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September 8, 2016

**Via Electronic Filing**

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation & Enforcement v.  
Clearview Electric Inc., Docket No. C-2016-2543592

Dear Secretary Chiavetta:

On behalf of Clearview Electric Inc., I have enclosed for electronic filing its Prehearing Conference Memorandum in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Sincerely,



Karen O. Moury

KOM/lww  
Enclosure

cc: Hon. Elizabeth H. Barnes, w/enc.  
Certificate of Service w/enc.


**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of Clearview Electric's Prehearing Conference Memorandum upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

**Via Email and/or First Class Mail**

Michael L. Swindler, Esq.  
Stephanie M. Wimer, Esq.  
Bureau of Investigation & Enforcement  
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Dated: September 8, 2016

  
\_\_\_\_\_  
Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation & Enforcement	:	
	:	
v.	:	Docket No. C-2016-2543592
	:	
Clearview Electric, Inc.	:	

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**PREHEARING CONFERENCE MEMORANDUM  
OF CLEARVIEW ELECTRIC, INC.**

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TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

Clearview Electric, Inc. (“Clearview” or “Company”) hereby submits this Prehearing Conference Memorandum in accordance with 52 Pa. Code § 5.222 and the Amended Prehearing Conference Order dated August 3, 2016.

**I. INTRODUCTION AND BACKGROUND**

Clearview is an electric generation supplier (“EGS”) licensed by the Commission since May 7, 2010 at Docket No. A-2010-2152506 to supply electricity or electric generation services to retail customers throughout Pennsylvania. Since receiving its EGS license, Clearview has supplied electric generation services to tens of thousands of residential and commercial electric customers under multiple fixed rate plans and two different types of variable rate plans. From June 2010 through May 31, 2013, Clearview offered variable rate plans to residential and commercial electric customers in Pennsylvania that contained a minimum and maximum rate, ranging from 8.9 cents to 17.9 cents per kWh. After May 31, 2013, the only variable rate plans offered by Clearview to residential and commercial electric customers in Pennsylvania contained

no minimum and maximum rate. Under both variable rate plans, Clearview issued disclosure statements to consumers explaining that prices would vary based on PJM market conditions.

Due to an informal complaint filed by a consumer with the Bureau of Consumer Services on March 26, 2014, Clearview queried all of its billing data and became aware of an error that had resulted in 4,157 customers being overcharged by 1 cent per kWh, for a total amount of \$105,225.64, during the months of February, March and through April 2014. Thereafter, Clearview immediately and proactively began the process for refunding and crediting those overcharges, with all customers being made whole by the end of 2014.

Clearview also revised its Variable Rate Customer Enrollment Policy on April 15, 2014 to include: (i) protocols in its system that only allow increases or decreases within the range specified in a customer contract; (ii) the generation of exception reports identifying contracts that would exceed the pricing parameters; (iii) running queries when a change is made in variable pricing to ensure that customer rates are correct; and (iv) performing quarterly audits. No billing errors have occurred since that time. Previously, such protocols and procedures were not put in place due to Clearview's assumption that the PJM market-based variable price would never exceed the maximum rate of 17.9 cents per kWh. But for the occurrence of the Polar Vortex crisis that occurred in early 2014, and its effect on wholesale market prices,<sup>1</sup> Clearview's rates would not have exceeded the range set forth in those plans.

On May 5, 2016, the Bureau of Investigation and Enforcement ("I&E") filed a Complaint alleging that Clearview had issued bills in early 2014 containing charges that exceeded the price range in its disclosure statement, in violation of Section 54.4(a) of the Commission's regulations, 52 Pa. Code § 54.4(a). Seeking a \$125 civil penalty for each bill containing an error, I&E requested

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<sup>1</sup> See *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014).

the imposition of a civil penalty in the amount of \$1,293,875. In addition, I&E alleged that Clearview changed the contract terms of affected customers without providing notice in violation of Section 54.10 of the Commission's regulations, 52 Pa. Code § 54.10. The total cumulative civil penalty sought by I&E is \$1,300,000.

Clearview filed an unopposed request for an extension of time to file responsive pleadings, which was granted by Secretarial Letter dated May 18, 2016. Clearview timely filed an Answer and New Matter on June 14, 2016. In that Answer and New Matter, Clearview explained: (i) the different types of variable rate plans that it has offered to residential and commercial customers in Pennsylvania; (ii) how the 1 cent per kWh billing error occurred in early 2014; (iii) its proactive efforts to, upon learning of the error, query all billing data, identify affected customers and immediately begin the reimbursement process; and (iv) how it changed its internal practices in April 2014 to ensure that such an error does not recur. Clearview further challenged the civil penalty proposed by I&E as being inconsistent with the factors set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201, particularly as those factors were applied by the Commission in *PA PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015). Clearview also noted that the provisions of the Commission's regulations regarding advance notices of changes in contract terms are inapplicable since Clearview did not change any contract terms.

I&E filed a Reply to New Matter on July 5, 2016.

A prehearing conference is scheduled for September 12, 2016. By Amended Prehearing Order dated August 3, 2016, Administrative Law Judge ("ALJ") Barnes directed the filing of Prehearing Conference Memoranda by September 8, 2016.

**II. SERVICE OF DOCUMENTS**

Clearview requests that all documents be served on:

Karen O. Moury  
Sarah C. Stoner  
Eckert Seamans Cherin & Mellott, LLC  
213 Market St., 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
717.237.6036

Clearview agrees to receive electronic service of documents in this proceeding. To the extent that materials are disseminated electronically, it is requested that copies be sent to [kmoury@eckertseamans.com](mailto:kmoury@eckertseamans.com).

**III. DISCOVERY**

Clearview proposes no modifications to the discovery rules that are set forth in the Commission's regulations.

**IV. PROPOSED SCHEDULE**

Clearview has been in contact with I&E regarding the procedural schedule and is generally agreeable to the schedule proposed by I&E, subject to a minor suggested adjustment in the due date for rebuttal testimony and confirmation regarding witness availability.

**V. WITNESSES**

At this time, Clearview Electric intends to call the following witnesses:

Overall Company Operations

Francis X. McGovern, CEO/President  
Clearview Electric, Inc.  
1201 Elm Street, Suite 3200  
Dallas, TX 75270

### Company Policies and Practices

Nicole Steele, Vice President  
Clearview Electric, Inc.  
1201 Elm Street, Suite 3200  
Dallas, TX 75270

### Regulatory Compliance

Thomas F. Walker, Compliance Manager  
Clearview Electric, Inc.  
1201 Elm Street, Suite 3200  
Dallas, TX 75270

Clearview reserves the right to call additional witnesses to address any issues that have been or are later raised during the course of the proceeding and will identify such additional witnesses within a reasonable period of time prior to the commencement of hearings.

## **VI. ISSUES**

The essential facts are not in dispute. The primary issue in this complaint proceeding is whether any civil penalty should be imposed on Clearview for a billing error that was immediately rectified upon its discovery in March 2014. Specifically, Clearview proactively took steps to identify affected customers and fully reimburse them for the 1 cent per kWh charge that exceeded the range set forth in those customers' contracts. Further, Clearview modified its internal practices to avoid the recurrence of such an error. Under these circumstances, along with other factors including the unintentional nature of the error and Clearview's excellent prior compliance record, Clearview's position is that no civil penalty is warranted.

Alternatively, to the extent that the Commission finds that a civil penalty is necessary, Clearview's position is that Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, limits the Commission's authority to imposing a fine of \$1,000 per day for each day on which the violation

continued.<sup>2</sup> Here, Clearview made one error, which resulted in incorrect invoices being issued over the period of roughly three months. Therefore, this error should be viewed as a continuing violation, with the maximum civil penalty being approximately \$90,000. However, since the Commission reserves \$1,000 civil penalties for the most egregious situations,<sup>3</sup> Clearview will advocate that a civil penalty in that range would be excessive.

Clearview will further argue that it is inappropriate to assess a civil penalty on the basis of each bill that was sent containing an error. As electric distribution companies (“EDCs”) issue consolidated bills containing both EDC and EGS charges, and EGSs have no control over how frequently bills are issued by EDCs, it is unfair to impose civil penalties on EGSs on the basis of the number of bills that repeated the error.

To the extent that the Commission determines that Clearview should be fined for each bill that contained incorrect charges, Clearview’s position is that such civil penalty should be significantly lower than the \$125 amount per billing error that was requested by the Complaint. Clearview will argue that each of the factors set forth in the Commission’s Policy Statement mitigates in favor of a lower civil penalty than proposed by the Complaint. These mitigating factors include the unintentional nature of the error; the small amount of the overcharges; the immediate and voluntary rectification by Clearview of the error through the issuance of refunds and credits to all affected (not just complaining) consumers; the proactive changes in internal practices to avoid recurrence of the error; and an excellent prior compliance record. .

Moreover, Clearview will argue that the \$125 amount per overcharge imposed by the Commission in *HIKO Energy* reflected a far different and much more egregious set of

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<sup>2</sup> See *PA PUC, Bureau of Investigation and Enforcement v. Daniel and Darlene Applegate t/a Independent Security Cab*, Docket No. C-2015-2451749 (Initial Decision served April 12, 2016; Final Order entered May 23, 2016).

<sup>3</sup> See *Rosi v. Bell-Atlantic-Pennsylvania, Inc., and Sprint Communications, L.P.*, Docket No. C-00992409 (Order entered March 16, 2000).

circumstances than exist here. For instance, in *HIKO Energy*, the EGS made an intentional, executive level decision to ignore written price guarantees and overbill customers. By contrast, in this case, no such decision was made; rather, an administrative oversight occurred and customers were charged 1 cent more per kWh than provided for in their contracts. Additionally, the overcharges in *HIKO Energy* were significantly higher -- totaling approximately \$1.8 million, whereas the Clearview billing error involved just a fraction of that amount, or \$105,225.64. Notably, the EGS in *HIKO Energy* did not proactively issue refunds and credits to customers and customers only started receiving refunds in June 2016, more than two years later.

This proceeding also raises issues concerning the Commission's jurisdiction to review private contracts between an EGS and its consumers to determine whether a breach has occurred.<sup>4</sup> Regardless of the language in the Complaint attempting to link Clearview's actions to the Commission's regulations, the Complaint essentially asks the Commission to go exceed its statutory authority to review these private contracts and determine that Clearview breached any terms and conditions.<sup>5</sup> Clearview's position is that the Commission may not review its private contracts with consumers and should defer to the competitive industry to resolve such matters -- exactly as occurred here once Clearview became aware of the error.

As to the Complaint's allegations that Clearview violated Section 54.10 of the Commission's regulations, 52 Pa. Code § 54.10, Clearview's position is that those notice provisions only apply to situations in which an EGS proposes to change the terms of service.

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<sup>4</sup> Clearview did not file preliminary objections raising jurisdictional issues due to recent Commission orders effectively finding that it may circumvent a lack of statutory authority under the guise of considering whether an EGS's prices conformed to its disclosure statement. *See, e.g., Commonwealth et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427644 (Order entered December 11, 2014). While Clearview does not concede subject matter jurisdiction in this proceeding, it opted to conserve resources during the pleading phase of the proceeding, while recognizing that subject matter jurisdiction is a prerequisite to deciding a controversy and cannot be waived. *See Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

<sup>5</sup> *See Office of Small Business Advocate v. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556 (Order entered January 26, 2015); *Adams et al. v. PA PUC*, 819 A.2d 631 (Pa. Cmwlth. 2003).

Clearview did not change any customer's terms of service; rather the billing error discussed above resulted in customers receiving charges that exceeded the price range in their contracts, which Clearview immediately rectified upon discovery.

**VII. CONSOLIDATION**

No similar complaints are pending against Clearview.

**VII. PUBLIC INPUT HEARINGS**

Clearview does not believe that public input hearings are necessary or appropriate to address the issues raised in this complaint proceeding.

**VIII. PROTECTION OF CONFIDENTIAL INFORMATION**

As of this time, no confidential or proprietary information has been provided or requested. If that situation changes, Clearview will file a Motion for Protective Order pursuant to Section 5.362 of the Commission's regulations, 52 Pa. Code § 5.362, seeking to protect confidential information such as the total number of customers that have been served by the Company.

**IX. SETTLEMENT**

Clearview is willing to engage in settlement discussions with I&E with the objective of achieving a mutually acceptable resolution of this matter, subject to the Commission's approval. At Clearview's request, the parties had an in-person settlement conference on July 7, 2016, during which Clearview presented an initial offer. Subsequently, Clearview revised that offer through a written communication sent to I&E on August 22, 2016.

Clearview believes that the assignment of an Administrative Law Judge (“ALJ”) to facilitate a settlement conference, pursuant to Section 5.231 of the Commission’s regulations, 52 Pa. Code § 5.231, may be beneficial in this proceeding. Given the size of I&E’s proposed civil penalty, and Clearview’s position that any civil penalty should be very minimal in comparison, particularly given the Company’s voluntary and proactive approach in issuing refunds and credits, the Company believes that the assistance of an ALJ would be valuable in helping the parties resolve this matter. To that end, Clearview suggests that this topic be discussed at the prehearing conference.

Respectfully submitted,



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Dated: September 8, 2016

Counsel for Clearview Electric Inc.