs and expenses related to administering the refunds, and a \$25,000 contribution to the EDCs' hardship fund. *Id.* at 6-8. HIKO has also agreed not to market any variable rate product to Pennsylvania consumers until July 1, 2016 and to implement a broad range of consumer protections in its operations and marketing procedures. *Id.* at 8-9.

70. By virtue of the proposed settlement, OCA and OAG have determined that HIKO's license as an EGS should not be rescinded and that the settlement provisions adequately protect PA consumers.
71. I&E had knowledge of the OAG/OCA Settlement terms and has not objected to the proposed settlement. Docket No. C-2014-2427652, Letter of Non-Opposition to Settlement (May 1, 2015).
72. I&E did not deem the OAG/OCA Settlement provisions, including the payment of restitution, to bear on the determination of the appropriate penalty amount. (N.T. at 61:1-2.)
73. HIKO's approved settlements with the Attorney Generals of New York and New Jersey also involve detailed and comprehensive procedures that will improve the Company's business practices and consumer marketing efforts. (HIKO St. 2 at 54:3-19; HIKO-Cicchetti Exhibits 5 and 6.)
74. By virtue of these proposed settlements, the Attorney Generals of New York and New Jersey have determined that HIKO's license as an EGS should not be rescinded and that the settlement provisions adequately protect PA consumers.
75. HIKO presented Dr. Charles J. Cicchetti, an expert in the field of energy economics and regulation, whose testimony was not contradicted by I&E. (N.T. at 76:10-16.)

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. As the complainant in this proceeding, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement ("I&E") bears the burden of proof. 66 Pa. Code § 332(a).
2. To satisfy the burden of proof, I&E must establish its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party. *See Pa. PUC v. Gary Polzot, t/a Airport Exec. Car Serv.*, Docket No. C-2011-2271305 (Order entered Oct. 31, 2013)
3. The Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980).
4. I&E's burden of proof is not limited to the elements of the alleged violation. I&E's proposed civil penalty must be supported by testimonial or documentary evidence regarding the ten factors set forth in the Commission's Policy Statement. *See Pa. PUC, Bureau of Investigation & Enforcement v. Steven J. Butts*, Docket No. C-2012-2325083 (Order entered Sept. 12, 2013); *Polzot* Order at 4.
5. In litigated proceedings, the presiding Administrative Law Judge is required to address each of the factors set forth in the Commission's Policy Statement. *See Butts* Order at 7-9.

The Commission has remanded cases where the analysis of these factors set forth in its Policy Statement did not take place. *Id.*

6. Because I&E failed to consider, or improperly considered, the penalty factors set forth in the Commission's Policy Statement, I&E did not meet its burden of proving that a civil penalty of \$14,689,000 is appropriate and necessary pursuant to 52 Pa. Code § 69.1201.
7. Further, under a complete and comprehensive evaluation of the penalty factors set forth in the Commission's Policy Statement, no civil penalty or, at best, a minimal civil penalty is warranted.
8. I&E failed to satisfy its burden of proving that revocation of HIKO's license to do business as an EGS in Pennsylvania is consistent with due process and therefore warranted. *See* 52 Pa. Code § 54.42(a) (stating that license revocation or suspension must be "[c]onsistent with due process"); *see also In re Licensing Requirements for Elec. Generation Suppliers*, Docket No. L-00970129 (Apr. 24, 1998) ("We note that we have clearly stated that our actions under these provisions will be '[c]onsistent with due process' . . . and arguments involving the nature of the alleged violation may be raised by a licensee in its defense."); *Herp v. Respond Power LLC*, Docket No. C-2014-2413756 (Initial Decision entered Dec. 17, 2014) (Barnes, J.) (finding that license suspension for EGS's alleged violations, which occurred during the Polar Vortex period, was a "drastic measure" since the matter was one of the first variable rate complaint cases to be fully litigated).

CERTIFICATE OF SERVICE

I, Ginene A. Lewis, hereby certify that on this day I caused a true and correct copy of the foregoing document to be served upon the presiding officers and parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant) and 52 Pa. Code § 5.412(f) (relating to service of written testimony).

VIA FIRST CLASS MAIL AND E-MAIL

Wayne T. Scott
Michael L. Swindler
Stephanie M. Wimer
Pa. Public Utility Commission
Bureau of Investigation and Enforcement
P.O. Box 3265
Harrisburg, PA 17105
wascott@pa.gov
mwindler@pa.gov
stwimer@pa.gov

John M. Abel
Nicole R. Beck
Office of Attorney General
Bureau of Consumer Protection
Strawberry Square, 15th Floor
Harrisburg, PA 17120
jabel@attorneygeneral.gov
nbeck@attorneygeneral.gov

Candis A. Tunilo
Kristine E. Robinson
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
ctunilo@paoca.org
krobinson@paoca.org

Dated: June 24, 2015



Ginene A. Lewis, Esq.
DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103-6996
215.988.2707
215.988.2757 (FAX)
Ginene.Lewis@db.com