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September 21, 2015

VIA E-FILING

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

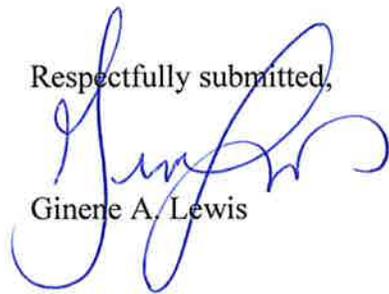
Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. HIKO Energy, LLC, Docket No. C-2014-2431410

Dear Secretary Chiavetta:

On behalf of HIKO Energy, LLC ("HIKO"), I have enclosed for electronic filing the Reply to the Bureau of Investigation and Enforcement's Exceptions to the Initial Decision in the above-referenced proceeding.

Copies of HIKO's Reply 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

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

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

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I. INTRODUCTION

HIKO Energy, LLC (“HIKO” or “the Company”) hereby submits its Replies to Exceptions filed by the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (“I&E”) to the Initial Decision of presiding Administrative Law Judges, Elizabeth Barnes and Joel Cheskis (collectively, “ALJs”), dated August 21, 2015, granting in part and denying in part I&E’s Complaint. The ALJs denied I&E’s requested civil penalty in the amount of \$1,000 per violation for a total civil penalty of \$14,689,000, and instead imposed a civil penalty in the amount of \$125 per violation for a total civil penalty of \$1,836,125. The ALJs also denied I&E’s request that HIKO’s license to do business as an electric generation supplier (“EGS”) in Pennsylvania be revoked and that the Company be ordered to pay refunds to its Price Guarantee customers.¹ In its Exceptions, dated September 10, 2015 (“I&E Exceptions”), I&E asserts one objection to the Initial Decision. Specifically, I&E argues that the \$125 per violation civil penalty is far too low and that the ALJs’ analysis of the penalty factors set forth in 52 Pa. Code § 69.1201 supports a higher penalty.² I&E assumes that a per violation civil penalty is warranted for each of the 14,689 violations of 52 Pa. Code § 54.4(a), despite the unexplainable inconsistencies (which the ALJs acknowledged but erred in accepting) within the underlying invoice data that was proffered as the only support for its civil penalty computation.³ I&E does

¹ Price Guarantee customers are customers enrolled in HIKO’s variable rate program that included an introductory six month billing cycle with a price guaranteed to be at least 1 - 7% (the “Price Guarantee”) less than the price to compare (“PTC”) of the customer’s local utility. (HIKO Rebuttal Testimony of Harvey Klein, hereinafter referred to as “HIKO St. 1”, at 6:2-5; N.T. at 169:25-170:7.) Once the Price Guarantee period expired, the customer automatically enrolled in HIKO’s standard uncapped variable rate program. (HIKO St. 1 at 5:11-21.)

² I&E does not assert exceptions related to the ALJs’ denial of license revocation and customer refunds.

³ The ALJs accepted this flawed civil penalty computation, which HIKO objects to in its Exceptions to the Initial Decision, dated September 10, 2015 (“HIKO Exceptions”). (See HIKO Exceptions at 11-18.) I&E alleged that HIKO violated 52 Pa. Code § 54.4(a) on 14,689 separate instances but failed to submit sufficient evidence supporting each of these alleged violations. Even the ALJs acknowledged the unexplainable inconsistencies within the underlying invoice data, noting that it was not entirely clear whether certain invoice entries should be considered a violation of the Commission regulations. (Initial Decision at 30-31.) As such, I&E failed to meet its burden on

not address the ALJs' confusions about the meaning of this data and whether certain entries actually amount to a Commission violation.

HIKO has filed its own Exceptions to the Initial Decision, arguing that the record evidence does not support a finding that HIKO violated 52 Pa. Code § 54.4(a) on 14,689 separate instances and that proper consideration of the Commission's penalty factors does not support a total civil penalty of \$1,836,125 (or \$125 per violation) in light of mitigating circumstances surrounding HIKO's alleged misconduct. Because I&E fails to support its request for relief with record evidence and relies on baseless inferences and mistaken assumptions made by the ALJs to support its position, it fails again to meet its burden of proof on the number of violations and civil penalty amount. Therefore, for the reasons stated below, and in further support of HIKO's Exceptions to the Initial Decision, dated September 10, 2015 and Reply Brief, dated June 25, 2015, the Commission should deny I&E's Exceptions for a higher penalty and grant HIKO's request for a civil penalty lower than that recommended by the ALJs.

II. REPLIES TO I&E EXCEPTIONS

A. REPLY TO EXCEPTION NO. 1: The Record and Presiding ALJs' Analysis of the *Rosi* Factors Do Not Support the Imposition of a Civil Penalty Greater than \$125 Per Violation.

I&E asserts a single exception to the Initial Decision — namely that the presiding ALJs' analysis of the penalty factors set forth at 52 Pa. Code §69.1201, otherwise known as the *Rosi* factors,⁴ does not support a \$125 per violation civil penalty. Although I&E characterizes the ALJs' analysis as “well-reasoned”, “thorough”, and “comprehensive”, it argues that the

each of the 14, 689 alleged violations and, in turn, the ALJs erred when including unproven violations (*i.e.*, anomalous invoice entries) in their civil penalty computation.

⁴ See *Rosi v. Bell Atlantic-Pa, Inc. and Sprint Commc'n Co.*, Docket No. C-00992409 (Order entered February 10, 2000).

aggregate civil penalty of \$1,836,125 is “conservative compared to the total civil penalty that would result from a ‘per violation’ civil penalty supported by the evidence and the ALJs’ findings.” (I&E Exceptions at 3.) Yet, I&E fails to point to a single piece of evidence “substantially supporting” its request for the imposition of a civil penalty in a greater amount for HIKO’s alleged violations of Commission regulations.⁵

Moreover, in objecting to the ALJs’ recommended civil penalty, I&E disregards key findings related to the circumstances surrounding HIKO’s alleged violations (*i.e.*, HIKO’s dire financial straits as result of the Polar Vortex and related market anomalies), the fact that significantly lower civil penalties have been levied against much larger companies for more egregious conduct, and HIKO’s independent remediation efforts as well as those taken in collaboration with other Pennsylvania regulators to provide full refunds to customers and improve its business practices. Instead, I&E insists on requesting a per violation civil penalty grossly disproportionate to the actual alleged economic harm to HIKO customers. To support its argument, I&E mischaracterizes HIKO’s compliance history and suggests without basis that HIKO cannot be sufficiently deterred from engaging in the same conduct absent a higher civil penalty. Addressing each of these issues in further detail below, HIKO respectfully submits that I&E’s requests for a higher “per violation” civil penalty is neither supported by the ALJs’ Initial Decision nor the record evidence and therefore should be rejected.

⁵ “[T]he Commission must ensure that the decision is supported by substantial evidence in the record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.” Initial Decision at 24 (citing *Norfolk & W. Railway Co. v. Pa. PUC* 413 A.2d 1037 (1980); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984)).

i. I&E Offers No Record Evidence or Legal Authority to Support Its Exception to the \$125 Per Violation Civil Penalty Amount.

Rather than point to specific proofs that the ALJs overlooked or authorities they did not consider, I&E simply quotes from portions of the Initial Decision and then says it disagrees with the ALJs' determination of the per violation civil penalty amount. This does not satisfy the Commission rules, which require the objecting party to provide "supporting reasons for the exceptions" and "incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs." 52 Pa. Code § 5.533 (relating to procedure to except initial decisions). I&E does not cite to a single overlooked or unconsidered record document or case to support its contention that the *Rosi* factors support a per violation civil penalty higher than \$125.⁶ Instead, it argues that because the ALJs determined that the record evidence supported a "higher penalty" when evaluating certain penalty factors, the "per violation" civil penalty amount should have been greater than \$125.

This argument fails. The ALJs' finding that certain *Rosi* factors support the imposition of a "higher penalty" does not mean that the maximum civil penalty amount (*i.e.*, \$1,000 per violation) or anything close to that number is warranted. As I&E correctly points out, "[t]he purpose of applying these ten factors to the facts and circumstances of each case is to establish where, in the range of \$0 to \$1,000, the civil penalty for a particular violation, if any, should fall." (I&E Exceptions at 4 (emphasis added).) Hence, a "higher penalty" can only be considered in relation to what the ALJs consider a low civil penalty given the "facts and circumstances" of the case, including the total number of violations and the average purported overcharge. Thus, in this matter the ALJs have determined that \$125 per violation was a

⁶ See I&E Exceptions at 4 ("[F]rom a range of \$0 to \$1,000, the ALJs settled on the incongruous minimum 'per violation' civil penalty of \$125."); *id.* at 11 ("\$125 per violation equals a mere 12.5% of the maximum"); *id.* at 12 ("the resulting minimum 'per violation' civil penalty reached in the Initial Decision.").

sufficiently high penalty. I&E does not offer any Commission precedent for the proposition that a “higher penalty” must mean something more than the \$125 per violation. And while I&E contends that a significantly greater civil penalty should be imposed, it does not suggest a total civil penalty amount that it believes would be appropriate. It does not offer any evidence or reasoning in support of its contention that the total civil penalty of \$1,836,125 would not be sufficient to deter future violations. It does not consider HIKO’s recent settlement with Pennsylvania’s Office of Attorney General (“OAG”) and Office of Consumer Advocate (“OCA”), at Docket No. C-2014-2427652 (“OAG/OCA Settlement”), which will provide full restitution for all of the violations at issue here and which will be paid on top of the civil penalty awarded in this matter. I&E concedes that the total civil penalty of \$1,836,125 is “facially large,” (I&E Exceptions at 3), and it cannot come up with any other case (litigated or settled) in which the Commission has assessed a total civil penalty even close to that amount against an EGS. And yet it wants more.

Given I&E’s proofs at the Evidentiary Hearing, its failure to offer any reasoned justification at the exceptions stage of this litigated proceeding is not surprising. At the Evidentiary Hearing, I&E offered no documentary evidence other than HIKO’s own customer records during the Polar Vortex to support the alleged violations of 52 Pa. Code § 54.4(a). Indeed it failed to even seek any more evidence during the period leading up to the hearing. Its witness, Daniel J. Mumford, testified that he simply applied the maximum civil penalty for each of those violations—no matter the “facts and circumstances” surrounding the case. I&E did not dispute HIKO’s evidence showing that (i) a significant number of customers received overcharges that were less than \$100, (ii) all of the violations occurred during a period of unforeseen cold weather and an unpredictable (and unprecedented) spike in wholesale

electricity prices, or (iii) HIKO had entered into the OAG/OCA Settlement, which would impose significant restrictions on HIKO's marketing and business practices and provide full restitution to all customers affected by the violations at issue in this case. I&E did not at the hearing (and does not now) offer any compelling justification for why—in view of these mitigating circumstances—a multi-million dollar civil penalty is nevertheless needed to deter HIKO from committing future violations. Furthermore, I&E does not argue that the ALJs should not have considered these factors. Indeed, all of them are encompassed within the *Rosi* factors and required to be weighed under 52 Pa. Code § 69.1201. Because I&E has not articulated any reasoned basis for increasing either the total civil penalty or the per violation civil penalty, the Commission should deny its Exception.

ii. I&E Advocates an Unprecedented Civil Penalty Without Considering Actual Harm to Customers.

In taking exception to the Initial Decision, I&E avers that “the presiding ALJs’ [sic] correctly determined that serious consequences occurred because ‘there was some financial hardship experienced by the customers.’” (I&E Exceptions at 5 (citing Initial Decision at 39).) Put simply, the “higher penalty” sought by I&E and the total civil penalty of \$1,836,125 proposed by the ALJs’ are grossly disproportionate to the actual amount charged in excess of the Price Guarantee and excessive given that HIKO will provide full restitution for these overcharges.⁷

As discussed in HIKO's Exceptions to the Initial Decision, a \$125 per violation civil penalty (and any higher amount) is unwarranted given that nearly two-thirds (65%) of the invoices at issue contained overcharges less than \$100, 8.8% were in amounts less than \$10.00,

⁷ HIKO has filed its own Exceptions to the Initial Decision on these same grounds. *See* HIKO Exceptions at 23-25 (arguing that the Initial Decision arbitrarily calculates a total civil penalty that does not consider the amount charged in excess of the Price Guarantee or refunds that HIKO customers will receive through the OAG/OCA Settlement).

and nearly 1% contained overcharges less than \$1.00. (HIKO Exceptions at 23-24.) I&E does not dispute these calculations and the ALJs accepted them in the Initial Decision. (Initial Decision at 23.) Moreover, the civil penalty requested by I&E and proposed by the ALJs fails to take into account those customers whose overcharges have already been refunded voluntarily by HIKO (prior to any regulatory involvement) and those customers whose overcharges will be refunded through the OAG/OCA Settlement. Hence, any financial harm to these customers has been, or will be, fully remedied.

In addition, I&E's contention that a higher civil penalty is supported by the ALJs' finding that HIKO's Price Guarantee customers experienced some financial hardship must be rejected. First, I&E did not submit any evidence of any particular financial hardship experienced by a single HIKO customer. Thus, the ALJs' conclusion that HIKO customers suffered financial hardship is unsupported by the record and unaddressed by I&E. Second, this unsupported inference is inconsistent with the ALJs' own admission that "it is unknown the financial detriment these account holders sustained during the winter." (Initial Decision at 34.) As such, the ALJs erred in drawing on this inference when imposing an unprecedented civil penalty and I&E should not be able to rely on this unfounded basis to support its request for a higher civil penalty. Thus, the Commission should reject I&E's request for a higher civil penalty (and the ALJs' 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 full refund.

iii. The Commission (and I&E) Has Approved Lower Civil Penalties Against Larger Companies for Similar and More Egregious Conduct.

I&E contends that the ALJs' finding that HIKO was not a small company "weigh[s] in favor of a larger civil penalty." (I&E Exceptions at 8.) Yet again, I&E bases its exception on an inference that finds no support in the record. As discussed in HIKO's Exceptions to the Initial

Decision,⁸ the ALJs erred in observing that HIKO was not a small company because this finding is based on extrapolated numbers and irrelevant assumptions related to an EGSs' potential business opportunities. Specifically, the ALJs inferred that HIKO's annual gross receipts in 2014 was \$7,500,000 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. The ALJs further inferred that, because HIKO holds a license to provide service across multiple states, the Company *could have* a larger customer base than a traditional utility company and therefore was financially able to bear a nearly \$2 million civil penalty. And, that inference was even more tenuous given that HIKO had voluntarily terminated its marketing which led to a significant drop in customer enrollment and also agreed to pay millions of dollars in customer refunds. Because there is no record evidence supporting any inference related to HIKO's size, the Commission should reject I&E's attempt to rely on the ALJs' baseless observation to support its request for a higher civil penalty. *Norfolk & W. Railway Co. v. Pa. PUC*, 413 A.2d 1037 (1980) (findings must be supported by substantial evidence in the record and not a mere trace of evidence or a suspicion of the existence of fact sought to be established).

Moreover, I&E fails to recognize instances in which the Commission has approved lower civil penalties against companies for conduct more egregious than what is alleged here. For example, 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*"), the Commission approved a \$64,450 civil penalty against an EGS for actions that involved

⁸ See HIKO Exceptions at 29-32 (arguing that ALJs erred in finding that HIKO was not a small company).

slamming—conduct that the Commission considers to be among the most egregious⁹— nearly three thousand Pennsylvania customers. The Commission characterized the case as a “matter involv[ing] fraudulent, deceptive acts . . . resulting in enrollments to change the EGS of a number of customers in PECO’s service territory without the customer’s authorization.” *Public Power Order* at 8. The Commission determined that this conduct resulted in the “initiation of the process of switching the EGS on 2,937 customer accounts without proper authorization.” *Id.* The Commission’s aggregate civil penalty of \$64,450 for slamming conduct that could have potentially affected 2,937 customer accounts would amount to a per violation civil penalty of \$22. Here, the ALJs recommend a per violation penalty amount nearly six times higher for less egregious conduct that occurred during a period when the entire wholesale electricity market was disrupted by unforeseeable and unprecedented market conditions. *See also Bennett v. Verizon Pa., Inc.*, Docket No. C-2010-2190280 (Final Order entered January 27, 2012) (reducing the per violation penalty upon Verizon from \$500 to \$200 per violation for intentional violations of its promised rates and finding that reduced amount constituted sufficient deterrence against future violations).

I&E also fails to consider instances in which the Commission approved lower civil penalties against EGSs for similar conduct 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 total civil penalty of \$25,000 for slamming and unauthorized marketing practices); *Commonwealth of Pa., et al. v. Energy Serv. Providers, Inc.*

⁹ Although the Commission has deemed slamming to be “egregious” and has declared its “zero tolerance” for this conduct,⁹ the Commission has not made any similar pronouncements in a case involving overbilling by an EGS company. *See, e.g., Pa. P.U.C. v. Total Gas & Elec. Inc.*, Docket No. M-0011529 (Order entered Sept. 26, 2001) at 5 (stating that “[it] does not trivialize allegations of unauthorized enrollment of customers, or ‘slamming,’ and seeks to deter such conduct by instituting firm retaliatory measures for violations of the Commission’s regulations with respect to enrollment of customers.”).

d/b/a Pa. Gas & Electric, Docket No. C-2014-2427656 (Initial Decision entered June 8, 2015) (approving a \$25,000 civil penalty for, *inter alia*, failure to bill customers at rate lower than the PTC during Polar Vortex period); *see also 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 \$25,000 civil penalty for, *inter alia*, failure to bill customers at rate lower than the PTC during Polar Vortex period). Notably, these EGSs settled the same claims for significantly smaller civil penalties, despite the fact that these companies had higher customer bases, charged rates that were, in some instances, higher than the rates charged by HIKO during the same period, and the Pennsylvania regulators received a higher volume of customer complaints related to variable rate plans against these EGSs. *See 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); *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); *Commonwealth of Pa., et al. v. Respond Power*, Docket No. C-2014-2427659, Joint Complaint at ¶¶ 18, 87 (June 20, 2014) (alleging that, of the 7,503 complaints received by the Attorney General, 520 (7%) were against Respond Power and the company charged customers as high as \$0.40 per kWh for electricity); *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, only 254 (3.4%) of the 7,503 complaints to the Attorney General were made by HIKO customers, *Commonwealth of Pa., et al. v. HIKO Energy, LLC*, Docket C-2014-

2427652, Joint Complaint at ¶17 (June 20, 2014), and I&E's witness, Mr. Mumford, testified that the maximum rate HIKO charged its Price 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). In view of this evidence, I&E fails to articulate why a higher penalty is warranted here.

The fact that HIKO's conduct was deemed intentional does not necessarily support a higher civil penalty. *See Bennett*, Docket No. C-2010-2190280 (Final Order entered January 27, 2012) (reducing the ALJs' recommended civil penalty of \$6,000 to \$2,400 for twelve months of intentional violations of customer pricing contract). And the Commission's decision in *Bennett* further supports the proposition that a civil penalty of \$125 per violation or any higher amount is unnecessary to deter HIKO from committing violations in the future. *See id.* (reducing the per violation civil penalty to \$200 and reasoning that this lower civil penalty was sufficient deterrence against Verizon, a much larger company). The significant financial burden HIKO has already suffered is more than enough to deter the company from engaging in the same conduct. HIKO has lost approximately 70% of its customers since voluntarily suspending its marketing efforts, endured market stigma related to its failed contractual commitment, and paid out significant attorney's fees in defending against multiple regulatory proceedings and related class actions stemming from the same underlying conduct. Further, by virtue of its settlement with the OAG and OCA, HIKO will also incur increased levels of expenses through operational and marketing changes to its business, administration and settlement costs, and payment to a hardship fund. HIKO also intends to make full restitution to all of its Pennsylvania Price

Guarantee customers. Accordingly, an additional civil penalty is neither appropriate nor necessary.

Accordingly, the Commission should reject I&E's request for higher civil penalties and give proper consideration to Commission precedent imposing significantly lower civil penalties for conduct similar to or more egregious than the conduct alleged here.

iv. I&E Ignores HIKO's Substantial Efforts to Rectify the Alleged Commission Violations.

"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 hire new executives." (I&E Exceptions at 7.) I&E offers no legal support for this statement and there is nothing in the Commission regulations requiring that the Company terminate its employees for the alleged violations. And, the presiding ALJs considered the testimony from HIKO's CEO, Harvey Klein, and did not feel such steps were warranted. Moreover, and contrary to I&E's suggestion, the fact that HIKO's senior executives were involved with the business decision to bill customers at a rate higher than the Price Guarantee so that the Company could stay afloat with increased costs in the wholesale market does not necessarily support a civil penalty higher than what has already been proposed by the ALJs. To be sure, in at least one instance, the Commission approved a significantly lower civil penalty for the "most egregious" slamming allegations where an employee falsified verifications and attempted to switch 319 customer accounts. *See Pa. PUC, Bureau of Investigation v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Electric* ("PaG&E"), Docket No. M-2013-2325122 (Order entered Mar. 4, 2014) (approving a \$150,000 civil penalty). Although the alleged slamming was committed by an employee and not executive, the Commission penalized the Company for its failure to have internal protocols in place to prevent unauthorized behavior and to self-report these slamming violations to the Commission. Despite these failures

and in imposing an appropriate penalty, the Commission did not require the Company to terminate its managerial or executive employees responsible for internal protocols and regulatory compliance. There is no reason the circumstances should be any different here.

Furthermore, the Commission should reject I&E's (and the ALJs') attempt to disregard HIKO's substantial remediation efforts to rectify the Commission violations alleged here. As discussed in further detail in HIKO's Exception, it is undisputed that HIKO started making changes to its business practices and marketing efforts prior to the initiation of any regulatory action. *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; *see also* HIKO St. 1 at 9:19-20.) 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.) *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.*)

More recently, HIKO made additional modifications to its business operations, including instituting changes to its energy purchasing program. HIKO 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.) Additionally, 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 13-14, Finding of Fact Nos. 34, 37.)

I&E does not acknowledge any of these remediation efforts, arguing that the only corrective action HIKO can pursue is terminating its executive employees for making a business decision that was the only viable option for the Company. The Commission should reject I&E's exception and give proper weight to all of HIKO's mitigation efforts.

v. **I&E Mischaracterizes HIKO's Compliance History.**

I&E mischaracterizes HIKO's compliance history, arguing that a higher civil penalty is warranted since "HIKO failed to provide proof that a bond or other approved security amount was obtained." (I&E Exceptions at 7-8.) The ALJs made this same error in their Initial Decision.¹⁰ As discussed in HIKO's Exceptions, the ALJs 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 Exhibit A to HIKO Exceptions, *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).) On November 5, 2013, HIKO

¹⁰ HIKO filed exceptions to this portion of the ALJs' Initial Decision, arguing that the ALJs erred in giving considerable weight to this minor procedural mistake 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.

notified the Commission that it had requested a Certificate of Continuation and would file it with the Commission upon receipt. (*See* Exhibit B to HIKO Exceptions, Letter of HIKO Energy, LLC to D. Gill, Deputy Director of Bureau of Technical Utility Services (Pa. PUC) (dated November 5, 2013).) Two days later, on November 7, 2013, HIKO filed with the Commission a Certificate of Continuation in the amount of \$250,000. (*See* Exhibit C to HIKO Exceptions, Letter of S. Simins to Secretary R. Chiavetta (dated November 7, 2013).) 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 the increase. (*Id.*) However, as the official correspondence between HIKO and the Commission demonstrates, (*see* Exhibit C to HIKO Exceptions), HIKO always maintained a certificate for the minimal level of security with the Commission. (*See* Exhibit A to HIKO Exceptions at 1 (stating that the "minimum 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. Because I&E's request for a higher civil penalty relies upon this mistaken assumption, the Commission should reject I&E's exception, correct this error, and then reduce the recommended civil penalty accordingly.

vi. **I&E's Request for Higher Civil Penalties Would Not Serve Public Policy or the Public Interest.**

I&E's main grievance is self-created: it filed a complaint seeking an enormous civil penalty based on its choice of a methodology that applied the maximum penalty of \$1,000 to nearly 15,000 invoice entries that allegedly reflected customer overcharges in violation of 52 Pa. Code § 54.4(a). This methodology yielded a total civil penalty that was unsupported by the underlying data, grossly disproportionate to the actual alleged economic harm to HIKO customers, and had never been recovered in even the most egregious violations that involved deaths, serious personal injury or significant property damage.¹¹ Although the ALJs ultimately denied I&E's extortionate civil penalty demand for a nearly \$15 million civil penalty, they still decided to impose an unprecedented civil penalty of \$1,836,125 based on this flawed penalty computation based on the overcharged invoices. But I&E still wants more. Without articulating any clear justification for why the Commission's penalty factors support the imposition of such outlandish civil penalties, I&E appears to believe the recommended civil penalty is insufficient—despite the fact it is nearly 80 times higher than the civil penalties assessed against other EGSs for similar conduct during the same time period. Moreover, I&E continues to seek multi-million dollar civil penalties, despite the fact that the record evidence clearly demonstrates that HIKO does not need such penalties to deter it from committing future violations. Indeed, even without the imposition of the enormous civil penalty in this case, HIKO has already implemented consumer-protection measures in its operations and is working closely with other Pennsylvania regulators, including providing customers with full refunds for the overcharges at

¹¹ See, e.g., *Pa. PUC v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order entered Sept. 26, 2013) (imposing a \$1,000,000 civil penalty after repeated violations of gas safety regulations spanning the course of nearly five years, with consequences that included many deaths and substantial property damage); *Pa. PUC v. UGI Utilities, Inc.*, Docket No. M-2009-2031571 (Order entered Jan. 14, 2010) (\$80,000 civil penalty for explosion that resulted in destruction of four homes and one personal injury); *Pa. PUC v. UGI Utilities, Inc.*, Docket No. C-2012-2308997 (Order entered Feb. 19, 2013) (increasing the civil penalty in a settlement to \$500,000 for a gas explosion that resulted in five deaths and substantial property damage.)

issue here. The Commission should not allow I&E to punish HIKO with a grossly excessive civil penalty simply because it was forced to litigate I&E's claims. Indeed, doing so would only encourage I&E to bring enforcement actions seeking even more outlandish civil penalties. The parties in those actions would, like HIKO here, have little choice except to fully litigate those cases. The result would not promote the just and efficient resolution of enforcement actions and would counter the Commission's goal of promoting settlement where possible.

III. CONCLUSION

For all the reasons set forth above, in addition to the reasons set forth in HIKO Energy, LLC's Exceptions, dated September 10, 2015, and Reply Brief, dated June 24, 2015, HIKO respectfully requests that I&E's Exceptions to the Initial Decision be rejected. HIKO further requests that 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.

Dated: September 21, 2015

Respectfully Submitted,

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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).

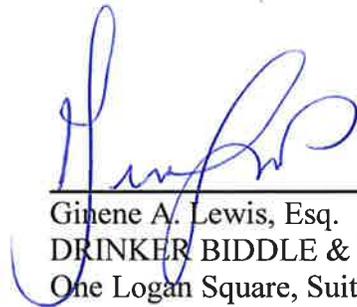
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