



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

IN REPLY PLEASE
REFER TO OUR FILE
C-2016-2543592

April 21, 2017

VIA ELECTRONIC 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. Clearview Electric, Inc.
Docket No. C-2016-2543592; **Joint Petition for Approval of Settlement**

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Joint Petition for Approval of Settlement and Appendices A through E consisting of: Appendix A - Joint Stipulation of Facts; Appendix B - Joint Proposed Conclusions of Law; Appendix C - Joint Proposed Ordering Paragraphs; Appendix D - The Bureau of Investigation and Enforcement's Statement in Support; and Appendix E - Clearview Electric, Inc.'s Statement in Support in the above-captioned 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
Prosecutor
PA Attorney ID No. 207522

Enclosure

cc: Honorable Elizabeth H. Barnes
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT,	:	
Complainant	:	
	:	
v.	:	DOCKET NO. C-2016-2543592
	:	
CLEARVIEW ELECTRIC, INC.,	:	
Respondent	:	

JOINT PETITION FOR APPROVAL OF SETTLEMENT

TO PRESIDING ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

Pursuant to 52 Pa. Code §§ 5.41 and 5.232, the Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”) and Clearview Electric, Inc. (“Clearview” or “Company”) hereby submit this Joint Petition for Approval of Settlement (“Settlement” or “Settlement Agreement”) to resolve all issues related to the above-docketed I&E Complaint proceeding alleging violations of Chapter 54 of Title 52 of the Pennsylvania Code related to Electricity Generation Customer Choice, 52 Pa. Code §§ 54.1 *et seq.* As part of this Settlement Agreement, I&E and Clearview (hereinafter referred to collectively as the “Parties”) respectfully request that Your Honor issue an initial decision or recommended decision approving the Settlement, without modification. A Joint Stipulation of Facts in Support of Settlement is attached as Appendix A. Joint Proposed Conclusions of Law are attached as Appendix B. Proposed Ordering Paragraphs are attached as Appendix C. Statements in Support of the Settlement expressing the individual views of I&E and Clearview are attached hereto as Appendix D and Appendix E, respectively.

I. INTRODUCTION

1. The Parties to this Settlement Agreement are the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement, by its prosecuting attorneys, P.O. Box 3265, Harrisburg, PA 17105-3265, and Clearview Electric, Inc. with a principal place of business at 1201 Elm Street, Suite 3200, Dallas, TX 75313.

2. The Pennsylvania Public Utility Commission is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate public utilities within this Commonwealth, as well as other entities subject to its jurisdiction, pursuant to the Public Utility Code ("Code"), 66 Pa.C.S. §§ 101, *et seq.*

3. I&E is the entity established to prosecute complaints against public utilities and other entities subject to the Commission's jurisdiction pursuant to 66 Pa.C.S. § 308.2(a)(11); *See also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011) (delegating authority to initiate proceedings that are prosecutory in nature to I&E).

4. Section 501(a) of the Code, 66 Pa.C.S. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code.

5. Section 701 of the Code, 66 Pa.C.S. § 701, authorizes the Commission, *inter alia*, to hear and determine complaints alleging a violation of any law or regulation that the Commission has jurisdiction to administer.

6. Section 3301 of the Code, 66 Pa.C.S. § 3301, authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation subject to the Commission's authority for violations of the Code, the Commission's regulations, or both. Section 3301 allows for the imposition of a fine for each violation and each day's continuance of such violation(s).

7. Clearview is a licensed electric generation supplier (“EGS”) as defined by 66 Pa.C.S. § 2803. On May 7, 2010, at Docket No. A-2010-2152506, Clearview was granted Commission approval to operate as an EGS offering services as a supplier of electricity to residential, small commercial, large commercial, industrial and governmental customers in the electric distribution company (“EDC”) service territories of Duquesne Light Company (“Duquesne”), Metropolitan Edison Company, PECO Energy Company (“PECO”), Pennsylvania Electric Company, Pennsylvania Power Company, PPL Electric Utilities (“PPL”), West Penn Power Company and UGI Utilities, Inc.

8. Clearview, as a licensed provider of electric generation supply service, is subject to the power and authority of the Commission pursuant to Sections 501 and 2809 of the Code, 66 Pa.C.S. §§ 501, 2809.

9. Pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of Clearview in its capacity as an EGS serving customers in Pennsylvania.

II. BACKGROUND

10. On March 26, 2014, the Commission’s Bureau of Consumer Services (“BCS”) received an informal complaint filed by a customer of Clearview who alleged that she was billed a price contrary to what had been promised to her at the time she enrolled and what was stated in her disclosure statement.

11. Based on the information contained in the informal complaint, BCS referred the matter to I&E.¹

12. By letter dated April 23, 2014, I&E notified Clearview that it had initiated an informal investigation of the Company consistent with Sections 331(a) and 506 of the Code, 66

¹ Subsequent to the March 26, 2014 informal complaint, BCS referred additional informal complaints to I&E, complaining about Clearview’s prices.

Pa.C.S. §§ 331(a) and 506, and Section 3.113 of the Commission’s regulations, 52 Pa. Code § 3.113. I&E advised Clearview that its investigation would focus on Clearview’s compliance with Commission regulations that require EGSs to bill prices that reflect the agreed upon prices in the disclosure materials provided to customers upon enrollment.

13. I&E served Clearview with three sets of data requests on April 23, 2014, July 25, 2014 and February 16, 2016, respectively.

14. Clearview responded to I&E’s three sets of data requests on May 19, 2014, August 11, 2014 and March 3, 2016, respectively.

15. The results of I&E’s investigation, which included a review of the Company’s responses to I&E’s data requests, formed the basis for I&E’s Formal Complaint that was filed with the Commission on May 4, 2016 at Docket No. C-2016-2543592, in which I&E alleged:

- a) In the marketing of electric supply to potential customers, Clearview offered multiple fixed rate and variable rate EGS pricing plans to residential and commercial electric customers in Pennsylvania.
- b) The sole variable rate pricing plan offered to residential and commercial electric customers in Pennsylvania from June 2010 to May 2013 provided that the customer would experience a variable rate that could range from 8.9 cents to 17.9 cents per Kilowatt-hour (“kWh”). In other words, the variable rate for this plan was capped at \$0.179/kWh (“capped variable pricing plan”).
- c) After May 31, 2013, Clearview revised its capped variable pricing plan offered to new customers to remove the minimum and maximum rate per kWh. The change applied only to new customers enrolled after that date and the capped rate was “grandfathered” for existing customers of the capped variable pricing plan.

- d) Clearview enrolled customers in the capped variable pricing plan in the service territories of Duquesne, PECO and PPL. As such, for each customer enrolled in Clearview's capped variable pricing plan prior to June 1, 2013, Clearview guaranteed that the customers' price for electric supply from Clearview would never exceed \$0.179/kWh.
- e) Clearview issued a Disclosure Statement to each customer who enrolled in its capped variable pricing plan which stated, in pertinent part:

2. (a) Basic Service Prices – *Itemize Basic Services you are billing for and their prices.*

You will pay a variable rate per kWh for electric generation service. Variable rate is based upon current market conditions and projected wholesale electric prices. Price per kWh can range from 8.9 cents to 17.9 cents, plus all applicable taxes. This price includes Transmission Charges and Estimated Total State Taxes, including the Gross Receipts Tax, but excludes applicable state and local Sales Taxes. All pricing can be viewed at <http://www.clearviewenergy.com/>.

- f) Clearview provided billing data to I&E, which showed that it billed 4,157 customers enrolled in Clearview's capped variable pricing plan within the service territories of PECO and PPL a unit rate for electricity supply that exceeded the maximum price of \$0.179/kWh in February, March and April 2014 invoices. The rate billed by Clearview was \$0.1899/kWh.
- g) I&E alleges that a total of 10,334 invoices contained charges exceeding \$0.179/kWh for customers enrolled in the capped variable pricing plan in the PECO and PPL service territories in February, March and April 2014 invoices.²

² In the Complaint, I&E alleges that there were a total of 10,351 instances where a customer invoice was overcharged based on the contractual terms of Clearview's capped variable pricing plan. Upon further review of Clearview's billing data, I&E determined that there were seventeen (17) less overcharges in the PPL service territory, making the cumulative total of invoices that were charged in excess of \$0.179/kWh to be 10,334.

- h) For the PECO service territory, the following consists of the monthly totals regarding Clearview's alleged overcharges:

February 2014	2,026
March 2014	3,188
April 2014	3,300
TOTAL:	8,514

- i) For the PPL service territory, the following consists of the monthly totals regarding Clearview's alleged overcharges:

February 2014	313
March 2014	753
April 2014	754
TOTAL:	1,820

- j) I&E alleges that Clearview failed to provide notice to customers of a change in contract terms in that the specific term of Clearview's capped variable pricing plan that the rate would range from 8.9 cents to 17.9 cents per kWh was changed to include rates that exceeded the maximum 17.9 cents per kWh without prior communication of this change provided to affected customers.

16. In the Complaint, I&E makes several requests for relief, including a request that the Commission impose a civil penalty upon Clearview in the amount of One Million Three Hundred Thousand Dollars (\$1,300,000), suspend Clearview's authority to do business as an EGS in Pennsylvania until the Company has complied with all measures set forth in I&E's Complaint and direct Clearview to submit proof that it issued refunds to each affected customer.

17. By Secretarial Letter dated May 18, 2016, Clearview was granted an extension of time until June 14, 2016 to respond to I&E's Complaint.

18. On June 14, 2016, Clearview, through counsel, filed an Answer and New Matter to the Complaint. In its Answer, Clearview admitted that it had charged 4,157 customers \$0.1899 per kWh in February, March and April 2014 and denied various averments made by I&E in the Complaint. Clearview further alleged that it had proactively and promptly refunded the amount of \$105,225.64 to the affected customers and that it had placed parameters into its system on April 15, 2014 to prevent any further charges in excess of \$0.179 per kWh. Also in its Answer, Clearview characterized the charges as an administrative billing error and challenged the imposition of a \$1,300,000 civil penalty. Further, Clearview's Answer alleged that the Company was not required to send notices of proposed changes in contract terms to the affected customers since it did not change their contract terms. In its New Matter, Clearview averred various affirmative defenses, primarily focusing on several factors affecting the level of the proposed civil penalty, including that the matter involved an unintentional billing error, for which Clearview had voluntarily made all affected customers whole in 2014.

19. On July 5, 2016, I&E filed its Reply to Clearview's New Matter specifically denying the viability of Clearview's assertions in its New Matter as defenses in this proceeding. I&E averred that the sheer quantity of the overcharges rendered it improbable that they were anything but intentional in nature and that the Company only stopped overcharging when a consumer complaint brought the matter to the Commission's attention. I&E further averred that the overcharges occurred month after month without any triggering any safeguard mechanism and resulting in a massive breach of Clearview's obligation to charge its customers the agreed-upon prices reflected in the disclosure statement.

20. By notice dated July 28, 2016, this matter was scheduled for an Initial Hearing on September 12, 2016 at 10:00 AM in Harrisburg before ALJ Elizabeth H. Barnes. A Prehearing Order dated July 28, 2016 was served to the parties on August 1, 2016.

21. On August 3, 2016, I&E filed an unopposed Motion to Convert the Initial Hearing scheduled for September 12, 2016 into a Prehearing Conference.

22. By Amended Prehearing Conference Order dated August 3, 2016, the Initial Hearing was converted into a Prehearing Conference scheduled for September 12, 2016, and the parties were directed to serve prehearing conference memoranda on or before September 8, 2016.

23. An Initial Prehearing Conference was convened on September 12, 2016.

24. A Procedural Order was entered on September 23, 2016, which commemorated the litigation schedule adopted at the Initial Prehearing Conference.

25. Pursuant to the September 23, 2016 Procedural Order, I&E served the written direct testimony of Daniel Mumford, I&E Statement No. 1, on October 26, 2016.

26. On December 2, 2016, Clearview filed an unopposed Motion for Modifications to Procedural Schedule to request additional time to serve Clearview's written rebuttal testimony.

27. On December 6, 2016, the presiding ALJ entered an Order Amending Procedural Order, which granted Clearview's request to extend the deadline for the submission of its rebuttal testimony and subsequent deadlines. An evidentiary hearing was scheduled for this matter on March 21-22, 2017.

28. On January 5, 2017, Clearview filed an unopposed Motion for Protective Order and proposed to treat certain information in this proceeding as being proprietary.

29. On January 6, 2017, Clearview's Motion was granted and a Protective Order was entered in this proceeding.

30. On January 9, 2017, Clearview served the written rebuttal testimonies of Frank McGovern, Clearview Statement No. 1; Nicole Steele, Clearview Statement No. 2; Thomas Walker, Clearview Statement No. 3; and Frank Lacey, Clearview Statement No. 4.

31. On January 11, 2017, Clearview filed a Motion for Summary Judgment seeking to dismiss the Complaint filed by I&E, asserting that the price of \$0.1899 per kWh did not exceed the price cap of \$0.179 per kWh in Clearview's disclosure statement due to a reference to applicable taxes being added to the price cap. Clearview attached a notarized affidavit containing information about applicable taxes and contended that when the applicable Gross Receipts Tax is added to the price cap in the disclosure statement, the price of \$0.1899 per kWh did not violate the Commission's regulations.

32. On January 31, 2017, I&E filed an Answer in opposition to Clearview's Motion for Summary Judgment asserting that genuine issues of material fact exist that preclude summary judgment. I&E also asserted that Clearview's Motion impermissibly relied on its own testimonial affidavit to establish the non-existence of a genuine issue of material fact in contradiction of well-settled law and that the plain language of Clearview's disclosure statement expressly included the Gross Receipts Tax in the capped variable rate quoted to customers.

33. By Order entered February 1, 2017, the presiding ALJ denied Clearview's Motion for Summary Judgment, finding that an affidavit is an insufficient basis for summary judgment and that genuine issues of material fact exist.

34. On February 13, 2017, I&E served the written surrebuttal testimony of Daniel Mumford, I&E Statement No. 1-SR.

35. Prior to the first day of the evidentiary hearing scheduled for this matter, I&E and Clearview reached a settlement in principle and advised the presiding ALJ of the settlement by e-mail dated March 15, 2017.

36. The presiding ALJ entered a Second Order Amending Procedural Schedule on March 16, 2017, which cancelled the evidentiary hearing scheduled for March 21-22 and directed the parties to file a joint petition for settlement with statements in support, stipulations

as to findings of fact and stipulations with regard to the submission of any evidence into the record by April 21, 2017.

III. ALLEGED VIOLATIONS

37. Had this matter been fully litigated, I&E would have proffered evidence and legal arguments to demonstrate that Clearview committed the following violations:

A. I&E alleges that Clearview billed customers enrolled in the capped variable pricing plan a rate of 18.99 cents per kWh when the customers' rate was guaranteed to be capped at 17.9 cents per kWh according to the express terms of Clearview's disclosure statement. Clearview's billing data demonstrates that it charged a rate in excess of 17.9 cents per kWh to customers enrolled in the capped variable pricing plan on 10,334 invoices between February and April 2014.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code § 54.4(a) (10,334 counts).

B. I&E alleges that Clearview failed to provide notice to customers of a change in contract terms in that the specific term of Clearview's capped variable pricing plan that the rate would range from 8.9 cents to 17.9 cents per kWh was changed to include rates that exceeded the maximum 17.9 cents per kWh without prior communication of the change provided to the 4,157 affected customers.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code § 54.5(g)(1) as was in effect between September 15, 2007 and June 13, 2014. *See 37 Pa. Bull.* 4996 (September 15, 2007) (multiple counts).³

38. Had this matter been litigated, Clearview would have proffered evidence and legal arguments to demonstrate the following:

A. While Clearview, from the standpoint of its business practices, has treated the charges in question as an unintentional billing error since March 2014, Clearview alleges that its charges of 18.99 cents per kWh were lawfully within

³ I&E's Complaint alleges that such action violates Section 54.10 of the Commission's regulations, 52 Pa. Code § 54.10. Section 54.10 became effective on June 14, 2014, subsequent to the period of time that I&E alleges Clearview overcharged customers. However, the substance of I&E's allegations regarding the failure to provide customers with notice of the change in terms of the capped variable pricing plan was covered under a nearly identical regulation, Section 54.5(g)(1), which was in effect during the time that the violations occurred. I&E was prepared to correct this legal technicality through the direct testimony of I&E's witness followed by a motion to conform I&E's Complaint to the evidence. Clearview did not object to this approach and it was accepted by the presiding Administrative Law Judge. *See* Procedural Order dated September 23, 2016 at this docket.

the acceptable range of prices set forth in its disclosure statement due to the language allowing it to add “all applicable taxes” and therefore did not amount to a violation of 52 Pa. Code § 54.4(a).

B. Clearview alleges that in order to find that Clearview’s charges of 18.99 cents per kWh exceeded the price range set forth in its disclosure statement, the Commission would need to engage in contract interpretation, which is beyond its statutory authority.

C. Clearview alleges that since it did not change the contract terms for the affected customers, it was not required to provide customers notice of a proposed change in contract terms pursuant to 52 Pa. Code § 54.5(g)(1).

D. Clearview alleges that under Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, the Commission is limited to imposing a civil penalty of \$1,000 per day for continuing violations.

E. Clearview alleges that a per invoice civil penalty is not reasonable or appropriate, particularly given the circumstances of this proceeding, including the unintentional nature of the billing discrepancy, the small amount of the discrepancy, and the dearth of consumer complaints involving this matter.

F. Clearview alleges that an application of the factors set forth in the Commission’s Policy Statement at 52 Pa. Code § 69.1201 warrants the imposition of either no civil penalty or a much lower civil penalty than proposed by I&E, due to several of those factors including: (i) the unintentional nature of the billing discrepancy; (ii) the lack of evidence of harm to customers; (iii) Clearview’s voluntary and proactive response in issuing refunds to customers and modifying its internal practices; (iv) Clearview’s prior compliance history; and (v) the fact that the total amount of the billing discrepancy was \$105,225.64.

IV. SETTLEMENT TERMS

39. Pursuant to the Commission’s policy of encouraging settlements that are reasonable and in the public interest,⁴ the Parties held a series of discussions that culminated in this Settlement. The purpose of this Joint Petition for Approval of Settlement is to resolve this matter without further litigation. There has been no evidentiary hearing before any tribunal and no sworn testimony taken in I&E’s Complaint proceeding docketed at C-2016-2543592. The parties have stipulated to relevant facts, *See* Appendix A, attached hereto, and a Commission

⁴ *See* 52 Pa. Code § 5.231(a).

Order approving the settlement shall have the effect of admitting into the record of this proceeding the previously served written testimony of the parties. *See* Paragraph 42(C), *infra*.

40. It is understood that this Settlement is the compromise of the allegations in the Complaint, which I&E intended to prove and that Clearview disputes. However, Clearview fully acknowledges the seriousness of I&E's allegations, namely billing customers a rate greater than the agreed upon rate set forth in the disclosure statement and failing to provide advance notice of the change in prices. Although Clearview disputes I&E's allegations that any violations of the regulations occurred, the Company recognizes the need to ensure that customers are billed at prices set forth in the disclosure statement and are given notices required by the Commission's regulations.

41. The Parties recognize that their positions and claims are disputed and, given that the outcome of a contested proceeding is uncertain, the parties further recognize the benefits of amicably resolving the disputed issues through settlement. This Settlement should not be considered to be or construed as an admission of liability or wrongdoing on the part of the Company. It is further understood that Clearview specifically denies any wrongdoing or liability in this proceeding.

42. I&E and Clearview, intending to be legally bound and for consideration given, desire to fully and finally conclude this litigation and agree that a Commission Order approving the Settlement without modification shall create the following rights and obligations:

A. Clearview will pay a civil penalty in the amount of Two Hundred Fifty-Thousand Dollars (\$250,000) ("Settlement Amount") pursuant to 66 Pa.C.S. § 3301. Said payment shall be made within sixty (60) days of the date of the Commission's Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the "Commonwealth of Pennsylvania." The docket number of this proceeding, C-2016-2543592, shall be indicated on the certified check or money order and the payment shall be sent to:

Secretary
Pennsylvania Public Utility Commission

P.O. Box 3265
Harrisburg, PA 17105-3265

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

B. Clearview agrees to provide quarterly reports to I&E for a period of two years detailing the nature and disposition of all consumer complaints and identifying billing errors. The reports shall commence with first full quarter following the entry of the Commission's Final Order in this matter. Clearview estimates the monetary cost associated with the preparation of the quarterly reports to be Two Thousand Dollars (\$2,000).

C. The following written testimony and associated exhibits served in this case shall be deemed admitted into the record of this proceeding:

- Direct Testimony of Daniel Mumford - I&E Statement No. 1;
- Rebuttal Testimonies of Frank McGovern - Clearview Statement No. 1, Nicole Steele - Clearview Statement No. 2, Thomas Walker - Clearview Statement No. 3 and Frank Lacey - Clearview Statement No. 4; and
- Surrebuttal Testimony of Daniel Mumford – I&E Statement No. 1-SR.

43. Upon payment by Clearview of the Settlement Amount, I&E's Formal Complaint shall be deemed satisfied and the matter shall be marked closed.

44. Upon Commission approval of the Settlement in its entirety without modification, I&E shall be deemed to have forever released Clearview from all past, existing and future claims that were made or could have been made for monetary and/or other relief based on allegations that Clearview: charged customers enrolled in the capped variable pricing plan a rate in excess of 17.9 cents per kWh in February, March and April 2014 invoices, and failed to provide advance notice to those customers of the increase in rates. Nothing contained in this Settlement Agreement shall affect the Commission's authority to receive and resolve any future formal or informal complaints filed by any affected party related to the allegations set forth in I&E's Formal Complaint.

45. I&E and Clearview jointly acknowledge that approval of this Settlement Agreement is in the public interest and fully consistent with the Commission's Policy Statement

for Litigated and Settled Proceedings Involving Violations of the Code and Commission Regulations, 52 Pa. Code § 69.1201. The Parties submit that the Settlement Agreement is in the public interest because it effectively addresses I&E's allegations that are the subject of the I&E Complaint proceeding, and avoids the time and expense of litigation, which entails hearings, travel for the Company's out-of-state witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals. Attached as Appendices D and E are Statements in Support submitted by I&E and Clearview, respectively, setting forth the bases upon which they believe the Settlement Agreement is in the public interest.

V. CONDITIONS OF SETTLEMENT

46. This document represents the Settlement Agreement in its entirety. No changes to obligations set forth herein may be made unless they are in writing and are expressly accepted by the Parties. This Settlement Agreement shall be construed and interpreted under Pennsylvania law.

47. The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in this Joint Petition for Approval of Settlement without modification. If the Commission modifies this Settlement Agreement, any party may elect to withdraw from the Settlement and may proceed with litigation and, in such event, this Settlement Agreement shall be void and of no effect. Such election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon all parties within twenty (20) days after entry of an Order modifying the Settlement.

48. In the event that the presiding Administrative Law Judge issues an initial decision or recommended decision approving this Joint Petition for Approval of Settlement without modification, the Parties agree to waive the exception period, thereby allowing the Settlement

Agreement to be presented directly to the Commission for review, pursuant to 52 Pa. Code § 5.232(e).

49. The Parties agree that the underlying allegations were not the subject of any hearing and that there has been no order, findings of fact or conclusions of law rendered in this complaint proceeding. It is further understood that, by entering into this Settlement Agreement, Clearview has made no concession or admission of fact or law and may dispute all issues of fact and law for all purposes in all proceedings that may arise as a result of the circumstances described in the Settlement.

50. The Parties acknowledge that this Settlement Agreement reflects a compromise of competing positions and does not necessarily reflect any party's position with respect to any issues raised in this proceeding.

51. This Settlement Agreement is being presented only in the context of this proceeding in an effort to resolve the proceeding in a manner that is fair and reasonable. This Settlement is presented without prejudice to any position that any of the parties may have advanced and without prejudice to the position any of the parties may advance in the future on the merits of the issues in future proceedings, except to the extent necessary to effectuate the terms and conditions of this Settlement Agreement. This Settlement does not preclude the parties from taking other positions in any other proceeding.

52. The terms and conditions of this Settlement Agreement constitute a carefully crafted package representing reasonably negotiated compromises on the issues addressed herein. Thus, the Settlement Agreement is consistent with the Commission's rules and practices encouraging negotiated settlements set forth in 52 Pa. Code §§ 5.231 and 69.1201.

WHEREFORE, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement and Clearview Electric, Inc. respectfully request that the Presiding

Administrative Law Judge issue an initial decision or recommended decision approving the terms of the Joint Petition for Approval of Settlement in their entirety as being in the public interest.

IN WITNESS WHEREOF, we have hereunto set our hands and seals on this the 21st day of April 2017.

FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT:

Steph M. M.
Signature

Prosecutor
Title

4/21/2017
Date

FOR CLEARVIEW ELECTRIC, INC.:

Karen
Signature

Counsel
Title

4/21/2017
Date

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT,	:	
Complainant	:	
	:	
v.	:	DOCKET NO. C-2016-2543592
	:	
CLEARIVEW ELECTRIC, INC.,	:	
Respondent	:	

**JOINT STIPULATION OF FACTS
IN SUPPORT OF SETTLEMENT**

Pursuant to 52 Pa. Code § 5.232(a) and the Second Order Amending Procedural Schedule dated March 16, 2017 of presiding Administrative Law Judge (“ALJ”) Elizabeth H. Barnes, the Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”) and Clearview Electric, Inc. (“Clearview” or “Company”), by their undersigned attorneys, agree and stipulate to the following facts for the sole purpose of supporting the approval of the Joint Petition for Approval of Settlement (“Settlement” or “Settlement Agreement”) in the above-captioned matter.

I&E and Clearview have entered into the Settlement, which they recognize is a compromise of disputed claims. I&E also recognizes that the Settlement is entered into without admission of wrongdoing or liability by Clearview.

STIPULATION OF FACTS

1. In the marketing of electric supply to potential customers, Clearview offered multiple fixed rate and variable rate EGS pricing plans to residential and commercial electric customers in Pennsylvania.

2. The disclosure statement for the variable rate pricing plan offered to residential and commercial electric customers in Pennsylvania from June 2010 to May 2013 provided that the customer would experience a variable rate that could range from 8.9 cents to 17.9 cents per kWh. Thus, the variable rate for electric generation service under this plan was capped at \$0.179/kWh.

3. After May 31, 2013, Clearview revised its capped variable pricing plan offered to new customers to remove the minimum and maximum rate per kWh. The change applied only to new customers enrolled after that date and the capped rate was “grandfathered” for existing customers of the capped variable pricing plan.

4. Clearview enrolled customers in the capped variable pricing plan in the service territories of Duquesne Light Company, PECO and PPL. As such, for each customer enrolled in Clearview’s capped variable pricing plan prior to June 1, 2013, Clearview guaranteed that the customers’ price for electric generation service from Clearview would not exceed \$0.179/kWh.

5. Clearview issued a Disclosure Statement to each customer who enrolled in its capped variable pricing plan which stated, in pertinent part:

2. **(a) Basic Service Prices** – *Itemize Basic Services you are billing for and their prices.*

You will pay a variable rate per kWh for electric generation service. Variable rate is based upon current market conditions and projected wholesale electric prices. Price per kWh can range from 8.9 cents to 17.9 cents, plus all applicable taxes. This price includes Transmission Charges and Estimated Total State Taxes, including the Gross Receipts Tax, but excludes applicable state and local Sales Taxes. All pricing can be viewed at <http://www.clearviewenergy.com/>.

6. Clearview billed 4,157 customers enrolled in the capped variable pricing plan a rate of \$0.1899/kWh in February, March and April 2014 invoices.

7. Clearview became aware of this billing discrepancy when a customer filed an

informal complaint with the Commission's Bureau of Consumer Services on March 26, 2014.

8. On May 1, 2014, Clearview began querying its billing data and identified 4,157 other customers affected by this billing discrepancy.

9. The affected customers were located in the PECO and PPL service territories.

10. The billing data produced by Clearview shows that 10,334 customer invoices contained a rate in excess of 17.9 cents per kWh to customers enrolled in the capped variable pricing plan. This number, 10,334, is seventeen (17) invoices less than what I&E had alleged in its Formal Complaint.

11. The total monetary amount of the billing discrepancy was \$105,225.64.

12. The affected Clearview customers paid an average of \$25.31, over the course of a three-month period, more than what they would have paid if Clearview had charged them a rate of 17.9 cents per kWh. The average amount of the billing discrepancy per invoice was \$10.17.

13. Between July 17, 2014 and August 5, 2014, Clearview mailed letters to 905 former customers notifying them of the overpayment and enclosing a refund check.

14. Between July 15, 2014 and August 31, 2014, Clearview mailed letters to 3,252 existing customers notifying them of the overpayment and indicating that credits would be applied to the supply portion of their bills.

15. Of the 3,252 existing customers 3,200 received credit in one monthly bill; 51 received credits over two monthly bills; and one customer received credit over three monthly bills.

16. Clearview did not apply credits that exceeded the current amount due for generation supply charges. As such, 52 existing customers received credit in more than one monthly bill.

17. The total monetary amount at issue with regard to the billing discrepancy, \$105,225.64, was fully refunded or credited to customers.

18. On April 15, 2014, Clearview revised its policy and billing system to ensure that prices cannot increase above the price cap of 17.9 cents per kWh as set forth in the disclosure statement.

19. Since 2010 when Clearview received its license, five consumers have filed formal complaints against Clearview with the Commission, at Docket Nos. C-2012-2335048; C-2013-2381987; C-2014-2411137; F-2015-2478664; F-2016-2559912. All of these complaints were later withdrawn, and no formal complaints against Clearview have been sustained by the Commission.

20. Less than 0.2% of the total customers served by Clearview have filed informal complaints with the Bureau of Consumer Services since Clearview received its license in 2010.

21. Clearview's informal complaint level declined from 2013 to 2014, and of the 8,344 informal complaints filed with the Commission against electric generation suppliers from January 2014 through June 2014, 16 involved Clearview.

22. Clearview cooperated during I&E's informal investigation.

23. This Stipulation of Facts is not an admission of wrongdoing or liability by Clearview.

4. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to the Bureau of Investigation and Enforcement (“I&E”) and other bureaus with enforcement responsibilities. *Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11); *See also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

5. The Commission has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 66 Pa.C.S. § 701.

6. The Commission has the power and the duty to enforce the requirements of the Public Utility Code pursuant to 66 Pa.C.S. § 501(a).

7. The Commission has the authority to impose civil penalties on any public utility or on any other person or corporation subject to the Commission’s jurisdiction for violations of the Public Utility Code, the Commission’s regulations, or both, pursuant to 66 Pa.C.S. § 3301. Section 3301 allows for the imposition of a civil penalty for each violation and each day’s continuance of such violation(s).

8. The Commission encourages and promotes settlements. 52 Pa. Code § 5.231(a).

9. The benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm’n v. City of Lancaster – Bureau of Water*, Docket No. R-2010-2179103 (Order entered July 14, 2011) at 11.

10. The Commission’s Policy Statement at 52 Pa. Code § 69.1201 sets forth ten factors (“*Rosi* factors”) that the Commission will consider in evaluating litigated and settled proceedings and determining whether a fine for violating a Commission statute, regulation or

order is appropriate, as well as whether a proposed settlement for the violations is reasonable and approval of the settlement agreement is in the public interest. The factors and standards that will be considered by the Commission include the following:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

52 Pa. Code § 69.1201(c)(1)-(10).

11. When applied in settled cases, the *Rosi* factors will not be applied in as strict a fashion as in a litigated proceeding. 52 Pa. Code § 69.1201(b). The parties in settled cases will be afforded flexibility in reaching amicable resolutions so long as the settlement is in the public interest. *Id.*

12. Taking into consideration all of the *Rosi* factors, the Settlement is in the public interest.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION AND ENFORCEMENT,	:	
Complainant	:	
	:	
v.	:	DOCKET NO. C-2016-2543592
	:	
CLEARIVEW ELECTRIC, INC.,	:	
Respondent	:	

**JOINT PROPOSED ORDERING PARAGRAPHS
IN SUPPORT OF SETTLEMENT**

1. That the Stipulation of Facts in Support of the Settlement submitted as Exhibit A to the Joint Petition for Approval of Settlement is admitted into the record of this proceeding.

2. That the following previously served written testimony and associated exhibits are admitted into the record of this proceeding:

- Direct Testimony of Daniel Mumford – Bureau of Investigation and Enforcement Statement No. 1;
- Rebuttal Testimonies of Frank McGovern – Clearview Electric, Inc. Statement No. 1, Nicole Steele – Clearview Electric, Inc. Statement No. 2, Thomas Walker – Clearview Electric, Inc. Statement No. 3 and Frank Lacey – Clearview Electric, Inc. Statement No. 4; and
- Surrebuttal Testimony of Daniel Mumford – Bureau of Investigation and Enforcement Statement No. 1-SR.

3. That the Joint Petition for Approval of Settlement filed on April 21, 2017 at Docket No. C-2016-2543592 by the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement and Clearview Electric, Inc. is hereby approved in its entirety

without modification.

4. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa.C.S. § 3301, within sixty (60) days of the date this Order becomes final, Clearview Electric, Inc. shall pay Two Hundred Fifty Thousand Dollars (\$250,000), which consists of the entirety of the civil penalty settlement amount. Said payment shall be made by certified check or money order payable to “Commonwealth of Pennsylvania.” The Docket No. of this proceeding, C-2016-2543592, shall be indicated on the certified check or money order and the payment shall be sent to:

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

5. That commencing with the first full quarter following the entry of the date this Order becomes final, Clearview Electric, Inc. shall provide quarterly reports to the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement for a period of two years detailing the nature and disposition of all consumer complaints and identifying billing errors.

6. That upon fulfillment of the conditions set forth in Paragraph 42(a) of the Joint Petition for Approval of Settlement, the Complaint filed by the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement shall be marked satisfied and the above-captioned matter shall be marked closed.

7. A copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

Commission regulations that require EGSs to bill prices that reflect the agreed upon prices in the disclosure materials provided to customers upon enrollment.

I&E initiated the investigation based on an informal complaint filed with the Commission's Bureau of Consumer Services ("BCS") on March 26, 2014 by a customer of Clearview. The customer alleged that she was billed a price contrary to what had been promised to her at the time she enrolled and what was stated in her disclosure statement. BCS referred the March 26, 2014 informal complaint to I&E and subsequently referred additional informal complaints to I&E that were filed by Clearview customers alleging that the Company billed a price contrary to the price set forth in the disclosure statement.

I&E's investigation primarily consisted of service and review of three sets of data requests to Clearview. I&E's investigation determined that Clearview offered a variable rate pricing plan to residential and commercial electric customers in Pennsylvania from June 2010 to May 2013, which provided that the customer would experience a variable rate that could range from 8.9 cents to 17.9 cents per Kilowatt-hour ("kWh"). The variable rate for this plan was capped at \$0.179/kWh ("capped variable pricing plan").

After May 31, 2013, Clearview revised its capped variable pricing plan offered to new customers to remove the minimum and maximum rate per kWh. The change applied only to new customers enrolled after that date and the capped rate was "grandfathered" for existing customers of the capped variable pricing plan.

Clearview enrolled customers in the capped variable pricing plan in the service territories of Duquesne Light Company, PECO Energy Company ("PECO") and PPL Electric Utilities ("PPL"). As such, for each customer enrolled in Clearview's capped variable pricing plan prior

to June 1, 2013, Clearview guaranteed that the customers' price for electric supply from Clearview would never exceed \$0.179/kWh.

Clearview issued a Disclosure Statement to each customer who enrolled in its capped variable pricing plan which stated, in pertinent part:

2. (a) Basic Service Prices – *Itemize Basic Services you are billing for and their prices.*

You will pay a variable rate per kWh for electric generation service. Variable rate is based upon current market conditions and projected wholesale electric prices. Price per kWh can range from 8.9 cents to 17.9 cents, plus all applicable taxes. This price includes Transmission Charges and Estimated Total State Taxes, including the Gross Receipts Tax, but excludes applicable state and local Sales Taxes. All pricing can be viewed at <http://www.clearviewenergy.com/>.

Based on a review of billing data that Clearview provided to I&E, I&E concluded that Clearview issued a total of 10,351 invoices containing charges exceeding \$0.179/kWh for customers enrolled in the capped variable pricing plan in the PECO and PPL service territories in February, March and April 2014 invoices. Clearview's overcharges affected 4,157 customers and totaled \$105,225.64.

The results of I&E's investigation formed the basis for I&E's Formal Complaint that was filed in this matter on May 4, 2016. In the Complaint, I&E alleged that Clearview violated Section 54.4(a) of the Commission's regulations, 52 Pa. Code 54.4(a), by billing customers enrolled in the capped variable pricing plan a rate of 18.9 cents per kWh when the customers' rate was guaranteed to be capped at 17.9 cents per kWh according to the terms of Clearview's Disclosure Statement. The Complaint alleged that Clearview billed a rate in excess of 17.9 cents per kWh on 10,351 occasions, however, upon further review, I&E determined that there were seventeen (17) less overcharges in the PPL service territory thereby rendering the cumulative total of overcharged invoices to be 10,334.

I&E's Complaint further alleged that Clearview failed to provide notice to customers of a change in contract terms in that the specific term of Clearview's capped variable pricing plan that the rate would range from 8.9 cents to 17.9 cents per kWh was changed to include rates that exceeded the cap of 17.9 cents per kWh without prior communication of this change provided to affected customers. The Complaint alleged that such action violated Section 54.10 of the Commission's regulations, 52 Pa. Code § 54.10. However, since this regulation became effective on June 14, 2014, subsequent to the period of time that I&E alleged Clearview overcharged customers, I&E was prepared to move to conform its Complaint to the evidence, which I&E avers would have shown that the failure to provide notice violated Section 54.5(g)(1) – a nearly identical regulation that was in effect during the time that the overcharging occurred.¹

On April 21, 2017, I&E and Clearview (collectively, the "Parties") filed a Joint Petition for Approval of Settlement resolving all issues between I&E and Clearview in the instant matter. This Statement in Support is submitted in conjunction with the Settlement Agreement.

II. THE PUBLIC INTEREST

Pursuant to the Commission's policy of encouraging settlements that are reasonable and in the public interest, the Parties held a series of settlement discussions. These discussions culminated in this Settlement Agreement, which, once approved, will resolve all issues related to the instant I&E Complaint proceeding.

I&E intended to prove the factual allegations set forth in its Complaint at hearing, to which the Company would have disputed. This Settlement Agreement results from the compromises of the Parties. Although I&E and Clearview may disagree with respect to I&E's

¹ See 37 Pa. Bull. 4996 (September 15, 2007).

factual allegations, the Company recognizes the need to prevent similar allegations from reoccurring.

Further, I&E recognizes that, given the inherent unpredictability of the outcome of a contested proceeding, the benefits of amicably resolving the disputed issues through settlement outweigh the risks and expenditures of litigation. I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and is in the public interest. As such, I&E respectfully requests that the Commission approve the Settlement without modification.

III. TERMS OF SETTLEMENT

Under the terms of the Settlement, I&E and Clearview have agreed as follows:

a. Clearview will pay a civil penalty in the amount of Two Hundred Fifty-Thousand Dollars (\$250,000) (“Settlement Amount”) pursuant to 66 Pa.C.S. § 3301. Said payment shall be made within sixty (60) days of the date of the Commission’s Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the “Commonwealth of Pennsylvania.” The docket number of this proceeding, C-2016-2543592, shall be indicated on the certified check or money order and the payment shall be sent to:

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

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

b. Clearview agrees to provide quarterly reports to I&E for a period of two years detailing the nature and disposition of all consumer complaints and identifying billing errors. The reports shall commence with first full quarter following the entry of the Commission’s Final Order in this matter. Clearview estimates the monetary cost associated with the preparation of the quarterly reports to be Two Thousand Dollars (\$2,000).

c. The following written testimony and associated exhibits served in this case shall be deemed admitted into the record of this proceeding:

- Direct Testimony of Daniel Mumford - I&E Statement No. 1;
- Rebuttal Testimonies of Frank McGovern - Clearview Statement No. 1,

- Nicole Steele - Clearview Statement No. 2, Thomas Walker - Clearview Statement No. 3 and Frank Lacey - Clearview Statement No. 4; and
- Surrebuttal Testimony of Daniel Mumford – I&E Statement No. 1-SR.

In consideration of Clearview’s payment of a monetary civil penalty and upon Commission approval of the Settlement in its entirety without modification, I&E agrees that it shall be deemed to have forever released Clearview from all past, existing and future claims that were made or could have been made for monetary and/or other relief based on allegations that Clearview: charged customers enrolled in the capped variable pricing plan a rate in excess of 17.9 cents per kWh in February, March and April 2014 invoices, and failed to provide advance notice to those customers of the increase in rates. Upon payment by Clearview of the Settlement Amount, I&E agrees that its Complaint shall be satisfied and the matter marked closed.

IV. LEGAL STANDARD FOR SETTLEMENT AGREEMENTS

Commission policy promotes settlements. *See* 52 Pa. Code § 5.231. Settlements lessen the time and expense that the parties must expend litigating a case and, at the same time, conserve precious administrative resources. Settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. “The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a ‘burden of proof’ standard, as is utilized for contested matters.” *Pa. Pub. Util. Comm’n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Order entered July 14, 2011) at p. 11. Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm’n v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004).

I&E submits that approval of the Settlement Agreement in the above-captioned matter is consistent with the Commission’s Policy Statement regarding *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and*

Commission Regulations (“Policy Statement”), 52 Pa. Code § 69.1201; *See also Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc.*, Docket No. C-00992409 (Order entered March 16, 2000).

The Commission’s Policy Statement sets forth ten factors that the Commission may consider in evaluating whether a civil penalty for violating a Commission order, regulation, or statute is appropriate, as well as whether a proposed settlement for a violation is reasonable and in the public interest. 52 Pa. Code § 69.1201.

The Commission will not apply the factors as strictly in settled cases as in litigated cases. 52 Pa. Code § 69.1201(b). While many of the same factors may still be considered, in settled cases, the parties “will be afforded flexibility in reaching amicable resolutions to complaints and other matters as long as the settlement is in the public interest.” *Id.*

The first factor considers whether the conduct at issue was of a serious nature, such as willful fraud or misrepresentation, or if the conduct was less egregious, such as an administrative or technical error. Conduct of a more serious nature may warrant a higher penalty. 52 Pa. Code § 69.1201(c)(1). The violations averred in I&E’s Complaint are of a serious nature in that they involve allegations that Clearview billed in excess of what had been guaranteed to customers pursuant to the terms and conditions of the Company’s Disclosure Statement. I&E alleges that 10,334 invoices were overcharged during a 3-month period of time. The alleged overcharges occurred during the Polar Vortex, a period of sustained, extreme cold weather experienced in Pennsylvania during the winter of 2014 which caused the wholesale cost of energy to increase.

I&E was prepared to demonstrate at hearing that Clearview’s executives made a decision to increase prices on its entire customer base, including those enrolled in the capped variable pricing plan, to recoup the surge of wholesale energy costs the Company experienced during the winter of 2014.

Further, I&E was prepared to demonstrate at hearing that the sheer quantity and duration of Clearview's overcharges rendered it improbable that the overcharges were anything but intentional in nature. It is undisputed that over 10,000 overcharges occurred over a mere three-month period. I&E also would have argued that Clearview's overcharges would have continued indefinitely had an outside consumer complaint not brought the overcharges to the Commission's attention, which then prompted I&E to launch an investigation.

I&E was also prepared to show that Clearview failed to maintain any safeguard mechanism to prevent the overcharges from occurring month after month, which I&E argues is an inexcusable breach of Clearview's obligation to abide by the Commission's regulations requiring EGSs to bill prices that reflect the marketed prices and agreed-upon prices in the Disclosure Statement.

Lastly, I&E was prepared to conclusively refute any notion advanced by Clearview that it was permitted to add the gross receipts tax ("GRT") to the price per kWh. The terms and conditions of Clearview's Disclosure Statement expressly include the GRT in the price per kWh. I&E's evidence at hearing would have revealed that Clearview's Disclosure Statement was reviewed by BCS in 2010, at which time Clearview executives were advised that "[a]ll charges should be bundled together to present one price to the customer. We advise including a phrase along the lines of "This price includes Transmission Charges and Estimated Total State Taxes, including the Gross Receipts Tax" ² Additionally, this Commission has clearly communicated to EGSs that it expects the GRT to be included in the price per kWh so that customers may make an easy "apples-to-apples" comparison with an electric distribution company's ("EDC") price-to-compare ("PTC"). The Commission has stated as follows:

² I&E Exhibit 2-SR.

The price that an EGS presents to a residential or small business customer is expected to be “all-inclusive” – including all of the pricing components found in the PTC for default customers (generation, transmission where applicable, gross receipts tax, etc.).

Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause,

Docket No. M-2013-2362961 (Order entered November 14, 2013) at 28 (hereinafter referred to as *Fixed Price Labels Order*).

Accordingly, I&E submits that Clearview’s alleged conduct is of a very serious nature and was considered in arriving at the substantial civil penalty in the Settlement Agreement.

The second factor considered is whether the resulting consequences of Clearview’s alleged conduct were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty. 52 Pa. Code § 69.1201(c)(2). Customers were financially impacted. The average overcharge per invoice was \$10.17. The average Clearview customer paid \$25.31 more than what he or she would have paid under the terms of the capped variable pricing plan between February 2014 and April 2014.

The third factor to be considered under the Policy Statement is whether the alleged conduct was intentional or negligent. 52 Pa. Code § 69.1201(c)(3). “This factor may only be considered in evaluating litigated cases.” *Id.* Whether Clearview’s alleged conduct was intentional or negligent does not apply since this matter is being resolved by Settlement of the Parties.

The fourth factor to be considered is whether the Company has made efforts to change its practices and procedures to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). On April 15, 2014, Clearview revised its policy and billing system to ensure that prices cannot increase above the price cap set forth in the Disclosure Statement. On May 1, 2014, Clearview

conducted a query of its billing data to identify the number of affected customers and the total amount involved. I&E was prepared to demonstrate at hearing that Clearview began reviewing its billing data only after I&E launched an investigation of the Company's billing practices when Clearview had been placed on notice as early as March 26, 2014 by a consumer complaint that it charged in excess of the capped variable pricing plan it guaranteed to customers.

The fifth factor to be considered relates to the number of customers affected by the Company's actions and the duration of the violations. 52 Pa. Code § 69.1201(c)(5). The number of affected customers is 4,157 and the alleged violations occurred over a three-month period: February, March and April 2014.

The sixth factor to be considered relates to the compliance history of Clearview. 52 Pa. Code § 69.1201(c)(6). An isolated incident from an otherwise compliant company may result in a lower penalty, whereas frequent, recurrent violations by a company may result in a higher penalty. *Id.* At least five customers have filed formal complaints against the Company alleging deceptive marketing, incorrect billing and/or an increase in rates.³ These matters were resolved by the filing of Certificates of Satisfaction pursuant to 52 Pa. Code § 5.24.

Additionally, I&E was prepared to allege that Clearview did not comply with the Commission's EGS bonding level requirements. Section 54.40(d) of the Commission's regulations, 52 Pa. Code § 54.40(d), provides that the security level for EGSs after the first year that an EGS's license is in effect is 10% of the licensee's reported gross receipts. By Secretarial Letter dated December 22, 2015 at Docket No. A-2010-2152506, Clearview was directed to respond to data requests that had been issued by the Commission's Bureau of Technical Utility

³ The five formal complaints are docketed as follows: F-2015-2478664, F-2016-2559912, C-2012-2335048, C-2014-2411137 and C-2013-2381987.

Services in response to Clearview's petition to reduce its bonding level to 5% of its most recent 12 months of revenue. The fourth data request directed to Clearview states as follows: "5% Bond Reduction - Applicant prematurely decreased its current bond before its Bond Reduction Petition was approved by the Commission." Had this matter been litigated, I&E would have alleged that Clearview reduced its bond from 10% to 5% without prior Commission approval and in contravention of Section 54.40(d) of the Commission's regulations. However, no Commission finding has been made with regard to Clearview's alleged non-compliance with required bonding levels and the instant matter is the first case involving an enforcement action brought against Clearview and resulting in a civil penalty.

The seventh factor to be considered relates to whether the Company cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). "Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty." *Id.* I&E submits that Clearview cooperated with I&E during its informal investigation, including timely and fully responding to I&E's three sets of data requests.

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). The size of the company may be considered to determine an appropriate penalty amount. *Id.* I&E submits that Clearview is a very large EGS operating in a number of jurisdictions⁴ and advertises itself as being the leading green energy provider in the United States.⁵ I&E also asserts that a civil penalty amount of \$250,000, is substantial and sufficient to deter Clearview from committing future violations. It is important

⁴ Clearview provides EGS service in the following jurisdictions: Connecticut, Washington, D.C., Delaware, Illinois, Massachusetts, Maryland, Maine, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Texas. *See* <https://www.clearviewenergy.com/service-areas>

⁵ *See* <https://www.clearviewenergy.com/>

to note that the civil penalty amount reached in this amicable settlement is not based on a precise calculation consisting of a dollar amount multiplied by a number representing the violations. Rather, the civil penalty settlement amount was reached by using a “black box” methodology.

The ninth factor to be considered relates to past Commission decisions in similar matters. 52 Pa. Code § 69.1201(c)(9). I&E submits that the instant Settlement, which resolves allegations of EGS billing not conforming to the agreed upon prices in the disclosure statement, provides comparable relief to a largely similar matter that was previously decided by the Commission. In *Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 3, 2015) (“*HIKO*”), the Commission imposed a civil penalty of \$1,836,125 for overcharging approximately 5,700 customers on 14,689 invoices over four consecutive months during the Polar Vortex of 2014. The customers were guaranteed at the time of enrollment to receive a savings of 1% to 7% over the EDC’s PTC for the first six monthly billing cycles, but the company’s top-level management made a deliberate decision to overcharge customers in order to save the company’s finances. *Id.* at 2 and 53. In *HIKO*, customers experienced an average overcharge of \$125 per invoice and the company overcharged customers by approximately \$1.8 million from January through April 2014. *Id.* at 10. Additionally, the company only offered refunds to customers who complained and those refunds consisted of a fraction of the total refunds the company owed to its customers. *Id.* at 10 and 16.

A significant difference between *HIKO* and the instant matter is that this proceeding is being resolved by settlement. Therefore, I&E submits that the instant Settlement Agreement should be viewed on its own merits and is fair and reasonable. However, in looking at the relevant factors that are comparable to other matters involving allegations of EGS billing not conforming to the disclosure statement, and comparing the allegations to the relief provided in

the Settlement – specifically, a substantial civil penalty – the instant Settlement is consistent with past Commission actions and presents a fair and reasonable outcome.

The tenth factor considers “other relevant factors.” 52 Pa. Code § 69.1201(c)(10). I&E submits that an additional relevant factor – whether the case was settled or litigated – is of pivotal importance to this Settlement Agreement. A settlement avoids the necessity for the governmental agency to prove elements of each allegation. In return, the opposing party in a settlement agrees to a lesser fine or penalty, or other remedial action. Both parties negotiate from their initial litigation positions. The fines and penalties, and other remedial actions resulting from a fully litigated proceeding are difficult to predict and can differ from those that result from a settlement. Reasonable settlement terms can represent economic and programmatic compromise but allow the parties to move forward and to focus on implementing the agreed upon remedial actions.

In conclusion, I&E fully supports the terms and conditions of the Settlement Agreement. The terms of the Settlement Agreement reflect a carefully balanced compromise of the interests of the Parties in this proceeding. The Parties believe that approval of this Settlement Agreement is in the public interest. Acceptance of this Settlement Agreement avoids the necessity of further administrative and potential appellate proceedings at what would have been a substantial cost to the Parties.

WHEREFORE, I&E supports the Settlement Agreement as being in the public interest and respectfully requests that the Honorable Administrative Law Judge recommend approval of, and the Commission approve by Final Order, the Joint Petition for Approval of Settlement, including all the terms and conditions set forth therein without modification.

Respectfully submitted,



Stephanie M. Wimer
Prosecutor
PA Attorney ID No. 207522

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Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
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Dated: April 21, 2017

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
	:	
v.	:	C-2016-2543592
	:	
	:	
Clearview Electric, Inc.,	:	
Respondent	:	

**CLEARVIEW ELECTRIC, INC.’S STATEMENT IN SUPPORT
OF JOINT PETITION FOR APPROVAL OF SETTLEMENT**

TO ADMINISTRATIVE LAW JUDGE ELIZABETH BARNES:

Pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code §§ 5.231, 5.232 and 69.1201, Clearview Electric, Inc. (“Clearview” or “Company”) files this Statement in Support of the Joint Petition for Approval of Settlement (“Settlement”) filed by Clearview and the Commission’s Bureau of Investigation and Enforcement (“I&E”) on April 21, 2017. In support of the Settlement, Clearview offers the following information for the Commission’s consideration.

I. INTRODUCTION

At the outset, Clearview notes that the Settlement is consistent with the Commission’s policy to encourage settlements.¹ Settlements conserve valuable resources of the Commission and the parties. Importantly, the focus of inquiry for determining whether a proposed settlement should

¹ 52 Pa. Code § 5.231(a).

be approved is not a “burden of proof” standard, as is utilized for contested matters.² Rather, the Commission reviews settlements to determine whether the terms are in the public interest.³

This Settlement fully satisfies the Formal Complaint (“Complaint”) filed by I&E against Clearview on May 4, 2016 in the above-captioned matter. As the Settlement resolves the contentious and complex issues that were raised in this proceeding concerning the alleged violations of Commission regulations and the appropriate level of civil penalty, and provides for a fair and reasonable resolution of those issues, it is in the public interest. Clearview respectfully requests that the Commission approve the Settlement without modification.

The Complaint alleged overcharges of approximately \$105,000 affecting 4,157 customers over a three-month period in early 2014 and sought the imposition of a civil penalty in the amount of \$1.3 million. The key provisions of the Settlement are the payment of a civil penalty by Clearview in the amount of \$250,000 and the submission of quarterly reports by Clearview to I&E for a period of two years detailing the nature and disposition of all consumer complaints and identifying billing errors. While Clearview has contended that the billing discrepancy at issue in this proceeding did not amount to a violation of the Commission’s regulations, the Company has agreed to pay this civil penalty, without admitting any wrongdoing, to achieve certainty that is not possible through litigation. Importantly, as further described below, the Settlement also avoids the need for the Commission to address and resolve the issues raised in this proceeding and to potentially defend them in subsequent appellate litigation. In this manner, the Settlement avoids

² *Pa. PUC, et al. v. City of Lancaster – Bureau of Water*, Docket No. R-2010-2179103 (Order entered July 14, 2011).

³ *See, e.g., Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009).

the uncertainty of litigation and the associated time and costs of litigation for Clearview, I&E and the Commission.

The agreed upon civil penalty is in the public interest due to the numerous mitigating factors that are supported by the Joint Stipulation of Facts filed by Clearview and I&E in this proceeding, including: (i) Clearview's voluntary and proactive response in issuing full refunds to affected customers in 2014; (ii) Clearview's modifications to its internal practices in 2014 to avoid a recurrence of the billing discrepancy; and (iii) Clearview's unblemished compliance record since being licensed in 2010. Additionally, Clearview presented evidence in this proceeding to show the unintentional nature of the billing discrepancy, the relatively small amount of the alleged overcharges and the minimal impact on consumers, which provides further support for the negotiated civil penalty amount. Also, Clearview's agreement to provide quarterly reports for two years demonstrates an ongoing commitment to regulatory compliance.

II. DISCUSSION OF ISSUES

A. Summary of Issues

The basic facts are not in dispute. During the months of February, March and April 2014 – the period commonly referred to as the “Polar Vortex”⁴ – Clearview charged customers on variable price plans the amount of 18.99 cents per kWh.⁵ Some of these customers were still being served by Clearview under discontinued or legacy disclosure statements that contained a price range, as follows: “Price per kWh can range from 8.9 cents to 17.9 cents, plus applicable taxes.”⁶

⁴ 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).

⁵ Joint Stipulation of Facts ¶ 6.

⁶ Joint Stipulation of Facts ¶ 5; Clearview Statement No. 1 at 2.

When a customer complained to the Commission's Bureau of Consumer Services on March 26, 2014 that Clearview charged a price that exceeded 17.9 cents per kWh, Clearview treated this event as a billing error and refunded the difference to the customer.⁷ On April 15, 2014, Clearview revised its internal protocols to ensure that prices would not exceed 17.9 cents per kWh in the future.⁸ Starting on May 1, 2014, Clearview queried its billing data and identified a total of 4,157 customers affected by this billing discrepancy.⁹ Over the next few months in 2014, Clearview fully refunded or credited amounts paid by customers in excess of 17.9 cents per kWh for a total of \$105,225.64.¹⁰ In May 2016, I&E filed the pending Complaint seeking the imposition of a \$1.3 million civil penalty, which was based on a proposed \$125 civil penalty for each alleged incorrect invoice issued by Clearview.¹¹

The issues that are in dispute in this proceeding are whether Clearview violated the Commission's regulations, whether any such violations were intentional and what an appropriate civil penalty, if any, should be. Through entering this Settlement, Clearview has opted for the certainty of a specific civil penalty amount and to avoid the continued costs of litigation, while not admitting to any wrongdoing or any violations of Commission regulations.¹² Similarly, by approving this Settlement, the Commission can avoid addressing questions and possibly defending

⁷ Joint Stipulation of Facts ¶¶ 13-17; Clearview Statement No. 1 at 3.

⁸ Joint Stipulation of Facts ¶ 18.

⁹ Joint Stipulation of Facts ¶ 8.

¹⁰ Joint Stipulation of Facts ¶¶ 13-17.

¹¹ I&E Complaint ¶ 53. A relatively small portion of the proposed civil penalty was attributable to alleged violations of provisions requiring electric generation suppliers to notify customers of proposed changes in the terms of service, which Clearview has contended were inapplicable since the Company was not proposing to change the terms of service and in fact did not change the terms of service. See Settlement ¶¶ 37.A. and 38.C.

¹² Joint Stipulation of Facts ¶ 23; Settlement ¶¶ 40-41.

issues on appeal concerning whether Clearview violated the regulations, and whether the Commission has statutory authority to impose a civil penalty that exceeds \$1,000 per day or to interpret the terms of a private contract to determine whether a breach has occurred.

B. Whether Clearview Violated Regulations

If this matter had been fully litigated, Clearview would have contended that it did not violate the Commission's regulations when charging customers 18.99 cents per kWh. Through its testimony, Clearview would have demonstrated that the applicable gross receipts tax ("GRT") for electricity sales is 5.9% and the formula to calculate the appropriate tax is:

$$\text{Effective Unit Cost} = \frac{\text{Taxable Amount}}{1 - \text{GRT Rate}}$$

Clearview's testimony would have also shown that due to a gross-up factor, the actual GRT rate is 6.27%.¹³ Further, this testimony would have shown that adding the applicable GRT to the 17.9 cent cap in the legacy disclosure statements would produce an effective total cost of electricity of 19.022 cents per kWh.¹⁴ This calculation is displayed mathematically as:

$$\frac{17.9}{1 - 0.059} = 19.022$$

Further, Clearview would have argued that it was under no legal or regulatory obligation to include GRT in the price ceiling that was in the disclosure statement. The Commission's regulations do not require EGS prices to include GRT.¹⁵ Rather, the Commission's Office of

¹³ Clearview Statement No. 4 at 4-5. See also <http://www.papowerswitch.com/frequently-asked-questions> (GRT FAQ).

¹⁴ Clearview Statement No. 4 at 5.

¹⁵ 52 Pa. Code § 54.5.

Competitive Market Oversight (“OCMO”) has given guidance to the industry to include GRT in the initial price, relying on a definition of “price to compare” (“PTC”) in the default service regulations, which indicates that the PTC is “equal to the sum of all unbundled generation and transmission related charges.”¹⁶ Not only does the cited definition of PTC appear in regulations that apply exclusively to default services that are provided by electric distribution companies, it also does not specify that GRT is part of the PTC or contain any requirement for EGSs to include GRT in either the initial or ceiling price. Moreover, the informal guidance offered by OCMO regarding the components for inclusion in EGS marketed prices does not establish binding rules or enforceable standards.¹⁷

Similarly, the Commission’s only guidance about what must be included in an EGS’s initial price is in an order regarding fixed price labels.¹⁸ In the *Fixed Means Fixed Order*, the Commission expressed its expectation that the initial price an EGS presents to a residential or small business customer be “all-inclusive” and include “all of the pricing components found in the PTC for default customers (generation, transmission where applicable, gross receipts tax, etc.)”¹⁹ Not only was the guidance issued well after the use of Clearview’s legacy disclosure statements had been discontinued, the *Fixed Means Fixed Order* likewise cannot be relied upon to establish enforceable standards and in fact acknowledges as much even with respect to the use of fixed price

¹⁶ 52 Pa. Code § 54.182. See recap of CHARGE Conference Call for January 7, 2010 at: http://www.puc.pa.gov/electric/docs/OCMO/CHARGE_Recap010710.doc (Issue 1, first topic).

¹⁷ See *Pa. Human Relations Commission v. Norristown Area School Dist.*, 473 Pa. 334, 350; 374 A.2d 671, 679 (1977); *Woods Services, Inc. v. Dep’t of Public Welfare*, 803 A.2d 260, 265 (Pa. Cmwlth. 2002).

¹⁸ *Use of Fixed Price Labels for Products with a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013) (“*Fixed Means Fixed Order*”).

¹⁹ *Id.* At 28.

labels.²⁰ Moreover, the focus of the Commission’s “all-inclusive” price was to promote an apples-to-apples comparison between EDC PTCs and EGS initial prices and did not discuss ceiling prices.²¹

In short, Clearview’s own characterization of this event as a billing error, for business reasons, does not translate into a violation of the Commission’s regulations. Stated otherwise, if Clearview was permitted to add all applicable taxes to the price cap – which would have been its litigation position in this proceeding – the amount of 18.99 cents per kWh would not constitute an actionable violation of those regulations. As the price of 18.99 cents per kWh is within the acceptable price range set forth in the disclosure statement when GRT is added, Clearview would have argued that the Complaint fails to set forth facts that support a finding that Clearview violated Section 54.4(a) of the Commission’s regulations.²²

C. Commission’s Statutory Authority to Interpret Contracts

Clearview would have further maintained that in order for the Commission to find that the Company charged an amount that exceeded the price range shown in the disclosure statement, it would be necessary to engage in contract interpretation, which it lacks the statutory authority to do. As a creation of the General Assembly, the Commission has only the powers and authority granted to it by the General Assembly and contained in the Public Utility Code.²³ It is well-settled

²⁰ *Id.* at 24.

²¹ *Id.* at 28.

²² 52 Pa. Code § 54.4(a).

²³ See *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) (“We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission’s power is statutory; and the legislative grant of power in any particular case must be clear.”); see also *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008).

that the Commission must act within, and cannot exceed, its jurisdiction.²⁴ Jurisdiction may not be conferred by the parties where none exists.²⁵ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.²⁶

Nothing in the Code authorizes the Commission to interpret the terms and conditions of a private contract between an electric generation supplier (“EGS”) and its customers. Indeed, the Commission has concluded that its jurisdiction over EGSs “does not extend to interpreting the terms and conditions of a contract between an EGS and a customer to determine whether a breach has occurred or setting the rates an EGS can charge.”²⁷ Rather, matters involving contract interpretation are for courts of competent jurisdiction.²⁸

The ultimate question presented by this proceeding is whether 18.99 cents per kWh was permitted under a contract that contained a price ceiling of 17.9 cents per kWh plus all applicable taxes.²⁹ Clearview would have contended that the Commission should find that the price of 18.99 cents per kWh was permissible under the plain language of the disclosure statement since simple mathematics show that adding the GRT to the price ceiling produces an effective unit rate that

²⁴ *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

²⁵ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

²⁶ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

²⁷ *Office of Small Business Advocate v. FirstEnergy Solutions Corp.*, Docket No. P-2014-2421556 (Order entered January 26, 2015), at 18.

²⁸ *See Allport Water Auth. V. Winburne Water Co.*, 258 Pa. Super. 555, 393 A.2d 673 (Pa. Super. 1978) (Commission lacks jurisdiction to address disputes involving private contracts; *Adams et al. v. Pa. PUC*, 819 A.2d 631 (Pa. Cmwlth. 2003).

²⁹ Courts have found that they may not read words into a contract that change its unambiguous meaning. *See Silvis et al. v. Ambit Energy LP, et al.*, 2016 WL 1086703 (March 21, 2016); *Orange, et al. v. Starion Energy PA, Inc.*, 2016 WL 1043618 (March 16, 2016).

exceeds the price charged by Clearview. To the extent that the Commission would have found that is necessary to go further and determine what is meant by the remainder of the language in the disclosure statement, Clearview's position would have been that such an analysis would need to be performed by a court of competent jurisdiction.

D. Whether Clearview Intentionally Exceeded the Price Cap

To the extent that the Commission would have found that Clearview violated its regulations, Clearview would have contended that its testimony demonstrated that it did not intentionally charge customers an amount that exceeded the 17.9 cent price cap in the legacy disclosure statements.³⁰ To the contrary, Clearview's testimony explained that the Company increased variable prices to a level that allowed it to recover a portion of the record-breaking wholesale prices that it was experiencing in early 2014.³¹ Clearview's testimony further noted that in the chaotic Polar Vortex environment, where the Company was scrambling to respond to the unprecedented wholesale price crisis, it overlooked the fact that it still had customers being served under the discontinued disclosure statements that had a price cap.³² This testimony also indicated that Clearview had previously (mistakenly) believed that a price cap was a regulatory requirement and that it had selected the price ceiling at a level that it did not expect to ever reach based on historical wholesale prices.³³ Clearview's testimony further explained that the Company imposed increases in a manner that was designed to moderate the impact on customers and that an

³⁰ Clearview Statement No. 1 at 10-11.

³¹ Clearview Statement No. 1 at 12-13. *See also Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014).

³² Clearview Statement No. 1 at 10-11.

³³ Clearview Statement No. 1 at 7.

overcharge in the amount of \$105,225.64 would have made no difference to the Company in terms of recouping its losses that were in the millions in early 2014.³⁴ Additionally, the fact that Clearview completed the refund process in 2014 for all affected customers without waiting for complaints to be filed supports Clearview's contention that the discrepancy was unintentional.³⁵ Through this testimony, Clearview would have established that any billing error was administrative in nature and was not an intentional overcharge of customers.

E. Appropriate Amount of Civil Penalty

As to the appropriate amount of a civil penalty, if any, Clearview's litigation position would have been that no civil penalty is warranted under the circumstances of this case, especially when this proceeding is compared to other Commission decisions. Clearview would have advocated for this result on the basis of its position that the Company did not violate the regulations. Clearview would have also relied on the facts that it: (i) fully refunded the disputed amounts of approximately \$105,000 to customers in 2014, upon first learning of the billing discrepancy and nearly two years prior to the filing of the I&E Complaint,³⁶ and (ii) modified its internal procedures in 2014 to ensure future compliance with the Commission's regulations.³⁷

If this matter had been fully litigated, Clearview would have also challenged the Commission's statutory authority to impose a civil penalty in excess of \$1,000 per day pursuant to Section 3301(b) of the Public Utility Code.³⁸ Clearview would have further maintained that it

³⁴ Clearview Statement No. 1 at 13-14.

³⁵ Clearview Statement No. 1 at 14.

³⁶ Joint Stipulation of Facts ¶¶ 13-17.

³⁷ Joint Stipulation of Facts ¶ 18.

³⁸ 66 Pa. C.S. § 3301(b).

is inappropriate under this circumstances of this proceeding to impose a civil penalty on the basis of each invoice.

III. APPLICATION OF POLICY STATEMENT FACTORS

An application of the factors and standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201 shows that the Settlement in this proceeding is in the public interest. The Policy Statement, which sets forth various factors and standards that are used in evaluating settled cases, is a codification of the Commission's decision in *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00092409 (Order entered February 10, 2000). These factors and standards are utilized by the Commission in determining if a proposed civil penalty is appropriate, as well as if an overall proposed settlement is reasonable and its approval is in the public interest.³⁹ Although the same criteria are used in the evaluation of both litigated and settled cases, they are not applied in as strict of a fashion to settled cases, and the parties in settled cases are afforded flexibility in reaching amicable resolutions to complaints as long as the settlement is in the public interest.⁴⁰ The Settlement's provision for the payment of a civil penalty in the amount of \$250,000 sufficiently addresses the issues raised in this proceeding. In addition, Clearview has committed to providing quarterly reports to I&E for two years detailing complaint activity and identifying billing errors, which demonstrates its ongoing commitment to regulatory compliance.

The first factor that is considered under the Policy Statement is whether the allegations were of a serious nature, such as willful fraud or misrepresentation, as opposed to administrative or technical errors.⁴¹ Although allegations of overcharging customers are of a serious nature,

³⁹ 52 Pa. Code § 69.1201(a).

⁴⁰ 52 Pa. Code § 69.1201(b).

⁴¹ 52 Pa. Code § 69.1201(c)(1).

Clearview presented testimony explaining that when it charged customers 18.99 cents per kWh, the Company did not recall that some customers remained on a disclosure statement that contained a price cap since that version of the disclosure statement had been discontinued the prior year.⁴² Clearview also offered testimony indicating that it originally included a price cap in its disclosure statement due to a mistaken belief that one was necessary and that it had selected the price cap of 17.9 cents per kWh on the basis of its experience with historical wholesale prices and its expectation that such a price would not be exceeded.⁴³ This evidence supports the treatment of the billing discrepancy as an alleged administrative error, warranting a lower civil penalty.

The second factor that is evaluated under the Policy Statement is whether the resulting consequences of the alleged actions were of a serious nature, such as whether personal injury or property damage was involved.⁴⁴ No allegations have been raised about personal injury or damage. As to the financial impact on customers, the average amount of the discrepancy was \$10.18 per bill or \$25.31 per customer, over a three-month period.⁴⁵ Although Clearview does not treat any billing discrepancy lightly, it is important to place this amount in perspective, particularly in comparison to the level of intentional overcharges - \$124 per bill or \$319.10 per customer – that were found to have occurred in a case involving a different EGS.⁴⁶ Also, this relatively low amount was further minimized by Clearview’s proactive and voluntary refunds and

⁴² Clearview Statement No. 2 at 8.

⁴³ Clearview Statement No. 2 at 9.

⁴⁴ 52 Pa. Code § 69.1201(c)(2).

⁴⁵ Joint Stipulation of Facts ¶ 12; Clearview Statement No. 2 at 9-10.

⁴⁶ *Pa. PUC v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Order entered December 5, 2015) (“*HIKO Order*”).

credits that were completed in 2014 – within months of the billing discrepancy, compared to the situation in the *HIKO Order* where the vast majority of the refunds were not issued until 2016 – more than two years after the overcharges.⁴⁷ Notably, Clearview’s testimony also demonstrated a dearth of consumer complaints regarding this billing dispute.⁴⁸ Therefore, this mitigating factor supports the negotiated civil penalty.

The third factor identified by the Policy Statement is whether the conduct at issue was deemed intentional or negligent.⁴⁹ Since this factor is only considered in evaluating litigated cases, it is not relevant in reviewing the Settlement.

The fourth factor that is considered under the Policy Statement is whether Clearview has made efforts to modify its internal practices and procedures to address the allegations at issue and prevent similar conduct in the future. These modifications may include improving company techniques.⁵⁰ Within three weeks of learning about the billing discrepancy that is the subject of this proceeding, Clearview modified its internal practices to ensure that the Company would not charge customers more than 17.9 cents per kWh.⁵¹ In its testimony, Clearview described these revisions as including: (i) protocols for the system to allow only increases or decreases within the range specified in a customer’s contract; (ii) the generation of exception reports identifying contracts that would exceed the pricing parameters; (iii) running queries when a change is made

⁴⁷ The EGS provided \$160,000 in refunds only to customers who complained prior to resolution of the proceeding and agreed to pay an additional \$1.67 million in refunds pursuant to a settlement in *Commonwealth of PA et al. v. HIKO Energy, LLC*, Docket No. C-2014-2427652 (Order entered December 5, 2015). *HIKO Order* at 16; Letter from the Office of Attorney General and Office of Consumer Advocate dated July 13, 2016 at Docket No. C-2014-2427652.

⁴⁸ Clearview Statement No. 3 at 8-10

⁴⁹ 52 Pa. Code § 69.1201(c) (3).

⁵⁰ 52 Pa. Code § 69.1201(c) (4).

⁵¹ Joint Stipulation of Facts ¶ 18.

in variable pricing to ensure customer rates are correct; and (iv) performing quarterly audits.⁵² These prompt and proactive modification to its internal procedures mitigates in favor of a lower civil penalty. Further, Clearview's issuance of full refunds and credits to all affected customers in 2014, along with the commitment to provide quarterly reports to I&E for two years concerning complaint activity or any billing errors supports approval of the Settlement.

The fifth factor that is evaluated under the Policy Statement is the number of customers who were affected and the duration of the alleged violations.⁵³ Here, when the 4,157 affected customers are compared to the total number of customers in Pennsylvania,⁵⁴ or to the total number of customers shopping for electricity in Pennsylvania,⁵⁵ the number of affected customers is a fraction of either number. Clearview also presented testimony showing that the number of affected customers is a fraction of the total number of customers it has served in Pennsylvania since 2010.⁵⁶ As to the duration of the alleged billing error, Clearview would have contended that three months is a relatively short period of time compared to situations where public utilities' billing errors have gone on for years before being discovered and corrected.⁵⁷ Clearview submits that this factor,

⁵² Clearview Statement No. 3 at 7.

⁵³ 52 Pa. Code § 69.1201(c)(5).

⁵⁴ Pennsylvania has 5,667,788 total electric customers.
<http://www.papowerswitch.com/sites/default/files/PAPowerSwitch-Stats.pdf>

⁵⁵ In Pennsylvania, 2,090,209 electric customers are purchasing supply from EGSs.
<http://www.papowerswitch.com/sites/default/files/PAPowerSwitch-Stats.pdf>

⁵⁶ Clearview Statement No. 1 at 4 (Proprietary); Clearview Statement No. 2 at 12.

⁵⁷ See *Pa. PUC v. Pike County Light & Power Company*, Docket Nos. M-00061973, 2008 WL 8013889 (Order entered September 15, 2008) (the public utility made billing errors over a period of years, which resulted in a \$35,300 contribution to "The Neighbor Fund," with no reference to the number of incorrect bills).

especially when viewed in conjunction with other factors including the amount of the billing discrepancy, supports the negotiated civil penalty.

The sixth factor is the compliance history of Clearview,⁵⁸ which has an exemplary track record of complying with the Commission's regulations. No formal complaints have been sustained against Clearview since it was licensed in 2010.⁵⁹ Only five formal complaints have been filed by customers with the Commission during that time, and in each instance, Clearview has worked with the consumers to reach amicable resolutions that resulted in the complaints being fully satisfied and withdrawn.⁶⁰ Similarly, Clearview has experienced minimal informal complaint activity during the past seven years. Less than 0.2% of the total customers served by Clearview since 2010 have filed informal complaint with the Bureau of Consumer Services.⁶¹ Notably, Clearview's complaint levels declined from 2013 to 2014, and of the 8,344 informal complaints filed against EGSs from January 2014 through June 2014, only 16 involved Clearview.⁶² Additionally, of the 9,458 informal complaints that were filed against over sixty EGSs in 2014, only 27 of them, or 0.28%, named Clearview.⁶³ Clearview's unblemished compliance record weighs in favor of a lower civil penalty.

⁵⁸ 52 Pa. Code § 69.1201(c) (6).

⁵⁹ Joint Stipulation of Facts ¶ 19.

⁶⁰ Docket Nos. C-2012-2335048; C-2013-2381987; C-2014-2411137; F-2015-2478664; F-2016-2559912.

⁶¹ Joint Stipulation of Facts ¶ 20.

⁶² Joint Stipulation of Facts ¶ 21.

⁶³ http://www.puc.state.pa.us/General/publications_reports/pdf/UCARE_2014.pdf (Appendix C, starting on page 70).

The seventh factor that is considered under the Policy Statement is whether Clearview cooperated with the Commission's informal investigation.⁶⁴ As I&E has acknowledged Clearview's cooperation during the informal investigation, this mitigating factor supports the Settlement.⁶⁵

The eighth factor that is evaluated under the Policy Statement is the amount of civil penalty that is necessary to deter future violations.⁶⁶ The civil penalty of \$250,000 is significantly higher than the civil penalties agreed to by other EGSs as part of Polar Vortex settlements with the Office of Attorney General and the Office of Consumer Advocate, and approved by the Commission.⁶⁷ Also, this amount is twice the amount of the civil penalty agreed to by I&E to resolve other Polar Vortex litigation.⁶⁸

Another important comparison is to the civil penalty resulting from a litigated proceeding that also arose during the Polar Vortex. In the *HIKO Order*, the Commission imposed a civil penalty of \$125 per incorrect invoice, after concluding that top level management made a deliberate choice not to honor promised savings so as to avoid bankruptcy and to charge customers approximately \$1.8 million more than permitted by their disclosure statement. By contrast in this

⁶⁴ 52 Pa. Code § 69.1201(c) (7).

⁶⁵ Joint Stipulation of Facts ¶ 22.

⁶⁶ 52 Pa. Code § 69.1201(c) (8).

⁶⁷ See *Commonwealth of PA et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered June 30, 2016), and *Commonwealth of PA et al. v. Energy Services Providers d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order entered March 9, 2016). While the allegations were somewhat different, the total refunds paid to customers by these EGSs as a result of those proceedings were \$6,577,000 and \$6,836,563. Also, these two EGSs combined to be accountable for over one-third of the total informal complaints filed against EGSs in 2014. http://www.puc.state.pa.us/General/publications_reports/pdf/UCARE_2014.pdf (Appendix C, starting on page 70)

⁶⁸ See *Commonwealth of PA et al. v. Respond Power LLC*, Docket No. C-2014-2427659 and *Pa. PUC, Bureau of Investigation and Enforcement v. Respond Power LLC*, Docket No. C-2014-2438640 (Order entered August 11, 2016).

proceeding, Clearview has presented testimony describing the \$105,000 billing discrepancy as an oversight that would not have had any impact on the wholesale market losses it was incurring.⁶⁹ Additionally, in imposing a \$1.8 million civil penalty in the *HIKO Order*, the Commission expressly noted the correlation between the amount of the overcharges and the resulting civil penalty.⁷⁰ Here, however, Clearview has agreed to pay – to avoid the uncertainty of litigation where I&E has proposed a \$1.3 million civil penalty – an amount that is nearly two and a half times the amount of the alleged billing error.

Had this matter been fully litigated, Clearview would have contended that a per invoice penalty is not appropriate under the circumstances of this case, particularly since public utilities routinely make billing errors that do not appear to result in the imposition of civil penalties.⁷¹ Clearview would have further argued that any per invoice penalty should be significantly lower than the \$125 per invoice proposed by I&E and imposed by the Commission in the *HIKO Order*. Specifically, Clearview would have contended the facts in this case are far different from the circumstances examined by the Commission in the *HIKO Order*. The most significant distinguishing factor is that Clearview proactively and voluntarily issued refunds and credits to all affected customers in 2014, rather than awaiting the filing of complaints and the resolution of a litigated proceeding two years later. Also, instead of waiting for the Commission to order

⁶⁹ Clearview Statement No. 1 at 10-14.

⁷⁰ *HIKO Order* at 48.

⁷¹ See, e.g., *PPL 2010-11 TIC Audit Report and Secretarial Letter*, Docket No. D-2011-2238984 (Released August 15, 2013) (it appears that the utility was simply required to correct the billing error); *Pa. PUC v. Pike County Light & Power Company*, Docket Nos. M-00061973, 2008 WL 8013889 (Order entered September 15, 2008) (the public utility made billing errors over a period of years, which resulted in a \$35,300 contribution to “The Neighbor Fund,” with no reference to the number of incorrect bills); *Investigation Docket No. 243 Re Duquesne Light Company*, 1977 Pa. PUC LEXIS 151, 50 Pa. PUC 555 (Order entered March 8, 1977) (as a result of billing errors over a period of ten years, the utility was required to develop a plan to avoid recurrence; no civil penalties appear to have been imposed).

modifications to its business practices, Clearview promptly changed its internal procedures in 2014 to avoid a recurrence of the billing discrepancy. In addition, Clearview would have relied upon its excellent record of compliance with the Commission's regulations, while noting that the EGS in the *HIKO Order* was operating under a conditional license at the time of the intentional overcharges. Further, Clearview would have argued that the evidence in this proceeding demonstrates the unintentional nature of the billing discrepancy and its relatively small magnitude with minimal impact on consumers. In pointing to these many distinguishing factors, Clearview would have maintained that any civil penalty per invoice should be far below the \$125 level imposed in the *HIKO Order*.

Had this matter been fully litigated, Clearview would have further relied on testimony showing that the \$1.3 million civil penalty proposed by I&E would have been devastating to the Company, in that it would have been the equivalent to the annual salaries of 26 of its 43 employees.⁷² Clearview would have also argued that a civil penalty that is more than twelve times the amount of the alleged billing error is excessively punitive in nature, particularly when compared with civil litigation that caps punitive damages at triple the amount of damages sustained.⁷³

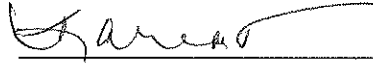
An evaluation of the factors in the Policy Statement shows that the Settlement is in the public interest and that it should be approved without modification. Not only does the Settlement sufficiently address the issues raised in this proceeding, particularly where all customers have been fully reimbursed for the alleged overcharges, it avoids the uncertainty and attendant costs of litigation and allows Clearview to focus on its EGS operations.

⁷² Clearview Statement No. 1 at 15.

⁷³ See *Schwartz v. Rocky*, 593 Pa. 536, 932 A.2d 885, 2007 Pa. LEXIS 2177 (2007).

WHEREFORE, based upon the foregoing, Clearview Electric, Inc. respectfully requests that the Commission approve the Joint Petition for Approval of Settlement without modification.

Respectfully submitted,



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