

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This Decision approves a Joint Petition for Approval of Settlement (Settlement) filed on April 21, 2017, resolving a formal complaint filed by the Bureau of Investigation and Enforcement (I&E or Complainant) against Clearview Electric, Inc. (Clearview or Respondent). The complaint alleged that Clearview had 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 Energy Company (PECO) and PPL Electric Utilities Company (PPL) service territories in February, March, and April 2014. Clearview’s overcharges affected 4,157 customers and totaled \$105,225.64.

The original complaint alleged 10,351 violations of 52 Pa. Code § 54.4(a) occurred, and sought the imposition of a civil penalty in the amount of \$125 per violation for a total civil penalty of \$1.3 million. The parties have stipulated that Clearview’s customers affected by the overbillings already received full refunds and that Respondent has placed parameters on its systems reinstating the rate cap to said customers. The Settlement requires Clearview to: 1) pay \$250,000 in civil penalties; and 2) submit 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 settlement is adopted in its entirety because it is in the public interest.

HISTORY OF THE PROCEEDING

On or about April 23, 2014, I&E initiated an informal investigation regarding Clearview, which resulted in the filing of the instant complaint on May 4, 2016 at Docket Number C-2016-2543592. Complainant averred it had received a referral from the Commission's Bureau of Consumer Services (BCS) regarding an informal complaint against Clearview. Complainant averred that Clearview offered a capped variable rate of up to 17.9 cents per kilowatt-hour (kWh) from June 2010 to May 2013. Beginning June 1, 2013, Clearview revised its capped variable pricing plan and removed the cap to new customers enrolled on or after June 1, 2013. The capped rate was still grandfathered and in effect for existing customers. Then, with no notice of any removal of the cap, Clearview charged 4,157 capped customers at 1.89 cents per kWh, which was over the capped variable rate during the months of February, March, and April 2014.

Complainant averred that there were 10,351 instances of deliberate overcharges and violations of 52 Pa.Code § 54.4(a) and the aggregate amount overbilled was \$105,225.64. On April 15, 2014, Clearview placed parameters on its system to prevent further charges in excess of 1.70 cents per kWh. Additionally, the company refunded \$105,225.64 to the affected customers; however, this was done only after an investigation prompted by an informal complaint had occurred. I&E requested Clearview be directed to pay a civil penalty of \$125 per each of the 10,351 violations of 52 Pa. Code § 5.4(a) and an additional penalty of \$6,125 for failure to provide notice to its affected customers of a change to a contract term, in violation of 52 Pa. Code § 54.5(g)(1).¹ Accordingly, I&E requested a \$1.3 million civil penalty be assessed against Clearview and that its electric generation supplier (EGS) license be suspended until the relief requested is satisfied. Complaint at 14-15, N.T. 5-21.

¹ It is noted the Complaint claimed a violation of 52 Pa. Code §54.10 occurred; however, at the prehearing conference I&E stated it wished to amend its Complaint and replace Section 54.10 with Section 54.5(g)(1). This amendment was further addressed in pre-served written testimony of I&E Witness Daniel Mumford. Complaint; N.T. 5-6; I&E Statement No. 1 at 37-40.

On June 14, 2016, Clearview filed an Answer and New Matter in response to the Complaint. In its Answer, Clearview admitted or denied the various averments made by Complainant. In particular, Clearview specifically denied that multiple violations of Pennsylvania law occurred and that consumers were intentionally misled or deceived as to the price they would pay for electricity. Clearview acknowledged the overbillings; however, it averred: 1) that the charges over the capped rate were due to administrative error; 2) that it had proactively and promptly refunded \$105,225.64 to the affected customers; and 3) that it had placed parameters on the capped customers' accounts to prevent future overbillings. In its New Matter, Clearview averred various affirmative defenses. On July 5, 2016, I&E filed a Reply to Clearview's New Matter denying the assertions in Clearview's New Matter.

An Initial Prehearing Conference was held on September 12, 2016, and a Procedural Order was issued on September 23, 2016, establishing a litigation schedule.

On January 11, 2017, Clearview filed a Motion for Summary Judgment seeking to dismiss the Complaint. By Order entered February 1, 2017, the Motion for Summary Judgment was denied.

On March 15, 2017, the parties notified the presiding officer that they had reached a settlement in principle.

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

A Joint Petition for Approval of Settlement with Appendices A – F was filed on April 21, 2017. The parties request as part of their settlement, that pre-served written testimonies and exhibits be considered and admitted into the record. The Settlement is ripe for a decision. For the reasons discussed below, the Settlement will be approved in its entirety because it is in the public interest.

FINDINGS OF FACT

I am adopting the following stipulated proposed findings of fact in Appendix A of the Settlement.

1. Clearview Electric, Inc. is an EGS as defined by 66 Pa.C.S. § 2803.
2. 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.
3. 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; therefore, the variable rate for electric generation service under this plan was capped at \$0.179/kWh.
4. After May 31, 2013, Clearview revised its capped variable pricing plan offered to new customers to remove the minimum and maximum rate per kWh.
5. The price offering change applied only to new customers enrolled on or after June 1, 2013, and the capped rate was grandfathered for existing customers of the capped variable pricing plan.
6. 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.
7. 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/>.

8. 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.

9. 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.

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

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

12. 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 invoices less than what I&E had alleged in its Formal Complaint.

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

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

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

20. 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.

21. 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; however, these Complaints have been satisfied through certificates of satisfaction.

22. 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.

23. 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.

24. Clearview cooperated during I&E’s informal investigation.

25. Clearview does not admit any wrongdoing.

DISCUSSION

Terms of Settlement

Although there was no evidentiary hearing, the parties stipulated to relevant proposed findings of fact and conclusions of law. Additionally, the parties agreed to the admission of the following written pre-served testimonies with accompanying exhibits into the record of this proceeding: 1) direct testimony of Daniel Mumford – I&E Statement No. 1; 2) rebuttal testimonies of Frank McGovern- Clearview Statement No. 1, Nicole Steel – Clearview Statement No. 2, Thomas Walker – Clearview Statement No. 3, and Frank Lacey – Clearview Statement No. 4; and 3) surrebuttal testimony of Daniel Mumford – I&E Statement No. 1-SR. Settlement, Paragraph 42(C) at 13.

The settlement proposes two forms of relief including: 1) a civil penalty; and 2) quarterly reports to I&E for two years. The key settlement terms begin in Paragraph 42 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.

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.

The settlement is conditioned upon additional terms and conditions typically found in most settlements presented to the Commission for approval. For example, the settlement is conditioned upon the Commission's approval of the terms and conditions without modification and the parties reserve the right to withdraw from the settlement if any of its terms are modified. The parties also reserved their right to continue litigation if the Commission does not approve the settlement and note that the settlement is made without any admission against, or prejudice to, any position which any settling party may adopt in subsequent litigation. Id. at 13-15. Finally, the parties waive their right to file exceptions if the settlement is adopted without modification. Id.

The parties stipulate that the settlement is in the public interest and should be approved without modification because it effectively addresses I&E's allegations and avoids the time and expense of litigation, which entails hearings, travel for out-of-state witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals. The parties also discussed in their respective Statements in Support of the Settlement why they believe the settlement is in the public interest.

Legal Standard

Commission policy promotes settlements. 52 Pa.Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa.Code § 69.401. 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.* (Opinion and Order entered July 14, 2011) (Lancaster).

The Commission must review proposed settlements to determine whether the terms are in the public interest. Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation, M-2009-2058182 (Opinion and Order November 23, 2009); Pa. Pub. Util. Comm'n v. Philadelphia Gas Works, M-00031768 (Opinion and Order January 7, 2004); 52 Pa. Code § 69.1201; Warner v. GTE

North, Inc., Docket No. C-00902815 (Opinion and Order entered April 1, 1996) (Warner); Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates, 74 Pa. PUC 767 (1991).

The Commission has historically defined the public interest as including ratepayers, shareholders and the regulated community. Pa.P.U.C. v. Bell Atlantic-Pennsylvania, Inc., Docket No. R-00953409 (Order entered September 29, 1995). What is in the public interest is decided by examining the effect of the proposed settlement on these “stakeholder” entities. Id. The public interest is best served, however, by ensuring that the underlying transaction complies with applicable law. Dauphin County Indus. Dev. Auth. V. Pa. P.U.C., 123 A.3d 1124 (Pa. Cmwlth. 2015). Furthermore, as a general rule, the interpretations of the agency charged with a statute’s administration and execution are entitled to great weight and the Legislature is presumed to favor public interests over private interests. Chappell v. Pa. P.U.C., 425 A.2d 873 (Pa. Cmwlth. 1981); 1 Pa.C.S. §§ 1921(c)(8), 1922(5).

With regard to the civil penalty, Section 3301 of the Public Utility Code grants the Commission authority to impose civil penalties. This section provides in pertinent part:

§ 3301. Civil penalties for violation.

(a) General rule. – If any public utility or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, such public utility, person or corporation . . . shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000 to be recovered by an action of assumpsit instituted in the name of the Commonwealth.

66 Pa.C.S. § 3301(a).

Section 69.1201 of the Commission’s regulations provides a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201. The Policy Statement notes that “these factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the

settlement agreement is in the public interest.” 52 Pa.Code § 69.1201(a). The Policy Statement notes that “when applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” 52 Pa.Code § 69.1201(b). These factors and standards are as follows:

- (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); *see also*, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company, Docket No. C-0092409 (Final Order entered February 10, 2000) (“Rosi factors”).

Application of the Rosi factors

First Rosi factor – whether the conduct was of a serious nature

With regard to the first Rosi factor, Section 69.1201(c)(1) states:

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.

52 Pa.Code § 69.1201(c)(1). I&E contends that Clearview’s alleged conduct is of a serious nature and was considered in arriving at the substantial civil penalty in the Settlement. I&E contends that the overcharging without prior notice until an informal complaint was filed at the Commission indicates a deliberate intent to overcharge and this is conduct of a serious nature.

Clearview admits that allegations of overcharging customers are of a serious nature; however, 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. Clearview Statement No. 2 at 8. 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. Clearview Statement No. 2 at 9.

Thus, Clearview contends the evidence supports the treatment of the billing discrepancy as an administrative error, warranting a lower civil penalty.

The conduct at issue in this proceeding was of a serious nature. Clearview does not deny 10,351 instances of overbilling 4,157 of its capped variable-rate customers during the months of February, March and April, 2014, during the period commonly referred to as the Polar Vortex.² Respondent merely contends that the overcharges were unintentional due to lack of recollection it had capped customers. Each instance of overbilling may be viewed as a separate violation of 52 Pa. Code §5.4(a). HIKO Order. The overbillings without prior notice could also be viewed as 4,157 violations of 52 Pa. Code § 54.5(g)(1) as these 4,157 customers were not notified of a material change to their rate prior to being charged. Although the amount overbilled is only an average of \$25 per customer, there is no dispute that the rate was lowered and refunds to affected customers were made only after an informal complaint was made to the Commission of a serious nature and therefore these undisputed facts support the proposed civil penalty.

Second Rosi factor - whether the resulting consequences were of a serious nature

With regard to the second Rosi factor, whether the resulting consequences of the conduct at issue were of a serious nature, Section 69.1201(c)(2) states:

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.

² A polar vortex is a system of upper-level winds that circle around one of the poles. In the northern hemisphere, the arctic polar vortex interacts extensively with the polar jet stream and may affect weather patterns at mid-latitudes. When the arctic polar vortex is strong, it acts to contain the coldest air masses in the polar regions favoring periods of milder winter temperatures in northern North America, Europe and Asia. When the winds of the polar vortex weaken, however, or interact with high-amplitude wave patterns in the jet stream, the shape of the vortex may become distorted. The circulation pattern around the pole may become increasingly asymmetrical, elongated and, in more extreme cases, may even split into two or more patterns. When this happens large incursions of arctic air may follow southward pointing lobes of the jet stream into mid-latitudes causing a period of colder than normal winter temperatures. <http://climatechange.cornell.edu/what-is-a-polar-vortex>.

52 Pa.Code § 69.1201(c)(2). In their Statements in Support of the Settlement, the parties agree that 4,157 customers were financially impacted such that the average overcharge per invoice was \$10.17, and 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 and April 2014. Joint Stipulation of Facts Par. 12; Clearview Statement No. 2 at 9-10.

There is no allegation that either personal injury or customer property damage occurred as a result of the alleged violations. There is no consumer testimony in the record as to hardship. Given the stipulated fact that Clearview conducted an internal investigation and voluntarily refunded the affected customers soon after the informal complaint was filed, I find that Clearview lessened the potential negative financial impact on its customers. Clearview Statement No. 3 at 8-10. Thus, even if consequences were of a serious nature, there were mitigating efforts made by the company. Therefore, this mitigating factor supports the negotiated civil penalty.

Third Rosi factor – whether the conduct was intentional or negligent

With regard to the third factor, whether the conduct at issue was deemed intentional or negligent, this factor is not relevant here because this factor is only evaluated in litigated proceedings. 52 Pa.Code § 69.1201(c)(3).

Fourth Rosi factor – efforts to modify internal practices and procedures

With regard to the fourth Rosi factor, efforts to modify internal practices and procedures, Section 69.1201(c)(4) states:

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.

52 Pa.Code § 69.1201(c)(4).

Complainant contends that 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.

Conversely, Clearview contends that 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. Joint Stipulation of Facts No. 18. 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 in variable pricing to ensure customer rates are correct; and (iv) performing quarterly audits. Clearview Statement No. 3 at 7.

The 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. It is noted that although the parties may disagree as to the exact timing of remedial action, the fact that Clearview did place pricing parameters into its system and voluntarily refunded its customers in the Spring of 2014 shows a willingness to comply with the Public Utility Code and Commission regulations in the future in order to prevent a similar occurrence and weighs in favor of mitigation.

Fifth Rosi factor – Number of customers affected and duration of violation

The fifth Rosi factor considers the number of customers affected and the duration of the violation. 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. This factor, when viewed in conjunction with other factors including the amount of the billing discrepancy, supports the negotiated civil penalty.

Sixth Rosi factor – compliance history

With regard to the sixth Rosi factor, Respond's compliance history, Section 69.1201(c)(6) provides that, "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." 52 Pa.Code § 69.1201(c)(6).

I&E claimed that 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 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.

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.

Conversely, Clearview argues that no formal complaints have been sustained against Clearview since it was licensed in 2010. Joint Stipulation of Fact No. 19. 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. Joint Stipulation of Fact No. 20. 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. Joint Stipulation of Fact No. 20. 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. Joint Stipulation of Facts No. 21. 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. Joint Stipulation of Fact No. 21.

A review of I&E Exhibit 17 and the testimony of I&E witness Daniel Mumford shows that Clearview may have prematurely decreased its bond before its Bond Reduction Petition had been approved by the Commission and this is concerning. I&E Statement No. 1 at 51-54; I&E Exhibit 17. However, I see no evidence that Respondent's license was ever revoked or suspended as a result. The insufficiency may have been cured to the satisfaction of the Commission in 2015. I&E Exhibit 17.

Although the Company admits no wrongdoing, the size of the refund amount of \$105,225 indicates overbilling involving 4,157 customers. This is not an "isolated incident," another issue to be considered when analyzing this factor. Nonetheless, I believe that this fact should not be a barrier to the approval of the settlement in this case. As this factor recognizes that frequent and recurrent violations may result in a higher penalty, I believe that the full total refund size of \$105,225.64, coupled with the civil penalty of \$250,000, and reporting requirements to I&E over the next two years is reasonable and in the public interest based on the record developed in this proceeding. Clearview is advised, however, that further violations of the Public Utility Code or a Commission Order or regulation will likely warrant increasingly higher penalties up to and including license revocation. At this time, however, I believe the settlement is in the public interest and should be adopted in its entirety.

Seventh Rosi factor – cooperation with the Commission investigation

With regard to the seventh Rosi factor, Section 69.1201(c)(7) analyzes “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.” 52 Pa.Code § 69.1201(c)(7).

As I&E has acknowledged Clearview’s cooperation during the informal investigation, this mitigating factor supports the Settlement. Joint Stipulation of Fact No. 22.

Eighth Rosi factor – amount of penalty necessary to deter future violations

With regard to the eighth Rosi factor, the amount of civil penalty or fine necessary to deter future violations, Section 69.1201(c)(8) analyzes “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.” 52 Pa.Code § 69.1201(c)(8).

I&E contends that Clearview is a very large EGS operating in Connecticut, Washington, D.C., Delaware, Illinois, Massachusetts, Maryland, New Jersey, Ohio, Pennsylvania, Rhode Island, and Texas. I&E also asserts that a civil penalty amount of \$250,000, is substantial and sufficient to deter Clearview from committing future violations. I&E and Clearview each reference in their respective Statements in Support of the Settlement the totality of the settlement as a deterrent to future violations. I find that the settlement as a whole deters future violations, is in the public interest, and warrants being adopted.

Ninth Rosi factor – past Commission decisions in similar cases

The ninth Rosi factor addresses past Commission decisions in similar cases. 52 Pa.Code § 69.1201(c)(9).

The instant settlement substantially resembles the settlements issued in prior cases involving similar issues and similar parties. In prior cases, the Commission has not had to hear

from individual consumer testimony in order to approve settlements following investigations involving multiple customers.

In the following decisions regarding settlements resolving allegations of EGSs slamming and/or overcharging multiple customers, the Commission has issued the following civil penalties. In LBPS v. MXenergy, M-2012-2201861, (Order entered May 3, 2012), a \$22,000 civil penalty was assessed for 22 violations of 52 Pa. Code §57.173 (relating to slamming); however, no refund was ordered because no customers were financially harmed. In I&E v. Public Power, M-2012-2257858, (Order entered December 19, 2013), the Commission assessed a \$64,450 civil penalty with refunds to 263 customers for the 60-day electric generation portion of bill for violating 52 Pa. Code §§ 57.171-57.177. In I&E v. Pa.Gas & Electric, M-2013-2325122, (Order entered October 17, 2013), a \$150,200 civil penalty (\$1,000 per 108 accounts switched, plus lesser penalty per 211 accounts about to be switched) was assessed; however, no refund was ordered. This case involved 319 accounts owned by 10 commercial customers and the intentional unauthorized switching by one Territory Service Representative (TSR). In Pub. Util. Comm'n v. ACN Energy, M-00021618, (Tentative Order entered June 14, 2002 became final by operation of law, on or about June 30, 2002), the Commission assessed \$45,000 in civil penalties broken down by \$11,000 – for 11 violations of 52 Pa. Code §57.173 (intentional slamming); \$4,000 – for 8 violations of 52 Pa. Code §57.173 (negligent slamming); and \$30,000 for 81 occurrences/violations of 52 Pa. Code § 54.4(a). In this case, the Commission considered mitigating factors in applying Rosi factors to violations of negligent slamming and negligent overbilling.

These above-referenced decisions regarding settlements also involved no admission to wrongdoing, and the EGSs agreed to lower civil penalties in order to avoid the possibility of more adverse consequences, including higher fines and license suspension/revocation. These decisions were rendered after consideration of the ten Rosi Factors, the same factors I am considering today. See also I&E v. HIKO Energy, LLC, C-2014-2431410 (Order entered December 5, 2015)(HIKO),⁴ citing Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Public Power, LLC, Docket No. M-2012-2257858 (Order

⁴ A civil penalty of \$1.8 million (an average of \$125 civil penalty per 14,689 overcharges) was imposed on HIKO for violations of 52 Pa. Code § 54.4(a).

entered August 29, 2013). The Commission's HIKO Order was entered after a fully litigated proceeding and is currently on appeal at Commonwealth Court of Pennsylvania at Case No. 5 C.D. 2016; however, it serves as precedent. In the HIKO case, 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. In the HIKO Order, the Commission imposed a civil penalty of \$125 per incorrect invoice (an amount similar to the average overcharge per 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 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. Clearview Statement no. 1 at 10-14. 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. 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. The penalty may be viewed as less than \$125 per overcharge (an amount assessed in the HIKO case), but greater than the average overcharge of \$10 per invoice in the instant case.

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.

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 modifications to its business practices, Clearview promptly changed its internal procedures in 2014 to avoid a recurrence of the billing discrepancy. As opposed to HIKO, Clearview was not operating under a conditional license at the time of overcharges. Clearview would have maintained that any civil penalty per invoice should be far below the \$125 level imposed in the HIKO case.

Past Commission decisions in similar cases support a finding that the settlement in this case is in the public interest and should be approved in its entirety. The civil penalty in the instant proceeding is consistent with civil penalties in other settled matters involving allegations of multiple violations of 52 Pa. Code §54.4(a).

Tenth Rosi factor – other relevant factors

The tenth factor analyzes other relevant factors. 52 Pa.Code § 69.1201(c)(10). I&E contends that 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.

I agree that an additional relevant factor that supports finding the settlement to be in the public interest and approved in its entirety is that the events which give rise to the complaint filed in this case occurred more than two years ago. Fully litigating this case may delay resolution and any Commission decision would potentially be subject to appellate review. The settlement, on

the other hand, helps to expedite or eliminate these delays. Refunds have already been issued by Respondent; however, the implementation of quarterly reporting requirements and payment of a civil penalty to act as deterrence from future misconduct is in the public interest.

CONCLUSION

In conclusion, this Decision adopts the Joint Petition for Approval of Settlement in its entirety as being in the public interest. The settlement is a comprehensive settlement of all of the issues and resolves the formal complaint filed by I&E. Refunds to consumers and modifications to business operations have already taken place. The additional civil penalty of \$250,000 is consistent other similarly settled complaints alleging multiple violations of 52 Pa. Code 54.4(a), and will deter future misconduct. Further, the quarterly reporting requirements over the next two years will enable I&E to better monitor Clearview's compliance with the Public Utility Code and Commission regulations going forward. The provision of the settlement that Clearview cannot claim the civil penalty as a tax deduction is consistent with 66 Pa. C.S. § 3301. Through entering this Settlement, the parties have opted for the certainty of a specific civil penalty amount and to avoid the continued costs of litigation. Therefore, the Settlement shall be approved in its entirety without modification.

CONCLUSIONS OF LAW

1. Commission policy promotes settlements. 52 Pa.Code § 5.231.
2. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa.Code § 69.401.
3. 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.* (Opinion and Order entered July 14, 2011).

4. The Commission must review proposed settlements to determine whether the terms are in the public interest. Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation, M-2009-2058182 (Opinion and Order November 23, 2009); Pa. Pub. Util. Comm'n v. Philadelphia Gas Works, M-00031768 (Opinion and Order January 7, 2004); 52 Pa. Code § 69.1201; Warner v. GTE North, Inc., Docket No. C-00902815 (Opinion and Order entered April 1, 1996); Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates, 74 Pa. PUC 767 (1991).

5. The Commission has historically defined the public interest as including ratepayers, shareholders and the regulated community. What is in the public interest is decided by examining the effect of the proposed settlement on these “stakeholder” entities. Pa.P.U.C. v. Bell Atlantic-Pennsylvania, Inc., Docket No. R-00953409 (Order entered September 29, 1995).

6. The public interest is best served by ensuring that the underlying transaction complies with applicable law. Dauphin County Indus. Dev. Auth. V. Pa. P.U.C., 123 A.3d 1124 (Pa. Cmwlth. 2015).

7. As a general rule, the interpretations of the agency charged with a statute’s administration and execution are entitled to great weight and the Legislature is presumed to favor public interests over private interests. Chappell v. Pa. P.U.C., 425 A.2d 873 (Pa. Cmwlth. 1981); 1 Pa.C.S. §§ 1921(c)(8), 1922(5).

8. The Commission’s regulations provide a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201; *see also*, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company, Docket No. C-0092409 (Final Order entered February 10, 2000).

9. The Policy Statement factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest. 52 Pa.Code § 69.1201(a).

10. When applied in settled cases, the Policy Statement factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest. 52 Pa.Code § 69.1201(b).

11. The Commission has plenary authority under Section 501 of the Public Utility Code to direct an electric generation supplier to issue a credit or refund for an over bill. Commonwealth of Pa, et al. v. IDT Energy, Inc., Docket No. C-2014-2427657 (Opinion and Order entered Dec. 18, 2014).

12. In addition to any powers expressly enumerated in this part, the Commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders or otherwise, all and singular, the provisions of this part, and the full intent thereof. 66 Pa.C.S. § 501.

13. The Commission's plenary authority under Section 501(a) of the Code includes directing an EGS to issue a credit or refund for an overbill in violation of 52 Pa. Code § 54.4(a) and a violation of the Commission's Interim Guidelines. Stephen Kiback, Jr. v. IDT Energy, Inc., Docket No. C-2014-2409676, (Opinion and Order entered August 20, 2015); *see also*, Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981 (Order entered November 5, 2010) and Herp v. Respond Power, LLC, Docket No. C-2014-2413756 (Opinion and Order entered January 28, 2016).

14. The Joint Petition for Approval of Settlement submitted in this proceeding on April 21, 2017 should be adopted in its entirety because it is in the public interest.

15. Clearview was granted Pennsylvania Public Utility 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 service territories of Duquesne Light Company, Metropolitan Edison Company, PECO Energy Company, Pennsylvania Electric Company, Pennsylvania Power Company, PPL Electric Utilities, West Penn Power Company and UGI Utilities, Inc. *License Application of Clearview Electric, Inc.*

for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2010-2152506 (Order entered May 7, 2010).

16. Clearview, as a licensed provider of EGS 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.

17. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to the Bureau of Investigation and Enforcement 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).

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

19. 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).

20. 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).

21. 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.

ORDER

THEREFORE,

IT IS ORDERED:

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

2. That the following written testimonies and associated exhibits in their proprietary and non-proprietary versions are admitted into the record of this proceeding:
 - Direct Testimony of Daniel Mumford – Bureau of Investigation and Enforcement Statement No. 1 together with I&E Exhibits 1, 2, 3, 4, 5, 6-A, 6-B, 7-A, 7-B, 8, 9, 10, 11, 12, 13, 14, 15,16, 17, and 18;
 - Rebuttal Testimony of Frank McGovern – Clearview Electric, Inc. Statement No. 1 together with Exhibits FM-1, FM-2 and FM-3;
 - Rebuttal Testimony of Nicole Steele – Clearview Electric, Inc. Statement No. 2 together with Exhibits NS-1, NS-2, NS-3 and NS-4;
 - Rebuttal Testimony of Thomas Walker – Clearview Electric, Inc. Statement No. 3 together with Exhibits TW-1, TW-2 and TW-3;
 - Rebuttal Testimony of Frank Lacey – Clearview Electric, Inc. Statement No. 4 together with Exhibit FL-1 ;
 - Surrebuttal Testimony of Daniel Mumford – Bureau of Investigation and Enforcement Statement No. 1-SR together with I&E Appendix A-SR, I&E Exhibit 1-SR, and I&E Exhibit 2-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.

