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September 10, 2015

VIA E-FILING AND FIRST CLASS MAIL

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:

On behalf of HIKO Energy, LLC ("HIKO), I have enclosed for electronic filing the Exceptions of HIKO to the Initial Decision and Request for Oral Argument in the above referenced matter.

Copies of the Exceptions and Request for Oral Argument have been served in accordance with the attached certificated of service.

Respectfully submitted,

Ginene A. Lewis

GAL
Enclosure

cc: Administrative Law Judge Elizabeth Barnes (via e-mail and First Class Mail)
Administrative Law Judge Joel Cheskis (via e-mail and First Class Mail)
Commission's Office of Special Assistants (via e-mail)
Certificate of Service

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 parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant).

VIA FIRST CLASS MAIL AND E-MAIL

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Dated: September 10, 2015

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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**

REQUEST FOR ORAL ARGUMENT ON EXCEPTIONS OF HIKO ENERGY, LLC TO INITIAL DECISION

Pursuant to 52 Pa. Code § 5.538, HIKO Energy, LLC ("HIKO") respectfully requests that the Commission hear oral argument on HIKO's Exceptions to the Initial Decision, dated August 21, 2014, in the above-captioned proceeding and any replies thereto.

Dated: September 10, 2015

Respectfully Submitted,

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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**

EXCEPTIONS OF HIKO ENERGY, LLC TO INITIAL DECISION

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I. INTRODUCTION[1]

Pursuant to 52 Pa. Code § 5.533, HIKO Energy, LLC ("HIKO" or "the Company") respectfully urges the Commission to reject the presiding Administrative Law Judges' ("ALJs") Initial Decision, dated August 21, 2015, which imposes an unprecedented civil penalty in the amount of $1,836,125 based on several errors of law and factual conclusions that are unsupported by the record evidence. The penalty here is orders of magnitude higher than the highest penalties approved against any other electric generation supplier ("EGS") — even for the most egregious (slamming) violations. The ALJs' penalty assessment gave undue deference to the Commission's Bureau of Investigation and Enforcement's ("I&E") proofs — which were unreliable and uncertain — and gave scant weight to the evidence militating in favor of a lower penalty, namely HIKO's efforts to ameliorate the increased costs to its customers, including through its settlement with the Office of the Consumer Advocate and the Office of the Attorney General that will provide full restitution to affected customers. Compounding their error, the ALJs justified an unprecedented penalty by giving undue weight to other unsupported or irrelevant factors, including by erroneously concluding that HIKO had failed to maintain a surety bond during the period of the alleged violations. As set forth below, these errors should compel the Commission to overturn the Initial Decision and impose a substantially reduced penalty.

First, the ALJs' recommended civil penalty of $1,836,125 is grounded in a flawed premise that the proper way for assessing violations of 52 Pa. Code § 54.4(a) is by the number of invoices issued by HIKO during the relevant time period. There is no basis for assessing a civil penalty in this fashion and the fact that HIKO issued invoices on a monthly basis is something that is both out of HIKO's control (it is controlled by the local utility) and totally unrelated to the alleged violations. Accordingly, to the ALJs' calculations, if HIKO issued invoices on a bi-

[1] HIKO incorporates its Reply Brief, dated June 24, 2015 herein by reference.

monthly basis the penalty amount would presumably be half the recommended penalty. Similarly, if HIKO issued invoices on a twice a month basis the recommended penalty would be twice the current amount. The number of invoices issued during the relevant time period has no relationship to HIKO's conduct or the harm to the consumer and there simply is no basis for assessing a civil penalty based on the number of invoices issued by HIKO.

Moreover, because the ALJs computed the civil penalty based on the number of invoices, the penalty amount for the vast majority of the invoices exceeds the amount actually overcharged. Indeed, for approximately 1,500 invoices the penalty amount would be more than ten times the amount of the overcharge. The recommended penalty is also based on obvious, unexplainable inconsistencies within the underlying data proffered by I&E. By accepting I&E's invoice-based methodology, the ALJs imposed a $125 civil penalty for hundreds of alleged violations that were never proven by a single piece of evidence. And although the ALJs acknowledged I&E's failure to offer any explanation for these—at best—questionable invoices, it still found that I&E met its burden of proof. This is a clear error of law as it is well-settled that the ALJs' decision (and I&E's claims) must be substantially supported by record evidence, not uncorroborated claims or mere suspicion.

Alternatively, a computation method driven by the number of customers affected or number of bills actually issued and billed to the account would have generated a civil penalty amount that more accurately captures the financial harm (if any) to customers by considering the actual overcharge billed to the customer, the customer's total savings under the Price Guarantee program, including periods prior to January through March 2014, and HIKO's commitment to providing customers with <u>full</u> relief.

Second, the ALJs did not properly consider the Commission's penalty factors set forth in 52 Pa. Code § 69.1201. Specifically, the ALJs ignored the many mitigating circumstances surrounding HIKO's alleged violation of 52 Pa. Code § 54.4(a), including an aberrational period marked by an unprecedented and unanticipated spike in energy prices due to the Polar Vortex and regulatory changes, HIKO's financially crippling PJM Interconnection, Inc. ("PJM") requirements which were doubling and tripling every few weeks, and HIKO's efforts to mitigate the harm to its customers by providing full refunds and implementing significant operational changes to its business through a recent settlement with Pennsylvania's Office of Attorney General and Office of Consumer Advocate. Even more, the ALJs based the $1,836,125 civil penalty on unsupported inferences contradicted by record evidence and inconsistent with recent Commission decisions approving significantly lower civil penalties for alleged misconduct that the Commission has considered to be more egregious and detrimental to public safety.

Third, though the ALJs rightly rejected I&E's extortionate civil penalty demand for a total civil penalty of nearly $15 million, the Initial Decision nevertheless saddles HIKO with an unprecedented civil penalty that is nearly 80 times higher than the civil penalties assessed against other EGSs for similar conduct during the same time period. HIKO should not be punished more severely because it was forced to litigate I&E's claims. I&E brought this case *after* two other regulators had already filed a Joint Complaint against the Company in *Commonwealth of Pa, et al. v. HIKO Energy, LLC*, at Docket No. C-2014-2427652 ("OAG/OCA case"). This Joint Complaint also alleged violations of 52 Pa. Code §54.4(a) based on the claim that HIKO's prices to certain customers did not reflect the marketed prices and the prices in its disclosure statement. Despite the duplication of claims, I&E insisted on maintaining a separate lawsuit and refused to consolidate its action with the first-filed case, burdening the parties and the Commission with

unnecessary and duplicative costs. HIKO and OAG/OAC then negotiated a comprehensive settlement agreement which allowed HIKO to continue to operate as an EGS and imposed no civil penalties. I&E refused to enter into these global settlement negotiations but chose not to oppose the settlement. Instead, I&E elected to continue to pursue its action to recover nearly $15 million in penalties and to revoke HIKO's license, thus forcing HIKO to litigate this case all the way up to an evidentiary hearing. HIKO should not be penalized for refusing to give in to I&E's unreasonable demands. Instead, the Commission should reject the ALJs' recommended civil penalty in its entirety or, in the alternative, reduce the $1,836,125 recommended penalty to a level commensurate with other settlements it has approved to resolve even more egregious violations.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Background — HIKO's Price Guarantee and the Polar Vortex

HIKO is an electric generation supplier ("EGS") licensed by the Commission since July 2012 to supply electric generation services to the public within the Commonwealth of Pennsylvania.[2] 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 Rebuttal Testimony of Harvey Klein at 5:11-13;[3] I&E Ex. 4 at ¶ 3.) HIKO's variable rates were at or below those of each local electric distribution company ("EDC") for most months during 2013. (HIKO St. 1 at 6:3-5.)

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[2] *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").

[3] HIKO's rebuttal testimony of Harvey Klein will hereinafter be referred to as "HIKO St. 1".

Based on its research and analysis of its energy purchases over an 18 month period and its history of meeting or beating the price to compare ("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 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.)

In addition to the Price Guarantee, HIKO also provided its customers with additional savings through its "One Free Month" benefit. This benefit has been 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 Rebuttal Testimony of Charles J. Cicchetti at 29:13-21;[4] I&E St. 1 at 8:10-12.) Specifically, in January 2014, wholesale prices for

[4] HIKO's rebuttal testimony of Dr. Charles J. Cicchetti will hereinafter be referred to as "HIKO St. 2".

hourly energy supply in the day ahead and real time markets unexpectedly, and exponentially, increased. Colder weather and higher natural gas prices caused electricity prices to surge. Indeed, even the Commission acknowledged that, during this time period, Pennsylvania experienced an unprecedented and unanticipated period of sustained, extreme cold weather — i.e., the Polar Vortex — which created "unprecedented price spikes in the wholesale electricity market."[5] 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.)

As a result of the Polar Vortex, HIKO's cost of electricity jumped nearly 300% in January 2014 and remained high through at least the end of March 2014. At the same time, because of the higher costs of energy, HIKO faced unprecedented collateral posting requirements to its energy suppliers. The combination of these two forces threatened HIKO's existence, as HIKO faced the real possibility of losing its energy supply sources and having all its customers (not just in Pennsylvania) forcibly transferred to the local utility companies. Such a dilemma is unheard of for utility companies, which have significantly greater resources, less onerous credit and collateral requirements and more stable energy sourcing.

B. Procedural History — I&E's Formal Complaint Against HIKO

On July 11, 2014, I&E filed a Complaint against HIKO, alleging that the Company overbilled 14,780 customer accounts and proposing a maximum penalty of $1,000 for each of the alleged overcharges for a total civil penalty of $14,780,000. (I&E St. 1 at 12:21, 21:18-21.)

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[5] *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 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 was billed more than the guaranteed rate. (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 St. 1-SR at 9-17; N.T. 38: 7.) I&E admitted that all of the customer complaints against HIKO that provide the sole basis of its Complaint involve customer invoices issued during the Polar Vortex, (I&E St. 1 at 8:10-12), and that it had no complaint from any customer involving HIKO's services before or after the Polar Vortex. (I&E St. 1 at 8:10-12; N.T. at 95:1-12.)

On July 31, 2014, HIKO filed an Answer and New Matter as well as Preliminary Objections admitting and denying various averments in the Complaint. In particular, HIKO denied violating 52 Pa. Code § 54.4(a). However, the Company admitted "due to anomalous and unforeseen market forces beyond HIKO's control during the winter of 2013 and 2014, certain electric bills of the months of January-April, 2014 sent to HIKO customers included rates that were higher than the PTC." (Answer at 5-6.) In its New Matter, HIKO averred, among other things, that its prices were in conformity with its Commission-approved disclosure statement, and to the extent that for a limited period of time they were not in conformity, that was due to unforeseen and anomalous causes beyond HIKO's control, including the Polar Vortex of 2013-2014. (Answer at 33.) HIKO further contended that the requested civil penalty relief and license revocation were disproportionate to the alleged violations of Commission regulations. In its Preliminary Objections, HIKO contended the doctrine of *lis pendens* effectively barred the instant cause of action because a similar cause of action was already pending against the

Company filed by the Commonwealth of Pennsylvania in *Commonwealth of Pa, et al v. HIKO Energy, LLC*, at Docket No. C-2014-2427652 ("OAG/OCA case").

In August 2014, the Pennsylvania Office of Consumer Advocate ("OCA") and the Pennsylvania Attorney General each filed a Notice of Intervention and Public Statement formally intervening into this matter.

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

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

On September 2, 2014 the presiding ALJs (Honorable Joel Cheskis and Elizabeth Barnes) denied HIKO's Preliminary Objections, finding the complaint was not barred by the doctrine of *lis pendens*.

On September 29, 2014, the Initial Prehearing Conference in this proceeding was held before the presiding ALJs, at which time a schedule for the litigation proceeding was established. On September 30, 2014, a Scheduling Order was issued establishing a litigation schedule and scheduling an evidentiary hearing on April 20-22, 2015.

On November 12, 2014, HIKO filed a Motion to Compel Further Responses by I&E to HIKO's First Set of Interrogatories and Request for Production of Documents. Also on November 12, 2014, HIKO filed an application for subpoena *duces tecum* addressed to the Director of the Bureau of Consumer Services ("BCS").

On November 24, 2014, HIKO filed a Motion to Compel Further Responses by I&E to HIKO's Second Set of Interrogatories. On December 2, 2014, I&E filed its Answer to HIKO's Motion to Compel Further Responses to its First Set of Interrogatories.

On December 3, 2014, I&E filed its Answer to HIKO's Motion to Compel Further Responses to HIKO's Second Set of Interrogatories. Also, on December 3, 2014, the Commission's Law Bureau, on behalf of the Director of BCS, filed an Objection of the Bureau of Consumer Services to HIKO Energy, LLC's Application for Subpoena *Duces Tecum*.

On December 23, 2014, I&E pre-served the direct written testimony of its witness, Daniel Mumford.

On December 30, 2014, an order was issued denying HIKO's Motions to Compel, and denying its Application for Subpoena *Duces Tecum*.

On March 13, 2015, HIKO filed an unopposed Motion for Protective Order, which was granted and a Protective Order was entered on the same day.

On March 18, 2015, I&E filed two Applications for Subpoena to secure the attendance of HIKO employees, Shevy Simins and Elly Bernstein, respectively, at the evidentiary hearing in this matter.

On March 30, 2015, HIKO filed Objections to the Applications for Subpoena of Ms. Simins and Mr. Bernstein, arguing the Commission cannot extend its *in personum* jurisdiction to issue a subpoena to Mr. Bernstein and Ms. Simins, who reside outside the borders of Pennsylvania.

On April 1, 2015, I&E filed a Motion to Strike the Direct Testimony of Harvey Klein and Charles J. Cicchetti, which was presented at the rebuttal phase of this proceeding.

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

On April 9, 2015, I&E served the Surrebuttal Testimony of Daniel Mumford. Also on April 9, 2015, HIKO filed a Petition for Interlocutory Review and Answer to a Material Question concerning the granting of I&E's Applications for Subpoena of Ms. Simins and Mr. Bernstein. On April 10, 2015, I&E withdrew its Motion to Strike HIKO's Direct Testimony.

The evidentiary hearing took place on April 20, 2015.

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

On April 22, 2015, HIKO filed a petition to withdraw its petition for interlocutory review concerning the subpoenas. Also on April 22, 2015, an Order was entered establishing a briefing schedule and notifying the parties of certain public documents of which the ALJs intended to take judicial notice.

On May 26, 2015, HIKO filed Proposed Transcript Corrections including the notation that Exhibits 1 and 2 to Dr. Cicchetti's Rebuttal Testimony were admitted into the record. There being no objection, by Order dated June 3, 2015, in accordance with 52 Pa. Code § 5.253(f), the proposed corrections were granted and the transcript was corrected to reflect the corrections.

I&E's main brief was timely submitted on June 3, 2015 and HIKO's reply brief was timely submitted on June 24, 2015. OCA and OAG did not file briefs. The record closed on June 24, 2015.

On August 21, 2015, the presiding ALJs issued an Initial Decision that grants in part and denies in part I&E's Complaint. Specifically, the ALJs held that HIKO violated 52 Pa. Code § 54.4(a) 14,689 times and directed the Company to pay a total civil penalty in the amount of

$1,836,125 (which is a $125 penalty multiplied by 14,689 occurrences). I&E's request for refunds was denied as moot because the relief granted in the concurrent, yet separate Initial Decision entered *ad seriatim* in the OAG/OCA case. The ALJs also denied I&E's request for license revocation, reasoning that such request was inconsistent with their approval of the settlement in the OAG/OCA case.

In the OAG/OCA case, the presiding ALJs approved a settlement between the OAG and OCA, the Office of Small Business Advocate ("OSBA"), and HIKO (hereinafter the "OAG/OCA Settlement"). The Settlement has a refund pool totaling $2,025,383.85 which provides customers enrolled in HIKO's Price Guarantee during the months of January through March 2014 with a 3.5% savings from their respective PTC rates. The settlement also involves detailed and comprehensive procedures that will improve HIKO's business practices, including but not limited to its internal operations, marketing efforts, disclosure statements, and customer services. The approved OAG/OCA Settlement does not include any penalties.

III. EXCEPTIONS

A. Exception 1: The Initial Decision Erred in Basing the Number of Alleged Violations of 52 Pa. Code § 54.4(a) on the Number of Invoices in Amounts in Excess of the Price Guarantee Rather than the Number of Customer Accounts Affected or the Dates on which Invoices Were Sent.[6]

The ALJs accepted I&E's premise that violations of Section 54.4(a) should be based on each instance where a customer's invoice entry reflected more than the rate promised in the Price Offering. (Initial Decision at 31.) Embracing this methodology, the ALJs found that, based on the invoice entries set forth in I&E Exhibits 6A through 11A, HIKO made 14,689 overcharges to 5,708 customer accounts in Pennsylvania. Yet, in the same breath, the ALJs acknowledged that this method of computing the total number of alleged violations relied on customer data that was

[6] Findings of Fact Nos. 64 and 67, Conclusions of Law Nos. 8 and 12.

inconsistent and thus potentially inaccurate. *See* infra Part III(B). Given the uncertainties inherent in I&E's choice of a "per invoice entry" methodology, the ALJs erred in adopting it as the basis for their penalty determination. Instead, they should have based the total number of alleged violations on data on which there was no ambiguity, namely, the number of customer accounts affected by the overcharges or the dates on which invoices were actually generated for those accounts.

There was no warrant to use I&E's methodology in a case involving thousands of customer invoices. Here, the essence of each alleged violation was the breach by HIKO of its promise to each customer that its electric supply charges would be at least 1% less than the PTC of the local utility. Indeed, the Initial Decision states that this is the correct way to view the violations in this case: "By making a conscious decision to not honor its obligations under the terms of its Price Offering Guarantee to customers who were within their 6-month introductory period, HIKO billed approximately 5,700 customers in a manner contrary to what was expressly guaranteed at the time of the customer's enrollment." (Initial Decision at 30.) Significantly, the governing regulation does *not* state that each EGS invoice must conform to the marketed price. Instead, Section 54.4(a) provides a more general statement that "EGS **prices billed** must reflect the marketed price and the agreed upon prices in the disclosure statement." 52 Pa. Code § 54.4(a) (emphasis added). The invoice amount and the actual amount ultimately billed to the customer account may very well be different, as I&E acknowledges by its decision to remove re-billed charges from the total number of alleged violations. Moreover, by basing the total number of violations on overcharged invoices, the Initial Decision ignores the fact that the OAG/OCA Settlement will fully reimburse HIKO customers for these same overcharges. A methodology based on the number of affected customers would also account for the fact that a sizable number

of overcharged invoices were to customers who became HIKO customers beginning in August 2013 through January 2014—during which the evidence was undisputed that HIKO honored the introductory rate (Initial Decision at 51)—and thus received substantial savings over the PTC.

The Initial Decision also supports use of the date of the invoice as a means of computing the number of violations. The ALJs believed that the fact the overcharges continued from January through April "suggest[s] that [HIKO's] decision to continue its scheme of overbilling could have been confirmed prior to each and every invoice date." (Initial Decision at 43.) I&E Exhibits 6A through 11A show invoicing occurred on virtually every day of the period January through April 2014. That would total approximately 120 days, and the total penalty — even assuming a $1,000 per violation penalty — would be $120,000, a number well within the range of penalties that the Commission approved for other EGS companies for similar violations during the same time period. *See Pa. PUC, Bureau of Investigation and Enforcement v. Respond Power*, Docket No. C-2014-2438640 (Initial Decision entered August 26, 2015) (approving a $125,000 civil penalty for violations of Commission regulations regarding marketing and billing practices to thousands of customers); *Pa. PUC, Bureau of Investigation and Enforcement v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric*, Docket No. M-2013-2325122 (Final Order entered June 5, 2014) (approving a civil penalty of $150,200 for "the most egregious" slamming violations to hundreds of customers); *Pa. PUC, Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Final Order entered December 19, 2013) (approving a civil penalty of $64,450 for what the Commission describes as a "matter involving fraudulent, deceptive acts . . . resulting in enrollments to change the EGS of a number of customer's [nearly 3,000] . . . without the customer's authorization.").

A per customer account or per invoice date computation would also comport with the decision in *Herp v. Respond Power*, Docket No. C-2014-2413756 (Initial Decision entered December 17, 2014), which the ALJs cited in support of their Initial Decision. Like this case, the *Herp* case involved an EGS that increased its variable rate price over the PTC during the winter of 2014. The complaint was filed by a former customer who alleged that the EGS misleadingly guaranteed that its variable rate would be no greater than the local utility company's PTC. *Herp*, Initial Decision at 1-2. The ALJ ultimately concluded that the EGS violated ten Commission regulations, including 52 Pa. Code §54.4(a) for its failure to bill customers at the marketed prices during January, February and March 2014, and imposed the maximum $1,000 per violation for a total civil penalty of $10,000.[7] *Id.* at 50-53. Hence, the total civil penalty included a single civil penalty for the Section 54.4(a) violation even though the EGSs' marketed price was exceeded on at least three separate occasions — January, February, and March 2014. In fact, the ALJ acknowledged that "[t]he Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of contract occurred." *Id.* at 12 (citing *Allport Water Auth. v. Windburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978).). Thus, it was not up to the ALJ (or complainant) to decide that each month's billing rate over the PTC was a separate breach of contract. Rather, the ALJ could only assess compliance with the lone regulation, i.e. Section 54.4(a), which was alleged to be violated.

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[7] In *Herp*, the ALJ also found that the EGS violated (1) the Commission's Order in *In re: License Application of Respond Power LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*; (2) 52 Pa. Code § 54.5(c)(10); (3) 52 Pa. Code § 54.7(a); (4) 52 Pa. Code § 54.42(a); (5) 52 Pa. Code § 54.43(1)(f); (6) 52 Pa. Code § 54.43(1)(g); (7) 52 Pa. Code §111.7(a)(1); (8) 52 Pa. Code § 111.9(b); and (9) 52 Pa. Code § 111.12(d). Additionally, the complainant was awarded a refund in the amount of the difference between the rate he was charged by the EGS, and the PTC rate that he would have been charged by his default service provider during the months of November 2013 through March 2014.

Applying this same reasoning to the case at hand, the ALJs erred in accepting I&E's premise that violations of Section 54.4(a) should be based on each instance where a customer's invoice entry was charged more than the rate promised in the Price Guarantee. A civil penalty based on HIKO's monthly invoice entries improperly relies on an interpretation of HIKO's terms and conditions with its customers and ultimately involves double (or triple) counting of what is really a single violation. Moreover, given the thousands of customer accounts at issue here, and the uncertainties inherent in relying upon invoice entries alone (as I&E did), the ALJs erred in not considering alternative civil penalty computations that would have resulted in a more appropriate civil penalty amount. Accordingly, the Commission should reject the ALJs decision to base the total civil penalty on the number of overcharged invoices and should instead base the total civil penalty amount on the number of customers affected or the dates on which invoices were sent.

B. Exception 2: The Initial Decision Erred In Concluding that the Evidence Supports a Finding that 52 Pa. Code §54.4(a) Was Violated on 14,689 Separate Occurrences.[8]

Even assuming I&E's "per invoice" method was appropriate, the Initial Decision erred in accepting I&E's position that HIKO invoiced its customers 14,689 times in amounts in excess of the Price Guarantee.

First, I&E failed to submit evidence in support of each of these alleged violations — a fact that even the ALJs acknowledge in the Initial Decision. As to I&E Exhibit 8A, for instance, the ALJs noted that "approximately sixty times" there were questionable "'energy charges' for the same account, for the same time period, with the same rates and PTC, but with differing invoice numbers, amounts, and usage." (Initial Decision at 30.) The ALJs described these invoice entries as an "inconsistenc[y]" because it was not "entirely clear whether these violations

[8] Findings of Fact No. 67; Conclusions of Law Nos. 8 and 12.

should be viewed as one violation for that time period, or two violations for that same time period." (*Id.* at 30-31.)

HIKO's expert witness, Dr. Cicchetti, also picked up on this inconsistency, but discovered hundreds of these "anomalous and questionable" entries. (HIKO St. 2 at 42-45.) Dr. Cicchetti testified "there were probably at least 300 instances where it was one of these bills dated one day, and then two days later it was modified and it was another bill." (N.T. at 211; *see also* HIKO St. 2 at 43:11-13 ("I found many instances where the time between bills was less than one week, sometimes just days."); *id.* at 44, Table 1 - Counts of Anomalous Invoices) (showing 700 invoices that were billed within less than three weeks, or 21 days, after the prior bill).) Because HIKO customers are typically billed every 29 to 32 days, Dr. Cicchetti explained that these invoice entries were not consistent with a normal account and likely represented contested or erroneous billing that was later corrected or replaced or partial bills for customers ending service before the end of a 30-day cycle. (*Id.* at 43:13-21.) Thus, by including these shortened billing anomalies, I&E's civil penalty computation almost certainly included invoice amounts that were never actually billed to the customer.

In the Initial Decision, the ALJs concluded that I&E's expert, Mr. Mumford, "was unspecific about which line items were incorrectly included in the calculations" and that the meaning and effect of those entries was "conjecture." (*Id.* at 31.) Despite that conclusion, the ALJs then determined that "I&E carried its burden of proving" that the inconsistent entries represented violations. (*Id.*) That conclusion was plain error.

I&E clearly had the burden of proving that Section 54.4(a) was violated on 14,689 separate and discrete occasions. *See* Initial Decision at 25 ("[E]ach element of alleged violation must be proven and the evidence must support a finding that Section 54.4(a) of the

Commission's regulations was violated in 14,689 separate occurrences as alleged."). That burden included the obligation of clearing up any confusion about the meaning of its exhibits and establishing that any seemingly anomalous entries were, in fact, invoices that had been billed to customers. To do that I&E could have questioned HIKO's witness, Mr. Klein, as to the meaning of those entries. I&E could have served written discovery to establish what those entries meant. I&E could have obtained the actual customer invoices to confirm whether the customer was actually billed the invoice amount. But I&E elected to none of these things. Where I&E's exhibits are inconsistent, misleading, or unreliable I&E has failed to carry its burden of proof and HIKO should not incur greater penalties because of that failure. Neither I&E nor the ALJs have identified any principle of law that says that a defendant bears the risk of greater penalties when I&E presents plainly inconsistent, incomplete, or ambiguous proof. Because I&E failed to offer any evidence proving that these partial, duplicative, or corrected invoice entries actually amounted to a violation of Commission regulations, it failed to meet its burden that HIKO violated Section 54.4(a) on 14,689 separate occasions.

Additionally, the total number of violations alleged by I&E includes hundreds of other "anomalous and questionable" invoices that the ALJs should not have included as violations of Section 54.4 (a). Specifically, I&E's civil penalty computation includes invoice entries for a relatively small amount of monthly use ranging from 1 kWh to 150 kWhs. In fact, Dr. Cicchetti testified that I&E's calculation included 1,421 invoices for less than 150 kWhs. (*See* HIKO St. 2 at 44, Table 1 – Counts of Anomalous Invoices.) Like the shortened billing anomalies, Dr. Cicchetti considered these invoice entries to be "questionable" since the average residential electricity use in Pennsylvania homes was approximately 867 kWhs per month. (*Id.* at 43:4-8.) Based on this data, Dr. Cicchetti explained that it is very likely that the small volume invoices

account for empty homes or seasonal homes that are not occupied during the winter. (*Id.* at 44:21-45:5.) But even more significant for purposes of the civil penalty calculation, very low usage amounted to a small overcharge to the customer account that was far below the $125 per violation recommended by the ALJs.

Dr. Cicchetti testified that at least 0.8% of the invoices (118) included in I&E's computation contained overcharges of less than $1.00 and 8.8% of the invoices (1293) were less than $10. (*Id.* at 47:4-5, Chart 8 – Breakdown of Alleged Overcharge, By Invoice.) And the Initial Decision credited this testimony. *See* Initial Decision at 39 (stating that this fact "may warrant less than the maximum penalty per occurrence . . . ."). Yet, the ALJs imposed a civil penalty computation that included such *de minimis* overcharges. This is overly punitive. *See generally Bristol-Myers Co. v. Lit Bros., Inc.*, 336 Pa. 81, 6 A.2d 843, 848 (Pa. 1939) ("[T]he court is not bound to a strictness at once harsh and pedantic in the application of statutes . . . Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should inflexibly severe."). Therefore, these invoice entries also should be removed from the penalty calculation.

C. Exception 3: The Initial Decision Fails to Properly Apply the Relevant Factors When Computing an Appropriate Civil Penalty Pursuant to 52 Pa. Code § 69.1201.[9]

In arriving at the conclusion that a civil penalty in the amount of $1,836,125 was an appropriate penalty for HIKO's alleged violations of Section 54.4(a), the ALJs failed to properly apply the factors that have been set forth by the Commission in 52 Pa. Code § 69.1201. *See also Rosi v. Bell Atlantic-Pa, Inc. and Sprint Commc'n Co.*, Docket No. C-00992409 (Order entered February 10, 2000). In other words, the ALJs imposed a civil penalty on HIKO for its admitted failure to honor the Price Guarantee during the period January through April 2014, but did not

[9] Conclusion of Law Nos. 8 and 12.

consider 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. Even worse, in recommending the imposition of this unprecedented penalty, the ALJs relied on unsupported inferences that are directly contradicted by the record evidence. While HIKO does not dispute the seriousness of violating Commission regulations, the record evidence does not support a nearly $2 million civil penalty, especially where HIKO's actions resulted from circumstances beyond its control and where the Company has since exercised good-faith efforts to provide its Pennsylvania customers with full refunds, as well as incorporate operational and marketing changes, as reflected in the OAG/OCA Settlement.

i. The Initial Decision Did Not Properly Consider the Fact that the Alleged Violations Stemmed from the Polar Vortex and Anomalous Market Conditions Beyond HIKO's Foresight and Control.

The Initial Decision recognized that HIKO only decided to make its Price Guarantee after studying its pricing and supply costs over a period of 18 months. (Initial Decision at 29.) That period included virtually all of HIKO's operating history. The ALJs agreed that when it made the Price Guarantee, HIKO intended to honor it and, in fact, did honor it over the period August 2013 through December 2013. (*Id.* at 51.) I&E did not produce any evidence to dispute these facts. 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, did HIKO suddenly find it difficult to meet its Price Guarantee. As the Commission has acknowledged, during the Polar Vortex, Pennsylvania experienced an unprecedented and unanticipated period of sustained, extreme cold weather, which created "unprecedented price spikes in the wholesale electricity market" and consequently "sharp increases in [customer's] monthly bills." (April 3,

2014 Final Omitted Order at 7; *see also MacLuckie v. Palmco Energy, PA, LLC*, Docket No. 2014-240558 (Opinion and Order entered December 4, 2014) (noting that the "no one could have predicted the extreme cold wrought by last year's winter . . . .").)

The Initial Decision also accepted the testimony of HIKO's energy expert, Dr. Cicchetti, that the Polar Vortex coincided with and exacerbated extraordinary regulatory disruptions in the wholesale energy markets. (Initial Decision, Findings of Fact No. 22.). Thus, 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; *see also* Initial Decision, Finding of Fact No. 22.) 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. The significant interdependence of the natural gas and electricity markets and Pennsylvania's increased demand and use of natural gas caused additional increases on electricity demand. (HIKO St. 2 at 15:6-16:21.) The end result was that prices for both natural gas and electricity surged to unanticipated (and unprecedented) levels during the winter of 2014. (*Id.* at 21:19-22:2.)

Adding to this unanticipated spike in electricity prices were PJM's operational struggles during that winter. As Dr. Cicchetti testified, 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. (*Id.* 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." (*Id.* at 24:1-15.) I&E did not attempt to rebut any of this testimony.

The unprecedented and exponential surge in electricity prices was felt by all EGSs and their variable rate customers in Pennsylvania. *See* Initial Decision at 29 (noting that "the restructured market underwent a 'stress test' when wholesale market rates spiked in the winter months of January – March, 2014. Some EGSs were able to absorb most of the unanticipated increased costs without passing those costs through to their customers. Others did not."). 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. (Initial Decision at 12, Finding of Fact No. 23.) The price quickly 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. (*Id.*; see also 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. (Initial Decision at 12, Finding of Fact No. 25; *see also* 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 require that HIKO maintain PJM membership. *See* HIKO License at 3-4. Again, I&E did not dispute any of this evidence.

In order to keep the company afloat, HIKO's CEO and President, Harvey Klein, personally guaranteed a $20 million loan and risked significant personal assets. (HIKO St. 1 at 9:7-12; *see also* Initial Decision, Finding of Fact No. 25.) HIKO could not have survived had it continued to honor the Price Guarantee during the Polar Vortex period. (HIKO St.1 at 8-9; HIKO St. 2 at 31.) Again, I&E did not challenge these facts either. Instead, I&E insisted, and the ALJs appear to have agreed, that HIKO should have gone out of business rather than breach its Price Guarantee. (Initial Decision at 42.) But there is no Commission precedent that requires that choice. Not surprisingly, neither I&E nor the ALJs identified any precedent in which violations grew out of similar dire economic and market constraints.

But even if HIKO had chosen to shut down operations entirely, it could not do so because the Company was required to provide 90 days notice to the Commission. *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"); *see also* 52 Pa. Code §54.41. I&E's witness, Mr. Mumford, was not familiar with this condition in HIKO's license. (N.T. at 79:14-21; 80:15-18 (admitting that he did not read HIKO's license and was unfamiliar with the license requirements).) Moreover, had HIKO exited the retail electric market in Pennsylvania during the winter of 2014 with little or no prior notice, its customers would have experienced at least some uncertainty and potential disruption. (N.T. at 171: 24-172:1-4, 207:2-5.)

The Initial Decision minimizes the import of that condition, noting that HIKO "could have petitioned for a waiver of the 90 day requirement and could have explained its exigent circumstances to the Commission." (Initial Decision at 42.) But, even filing a petition and obtaining a waiver would have taken time and, even then, it is far from certain the Commission

would have granted that relief or even reduced the notice period within the days in which HIKO's costs skyrocketed. This sort of speculation should not be enough to overcome the express condition in HIKO's license. Furthermore, during that time, HIKO would have had to continue operations, would still have been in breach of the Price Guarantee, and would still have been exposed to thousands of potential violations. Thus, while HIKO did not want to breach its Price Guarantee, HIKO was faced with a situation in which it was exposed to potential penalties no matter how it acted. (HIKO St. 1 at 8:11-9:2; HIKO St. 2 at 30:20-31:6.)

The ALJs erred in ignoring these points and finding that HIKO's decisions were purely voluntary. *See* Initial Decision at 42 ("The decision to offer the introductory price for 6 months beating the price to compare of the local utility, which ended up becoming regulatory violations when the company decided not to honor the Price Offer."). Specifically, the ALJs should have given sufficient weight to the forces beyond HIKO's foresight and control that constrained its ability to honor the Price Guarantee. Had those circumstances been properly considered, the Initial Decision would have imposed a civil penalty far below $1,836,125. Accordingly, the Commission should reject the recommended civil penalty and give proper consideration to these mitigating factors in accordance with Commission regulations.

ii. The Initial Decision Arbitrarily Calculates a Total Civil Penalty that Neither Considers the Amount Charged in Excess of the Price Guarantee Nor the Refunds That HIKO Customers Will Receive through the OAG/OCA Settlement.

I&E sought the maximum $1,000 penalty for each of the invoices that contained an overcharge ("Overcharge Invoice"), irrespective of the actual amounts each customer had been overcharged. The ALJs correctly saw that the evidence and precedents did not support such a severe approach and that a far lower per violation penalty was warranted. However, the ALJs $125 per invoice penalty is still excessive, given that nearly two-thirds (65%) of the Overcharge Invoices contained overcharges less than $100, nearly 1% contained overcharges of less than

$1.00 (*see supra* Part III(B)) and 8.8% of the Overcharge Invoices were in amounts less than $10.00. (HIKO St. 2 at 47-48.) I&E did not dispute these calculations and the ALJs accepted them in the Initial Decision. (Initial Decision at 23.) Imposing a $125 civil penalty for most of the Overcharge Invoices significantly exceeds the actual economic injury to most of the individual HIKO consumers.

Moreover, the $125 per violation penalty did not take into account those customers whose overcharges had already been refunded voluntarily by HIKO (prior to any regulatory involvement). The undisputed evidence shows that HIKO made voluntary refunds in the amount of $160,000 to many of these customers. (Initial Decision at 13, Finding of Fact No. 33.) More importantly, HIKO has agreed in its Settlement with the OAG and OCA to make full restitution to all of its Price Guarantee customers who are the subject of this action, so any economic consequence will be remedied.[10] Any economic harm to the Price Guarantee customers has therefore been fully remedied.

The Initial Decision further compounds the failure to account for HIKO's customer refunds by drawing on inferences unsupported by the record and unaddressed by I&E. The ALJs admit that "it is unknown the hardship the approximately 5,700 customers experienced." Initial Decision at 39; *see also id.* at 34 ("[I]t is unknown the financial detriment these account holders sustained during the winter."). I&E did not submit any evidence of any particular financial hardships experienced by any of the affected customers. The ALJs nonetheless infer "that there was some financial hardship experienced by the customers," (Initial Decision at 39), and "that a customer might have had to borrow money, spend less, or pay fewer bills in order to weather the

[10] As the Decision notes, HIKO's Settlement will be based on refunding the difference between the applicable PTC and 3.5% less than the PTC, rather than the baseline 1% below the PTC that was promised in the Price Guarantee. Thus, the ALJs properly concluded that, even though the Settlement covered customers during January-March 2014 and I&E's complaint sought restitution for customers during January -April 2014, there was no need for an additional restitutionary amount. (Initial Decision at 2.)

polar vortex storm," (*id.* at 34). Such an unsupported inference—universally presumed to apply to all 14,689 instances—does not provide a basis for imposing $1,836,125 in penalties, especially given that HIKO will provide full restitution of any overcharges. Accordingly, the Commission should reject the recommended civil penalty and give proper consideration to the fact that each customer affected by the overcharges will be (or already has been) provided with a refund.

iii. The Initial Decision Did Not Properly Consider the Substantial Modifications HIKO Made to Its Operations in an Effort to Rectify the Violations.

The ALJs erred in stating in the Initial Decision that "[t]here is no evidence that the company modified its internal practices or procedures to address the conduct at issue." (Initial Decision at 43.) This statement is inconsistent with the uncontroverted record evidence. At the same time HIKO decided it was impossible to stay in business and meet its Price Guarantee, it also considered ways to mitigate any potential harm to its customers. 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. (Initial Decision at 13, Finding of Fact No. 30; *id.* at 43.) As HIKO's CEO and President, Mr. 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 (which preceded any action by any regulator), HIKO's customer base (including customers under the Price Guarantee and other customers with pure variable rates) 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 for HIKO. (N.T. 214:9-22.)

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. (Initial Decision at 13, Finding of Fact No. 32.)

Third, as early as February 2014, HIKO voluntarily started issuing refunds to Price Guarantee customers who were billed more than the guarantee offering. (Initial Decision at 13, Finding of Fact No. 33.) To date, HIKO has paid out approximately $160,000 to Pennsylvania customers (*Id.*)

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. (Initial Decision at 13, Finding of Fact No. 34.) 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. (N.T. 167:5-10.)

Fifth, HIKO has entered into a settlement with the OAG and OCA to provide full restitution to the customers at issue in this case, and will implement significant consumer-protection measures in its operations and marketing practices. (Initial Decision at 13, Finding of Fact No. 34.)

The Initial Decision acknowledges only the last of these as supporting a finding that a lower penalty is warranted. (*Id.* at 44.) Had proper weight been given to all of HIKO's mitigation efforts, the penalty amount would have been significantly reduced to an amount more

in line with precedent. The Commission should correct that error and reduce the recommended civil penalty.

iv. The Initial Decision Improperly Determined that HIKO Had a History of Non-Compliance.[11]

In assessing HIKO's compliance history, the ALJs determined that a higher penalty was warranted in part due to HIKO's non-compliance with the Commission's surety bond requirements. (Initial Decision at 46-47.) The considerable weight the ALJs gave to this minor procedural mistake was unwarranted because (1) the ALJs mistakenly believed HIKO did not have a surety bond during the period of the alleged violations; and (2) HIKO's inadvertent failure to submit a renewal of the surety bond for 2014 was promptly rectified without prejudice to the Commission and consumers.

HIKO's alleged failure to satisfy its surety bond requirements was never raised by I&E when presenting this case. Even during the Evidentiary Hearing when it was charged with submitting substantial evidence to support its unprecedented penalty of nearly $15 million, I&E never submitted testimony or any other evidence to support the finding that HIKO violated Commission regulations regarding surety bond requirements, nor did I&E cross-examine Mr. Klein on this matter. And, while I&E mentioned HIKO's alleged failure to timely submit its bond renewal to the Commission, the crux of its argument focused on the probationary status of HIKO's license during the time period in which the Company failed to honor the Price Guarantee. (I&E Closing Brief, dated June 3, 2015, at 32-33.) Hence, the ALJs' decision to consider circumstances that were neither raised by the parties nor supported by documentary evidence submitted by the parties is an error of law. *See* Initial Decision at 24, citing *Norfolk & Western Railway Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980) (noting that the

[11] Findings of Fact No. 80

Commission's decision must be supported by *substantial evidence in the record*, not a mere trace of evidence or a suspicion of the existence of a fact) (emphasis added).

More significantly, the Initial Decision mistakenly asserted that HIKO did not have the required surety bond during the period of the alleged violations in January through April 2014. That was simply incorrect. In October 2013, the Commission notified HIKO that its surety bond would expire on December 22, 2013 and that it had until then to file a Certificate of Continuation. (*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, Letter of D. Gill, Deputy Director of Bureau of Technical Utility Services (Pa. PUC) to HIKO Energy, LLC (dated October 31, 2013), attached hereto as Exhibit A.)[12] On November 5, 2013, HIKO notified the Commission that it had requested a Certificate of Continuation and would file it with the Commission upon receipt. (*See* November 5, 2013 Letter of HIKO Energy, LLC to D. Gill, Deputy Director of Bureau of Technical Utility Services (Pa. PUC) (dated November 5, 2013), attached hereto as Exhibit B.) Two days later, on November 7, 2013, HIKO filed with the Commission a Certificate of Continuation in the amount of $250,000. (*See* Letter of S. Simins to Secretary R. Chiavetta (dated November 7, 2013), attached hereto as Exhibit C.) Thus, it was error for the ALJs to conclude that HIKO did not have the required surety bond during the period of the alleged violations.

During the Evidentiary Hearing, Mr. Klein testified that there was some confusion between HIKO and the Commission regarding the amount of the surety bond. (N.T. at 170:8-171:18.) Specifically, Mr. Klein stated that the Commission wanted HIKO's surety bond increased from $250,000 to $750,000 and that there was some delay in the Company obtaining

[12] By Order entered April 22, 2015, the ALJs indicated that they would take judicial notice of certain documents related to the proceeding regarding HIKO's Application for an EGS license as well as public documents from the Commission or its staff addressed to HIKO pertaining to HIKO's surety bond.

the increase. (*Id.*) However, as the official correspondence between HIKO and the Commission demonstrate, (*see* Exhibit C), HIKO always maintained a certificate for the minimal level of security with the Commission. (*See id.* at 1 (stating that the minimal security level provided may not be less than the initial security level provided when the license was granted [which] [u]nless approved by the Commission, the initial security level is $250,000.").) Hence, the mistaken assumption that HIKO did not have such a bond caused the ALJs to increase the civil penalty amount and thus was highly prejudicial to HIKO. Accordingly, the Commission should correct this error and reduce the recommended civil penalty.

v. The Initial Decision Improperly Determined that HIKO was Not a Small Company, Resulting in an Increased Penalty.

In assessing a civil penalty amount that was necessary to deter future violations, the ALJs held that $1,836,125 was a reasonable deterrent given HIKO's size and the potential customer base. (Initial Decision at 49.) Specifically, the ALJs determined that HIKO is not as "small as it purports to be" since the Company had approximately $7,500,000 in reported annual Pennsylvania gross receipts in 2014 and holds a license to provide natural gas and alternative natural gas in multiple states, including Pennsylvania. (*Id.*) According to the ALJs, "the potential number of customers an EGS can have is much larger than an EDC or natural gas distribution company (NGDC)." (*Id.*) The ALJs' observations involve several errors.

First, the ALJs erred in basing their decision on inferences that find no support in the record evidence. The ALJs reasoned that because Commission regulations require EGSs to maintain a surety bond in the amount of 10% reported annual gross receipts and HIKO was required to file a surety bond in the amount of $750,000 in December 2014, HIKO's annual

gross receipts in 2014 was $7,500,000.[13] Even assuming that these extrapolated numbers are correct, the Initial Decision must be supported by "substantial evidence in the record" and "more is required than a mere trace of evidence or a suspicion of the existence of fact sought to be established." (Initial Decision at 24, citing *Norfolk & Western Railway Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).)

Second, the fact that HIKO holds a license to provide service across multiple states offers no support for the inference that the Company is financially capable of bearing a nearly $2 million civil penalty, especially after the company ***voluntarily*** terminated its marketing which led to a precipitous drop in customer enrollment and agreed to pay millions of dollars, including to fully refund affected Pennsylvania customers all amounts owed. There is no record evidence showing HIKO's annual gross receipts in any state in which it is licensed. There is no record evidence showing the actual number of customers that HIKO serves in any state in which it is licensed, except Pennsylvania. Nor does a simple customer count establish the profitability of a business. A business can have a large customer base, but very thin margins. And there is no record evidence showing HIKO's intent to serve a customer base larger than that of a local utility. The ALJs' observations rest on baseless and irrelevant assumptions that find no support in the record before them.

Moreover, these assumptions are contrary to the record evidence which demonstrates that HIKO was a young company that was rapidly growing in Pennsylvania but still relatively small. HIKO's expert, Dr. Cicchetti, testified that, prior to the unprecedented spike in energy prices during the Polar Vortex, HIKO served approximately 10,000 Pennsylvania consumers. (HIKO St. 2 at 36.) After the Polar Vortex, HIKO's customer base in Pennsylvania dropped to 3,000

[13] Thus, even if there was an inadvertent failure to provide an increased surety bond that omission did not involve the period of the alleged violations and, in any event, it was promptly remedied. *See* discussion at Part III(C)(iv).

customers, resulting in significant financial loss to the Company. (*Id.*) And on top of this loss, HIKO must still pay nearly $2 million in restitution to its Price Guarantee customers, as well as the civil penalties it owes in other states, which are discussed in the Initial Decision and total in the millions of dollars. Notably, other EGSs that entered similar agreements with Pennsylvania regulators have agreed to pay restitution amounts during the same time period for their larger customer bases and the Commission has approved significantly lower civil penalties. *See Pa. PUC, Bureau of Investigation and Enforcement v. Respond Power*, Docket No. C-2014-2438640 (Initial Decision entered August 26, 2015) (approving a refund pool of $3 million and a $25,000 civil penalty); *Commonwealth of Pa., et al. v. IDT Energy*, Docket No. C-2014-2427657 (Joint Petition for Settlement Approval filed August 4, 2015) (petitioning for a refund pool of $6,577,000 and a $25,000 civil penalty); *Commonwealth of Pa., et al. v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric*, Docket No. C-2014-2427656 (Initial Decision entered June 8, 2015) (approving a refund pool of $6,836,563 and a $25,000 civil penalty).[14] Here, the ALJs recommend a civil penalty nearly 80 times higher than that assessed against EGSs much larger than HIKO for a much smaller purported economic harm. Hence, the recommended civil penalty not only ignores the actual size of HIKO, but also disregards civil penalty amounts that other

[14] Notably, these EGSs settled the same claims for a larger customer base and significantly smaller civil penalty, despite the fact that Pennsylvania regulators received a higher volume of customer complaints for these EGSs regarding variable rates that were, in some cases, higher than the rate charged by HIKO during the same time period. *Compare Commonwealth of Pa., et al. v. HIKO Energy, LLC*, Docket C-2014-2427652, Joint Complaint at ¶ 17 (June 20, 2014) (alleging that, of the 7,503 complaints received by the Attorney General, 254 (3.4%) were against HIKO) *with Commonwealth of Pa., et al. v. IDT Energy*, Docket No. C-2014-2427657 Joint Complaint at ¶¶ 20, 64 (June 20, 2014) (alleging that, of the 7,503 complaints received by the Attorney General, 1,917 (26%) were against IDT Energy and the company charged customers as high as $0.34 per KWH for electricity); *Commonwealth of Pa., et al. v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric*, Docket No. C-2014-2427656, Joint Complaint at ¶¶ 20, 64 (June 20, 2014) (alleging that, of the 7,503 complaints received by the Attorney General, 1,762 (23%) were against PaG&E and the company charged customers as high as $0.41 per KWH for electricity); *Pa. PUC, Bureau of Investigation and Enforcement v. Respond Power*, Docket No. C-2014-2438640, Formal Complaint at ¶ 28 (dated August 21, 2014) (alleging that the Bureau of Consumer Services received 1,050 informal complaints against Respond Power). By contrast to these rates, I&E's witness, Mr. Mumford, testified that the maximum rate HIKO charged its guarantee customers was $0.2990. *See* I&E St. 1 at 23:5-44:19 (discussing the billing data for HIKO customers for each service territory, including the rates charged by HIKO); *see also I&E Complaint*, Docket No. C-2014-2431410 (July 11, 2014) (same).

EGSs have agreed to pay for conduct akin to what is alleged here. Accordingly, the ALJs erred in concluding that a total civil penalty of $1,836,125 is appropriate given the size of HIKO and therefore should be rejected by the Commission.

vi. The Initial Decision Did Not Properly Consider Civil Penalties that Have Been Approved Against Other EGS Companies.

The ALJs erred in not properly considering settlements reached between Pennsylvania advocates, including I&E, and other EGSs wherein the total civil penalty levied against the EGS for similar or more egregious conduct did not exceed $150,000. The ALJs disregard these settlements, reasoning that it is inappropriate to consider a settlement as precedent in a subsequent litigated proceeding. (Initial Decision at 52.) The ALJs cite to a single case to support its position — *Pa. PUC v. Bell Telephone Co. of Pa.*, Docket No. R-811819, 1988 Pa. PUC LEXIS 572, *19 (PUC Nov. 10, 1988). The Commission should reject this position for several reasons.

First, *Bell Telephone* is factually distinguishable from this case as it involves the recovery of interest on a recoupment of revenue and has nothing to do with the billing practices of an EGS or utility company. Second, in deciding *Bell Telephone*, the Commission was not faced with the same issue as the ALJs here — that is, resolving a case where "there are not many fully litigated cases specifically regarding Section 54.4(a) of the Commission's regulations." (Initial Decision at 50.) In *Bell Telephone*, the parties were able to point the Commission to relevant legal authority for its respective positions. *See* 1988 Pa. PUC LEXIS at *17-24 (analyzing prior cases involving interest collection in recoupments). Here, even the ALJs recognize the dearth of guidance on deciding a litigated proceeding involving thousands of alleged violations during a period in which the Commission acknowledged the difficulty of EGSs such as HIKO meeting customer service demands. And while the Initial Decision cites to a few litigated cases involving

a supplier's failure to comply with Commission regulations regarding billing practices, each of these cases involve a single customer rather than thousands of customers as alleged here. Hence, the ALJs erred in concluding that recent settlements approved by the Commission and involving the same procedural complexities and allegations as here have no bearing on whether the proposed civil penalty for I&E's complaint is reasonable and just. That is especially true, where I&E's outrageous penalty demands left HIKO no choice except to litigate this matter.

Additionally, the fact that these recent settlements were amicably resolved and the instant case was fully litigated does not justify the hugely disproportionate civil penalty imposed here. The Commission's Policy Statement explicitly states that the factors evaluated in a litigated proceeding are the very same factors that are considered in approving a settled proceeding. I&E's expert witness, Mr. Mumford, confirmed this point. (N.T. at 134:16-21.) 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(c)(3). However, the exclusion of this single factor does not make Commission decisions analyzing the other nine factors irrelevant. Moreover, the fact that the Commission is reviewing these factors in a settled proceeding is not a reason to discount the Commission's own prior statements about the penalty factors. In fact, it is not uncommon for the Commission to reject a settlement agreement where it believes the civil penalty amount is not supported by the penalty factors. *See e.g.*, *Pa. PUC, Law Bureau Prosecutory Staff v. MXenergy Electric Inc.*, Docket No. M-2012-2201861 (Order entered May 3, 2012) (rejecting a settlement agreement where it did not believe the agreed upon civil penalty amount was "enough to remedy th[e] situation or to deter potential future violations of the Code or [Commission] regulations by an EGS."); *Pa. PUC, Bureau of Investigation and Enforcement v. Energy Serv. Providers, Inc. d/b/a Pa. Gas and Electric*, Docket M-2013-

2325122 (Order entered March 4, 2014) (rejecting civil penalty of $75,000 as insufficient to act as a deterrent and later accepting revised civil penalty of $150,000). *See also See Bennett v. Verizon Pa., Inc.*, Docket No. C-2010-2190280 (Final Order entered January 27, 2012) (finding that ALJ's recommended civil penalty of $6,000 for twelve months of intentional violations of customer pricing contract was excessive and unsupported by penalty factors, and reducing penalty to $2,400). Based on the foregoing, the ALJs' improperly rejected consideration of recent settlements involving civil penalties against other EGSs.

As a final point, the ALJs disregarded the Commission's approval of a $64,450 civil penalty against an EGS in *Pa. PUC, Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Final Order entered December 19, 2013) ("Public Power"), reasoning that the case involved "unintentional misconduct" on the part of a third-party vendor that "mistaken[ly]" enrolled customers without proper authorization. (Initial Decision at 52.) But, to support its position, the ALJs cite to the parties' settlement agreement as opposed to the Commission's formal opinion resolving the case. (*Id.*) Tellingly, the Commission disagreed with the ALJs describing *Public Power* 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 2,937 customer accounts without proper authorization." *Public Power* Order at 8. Hence, contrary to the ALJs' submission, the Commission itself concluded that *Public Power* involved allegations of highly egregious, willful, and flagrant conduct affecting thousands of Pennsylvania customers. The amount of the civil penalty the Commission deemed appropriate in *Public Power* therefore should have guided the ALJs decision when deciding an appropriate civil penalty for the violations alleged here. Thus,

the Commission should reject the ALJs recommended civil penalty and give proper consideration to recent approved settlements between Pennsylvania state officials, including I&E, and other EGSs involving similar allegations as those alleged here.

IV. CONCLUSION

For all the reasons set forth above, in addition to the reasons set forth in HIKO Energy, LLC's Reply Brief, dated June 24, 2015, HIKO respectfully requests the Initial Decision be modified to properly reflect (1) I&E's failure to meet its burden of proving 14,689 separate and discrete violations of 52 Pa. Code § 54.4(a); and (2) the ALJs' failure to properly consider the factors and standards set forth in 52 Pa. Code § 69.1201.

HIKO further requests that the Commission permit oral argument pursuant to 52 Pa. Code § 5.538 on these Exceptions to provide the Commission an opportunity to hear the facts and evidence surrounding this matter.

Dated: September 10, 2015

Respectfully Submitted,

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Counsel for HIKO Energy, LLC

EXHIBIT A

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

IN REPLY PLEASE
REFER TO OUR FILE

October 31, 2013

Docket No. A-2012-2289944

BRIAN GOTTESMAN
HIKO ENERGY LLC
12 COLLEGE ROAD
MONSEY NY 10952

RE: License Bond or Other Financial Security

Dear Mr. Gottesman:

Pursuant to 66 Pa. C.S. §2809(c), no electric supplier license shall remain in force unless the licensee furnishes an original of a bond or other security approved by the Commission to ensure the financial responsibility of the electric generation supplier and the supply of electricity at retail. The Commission's records indicate that the expiration of the bond or other approved security provided by Hiko Energy LLC occurs on December 22, 2013.

The Commission's regulations at 52 Pa. Code §54.40(d) require "the security level for each licensee will be reviewed annually and modified primarily based upon the licensee's reported annual gross receipts information. The security level will be 10% of the licensee's reported gross receipts." The minimum security level provided may not be less than the initial security level provided when the license was granted. Unless approved by the Commission, the initial security level is $250,000.

The Commission's regulations at 52 Pa. Code §54.39(b) require a licensee to file an annual report on or before April 30 of each year, for the previous calendar year, in order to comply with 66 Pa. C.S. §2810(c)(6). This report discloses the total amount of gross receipts from the sale of electricity and the total amount of electricity sold during the preceding calendar year. You must use this same information in calculating the appropriate security level necessary to maintain your license.

In order for your company to maintain its status as a licensed electric supplier in the Commonwealth of Pennsylvania, it must provide proof to the Commission that a bond or other approved security has been obtained. Provide an original of any documentation submitted as proof; including bond, letter of credit, continuation certificate, amendment, etc.

Your response in this matter is requested within fifteen (15) days of the date of this letter. Submit your response to the Commission's Secretary. Additionally, fax a copy of your response to James Shurskis at (717) 787-4750, Bureau of Technical Utility Services.

Failure to respond to this matter within fifteen (15) days will cause Commission staff to initiate a formal proceeding, that may lead to the following: cancellation of your company's electric supplier license, removal of your information from the Commission's website and notification to all electric distribution companies, in which your company is licensed to do business, of the cancellation of the license.

Please direct any questions to James Shurskis at (717) 787-8763, Bureau of Technical Utility Services.

Sincerely,

Darren Gill, Deputy Director
Bureau of Technical Utility Services

Cc: R. Chiavetta, Secretary

EXHIBIT B

A-2012-2289944

HIKO ENERGY
hikoenergy.com

Darren Gill, Deputy Director
Bureau of Technical Utility Services
PA Public Utility Commission

November 5, 2014

RE: License Bond for HIKO Energy, LLC

Mr. Gill,

We are in receipt of your notice, indicating that HIKO's bond is expiring on 12/22/14. We have requested a Continuation Certificate and will file it with the Pennsylvania Public Utility Commission upon receipt.

If you have any additional concerns or questions, please feel free to contact me at ssimins@hikoenergy.com.

Thank you,

Shevy Simins

Regulatory Supervisor

Cc: R. Chiavetta, Secretary

James Shurskis, Bureau of Technical Utility Services

From: (845) 406-9100
Shevy
HIKO Energy
12 College Rd.
Right Front Door
Monsey, NY 10952

Origin ID: PSBA

FedEx Express

J14221402303uv

Ship Date: 07NOV14
ActWgt: 0.5 LB
CAD: 10374802/INET3550

Delivery Address Bar Code

SHIP TO: (845) 406-9100 BILL SENDER

Secretarys Bureau
Public Utility Commission
400 NORTH ST
KEYSTONE BUILDING KEYSTONE BUILDING
HARRISBURG, PA 17120

Ref # PA Electric PUC Bond Notice
Invoice #
PO #
Dept #

MON - 10 NOV AA
STANDARD OVERNIGHT
ASR
17120
PA-US
MDT

TRK# 7717 7471 3046
0201

SH MDTA

522G1A516C8AC9

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.
Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

EXHIBIT C

HIKO
ENERGY
hikoenergy.com

Rosemary Chiavetta
Secretary of the Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17120

November 7, 2013

Re: License Bond or Other Financial Security

Docket No. A-2012-2289944

To the Secretary,

In order to maintain HIKO's status as a licensed electric supplier in the Commonwealth of Pennsylvania, please see enclosed continuation certificate.

Please feel free to contact me directly if you have any questions or comments at 845-406-9100 x 205.

Shevy Simins

Regulatory Supervisor

HIKO Energy, LLC

CONTINUATION CERTIFICATE
To be attached to and form a part of Bond described below.

Global Indemnity Insurance Agency, Inc.
195 Scott Swamp Road
Farmington, CT 06032
Phone: (860) 676-8830
Fax: (860) 676-1928

Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Date: 15-Oct-13

Re: Hiko Energy, LLC
Bond Number- B10017143

The Aegis Security Insurance Company, hereinafter called the "Company," as Surety on Bond No.: B10017143 issued on the 22nd day of DECEMBER, 2013 in the sum of TWO HUNDRED FIFTY THOUSAND AND 00/100 Dollars ($250,000.00), on behalf of Hiko Energy, LLC, Principal, in favor of Pennsylvania Public Utility Commission, Obligee, hereby certify that this bond is continued in full force and effect until the 22nd day of DECEMBER, 2014, subject to all covenants and conditions of said bond.

This bond has been continued in force upon the express condition that the full extent of the Company's liability under said bond and all continuations thereof for any loss or series of losses occuring during the entire time the Company remains on said bond shall in no event exceed the sum of the bond.

In witness whereof the Company has caused this instrument to be duly signed, sealed and dated as of the 28th day of OCTOBER, 2013.

Aegis Security Insurance Company

Surety

By STEPHEN WAGNER,

Attorney-in-Fact

Power Certificate No. NJ 063

AEGIS SECURITY INSURANCE COMPANY
POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, THAT AEGIS SECURITY INSURANCE COMPANY does hereby make, constitute and appoint: **TIMOTHY J. WAGNER, ROBERT N. WENIG, JOHN C. WAGNER, LINDA J. HAYWARD, STEPHEN WAGNER, LAUREN LYGA**

its true and lawful Attorney-in-Fact, to make, execute and deliver on its behalf surety bonds, undertaking and other instruments of similar nature as follows: **$2.5 MILLION**

This Power of Attorney is granted and sealed under and by the authority of the following Resolution adopted by the Board of Directors of the Company on the 4th day of February 1993.

"Resolved, That the President, any Vice President, the Secretary and any Assistant Secretary appointed for that purpose by the officer in charge of surety operations shall each have authority to appoint individuals as Attorney-in-Fact or under other appropriate titles with authority to execute on behalf of the Company, fidelity and surety bonds and other documents of similar character issued by the Company in the course of its business. On any instrument making or evidencing such an appointment, the signatures may be affixed by facsimile. On any instrument conferring such authority or on any bond or undertaking of the Company, the seal or facsimile thereof may by imposed or fixed or in any other manner reproduced; provided, however, that the seal shall not be necessary to the validity of any such instrument or undertaking."

"Resolved, That the signature of each of the following officers; President, Vice President, any Assistant Vice President, any Secretary or Assistant Secretary and the seal of the Company may be affixed by facsimile to any Power of Attorney or to any Certificate relating thereto, appointing Resident Vice Presidents, Resident Assistant Secretaries or Attorneys-in-Fact for the purpose only of executing and attesting bonds and undertaking and other writings upon the Company and any such power required and certified by such facsimile signature and facsimile seal shall be valid and binding on the Company in the future with respect to any bond or undertaking to which it is attached."

IN WITNESS WHEREOF, AEGIS SECURITY INSURANCE COMPANY has caused its official seal to be hereunto affixed, and these presents to be signed by its President this 9th day of October, 2013.

AEGIS SECURITY INSURANCE COMPANY

BY: _____

DARLEEN J. FRITZ
President

AEGIS SECURITY INSURANCE COMPANY CORPORATE SEAL 1977 PENNSYLVANIA

Commonwealth of Pennsylvania }
} s.s.: Harrisburg
County of Dauphin }

On this 9th day of October 2013, before me personally came Darleen J. Fritz to me known, who being by me duly sworn, did depose and say that she is President of **AEGIS SECURITY INSURANCE COMPANY,** the corporation described herein and which executed the above instrument; that she knows the seal of the said corporation, that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that she signed her name thereto by like order.

_____

REBECCA LIDDICK
Notary Public
My Commission Expires July 25, 2017

REBECCA LIDDICK COMMONWEALTH OF PENNSYLVANIA NOTARY PUBLIC

I, the undersigned, Secretary of **AEGIS SECURITY INSURANCE COMPANY,** a Pennsylvania corporation, **DO HEREBY CERTIFY** that the foregoing and attached Power of Attorney remains in full force and has not been revoked: and furthermore that the Resolution of the Board of Directors, set forth in the said Power of Attorney, is now in force.

Signed and sealed at the City of Harrisburg, in the Commonwealth of Pennsylvania, dated this 28th day of, October 2013

_____

DEBORAH A. GOOD
Secretary

AEGIS SECURITY INSURANCE COMPANY CORPORATE SEAL 1977 PENNSYLVANIA

THIS POWER NULL AND VOID IF NUMBER IS NOT IN RED