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

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

September 21, 2015

Via E-filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

On behalf of the Bureau of Investigation and Enforcement, enclosed please find the Replies to the Exceptions of HIKO Energy, LLC in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Stephanie M. Wimer
PA Attorney ID No. 207522

Michael L. Swindler
PA Attorney ID No. 43319

Enclosure
cc: As per certificate of service
Honorable Elizabeth H. Barnes
Honorable Joel H. Cheskis
ra-OSA@pa.gov

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

BUREAU OF INVESTIGATION AND ENFORCEMENT
REPLIES TO EXCEPTIONS OF
HIKO ENERGY, LLC

Michael L. Swindler
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Dated: September 21, 2015

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I. INTRODUCTION

On August 21, 2015, the Initial Decision of presiding Administrative Law Judges (ALJs) Elizabeth H. Barnes and Joel H. Cheskis was issued in the instant proceeding regarding the Bureau of Investigation and Enforcement's (I&E) Complaint against HIKO Energy, LLC (HIKO or Company). The presiding ALJs correctly found that HIKO committed 14,689 violations of the Commission's regulation at Section 54.4(a), 52 Pa. Code § 54.4(a), by overbilling customers contrary to the Company's Disclosure Statement.[1]

Specifically, HIKO, an Electric Generation Supplier (EGS), marketed a variable rate price offering primarily to residential electric customers in Pennsylvania, which provided that a customer enrolled in this offering would experience a guaranteed rate for "the first six monthly billing cycles" (the introductory period) that would be "1-7% less" than the local electric distribution company's (EDC) price to compare (PTC) (referred to hereafter as the "Price Offering").[2] HIKO issued a Welcome Letter to each customer who enrolled in this price offering which stated:

> **Guaranteed Savings!** You have been enrolled onto a variable rate, which is guaranteed to be 1-7% less than your local Utility's price to compare, for the first six monthly billing cycles. After the six-month introductory rate plan, you will be automatically rolled over onto a competitive variable rate, which will be determined by HIKO Energy, based on numerous key factors, including current market conditions and climate. The variable rate can change regularly.

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[1] Finding of Fact Nos. 67, 71; Conclusion of Law 13.
[2] I&E St. 1 at 9.

I&E Ex. 3 (emphasis in original). HIKO also issued a Disclosure Statement to each customer who enrolled in the Price Offering, which provided that the rate is the "price stated at-sign-up and confirmed in your written Welcome Letter from HIKO."[3]

Section 54.4(a) of the Commission's regulations mandates that "EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement." 52 Pa. Code § 54.4(a). The presiding ALJs correctly found, based on hundreds of pages of billing data supplied by HIKO to I&E[4] and authenticated by HIKO's own witness and Chief Executive Officer (CEO),[5] 14,689 occasions of billing an amount that was contrary to and higher than the guaranteed discounted amount of the Price Offering between January and April 2014.

Additionally, based on the record evidence, the ALJs properly concluded that HIKO made a "deliberate and intentional business decision"[6] to overcharge customers enrolled in a Price Offering and that this decision "appear[s] to have come from HIKO's top executive and management, rather than the actions of subordinate employees."[7]

After thoroughly analyzing the factors and standards used by the Commission to evaluate the appropriate level of a civil penalty, the presiding ALJs imposed a civil penalty in the amount of $125 per violation for a total civil penalty of $1,836,125.[8]

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[3] I&E Ex. 4.
[4] I&E St. 1 at 16-17; I&E Ex. 6A-11A.
[5] N.T. 141-152.
[6] I.D. at 40.
[7] *Id.*
[8] I.D. 1 and 62. On September 10, 2015, I&E filed Exceptions to the presiding ALJs' Initial Decision arguing that the evidence in the case, as well as the presiding ALJs' own sound analysis of HIKO's misconduct by a detailed review of each of the factors used to evaluate the appropriate level of a civil penalty supports the imposition of a civil penalty much greater than $125 per violation.

A. HIKO's Exceptions

On September 10, 2015, HIKO filed Exceptions to the ALJs' Initial Decision. HIKO advances three unconvincing arguments, which I&E will individually address and reject. HIKO first argues that the ALJs erred by determining that each invoice issued by HIKO between January and April 2014 that was billed contrary to the Price Offering constitutes a violation of Section 54.4(a) and is subject to a civil penalty. HIKO's argument lacks merit. The clear language of Section 54.4(a) of the Commission's regulations requires EGS billing to reflect the agreed-upon prices in the disclosure statement. HIKO perpetuated its act of overcharging customers enrolled in the Price Offering through the issuance of invoices. Accordingly, each overcharged invoice is subject to a civil penalty of up to $1,000, pursuant to Section 3301(a) of the Code, 66 Pa.C.S. § 3301(a).

Incredibly, HIKO also asserts that the invoice-based methodology was "never proven by a single piece of evidence."[9] Nothing could be further from the truth. I&E Exhibits 6A-11A consist of HIKO's own billing data in spreadsheet format and each highlighted entry on the spreadsheets represents an overcharged invoiced amount, which equates to a violation. Further, HIKO's CEO **admitted** that the Company was aware that it was charging a higher rate than allowed by deviating from the terms of the Price Offering.[10]

[9] HIKO Exceptions at 2.
[10] N.T. at 165.

HIKO next argues that the ALJs did not properly consider the Commission's penalty factors set forth in 52 Pa. Code § 69.1201 and ignored the "mitigating circumstances" surrounding HIKO's clear violation of 52 Pa. Code § 54.4(a), including HIKO's efforts to lessen harm towards its customers.[11] To the contrary, the presiding ALJs spent twenty-four pages of their sixty-seven page Initial Decision reviewing the positions presented on the record by I&E and HIKO and comparing them to the penalty factors of 52 Pa. Code § 69.1201. Regarding HIKO's "mitigating circumstances," the ALJs appropriately found "little merit to HIKO's excuses . . . ."[12] Significantly, HIKO made no effort to systematically and proactively provide refunds to customers for the invoices that were overcharged. Rather, refunds were only processed for the specific customers who expressly complained or filed complaints regarding the overbilling.[13]

Lastly, HIKO argues that the civil penalty imposed by the ALJs is not consistent with other civil penalties imposed against EGSs during the same time period. However, there have been no previous decisions or orders entered by this Commission regarding a situation similar to the egregious, willful, flagrant overcharges by an EGS or the sheer quantity of overcharges that are the subject of this litigated proceeding.[14]

HIKO also asserts that it was "forced to litigate" this matter because I&E refused to enter into settlement negotiations.[15] Ordinarily, I&E does not publicly mention settlement negotiations since offers of settlement are privileged, confidential and

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[11] HIKO Exceptions at 3.
[12] I.D. at 58.
[13] N.T. 205; I&E Ex. 13.
[14] I&E St. 1 at 52.
[15] HIKO Exceptions at 3-4.

inadmissible into evidence. *See* 52 Pa. Code § 5.231(d). However, I&E cannot allow HIKO to misrepresent what *actually* occurred. I&E did in fact engage in settlement negotiations with HIKO, including an in-person meeting as well as telephonic conversations. Obviously, the parties did not arrive at a meeting of the minds, leading to the present litigation.

B. HIKO's Request For Oral Argument

Pursuant to Section 5.538 of the Commission's regulations, 52 Pa. Code § 5.538, HIKO requests that the Commission hear oral argument on its Exceptions to the Initial Decision so that the Commission may "hear the facts and evidence surrounding this matter."[16] A thorough record was developed, including a clear admission by HIKO that it made a business decision not to absorb the increased energy costs of the polar vortex winter,[17] which led to HIKO unlawfully passing the costs onto customers enrolled in the Price Offering. No factual dispute, change in circumstance or legal argument exists that would justify granting an oral argument. In fact, granting oral argument in this matter where a clear and comprehensive record has been developed would set a precedent so low that virtually every case before the Commission hereinafter would be entitled to oral argument. Therefore, HIKO's request for an oral argument should be denied.

[16] HIKO Exceptions at 35.
[17] N.T. 165.

II. I&E'S REPLIES TO EXCEPTIONS

A. HIKO EXCEPTION NO. 1: The Initial Decision Properly Concluded That Each Invoice Entry Containing An Overcharge Constitutes A Violation Of 52 Pa. Code § 54.4(a).[18]

HIKO unpersuasively argues that the presiding ALJs committed an error by concluding that each invoice entry reflecting an overcharge amounts to a violation of Section 54.4(a) of the Commission's regulations, 52 Pa. Code § 54.4(a).[19] Specifically, HIKO asserts that a "per invoice entry" methodology is "*potentially* inaccurate."[20] Rather, HIKO avers that the violations should be based upon the number of affected customers[21] or the number of days that violations occurred.[22] Not surprising, each alternative methodology suggested by HIKO is not supported by law and would result in a significantly lower civil penalty not commensurate with HIKO's egregious misconduct.

To the contrary, each invoice entry reflecting an overcharge *does* constitute a violation of Section 54.4(a) of the Commission's regulations, which provides as follows:

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

52 Pa. Code § 54.4(a) (emphasis added). As noted above, HIKO marketed a guaranteed rate for a customer's first six monthly billing cycles that would be 1-7% less than the local EDC's PTC. Customers enrolled into this Price Offering, which was set forth in HIKO's Welcome Letter and Disclosure Statement.[23] Faced with increased energy costs

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[18] I.D. at 30, Finding of Fact No. 67, Conclusion of Law No. 13.
[19] HIKO Exceptions at 11.
[20] HIKO Exceptions at 12 (emphasis added).
[21] HIKO Exceptions at 12.
[22] HIKO Exceptions at 14.
[23] I&E Ex. 3 and 4.

during the winter of 2014, HIKO made a business decision at the highest level of management to deliberately ignore the guarantee of the Price Offering. HIKO perpetuated its overbilling by issuing invoices as demonstrated by each highlighted invoice entry on I&E Exhibits 6A-11A.

The ALJs noted two potential inconsistencies in I&E's total number of violations: (1) I&E Exhibit 14 increased by one violation instead of remaining the same or decreasing after I&E removed from its total violation count account entries containing "zero usage;"[24] and (2) I&E Exhibit 8A contains sixty instances where energy charges were consumed for the same account during the same time period, but with differing invoice numbers, amounts and usage. The ALJs properly concluded that there were two invoices issued for each account during the same time, especially given that HIKO never specifically refuted I&E's evidence, which identified these entries as being invoices that were ultimately billed to customers.[25] It is revealing that even in its Exceptions, HIKO neglects to provide what it considers to be an accurate total number of overcharges issued between January and April 2014, presumably because that number would garner no sympathy towards the Company.

HIKO instead suggests that the number of violations should be based on the number of affected customers, which was approximately 5,700.[26] However, HIKO's interpretation is contrary to the Commission's regulation at Section 54.4(a). A violation

[24] HIKO asserts that I&E decided to remove "re-billed" charges from the total number of alleged violations. HIKO Exceptions at 12. However, this statement is inaccurate. I&E removed approximately 68 invoice entries from its total count of violations because the billing data reflected that no energy was consumed. I&E St. SR-1 at 12-13.
[25] I.D. at 30-31.
[26] I.D. at 30.

of 52 Pa. Code § 54.4(a) occurs when the price charged is not the price promised, which the ALJs concluded occurred on 14,689 occasions based on record evidence. Further, if the Commission were to accept HIKO's suggestion, it would ignore the fact that some customers were overbilled up to four separate instances between January and April 2014.

HIKO next argues that any civil penalty should be based on each day that overcharging occurred during the 4-month period between January and April 2014, or 120 days. HIKO's more lenient interpretation likewise contradicts the law. In *Newcomer Trucking, Inc. v. Pa. Pub. Util. Comm'n*, 531 A.2d 85 (Pa. Cmwlth. 1987), the Commonwealth Court held that Section 3301 of the Code authorizes the Commission to impose a civil penalty of up to $1,000 for *each and every discrete violation*, regardless of the number of violations occurred. In *Newcomer*, the carrier's certificate prohibited it from transporting the goods of more than one consignor on one truck at any time. Newcomer was found to have violated its certificate restriction 184 times on 128 separate days. The Commonwealth Court affirmed the Commission's Order and found that since 184 unlawful shipments were identified, each shipment constituted a violation. The Court disagreed with the carrier's argument that the shipments could be characterized as a continuing offense of an ongoing nature because the shipments could be feasibly segregated into discrete violations so as to impose separate penalties. *Id.* at 87. The Court stated:

> Interpreting Section 3301(a) of the Code in the fashion proposed by Newcomer, however, would be both absurd and unreasonable. Under Newcomer's argument, no matter how many times a Code provision or PUC regulation is violated, be it once or 100 times, the maximum penalty

> that the PUC could levy would be $1,000. Clearly, this could not have been the intent of the legislature, and we decline to so find.

Id. at 86. Consistent with Commonwealth Court's determination regarding the number of unlawful shipments in *Newcomer*, the number of overcharges facilitated by HIKO that took place between January and April 2014 can be segregated into 14,689 discrete violations that are subject to a separate monetary civil penalty, as correctly found by the ALJs.[27]

To support its argument that the civil penalty be reduced, HIKO cites four cases purportedly showing a lower range of civil penalties approved by the Commission for other EGSs for similar violations during the same time period. The first matter cited by HIKO, *Pa. PUC, Bureau of Investigation and Enforcement v. Respond Power*, Docket No. C-2014-2438640 (Initial Decision allegedly issued August 26, 2015)(allegedly approving a $125,000 civil penalty) is a decision that simply does not exist. No initial decision considering the merits of the case has been issued in the *Respond Power* proceeding.

The next two matters cited by HIKO, *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 108 instances of slamming that occurred in 2013) and *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

[27] I.D. at 35.

inadvertent, mistaken customer enrollments) involve allegations unrelated to the 2014 polar vortex. Further, both matters were amicably settled, not litigated. It is not appropriate to consider a settlement, which is intended to be an amicable resolution of disputed claims, as precedent in any subsequent proceeding. *See Pa. Pub. Util. Comm'n, v. Bell Telephone Co. of Pa.*, Docket No. R-811819, 1988 Pa. PUC Lexis 572* (Order entered November 10, 1988) at *19 (where the Commission made it clear that "we vigorously, and without equivocation, reject considering a settlement as precedent, as to *any* subsequent issue, in *any* proceeding").

HIKO cites another case, *Herp v. Respond Power*, Docket No. C-2014-2413756 (Initial Decision entered December 17, 2014), to stand for the proposition that a civil penalty of up to $1,000 can only be assessed for non-compliance of each violation.[28] In *Herp*, the EGS was assessed a $10,000 civil penalty for violating ten regulations and HIKO asserts that some regulations were violated on more than one occasion. HIKO's argument is nonsensical. To accept it would mean that in the present matter, the Commission could only impose a civil penalty in the amount of $1,000 because I&E alleges that only one regulation was violated. As Commonwealth Court in *Newcomer* stated, "Clearly, this could not have been the intent of the legislature . . . ." *Newcomer*, 531 A.2d at 87. Moreover, the *Herp* decision is presently before the Commission and it is entirely possible that the civil penalty could be increased.

[28] HIKO Exception at 14.

Therefore, the ALJs thorough, well-reasoned determination that each instance where a customer's invoice entry was overbilled constitutes one violation should be affirmed and HIKO's Exception No. 1 should be denied.

B. HIKO EXCEPTION NO. 2: The Initial Decision Properly Concluded That HIKO Violated 52 Pa. Code § 54.4(a) On 14,689 Separate And Distinct Occasions As Supported By Record Evidence.[29]

HIKO argues that I&E failed to meet its burden in proving that HIKO violated 52 Pa. Code § 54.4(a) on 14,689 separate and distinct occasions.[30] At the outset, I&E notes that HIKO's second exception is nearly identical to its first exception and, for the sake of brevity, I&E will not repeat the same arguments that are mentioned above.

Nevertheless, HIKO's argument fails. The presiding ALJs rightly concluded that I&E met its burden in proving that 14,689 violations occurred between January and April 2014. The term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950). "'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."[31]

The evidence presented by I&E was not just slightly convincing – it was overwhelmingly convincing. I&E identified by yellow highlight 14,689 individual invoice entries over 1,115 pages of spreadsheet data provided by HIKO that were billed

[29] Finding of Fact No. 67; Conclusion of Law Nos. 8 and 12.
[30] HIKO Exceptions at 15-16.
[31] I.D. at 24 (emphasis added).

contrary to the terms of the Price Offering between January and April 2014.[32] While the ALJs noted approximately 60 possible inconsistencies in the 14,689 overcharged invoices identified by I&E, the ALJs correctly concluded that HIKO failed to outweigh I&E's evidence. Specifically, the ALJs stated that HIKO's expert witness, Mr. Cicchetti:

> . . . was unspecific about which line items were incorrectly included in the calculations. He also seemed unsure whether the customer was billed the re-bill or not. As his testimony contains conjecture, we find I&E carried its burden of proving 14,689 violations did occur during the four month period in question.

I.D. at 31.

It is HIKO's responsibility to refute evidence offered by I&E. HIKO had the opportunity to correct any alleged mistakes in I&E's total calculation of 14,689 overcharges. However, at no point in time did HIKO identify any specific invoice entry that was incorrect. Therefore, I&E demonstrated through a preponderance of the evidence that HIKO overcharged customers on 14,689 separate instances between January and April 2014.

HIKO next argues that the ALJs should not have included as violations overcharges related to relatively small amounts of money or minimal electric consumption.[33] HIKO's arguments lack merit. The amount of the overcharge or the level of consumption is irrelevant when determining whether a violation of 52 Pa. Code § 54.4(a) occurs. The ALJs properly determined that "each instance where a customer's invoice entry was overbilled is a violation of the Commission's regulation at 52 Pa. Code

[32] I&E Ex. 6A-11A.
[33] HIKO Exceptions at 17.

§ 54.4(a)."[34] Simply stated, whether a violation occurred is not determined by the extent of the overcharge or the amount of electricity consumed. Therefore, HIKO's Exception No. 2 should be denied.

C. HIKO EXCEPTION NO. 3: The ALJs Thoroughly And Properly Considered The Factors Used By The Commission To Evaluate A Civil Penalty Pursuant To 52 Pa. Code § 69.1201.[35]

It is important to note that, unlike HIKO, I&E agrees with the ALJs' sound analysis of HIKO's misconduct. However, I&E asserts in its Exceptions that were filed on September 10, 2015, that the record and the ALJs' own reasoning of HIKO's misconduct by a detailed review of each of the ten *Rosi*[36] factors supports the imposition of a civil penalty much greater than $125 per violation. Nevertheless, I&E will address and reject each argument presented by HIKO.

1. HIKO's Excuses Have Little Merit

HIKO first argues that the ALJs did not properly consider what HIKO claims to be the mitigating circumstance of the polar vortex winter.[37] To the contrary, the ALJs appropriately evaluated and found little merit in HIKO's excuses for its misconduct. Specifically, the ALJs stated that:

> We find that the polar vortex weather condition, the increase in natural gas prices due to the Canadian regulatory change, the increase in demand because of the weather, PJM's operational requirements, and/or the

[34] I.D. at 31.
[35] Conclusions of Law 8 and 12.
[36] The present standard for the imposition of a civil penalty was developed in *Rosi v. Bell-Atlantic - - Pennsylvania, Inc. and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000) and is promulgated in a Policy Statement at 52 Pa. Code § 69.1201. These factors and standards are hereinafter referred to as the "*Rosi* factors."
[37] HIKO Exceptions at 19.

> resulting spot market energy prices do not constitute a good excuse for HIKO's business decision to not honor a guaranteed discount under the terms and conditions of its Price Offering nor mitigate the warranted imposition of a civil penalty in this case.
>
> There is no evidence to suggest that HIKO's disclosure statement or welcome letter indicated to the customer that its introductory rate would be dependent upon any of these aforementioned factors.

I.D. at 57. Other EGSs were faced with the challenges of the 2014 polar vortex and I&E is not aware of any other instance where an EGS decided to pass increased energy costs to customers who were entitled to receive a guaranteed discounted rate established in a disclosure statement.

Further, while HIKO asserts that many external circumstances were beyond its control, the ALJs properly found that many *internal factors* were within the control of the Company, such as the following:

> 1) the language contained in the welcome letter and disclosure statement regarding the guaranteed savings plan; 2) the decision on purchasing 100% of its energy supply on the spot wholesale market; 3) the decision to borrow $20 million to satisfy PJM requirements and stay in business; 4) the decision to mark-up wholesale prices for guaranteed savings plan customers and other variable rate customers in Pennsylvania and other States; 5) the decision to pass through increased costs and overcharge the customers in the guaranteed savings plan; and 6) the decision to refund or not refund customers.

I.D. at 58. As noted by I&E's expert witness, Daniel Mumford, "it would appear that HIKO's wholesale electric supply procurement strategy and its product offering to its retail customers of a guaranteed discount did not properly align."[38] HIKO took a risk by procuring energy on the spot wholesale market while offering a guaranteed, discounted

[38] I&E St. 1-SR at 3-4.

price. When that risk failed, HIKO unlawfully passed the costs of its blunder onto its unsuspecting customers enrolled in the Price Offering.

In discussing why HIKO opted to breach the Price Offering, HIKO states that "its customers would have experienced at least some uncertainty and potential disruption."[39] HIKO's scare tactic is a ruse and should be ignored. Had HIKO exited the retail electric market, its customers would have been instantly, automatically and seamlessly transferred to the local utility's default service and, as a result, would not have been deprived of essential electricity.[40]

2. The Civil Penalty Is Minimal Due To The Egregious Nature Of HIKO's Conduct

I&E hereby incorporates by reference its Exceptions filed on September 10, 2015 to illustrate why a civil penalty of $125 per violation is actually *minimal.*

HIKO argues that the civil penalty imposed by the ALJs of $125 per violation is excessive because it is not dependent on refunds that were made or will be made to customers and the amount of the overcharges.[41] I&E submits that HIKO's assertions do not minimize the serious nature of HIKO's conduct for which it should be decisively penalized.

The Commission's Policy Statement at 52 Pa. Code § 69.1201 appropriately does not consider refunding money to customers as a factor in evaluating the appropriate civil penalty. Whether HIKO provided refunds to customers, which even HIKO admits that it

[39] I.D. at 22.
[40] I&E St. 1-SR at 15.
[41] HIKO Exceptions at 23-24.

did not provide to all affected customers, does not act as a sufficient deterrent or substitute for a civil penalty because it merely rightfully returns money to customers – money that HIKO was not entitled to keep in the first place.[42]

Regarding overcharges, HIKO states that two-thirds of the overcharged invoices contained overcharges less than $100, 1% of the overcharged invoices contained overcharges of less than $1 and 8.8% of the overcharged invoices contained overcharges of less than $10.[43] HIKO asserts that the amount of the overcharges weighs in favor of a lower per-violation civil penalty. However, the amount of the civil penalty is not dependent upon quantifying the overcharges. Further, the ALJs correctly and logically inferred that customers may have experienced some financial hardship[44] especially since they were expecting to receive a rate for electric generation service that was guaranteed to be at least 1% less than the PTC.

3. The ALJs Appropriately Found That There Is No Evidence That HIKO Modified Its Internal Practices Or Procedures To Correct Its Misconduct[45]

HIKO continued for four consecutive months its practice of overbilling. While HIKO lauds its efforts for ceasing to market its Price Offering,[46] hiring additional people to handle an "enormous"[47] call volume presumably created by HIKO's own overbilling and changing its energy procurement strategy,[48] HIKO cannot escape the fact that it made

[42] N.T. 120.
[43] *Id.*
[44] I.D. at 39.
[45] I.D. at 43.
[46] HIKO Exceptions at 25.
[47] HIKO Exceptions at 26.
[48] *Id.*

no effort to stop overcharging as it occurred. I&E submits that the only internal change that HIKO could have initiated to address the unlawful overbilling as it occurred would have been to replace its entire management team.

Regarding refunds, HIKO made no effort to systematically and proactively provide refunds for the invoices that were overcharged. Rather, refunds were only processed for the specific customers who expressly complained or filed complaints regarding the overbilling.[49] Only after enforcement actions were taken against HIKO in Pennsylvania,[50] has HIKO agreed to provide restitution to the affected customers.

4. The ALJs Properly Determined That HIKO Has A History Of Non-Compliance, Including A Failure To Timely Submit A Surety Bond To The Commission[51]

The ALJs did not err in considering publicly available documents, pursuant to 52 Pa. Code §5.408, in determining that HIKO's compliance history was less than satisfactory. Specifically, the ALJs noted that the Commission tentatively and conditionally approved HIKO's EGS license, subject to certain reporting requirements, due to HIKO's history of a high number of consumer complaints in other states.[52] HIKO's conditions applied for a term of 18-months and the violations in this case took place during HIKO's 18-month "probationary" period.[53]

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[49] N.T. 205; I&E Ex. 13.
[50] In addition to the present case, the Pennsylvania Office of Attorney General and Office of Consumer Advocate filed a Joint Complaint against HIKO. *See Commonwealth of Pa. et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Initial Decision dated August 21, 2015).
[51] Finding of Fact 80.
[52] I.D. at 45. *See also License Application of HIKO Energy LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power*, Docket No. A-2012-2289944 (Tentative Order entered June 7, 2012).
[53] I.D. at 45-46.

The ALJs also did not err in concluding that HIKO failed to timely submit a surety bond.[54] By Secretarial Letter dated February 20, 2015 at Docket No. A-2012-2289944, the Commission advised HIKO that:

> On October 21, 2014, the Bureau of Technical Utility Services sent a 60 day Bond Renewal Notice seeking proof, be submitted to the Commission that a bond or other approved security has been obtained. To date, H[IKO] has not submitted the required proof.

Attached to the Secretarial Letter is a copy of the 60 day Bond Renewal Notice, which indicates that HIKO's bond expired on December 22, 2014.

HIKO baldly asserts in its Exceptions that it has always maintained a certificate for the minimal level of security with the Commission.[55] However, its assertion is not supported by publicly available documents at Docket No. A-2012-2289944, which demonstrate that no certificate or other proof of security was provided to the Commission prior to the expiration of HIKO's bond on December 22, 2014. Thus, the ALJs did not err in concluding that HIKO has been non-compliant.

5. The ALJs Properly Determined That HIKO Is Not A Small Company Regarding The Amount Of The Fine Necessary To Deter It From Committing Future Violations[56]

Contrary to HIKO's assertion, record evidence supports the ALJs' finding that HIKO is not a small company. Specifically, HIKO's CEO testified that the Commission required HIKO to renew a surety bond based on an increased amount of $750,000.[57] The Commission's regulation at 52 Pa. Code § 54.40(d) requires the security level to be 10%

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[54] I.D. at 47.
[55] HIKO Exceptions at 29.
[56] I.D. at 48-9.
[57] N.T. 171.

of the EGS's reported gross receipts. Therefore, in concluding that HIKO is not a small company, the ALJs appropriately inferred from record evidence that HIKO had approximately $7,500,000 in Pennsylvania gross receipts in 2014.

In addition, the ALJs properly observed that HIKO is not a small company due to the fact that it sells electric generation and natural gas supply in several states other than Pennsylvania including New York, New Jersey, Maryland, Massachusetts, Connecticut, Illinois and Ohio.[58] While HIKO refutes this observation, it provided no evidence to demonstrate that it in fact has a small customer base despite operating in seven states other than Pennsylvania or earned a minimal amount of gross receipts in those other states.

6. There Are No Past Commission Decisions In Similar Situations

HIKO argues that the ALJs erred in not considering settlement agreements reached between Pennsylvania regulators and other EGSs for violations that occurred during the same period of time.[59] Unlike this litigated proceeding, all of the matters cited by HIKO have been amicably resolved and many of those settlements remain pending final Commission approval.[60] Further, no matter cited concerns a factual pattern similar to HIKO's intentional, egregious misconduct in the present case.

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[58] I.D. at 49.

[59] HIKO Exceptions at 31-33.

[60] The following matters have not yet been approved by the Commission: *Commonwealth of Pa., et al. v. IDT Energy*, Docket No. C-2014-2427657 and *Commonwealth of Pa., et al. v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric*, Docket No. C-2014-2427656. In fact, one matter that HIKO cites has not been decided on the merits at any level, including the ALJ level. *See Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Respond Power*, Docket No. C-2014-2438640.

The ALJs properly relied on the law by not considering settlements as precedent in any subsequent proceeding.[61] Notably, the ALJs stated that:

> Although the public interest is considered in evaluating a settled case, there is not always substantial evidence in the record to support the remedies and civil penalties outlined in the settlement agreement between the parties. In a settled case, there may be a civil penalty even though the respondent does not admit to any wrongdoing or any violation.

I.D. at 52. No record was created in the cases that HIKO cites. However, the evidentiary record in this case establishes that HIKO consciously disregarded its obligation to honor the Price Offering by overcharging customers on 14,689 occasions. As I&E's expert witness, Daniel Mumford, testified:

> . . . I'm not aware of any previous case where this large number of customers were overcharged deliberately.

N.T. 132. Therefore, it was entirely appropriate for the ALJs to impose a civil penalty in this litigated case that is based, not on fines agreed-to in unrelated, settled matters, but rather on the specific, detailed and convincing evidence of record and legal reasoning presented by I&E in this matter.

[61] *See Pa. Pub. Util. Comm'n v. Bell Telephone Co. of Pa.*, Docket No. R-811819, 1988 Pa. PUC Lexis 572 (Order entered November 10, 1988).

III. CONCLUSION

For the reasons set forth above, and for the reasons set forth in I&E's Main Brief and Exceptions, I&E respectfully submits that the Commission should deny the Exceptions of HIKO Energy, LLC, deny HIKO's request for oral argument and impose a "per violation" civil penalty greater than $125 for HIKO's deliberate and unlawful overbilling on 14,689 separate and distinct occasions.

Respectfully submitted,

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Dated: September 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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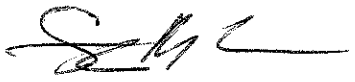

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