PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held December 3, 2015

Commissioners Present:

Gladys M. Brown, Chairman, Statement
John F. Coleman, Jr., Vice Chairman
Pamela A. Witmer
Robert F. Powelson
Andrew G. Place

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement C-2014-2431410

v.

HIKO Energy, LLC

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions and Request for Oral Argument on Exceptions of HIKO Energy, LLC (HIKO or Company), an electric generation supplier (EGS), and the Exceptions of the Commission's Bureau of Investigation and Enforcement (I&E), filed on September 10, 2015, to the Initial Decision (I.D.) of Administrative Law Judges (ALJs) Elizabeth H. Barnes and Joel H. Cheskis, issued on August 21, 2015, in the above-captioned proceeding. On September 10, 2015, the Office

of Consumer Advocate (OCA) filed a letter stating it would not be filing Exceptions. HIKO and I&E each filed Replies to Exceptions on September 21, 2015.

I. History of the Proceeding

On July 11, 2014, I&E filed a Formal Complaint (Complaint) against HIKO. In the Complaint, I&E alleged that the Company billed a large number customers of six electric distribution companies (EDCs) – Duquesne Light Company (Duquesne), Metropolitan Edison Company (Met-Ed), PECO Energy Company (PECO), PPL Electric Utilities (PPL), Pennsylvania Electric Company (Penelec) and West Penn Power Company (West Penn) – a variable rate in excess of the discount introductory rate that was guaranteed at the time of enrollment to provide customers savings of 1% to 7% over the EDC's price-to-compare (PTC) for the first six months' billing cycles. Complaint at 4-6. I&E averred that HIKO admitted to billing rates that exceeded the guaranteed introductory rate, with the explanation that the deviation was the result of unprecedented costs associated with the polar vortex weather effects in the winter of 2013-14. *Id.* This, alleged I&E, violated Section 54.4(a) of the Commission's Regulations, 52 Pa. Code § 54.4(a), which requires that the EGS' billed prices reflect the prices marketed and agreed upon in the disclosure statement. *Id.* at 7.

I&E set forth for each of the six EDCs the number of customers enrolled by HIKO who were provided the guaranteed introductory rate but not billed in accordance with the guaranteed 1% to 7% savings for the months of January through and including April 2014. Calculating a total of 14,780 violations among all affected customers, I&E requested a civil penalty of $1,000 for each violation pursuant to Section 3301 of the Public Utility Code (Code), 66 Pa. C.S. § 3301, for a total of $14,780,000. In addition, I&E requested that HIKO provide a refund for each customer account that had not already been refunded, to be calculated at the difference between the amount each customer was billed and the guaranteed minimum rate the customer should have been

billed. Finally, I&E requested that HIKO's license in Pennsylvania be rescinded. *Id*. at 7-27.

On August 4, 2014, HIKO filed an Answer (Answer) to the Complaint and Preliminary Objections. In response to I&E's substantive allegations, HIKO admitted that until around January 2014 the Company marketed a variable rate plan to residential customers in the EDC areas identified by I&E. For a period of time, that plan included pricing for an introductory period, with customers automatically enrolled in the Company's standard variable rate product after the conclusion of the introductory period. Answer at 3-4. HIKO denied I&E's specific allegations of the number of customers and bills affected and referred instead to its invoices and customer enrollment materials. HIKO further responded that some customers who received bills during the January to April 2014 time-frame that exceeded the applicable PTC due to the "anomalous and unforeseen market forces beyond HIKO's control during the winter of 2013 and 2014" had been or were being reimbursed by the Company and that the Company also paid the generation portion of the monthly bills of customers who had opted for HIKO's "one month free" program. The Company concluded that except for that limited period of time, the Company provided savings to Pennsylvania customers. *Id.* at 5-33.

In New Matter, HIKO contended that I&E could not enforce ambiguous Regulations; the Commission had already reviewed and approved HIKO's disclosure statement, which fully disclosed HIKO's rate and pricing information; the Commission lacked authority to regulate EGS prices; to the extent HIKO's prices did not conform to its disclosure statement it was due to the unforeseen and uncontrollable polar vortex weather effects; HIKO engaged in no deceptive conduct and engaged in prompt investigation and remediation of any such conduct; the invoices of customers who had already settled with HIKO could not form the basis of I&E's allegations nor could I&E seek restitution for such customers; the Commission lacked authority to order restitution; and I&E's requested relief was "grossly disproportionate" to the alleged violations.

HIKO also alleged that a similar matter was already pending at Docket No. C-2014-2427652, therefore the doctrine of *lis pendens* precluded I&E's pursuit of its Complaint. *Id.* at 33. HIKO also contended in its Preliminary Objections that I&E's pursuit of this Complaint was barred by *lis pendens* and that the Commission lacked jurisdiction to order refunds. I.D. at 6.

The other pending proceeding addressing consumer complaints over HIKO's billing during the winter of 2014 is *Commonwealth of PA v. HIKO Energy, LLC*, Docket No. C-2014-2427625 (*OAG/OCA-HIKO Settlement*). That proceeding was initiated upon a complaint filed against HIKO on June 20, 2014, by the Pennsylvania Office of Attorney General, Bureau of Consumer Protection and Office of Consumer Advocate (OAG/OCA).[1] *Id.* at 33; I.D. at 3. The OAG/OCA complaint included eight counts against HIKO, including deceptive promises of savings, slamming, lack of good faith handling of complaints, failing to provide accurate rate and pricing information, prices nonconforming to disclosure statements, failure to follow purchase of receivables parameters, and failure to comply with the Telemarketer Registration Act. I.D. at 3-4. The OAG/OCA also requested restitution and license revocation. I&E and the Office of Small Business Advocate intervened in that proceeding; the OCA also intervened in this proceeding. I&E objected to the consolidation of the two proceedings. *Id.* at 4.

On August 11, 2014, I&E filed an Answer to HIKO's Preliminary Objections, and on August 18, 2014, I&E filed an Answer to the Company's New Matter. By Order dated September 2, 2014, the ALJs denied HIKO's Preliminary Objections, finding I&E's pursuit of this Complaint was not barred by the doctrine of *lis pendens* and that the Commission had jurisdiction to compel refunds. I.D. at 6.

[1] In that proceeding, the parties achieved a settlement, which was also addressed by ALJs Barnes and Cheskis in an Initial Decision issued by the Commission August 21, 2015 (*OAG/OCA-HIKO Settlement Initial Decision*), which while acted on separately, we take official notice of in our disposition herein.

An evidentiary hearing was held on April 20, 2015. I&E presented the direct and surrebuttal testimony of its witness Daniel Mumford, an appendix of qualifications to accompany Mr. Mumford's direct testimony, fourteen direct exhibits, and one cross-examination exhibit, which were entered into evidence. HIKO presented the rebuttal testimony of its witness Harvey Klein and the accompanying HIKO Exhibits 1-3, the rebuttal testimony of its witness Charles Cicchetti and the accompanying Exhibits-HIKO-Cicchetti-1, and HIKO-Cicchetti-2, HIKO Exhibits 2-6, and one cross-examination exhibit, which were entered into evidence. The hearing generated a transcript of 228 pages. I&E filed a Main Brief on June 3, 2015, and HIKO filed a Reply Brief on June 24, 2015. OAG/OCA did not submit evidence or file briefs. The record closed on June 24, 2015.

By Initial Decision issued August 21, 2015, the ALJs granted in part and denied in part I&E's Complaint. The ALJs denied as moot I&E's request for refunds in this proceeding in light of their proposed resolution of the OAG/OCA complaint in their Initial Decision issued in *OAG/OCA-HIKO Settlement*. The ALJs also denied I&E's request for license revocation as inconsistent with that proposed disposition. Finally, the ALJs denied I&E's request for a penalty of $14,780,000, or $1,000 for each of the 14,780 violations initially averred by I&E, but instead directed HIKO to pay a penalty in the amount of $1,836,125, or $125 for each of the 14,689 violations ultimately addressed in the testimony of I&E's witness.[2] I.D. at 1-2, 18. As stated previously, I&E and HIKO filed Exceptions to the ALJs' Initial Decision on September 10, 2015, and both parties filed Replies to Exceptions on September 21, 2015.

[2] In response to the testimony of HIKO witness Cicchetti addressing accounts with zero usage, I&E's witness Mumford removed 68 alleged violations from his original averment and revised that amount downward to aver 14,689 violations.

II. Discussion

A. Legal Standard

As the proponent of a rule or order, the Complainant in this proceeding, I&E, bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that HIKO is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Company. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by I&E of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to HIKO. If the evidence presented by the Company is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Company. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*,

768 A.2d 1217 (Pa. Cmwlth. 2001). Having filed the Complaint against HIKO, I&E is obliged to carry the burden of proving that the Company has violated the Code, a Commission Regulation, or a Commission Order.

In their Initial Decision, the ALJs made eighty-three Findings of Fact (FOF) and reached twenty-one Conclusions of Law (COL). I.D. at 8-20, 63-66. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. The ALJs' Initial Decision

In their Initial Decision, the ALJs granted the Complaint in part and denied it in part. The ALJs summarized I&E's position as contending that HIKO's actions in 2014 "constituted brazen, selfish, deliberate, and egregious misconduct in that HIKO expressly, unambiguously, and clearly guaranteed an introductory period discount, after which HIKO's management decided not to honor its promises for as many as four consecutive billing cycles from January through and including April 2014." I.D. at 20. According to the ALJs, I&E determined the number of violations by calculating each bill for which a customer was overcharged by not being billed at least 1% less than the EDC's PTC, rather than by counting the number of customers overcharged, because a single customer could have experienced more than one billing violation. I.D. at 17-18,

21-22. For each violation, I&E sought a civil penalty of $1,000, or $14,689,000, a refund for every enrolled customer who was billed a rate that exceeded 99% of the customer's EDC's PTC, license revocation, and any other penalty the Commission deemed appropriate. I.D. at 20.

The ALJs concluded that HIKO's response left the appropriate civil penalty to be assessed as the sole issue before them. Admitting that it billed customers in excess of the price guarantees contained in its disclosure statement, and arguing that even if that happened on 14,689 occasions, HIKO contended that nothing supported the level of civil penalty I&E sought. HIKO argued that the Commission should consider mitigating factors, including the following: (1) the Company's explanation for the overbilling; (2) the dire financial situation it faced by the extended and serious weather conditions brought about by the polar vortex weather effects in the affected time period; (3) the fact that the average overcharge was only $124 and that 70% of its overcharges were less than $100; (4) the fact that the Company voluntarily refunded approximately $160,000 and then entered into a settlement agreement with the OAG/OCA that provided for an additional $1.67 million refund pool for the customers that were the subject of I&E's Complaint; (5) the Company's agreement with the OAG/OCA to conduct many corrective actions to its business practices, including changes to its marketing, sales, and disclosures; (6) the fact that the Company's customer base shrank from approximately 10,000 to around 3,000 currently, none of whom is in a guaranteed price plan. HIKO contended that these actions all constituted sufficient hardship to deter it from repeating these violations in the future without any civil penalty. In the alternative, the Company contended that nothing supported the size of I&E's requested penalty, which, if imposed, should be minimal, and that the Company's license should not be revoked. *Id.* at 23.

In dispute, stated the ALJs, was the manner of calculating the number of violations under Section 54.4(a) of the Regulations, which requires the EGS' billed prices to reflect those prices that were marketed and agreed to by the parties in the EGS'

disclosure information. The calculation could result in 1 violation if it were based on HIKO's decision to overcharge customers when facing unplanned-for price spikes, 4 violations if counted on a monthly basis, 5,700 violations if calculated on a per-customer basis, 14,689 violations if counted on a per-bill basis, or on some other appropriate measure. *Id.* at 24-26.

Concluding that the Commission had jurisdiction over the subject matter of I&E's Complaint, the ALJs addressed provisions under the Electricity Generation Customer Choice and Competition Act, Act 138 of 1996, as amended by Act 129 of 2008, 66 Pa. C.S. §§ 2801-2815 (Competition Act), the Commission's Regulations under Chapter 54 of 52 Pa. Code, and prior Commission and Court Orders. The ALJs found that the Commission has general jurisdiction under Section 501 of the Code as well as certain provisions of the Competition Act that specifically established Commission jurisdiction over EGS standards and billing practices. *See* Sections 2802(14), 2807, and 2809 of the Competition Act, 66 Pa. C.S. §§ 2802(14), 2807, and 2809; *see also Commonwealth of Pennsylvania v. Blue Pilot Energy, LLC,* Docket No. C-2014-2427655 (Order entered December 11, 2014) (*Blue Pilot Material Question); Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. Pa. PUC*, 120 A.3d 1087 (Pa. Cmwlth. 2015) (*CAUSE*). I.D. at 27-29.

The ALJs characterized the winter months of January through March 2014 as a "stress test" for the competitive market and concluded that it was foreseeable that HIKO's decision to purchase 100% of its supply through the spot market might lead to risks of a volatile market notwithstanding the relatively stable preceding eighteen-month period immediately following HIKO's June 2012 licensure. While some EGSs were able to absorb the impact of that volatility, others were not. Resolving perceived inconsistencies in I&E's exhibits of instances of overbilling, the ALJs found that HIKO "made a conscious decision" not to honor its price savings guarantee to customers within their 6-month introductory period, and as a result billed 5,708 Pennsylvania customers in

6 separate EDC territories a total of 14,689 overcharges. *Id.* at 30. The ALJs were also persuaded by I&E's argument that each of the 14,689 overcharges constituted a violation of Section 54.4(a), because what was marketed and agreed to in HIKO's welcome letter and disclosure statement was not what was billed on each of those occasions. Noting that HIKO's rate was variable and not capped, the ALJs concluded that nonetheless, the EGS essentially capped its own rate for the six-month introductory period through the customer information[3] it provided consumers and "was obligated to make good on its promise" to save consumers at least 1% over their EDC's PTC. *Id*. at 33.

Although I&E and HIKO agreed that the average overcharge was $124 per bill, the ALJs found no overbill to be *de minimis* and agreed with I&E witness Mumford that each overbilling constituted an instance, *i.e.* a violation. The ALJs also found that while HIKO overcharged customers by approximately $1.8 million from January through April 2014, the Company not only covered its costs but also possibly made a profit during 2014, though there was insufficient evidence to make a definitive finding on that latter point. *Id.* at 19 (Finding of Fact No. 79), 33-34. Dismissing HIKO's contention that the Commission's Regulations forbid EGSs from abandoning service with less than ninety days' notice, the ALJs posited other actions the Company could have taken short of conscious disregard of its customer information.

The ALJs disagreed with HIKO's argument that I&E's proposed penalty was exaggerated because it was based on essentially one business decision, finding persuasive I&E's metaphor that finding just one violation was akin to charging a robber

[3] The ALJs found that HIKO issued a disclosure statement to each customer that provided that the rate was the price stated when the customer enrolled as confirmed in the Company's welcome letter. I.D. at 32. When referring to any or all of these HIKO customer communications – the price marketed, disclosed, and billed through oral representations, letters, or disclosure statements – we use the inclusive term "customer information," defined under our Regulations to encompass written, oral, and electronic communications used by providers to communicate prices and terms to consumers. *See* 52 Pa. Code § 54.2.

with only one criminal violation even though he robbed ten banks. Relying on *Newcomer Trucking, Inc. v Pa. PUC*, 531 A.2d 85 (Pa. Cmwlth. 1987) (*Newcomer*), which held that Section 3301 of the Code authorizes the Commission to impose a penalty of up to $1,000 for each discrete violation without regard to the number of violations, the ALJs found that each of I&E's proven 14,689 discrete overcharges was subject to a separate civil penalty. As the ALJs reasoned, had each of the individual 5,708 customers affected by the overbilling filed individual complaints, HIKO could have been held liable in each individual case. The ALJs agreed with HIKO witness Cicchetti, however, that consideration should be given to HIKO's efforts at mitigation and factored that into their penalty analysis they conducted under our policy statement at 52 Pa. Code § 69.1201. I.D. at 34-35.

Analyzing the Commission's authority under Section 3301 of the Code to impose civil penalties of up to $1,000 for each violation and finding jurisdiction under that section as well as specific sections of the Competition Act to impose those civil penalties on EGSs, the ALJs concluded that the Competition Act directly authorized the Commission to act to ensure HIKO's compliance with requirements concerning service that protected the public. The ALJs also noted that in *OAG/OCA-HIKO Settlement*, there was no provision for the imposition of a civil penalty. Having stated that a civil penalty in the amount of $1,836,125, or $125 for each of the 14,689 violations proven by I&E, was appropriate, the ALJs presented a point-by-point analysis of the nine specific and tenth "other relevant" factors and standards identified under our policy statement justifying their civil penalty. *Id.* at 36-38.

The ALJs set forth the ten factors warranting consideration of an appropriate civil penalty in our policy statement 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.

I.D. at 25-26, quoting 52 Pa. Code § 69.1201(c) and *Rosi v. Bell Atlantic-Pa., Inc.*, Docket No. C-0092409 (Final Order entered February 10, 2000).

In their analysis of these factors, the ALJs found the first factor, HIKO's conduct, to be serious because it was intentional rather than negligent, and not just a mere administrative error or technical glitch. This justified a higher penalty. *Id.* at 38.

The ALJs found the second factor, addressing the resulting consequences of HIKO's conduct, also to be serious. While the consequences were economic and did not involve personal injury or property damage, the ALJs were not persuaded by HIKO's reference to *Pa. PUC v. UGI Penn Natural Gas, Inc.*, Docket No. M-2013-2338981 (Order entered September 26, 2013). In that case, despite involving repeated gas safety violations including ultimately deaths and property damage, the penalty imposed was only $1 million. The ALJs found it difficult to compare a settled gas proceeding, however, with a litigated proceeding involving over 14,000 overcharges and substantial increases even though some overcharges were less than $1 dollar. The ALJs ultimately found the conduct serious as a result of its overall magnitude, justifying a higher penalty. I.D. at 39-40.

The third factor, reflected in litigated cases only, considers whether the conduct was intentional or negligent. The ALJs found substantial evidence that during January through April 2014, HIKO's top executive and management made the "deliberate and intentional business decision to violate the terms of its agreements with customers enrolled in the 1-7% guaranteed savings plan 14,689 times" intentionally overbilling customers in order to stay in business everywhere it operated. *Id.* at 40-41. The ALJs

noted that the decision was made without evidence to suggest that the Company considered options other than deliberately ignoring their customers' guaranteed price savings, such as exiting the Pennsylvania market by seeking a waiver of Commission Regulations or bankruptcy protection. This, the ALJs found, was serious and warranted a higher penalty. *Id.* at 41-42.

The fourth factor considered by the ALJs reviews efforts made by the Company to modify internal practices and procedures in order to prevent the conduct in question from recurring. The ALJs found pertinent the following facts: (1) HIKO took remedial action to offer refunds only after customers complained; (2) the deliberate overbilling recurred over a period of four months even though the Company had multiple opportunities with each new billing cycle to revisit its decision; (3) although HIKO ceased offering the guaranteed saving plan at issue in February 2014 and hired additional customer service staff to handle growing complaints, the Company continues to consider inclusion of a guaranteed savings plan a part of its business model; (4) while the Company now includes six-month supply contracts for purchased power supply in addition to its previously spot-only supply, whether that is sufficient risk management remains uncertain, and; (5) the Company agreed to modify internal procedures as part of its settlement with the OAG/OCA. Apparently unpersuaded that the first four facts demonstrated sufficient movement by the Company to modify its internal procedures to address the conduct at issue, the ALJs nonetheless, citing the *OAG/OCA-HIKO Settlement*, deemed this factor supported finding that less than the maximum penalty was warranted. I.D. at 43-44.

The fifth factor considers the impact of HIKO's conduct with respect to the number of customers affected and the duration of the impact. Upon review of both HIKO's and I&E's evidence of the number of customers affected and the number of overbillings charged, including the fact that HIKO doubled its Pennsylvania customer base from 5,000 to 10,000 customers from August 2013 to January 2014, but then lost a

large number of customers when the overbillings commenced, the ALJs found a large number of customers were affected. *Id.* at 44.

HIKO's compliance history was examined in consideration of the sixth factor in order to determine whether the violations at issue are isolated or not. The ALJs found that HIKO's final licensing order was effective July 2, 2013, its conditional license was issued effective July 7, 2012, and its Pennsylvania operations commenced in December 2012 subject to the application of conditions on its license through June 2014. The ALJs concluded that the license conditions were imposed because HIKO was subject to a high number of customer complaints in New York when it applied for Pennsylvania licensure. Further the ALJs noted that it became evident during the proceeding that HIKO's surety expired at the end of December 2014, putting the Company in violation of Section 54.40 of our Regulations, 52 Pa. Code § 54.40, which requires licensees to provide a bond or other surety, initially set at $250,000, and after one year of operations, subject to modification based upon the licensee's reported annual gross receipts. As HIKO explained, the increase in its surety from $250,000 to $750,000 caused a delay in implementing new surety until March 2015. Expressing doubt that HIKO's failure to file timely proof of new surety was an inadvertent error, and finding that HIKO deliberately overcharged over 5,700 customers over a four month period on 14,689 occasions while operating under a conditional license, the ALJs concluded that consideration of this sixth factor warranted a higher penalty. *Id.* at 44-47.

The ALJs found that HIKO cooperated with I&E during its investigation, the seventh factor to be considered under our policy statement. They concluded, however, that cooperation by itself, though mitigating, is not sufficient to warrant a minimal civil penalty if the mitigating factors do not deter possible future violations. *Id.* at 48, citing *Pa. PUC Bureau of Investigation and Enforcement v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2014-2306076 (Order entered December 18, 2014).

The eighth factor our policy statement sets forth for consideration is the amount necessary to deter future violations and allows for consideration of the Company's size. Citing the testimony of I&E witness Mumford that he considered a penalty of $1,000 per violation to be a significant deterrence to both HIKO and the industry in general, the ALJs concluded that the deterrence should be measured as it applied to HIKO specifically, and not the industry in general, because "the Commission did not expressly define the deterrence level to include such a consideration." I.D. at 48.

In contemplating HIKO's size, the ALJs considered the Company's overall mid-Atlantic business footprint and its Pennsylvania-specific revenues. As to its footprint, the ALJs identified that in addition to Pennsylvania, the Company's business extended into New York, New Jersey, Maryland, Massachusetts, Connecticut, Illinois, and Ohio, making it a large regional player. The ALJs also considered not only the 11,000 customers served in Pennsylvania at its high point but also the potential number of customers the Company could serve in this region compared to the state-bound EDCs, and they considered that the Company also provided gas supply in addition to electricity.

As to revenues, the ALJs determined that while there was no evidence of the Company's rate of return during the winter of January through April 2014, there was evidence that the Company had income during that time. Also because there was evidence that the Company's surety was increased to $750,000, the ALJs concluded that HIKO had 2014 revenues of at least $7.5 million since the surety is measured as 10% of reported annual gross receipts. The ALJs concluded that HIKO's loss of customers and self-motivated provision of $160,000 in refunds was insufficient deterrence. However, the ALJs concluded that the imposition of a civil penalty of $1,836,125, representing approximately 25% of HIKO's 2014 gross receipts, in addition to the $1.67 million in refunds agreed to in *OAG/OCA-HIKO Settlement*, together with the injunctive relief and corrective action they approved in that settlement, provided sufficient deterrence. *Id.* at 48-50.

In consideration of the ninth factor under our policy statement, past Commission decisions in similar cases, the ALJs essentially found few cases similar to this. The ALJs distinguished *Pa. PUC Bureau of Investigation and Enforcement v. MXenergy Electric Inc.*, Docket No. M-2012-2201861 (Order entered May 3, 2012) (*MXenergy*), a settled case relied upon by I&E for its proposed imposition of $1,000 per violation, because it involved slamming of twenty-two customers and, unlike in *MXenergy*, there was no evidence in this proceeding that HIKO intended to defraud customers in making its offering. The ALJs also discussed *Towne v Great American Power, LLC*, Docket No. C-2012-2307991 (*Towne*), in which we increased the ALJ's recommended civil penalty from $5,000 to $10,000 for an EGS found to have engaged in aggressive telemarketing and slamming, contacting a prospective customer fourteen times over twenty-six days despite being told to stop. In both of these cases, however, the ALJs noted our concern over the impact such conduct would have upon the development of our competitive market. I.D. at 50-52.

The ALJs distinguished cases relied upon by HIKO for a lower civil penalty of $1 million or less on the basis that those cases were achieved by settlement, which the ALJs found incomparable in the evidentiary records created, including generally the lack of admissions of wrongdoing, and their intended lack of precedential value. Moreover, in those cases there were generally far fewer customer accounts impacted by the wrongdoing.

The ALJs also discussed recent Commission rulings in *Kiback v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Order entered August 20, 2015) (*Kiback*) and serial orders entered in *MacLuckie v. PALMCO Energy PA, LLC*, Docket No. C-2014-2402558 (Order entered December 4, 2014) (*MacLuckie Order on Remand*), the ALJ's April 30, 2015 Initial Decision following remand (*MacLuckie Initial Decision on Remand*), and the final order entered by operation of law on June 20, 2015, following the

issuance of *Initial Decision on Remand* to which no exceptions were taken. Each of those cases involved a single complainant, deceptive marketing by an EGS or natural gas equivalent, a violation of Section 54.4(a) of our Regulations and another provision, and the imposition of a penalty of $2,000 in addition to directed refunds. I.D. at 54-56.

Finally the ALJs addressed *OAG/OCA-HIKO Settlement*. With respect to that proceeding, the ALJs concluded that inasmuch as this proceeding and that settlement involved similar parties, facts, and requests for relief, but which were not consolidated due to I&E's objection, "neither decision is being made in a vacuum without consideration for the impact each case has upon the other." I.D. at 56. Rather, as the ALJs opined, the rulings in both "should be consistent and in the public interest as a whole." *Id.* The ALJs stated that "the reasonableness of a lack of a civil penalty in the Settlement [was] evaluated considering the fully litigated record in the instant case" including the testimony of both parties. *Id.* In concluding their consideration of this ninth factor, the ALJs determined that it "weighed in favor of a moderate per occurrence/violation civil penalty, but a substantial total civil penalty higher than $1,000,000 in the instant case given the high number of admitted intentional occurrences of overcharging." *Id.*

In consideration of the final factor under our policy statement, the catchall "other relevant factors," the ALJs addressed the weather effects caused by the polar vortex as requested by HIKO. As pleaded by HIKO, the Company's loss of customers and plans to make restitution following that weather impact were sufficient and warranted against the imposition of any civil penalty. The ALJs disagreed and found that the weather brought about by the polar vortex and other conditions that caused exponential increases in the spot market prices upon which HIKO exclusively relied were insufficient grounds for HIKO to have deliberately breached their guaranteed savings to customers. As the ALJs noted, quoting from our Order following review of the variable rate market

after the polar vortex impact,[4] some competitive supply providers simply absorbed the price increases. While acknowledging that the weather was outside HIKO's control, the ALJs noted several factors within the Company's control, including its marketing and sales customer information, the composition of its supply portfolio, its executive decision to borrow $20 million in order to stay in business, and its decision to ignore its guaranteed savings contracts by recovering those increased costs from those customers through price increases without regard to refunds absent customer complaints. *Id.* at 58.

In consideration of other relevant factors, the ALJs also again considered their proposed disposition in *OAG/OCA-HIKO Settlement* as well as settlements HIKO agreed to in neighboring New York and New Jersey. In the pending Pennsylvania settlement, the ALJs described the conditions agreed to as the establishment of a refund pool in the amount of $2,025,383.85, which comprises the total refund less the $159,320.15 in refunds already provided by HIKO. This refund pool assures that all customers on the 1%-7% guaranteed savings plan will receive a refund reflecting an average savings of 3.5% for the period January through March 2014. The refund pool also reflects $352,860.75 to be allocated as refunds to customers on HIKO's variable rate plans but not in the guaranteed savings plan, less the $42,139.24 again already refunded by HIKO. In addition to the refunds, HIKO also agreed to pay up to $50,000 in the cost of administering the refunds plus a $25,000 contribution to the EDCs' hardship funds. In addition to those monetary agreements, HIKO also agreed to forbear marketing a variable rate product in Pennsylvania before July 1, 2016, and to implement a broad range of consumer protections in its operations and marketing. *Id.* at 58-59.

The ALJs described the New York settlement, where HIKO served approximately ten times more customers than in Pennsylvania, as providing for a $2.1

[4] *Review of Rules, Policies, and Consumer Education Measures Regarding Variable Rate Retail Electric Markets*, Docket No. M-2014-2406134 (Order entered March 4, 2014).

million settlement, comprising $1.85 million in restitution, $100,000 in civil penalties, $150,000 in attorney fees and investigative costs, and a promise not to market but then fail to deliver a guaranteed savings plan. Similarly, in the New Jersey settlement, which impacted two to three times the number of customers as affected in Pennsylvania, HIKO agreed to restitution in the amount of $1.25 million and administrative costs. The ALJs found noteworthy that HIKO engaged in similar practices and settlements in those neighboring states, but did not find those settlements to be controlling in terms of imposing a lower civil penalty in this fully litigated Pennsylvania proceeding. *Id*. at 59-60.

Following completion of the ALJs' analysis of their determination of a civil penalty, they turned attention to the other relief requested by I&E, suspension or revocation of HIKO's license. Noting that I&E's primary concern in argument appeared to be the level of the civil penalty, the ALJs agreed that HIKO's conduct was egregious. However, the ALJs denied I&E's request to revoke HIKO's license because the Company agreed in *OAG/OCA-HIKO Settlement* to substantial consumer relief. The ALJs restated the establishment of the refund pool, noting that the 3.5% savings is more than the minimum 1% savings that was guaranteed. Although the OAG/OCA complaint addressed the period January through March 2014 as compared to the January through April 2014 period addressed by I&E, the ALJs opined that the savings guaranteed by the 3.5% overcame that one month difference. This and the other factors in the settlement warranted against revocation of HIKO's license, concluded the ALJs.

Moreover, the ALJs concluded that declining to revoke HIKO's license was supported by two decisions involving another EGS, one completed before the Commission and one that remained pending. The ALJs first addressed the settlement adopted by the Commission in *Pa. PUC Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas and Electric and U.S. Gas and Electric d/b/a Pennsylvania Gas and Electric*, Docket No. M-2013-2325122 (Order

entered October 2, 2014) (*PaG&E 2014 Settlement*), in which the Commission approved a civil penalty of approximately $150,000 and full refunds of over $67,000 for 10 customers with 108 slammed accounts. In another PaG&E settlement approved by the ALJs but still pending before the Commission the EGS agreed to pay approximately $6 million into a refund pool. Neither the *PaG&E 2014 Settlement* approved by the Commission nor the second pending settlement required revocation of the EGS' license. I.D. at 60-62.

The ALJs concluded that EGSs enjoyed a unique position to market competitive supply across multiple jurisdictions to a customer base larger than the EDCs without regulatory oversight of the rates offered. The ALJs found, however, that HIKO's determination to stay in business by violating Section 54.4(a) for 5,708 customer accounts over a 4-month period of time warranted a civil penalty of $1,836,125, or a penalty of $125 multiplied by the 14,689 times HIKO billed customers an amount that did not match the Company's customer information promising guaranteed savings.

Agreeing with I&E's calculation of the number of violations, the ALJs found mitigation in HIKO's voluntary refund of $160,000 in addition to the refunds of $1.67 million agreed to in *OAG/OCA-HIKO Settlement* for the guaranteed savings customers and the other conditions in that settlement, including a moratorium on marketing of variable rate products until June 2016, the agreement to correct business practices, and the fact that the violations did not include slamming. The ALJs also found the penalty would serve as a deterrent because it represented 25% of HIKO's reported annual gross receipts for the year 2014. The ALJs found this penalty to be substantial and supported by the facts of this case as well as the agreement reached in *OAG/OCA-HIKO Settlement*, absent which the ALJs would have revoked HIKO's license. As the ALJs concluded, since "HIKO is showing a willingness to correct its business practices and comply with regulations in the future regarding its retail market activities, HIKO shall retain a conditional authority to operate in Pennsylvania provided the EGS brings

itself into compliance and remains compliant" with Pennsylvania law, including "timely, continuous, and uninterrupted provision of proof of security as well as the timely filing of annual reports at the Commission and payment of gross receipts taxes to the Pennsylvania Department of Revenue." I.D. at 63.

C. Exceptions, Replies, and Disposition

As previously stated, the ALJs constructed their proposed resolution in this proceeding such that it comported with the scope of their proposed resolution of the OAG/OCA complaint in *OAG/OCA-HIKO Settlement*. As noted *supra*, the ALJs in this proceeding, who also presided over the OAG/OCA complaint, concluded that neither decision should be made in a vacuum without consideration for the other, and both decisions as a whole should be consistent and benefit the public interest.

We agree, and for that reason but without ruling on that proceeding here as it remains procedurally separate from this, we also note that our disposition of Exceptions herein is arrived at with consideration of our disposition of *OAG/OCA-HIKO Settlement*, which is before us upon the ALJs' Initial Decision recommending adoption of the settlement without modification and without any party's having filed exceptions or replies.

1. HIKO Exception No. 1 – The Method for Calculating the Number of Violations under Section 54.4(a)

a. HIKO's Position

In its first Exception, HIKO contests the ALJs' acceptance of I&E's calculation of the number of violations of Section 54.4(a) based upon the number of customer invoices on which HIKO billed a customer a rate higher than what was

promised in the customer information rather than the number of customer accounts affected or the dates the invoices were sent (FOF Nos. 64 and 67; COL Nos. 8 and 12). HIKO claims that even though the ALJs acknowledged that I&E's evidence of the number of invoices was potentially inaccurate, they accepted it anyway. HIKO argues that Section 54.4(a), which requires that prices billed match prices marketed and agreed to in disclosure, does not require each invoice to conform to the marketed price. Invoiced amounts and billed amounts may differ, contends HIKO, as proven by I&E's agreement to remove from its calculations amounts that appeared to be re-bills. Counting invoices also ignores the fact that these customers will receive refunds in *OAG/OCA-HIKO Settlement*, contends HIKO. HIKO also argues that using an invoice-based rather than customer-based calculation ignores the fact that many customers received savings prior to the price hikes beginning in January 2014. HIKO Exc. at 11-13.

Using the date of the invoice as a basis for the calculation is also supported under the Initial Decision, claims HIKO. Because the ALJs determined that HIKO made a conscious decision to overbill customers each day invoicing occurred, under this analysis at most 120 violations occurred, once for each day in January through April 2014. Thus, contends HIKO, even accepting I&E's proposed $1,000 per violation would support at most a penalty of $120,000, a penalty HIKO characterizes as "well within the range of penalties that the Commission approved for other EGS companies for similar violations during the same time period." *Id.* at 13, citing, *inter alia*, *PaG&E 2014 Settlement*[5] and *Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Final Order entered December 19, 2013) (*Public Power*).

[5] In citing *PaG&E 2014 Settlement*, HIKO cites to a "Final Order entered June 5, 2014" in this case. We note, however, that in June 2014 we issued an order seeking comments on a revised I&E/PaG&E settlement, after we rejected the initial settlement for providing an insufficient penalty. The final order issued addressing this case was entered October 2, 2014.

HIKO also contends that the ALJs' calculation of the number of violations based upon the number of customer invoices with prices that exceeded the guaranteed savings required an interpretation of HIKO's contract, a matter outside the Commission's jurisdiction. According to HIKO, "it was not up to the ALJ (or complainant) to decide that each month's billing rate over the PTC was a separate breach of contract" and a penalty based upon the number of invoice entries "relies on an interpretation of HIKO's terms and conditions with its customers and ultimately involves double (or triple) counting of what is" one violation of Section 54.4(a). *Id*. at 14-15. Thus, HIKO concludes, calculation of the number of violations should be based on the number of customers affected or the dates the invoices were sent, but not the number of invoices that allegedly overbilled guaranteed-price customers.

b. I&E's Reply

Addressing HIKO's claim that the evidence does not support the 14,689 number of violations based on the invoices, as revised by I&E and accepted by the ALJs, I&E responds that its Exhibits 6A through 11A contain spreadsheets of HIKO's own billing data, with each highlighted entry representing an overcharged invoiced amount. I&E R. Exc. at 3. As for the two potential inconsistencies noted by the ALJs, I&E explains that in revising its original calculation of invoices downward it removed sixty-eight entries where the billing data reflected no energy consumption. I&E asserts that while characterizing the methodology adopted by the ALJs as "*potentially* inaccurate," nowhere does HIKO provide what it contends is a correct number of instances where the customers' bills do not honor the guaranteed savings price marketed by HIKO and agreed to by the parties. *Id.* at 6 (emphasis in original).

Rejecting HIKO's proposal to calculate the number of violations on the basis of the number of customers affected, I&E asserts that this is not only contrary to Section 54.4(a), which is based upon billing, but also would ignore the fact that some

customers experienced repeated overbilling between January and April 2014. *Id*. at 7-8. I&E also rejects HIKO's alternate calculation, based upon the number of days each overbilling occurred, arguing that in *Newcomer*, relied on by the ALJs in their Conclusion of Law No. 11, Commonwealth Court affirmed the Commission's authority to impose a penalty of up to $1,000 for each discrete violation even if that calculation results in multiple violations for a "continuing offense." *Id.* at 8. I&E concludes that the number of overcharges billed by HIKO over that 4-month period can be segregated into 14,689 discrete violations subject to a separate civil penalty.

As for other cases relied on by HIKO, I&E first notes that the Initial Decision purportedly entered August 26, 2015 in *Pa. PUC Bureau of Investigation and Enforcement v. Respond Power*, Docket No. C-2014-2438640 "is a decision that simply does not exist." The *PaG&E* and *Public Power* cases, contends I&E, are dissimilar in facts and resulted in settlements. Citing *Pa. PUC v. Bell Telephone Co. of Pa.*, Docket No. R-811819 (Order entered November 10, 1988) (*Bell*), also relied on by the ALJs, I&E argues that settlements unequivocally do not serve as precedent in any proceeding.

c. Disposition

We find the ALJs' decision to calculate the number of violations of Section 54.4(a) on the basis of the number of invoices in which the price billed did not match the customer information to be supported under our policy statement and case law and adopt the ALJs' decision on this point.

Although HIKO argues that Section 54.4(a) "does *not* state that each EGS invoice must conform to the marketed price" but rather contains a "general" statement that "**prices billed** must reflect the marketed price and the agreed upon prices in the disclosure statement" we find that distinction to be one without a difference. HIKO Exc. at 12 (emphasis in original). The prices in HIKO's invoices did not match the customer

information provided, which guaranteed savings of between 1% and 7%. We find no basis to adopt an analysis that Section 54.4(a) demands anything more than disparate pricing in order for us to adopt the ALJs' conclusion that HIKO **billed** prices that did not match its customer information.

With respect to the cases cited by HIKO, we agree with both the ALJs and I&E that *Public Power* and *PaG&E 2014 Settlement* are settled cases with incomparable records and findings that do not serve as precedent. As the ALJs stated, *Public Power* involved unintentional conduct in which "the EGS did not premeditate a conspiracy to slam 2,937 customers. Rather, the case involved the transmission by a third-party vendor of mistaken enrollments[,]" as addressed directly in the parties' settlement. I.D. at 53. In *PaG&E 2014 Settlement,* we rejected the initial settlement because we found the proposed $75,000 civil penalty insufficient to act as a deterrence and ultimately accepted a revised settlement that doubled the initial civil penalty to $150,200 for intentional slamming of 108 accounts of 10 customers.

As the ALJs noted, these cases address settlements where the supporting record and positions adopted by parties are often not comparable. Moreover, by the express terms of our own policy statement addressing the standards we employ in considering an appropriate civil penalty, we do not apply the standards as strictly in settled cases as they are in litigated proceedings such as is before us currently. *See* 52 Pa. Code § 69.1201(b). We also agree with the ALJs that the conduct at issue in both those cases was distinguishable. *PaG&E 2014 Settlement,* for example, involved the conduct of 1 telephone sales representative that impacted 108 accounts and 10 customers, not an executive-level decision to intentionally overcharge the accounts of over 5,700 customers over a 4-month period in order to recover unexpected costs associated with unanticipated weather.

Further, we also note that in *PaG&E 2014 Settlement*, we applied as the standard for calculating the number of violations the number of customer accounts affected, 108, and imposed the fullest monetary penalty per violation allowed, $1,000, in arriving at a penalty of $108,000 (plus an additional $42,000 for accounts in the process but not fully switched). Were we to apply as an alternative standard argued by HIKO in this case the number of customers affected, and apply the same level of penalty per violation as we did in *PaG&E 2014 Settlement* due to the fact that the conduct at issue was an intentional decision by a top HIKO executive, a civil penalty in the range of $5,700,000 in lieu of the $1.8 million proposed by the ALJs could be sustained. While, as discussed below, we decline to do that, we believe that the intentional decision by top management and the broad scope of HIKO's violations substantially distinguish it from the cases upon which HIKO relies.

With respect to the complaint proceeding involving Respond Power at Docket No. C-2014-2438640, we agree with I&E that no such decision exists. Commission records reveal a settlement agreement entered by the parties on August 26, 2015, which agreement was subject to further modification on September 18, 2015. Even were an initial decision issued, however, we note that initial decisions are not, and do not carry the weight of, final Commission Orders.

Consequently, we deny HIKO's Exception No. 1 and adopt the ALJs' conclusion that HIKO violated Section 54.4(a) of our Regulations each time it issued an invoice that billed a price that did not match its customer information. We also dismiss out of hand HIKO's bald assertion that doing so requires us to engage in an *ultra vires* contract interpretation. We do not need to interpret a contract in order to count the number of overbilled invoices HIKO issued, invoices we point out that were provided by HIKO.

2. HIKO Exception No. 2 – The Number of Invoices That Violated Section 54.4(a)

a. HIKO's Position

In its second Exception, HIKO contends that even if the Commission agrees with I&E's method for calculating the civil penalty based on the number of invoices, the ALJs erred by accepting I&E's revised figure that those invoices numbered 14,689. HIKO points to the first inconsistency in I&E's numbers, that approximately sixty anomalous entries were questionable because they involved the same account, time period, rates, and PTC, but were different invoices with different invoice numbers, amounts, and usage. HIKO asserts that its witness Cicchetti discovered "probably at least 300 instances where it was one of these bills dated one day, and then two days later it was modified and it was another bill." HIKO Exc. at 16, quoting Tr. at 211. Contending that these anomalous entries were not consistent with the Company's normal billing and likely represented contested or erroneous billing later corrected or replaced, HIKO contends I&E's calculation "almost certainly included invoice amounts that were never actually billed to the customer." *Id.*

In further challenging the evidence supporting the number of invoices, HIKO ascribes to the ALJs the conclusion that I&E's witness Mumford "'was unspecific about which line items were incorrectly included in the calculations' and that the meaning and effect of those entries was 'conjecture.'" *Id.* Contending that the ALJs determined I&E met its burden of proof "[d]espite this conclusion," HIKO argues the ALJs' determination was "plain error." *Id.* HIKO illustrates several ways in which I&E could have clarified any confusion over its invoice exhibits, including the conduct of further discovery or cross-examination. Having failed to do that, HIKO argues that "[n]either I&E nor the ALJs have identified any principle of law that says that a defendant bears the risk of greater penalties when I&E presents plainly inconsistent,

incomplete, or ambiguous proof." *Id.* at 17. Thus, concludes HIKO, I&E failed to prove 14,689 violations because it "failed to offer any evidence proving that these partial, duplicative, or corrected invoice entries actually amounted to a violation of Commission regulations." *Id.*

Next HIKO takes exception to I&E's inclusion within the total 14,689 invoices, accepted by the ALJs, 1,421 invoices with usage of less than 150 kWhs, when the average monthly residential usage is approximately 867 kWhs. HIKO refers to its witness' explanation that these invoices "likely" were for empty or seasonal homes unoccupied during the winter. *Id.* at 17. More significant to HIKO, however, is its contention that small usage equated to a small overcharge "far below the $125 per violation recommended by the ALJs." *Id.* at 18. According to HIKO, notwithstanding the ALJs' acknowledgement of that factor's weighing in favor of a lower penalty, the ALJs' proposed penalty was "overly punitive" because the *de minimis* overcharges should have been excluded in total. *Id.*

b. I&E's Reply

I&E contends that the ALJs correctly determined that it met its burden of proof because it presented evidence that was more convincing by more than just the slightest degree required. Pointing to its Exhibits 6A to 11A, I&E describes its evidence as "yellow highlight[ed] 14,689 individual invoice entries over 1,115 pages of spreadsheet data provided by HIKO that were billed contrary to the terms" of the guaranteed savings from January through April 2014. I&E R. Exc. at 11. Correcting HIKO's claim in Exceptions that the ALJs' characterized its witness Mumford's testimony as conjecture, I&E notes that it was the evidence of *HIKO's own witness Cicchetti*, not I&E's witness Mumford, that the ALJs so characterized. I&E claims that it was HIKO's responsibility to refute I&E's evidence, but at no point did HIKO identify any specific invoice entry that was incorrect. Therefore I&E met its burden of proof

through a preponderance of the evidence. As to HIKO's "*de minimis*" claims, I&E responds that the level of the overcharge is not relevant to a determination whether a violation occurred. *Id*. at 12-13.

c. Disposition

Regarding the number of violations found by the ALJs, we adopt the ALJs' analysis of the record as sound and supported by the evidence. The ALJs' analysis is succinctly described in the following passage:

> HIKO made 14,689 separate and distinct overcharges to 5,708 Pennsylvania customer accounts from January through April 2014. Based on the invoice entries set forth in I&E Exhibits 6A through 11A, and as summarized in I&E Exhibit 14, the evidence shows a total of 14,689 overcharges disaggregated as follows: 264 in Duquesne Light service territory, 1,624 in Met-Ed service territory, 1,599 in PECO service territory, 1,782 in Penelec service territory, 8,018 in PPL service territory and 1,402 in West Penn service territory.
>
> We question two inconsistencies in I&E's exhibits. First, I&E Exhibit 14 Revised shows that the total number of overcharged invoices under rate class [EDC] E-SAV1-7 increased by one instead of remaining the same, or decreasing. The reason given for the revision was that Mr. Mumford was removing 68 violations from his prior calculation of number of violation occurrences due to "zero usage." Thus, we do not understand why this total would increase by 1. We further question the fact that approximately sixty times, there were two entries in the I&E Exhibit 8A, both labeled as "energy charges" for the same account, for the same time period, with the same rates and PTC, but with differing invoice numbers, amounts, and usage. It could be that there were two invoices issued and that neither one was a re-bill, but it is not entirely clear whether these violations should be viewed as one violation for that one time period, or two violations for that same time period.

* * *

In Exhibits 6A, 7A, 9A, 10A and 11A, the number of violations appears to be accurately highlighted. Where there is a re-bill in these exhibits, it is clearly marked "Rebilled Energy Charge" and these charges do not appear to be highlighted or included in the total number of violations, i.e. Exhibit 7A, at 1. However the PECO exhibit does not have any line-itemed re-bill charges expressly stating such. Mr. Cicchetti testified as follows:

> There were a lot of overcharges where, if you look at the data, there were probably at least 300 instances where it was one of these bills dated one day, and then two days later it was modified and it was another bill. And I'm not sure the customer even saw that. It may have just been between HIKO and the utility.

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

* * *

HIKO does not dispute that it failed to honor the guaranteed discounted rate during the winter of 2014. HIKO admits that from January 2014 through April 2014, HIKO billed a large number of customers within the service territories of Duquesne Light, Met-Ed, PECO, Penelec, PPL and West Penn a unit rate for electricity supply during the customers' introductory periods that exceeded, and sometimes far exceeded, the discounted introductory rate that was guaranteed at the time of each customer's enrollment as a HIKO supply customer.

> I&E Exhibits 6A through 11A show the highlighted number of violations. HIKO's witness, Mr. Klein, confirmed that the spreadsheets were true and correct business records representing billing data for HIKO customers of this price guarantee for January through April 2014 in each EDC service territory. Mr. Klein testified that each row of data set forth in the spreadsheets represents a single invoice entry. Mr. Klein confirmed the meaning of each column heading. Mr. Klein confirmed the process for determining whether an invoice entry was deemed to be an overcharge under the terms of the Price Offering.
>
> The testimony of I&E's witness Daniel Mumford, Manager of the Informal Compliance and Competition Unit of BCS, is persuasive and supports a finding that these spreadsheets show 14,689 occurrences of HIKO's overbilling over 99% of the price to compare rate of the EDC in six EDCs' territories. Although we note that in the PECO Exhibit 8A there are approximately 60 highlighted charges that appear to involve thirty double billings (the same account number, the same time period, and different usage amounts and billed amounts), since the line items are labeled Energy Charge instead of Rebilled, we are willing to accept these also as violations of 52 Pa. Code 54.4(a).

Initial Decision at 30-33 (citations omitted) (emphasis added).

As I&E stated, HIKO had the opportunity to correct mistakes in I&E's calculation. HIKO witness Klein, however, the Company's Chief Executive Officer and President,[6] confirmed that the data presented in I&E's exhibits were "true and correct business records representing billing data for HIKO customers of this price guarantee for January through April 2014 in each EDC service territory[.]" I.D. at 32-33. While HIKO criticizes I&E for not questioning Mr. Klein about entries HIKO contested, neither did HIKO present any clear evidence of errors that would affect this outcome. HIKO offered only the testimony of its witness Cicchetti, a senior advisor to Navigant Consulting, Inc.

[6] *See* Finding of Fact No. 10, I.D. at 10.

testifying for HIKO as an independent consultant.[7] However, Mr. Cicchetti, an outside consultant, testified that these contested entries "likely represented" contested billing that was later corrected or replaced, HIKO Exc. at 16, testimony that the ALJs found to be conjecture.[8]

On this point, HIKO misattributes the ALJs' finding of "conjecture" to I&E witness Mumford when in reality it was in response to the testimony of HIKO's own witness Cicchetti that the ALJs made that finding, rendering HIKO's attribution of "plain error" by the ALJs itself plainly erroneous. Once I&E presented evidence of HIKO's billing invoices, information based on data provided by HIKO, it was incumbent upon HIKO, particularly as the party in control of the information, to provide clear and convincing evidence to refute I&E's evidence. HIKO's failure to do so resulted in its failure to carry its burden of persuasion once that burden shifted from I&E to the Company. I&E carried its burden of proof by providing a preponderance of evidence that is substantial and legally credible, which HIKO failed to refute by providing evidence of at least co-equal value or weight.

Finally, as HIKO acknowledged, in analyzing the factors and standards for calculation of an appropriate penalty as set forth in our policy statement, the ALJs determined that a lower level of overcharge mitigates in favor of less than the maximum penalty per violation authorized under the law. In light of this and the other factors considered in their analysis, the ALJs calculated a per violation penalty of $125 that was close to the average monthly overcharge of $124 and only 12.5% of the highest possible per violation penalty requested by I&E. We have the discretion to craft a penalty in

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[7] *See* Finding of Fact No. 9, I.D. at 10.

[8] The HIKO employees who sponsored and verified the responses to data requests provided in I&E's evidence were not offered as witnesses by HIKO and were subject to an I&E subpoena objected to by HIKO and ultimately resolved by the parties. As stated, however, I&E's evidence, based upon that information, was authenticated by Mr. Klein. *See* I.D. at 7-8.

consideration of a number of factors and standards, and to that end, agree with the ALJs' determination of a penalty of $125 per violation. While we can and do consider the fact that some overcharges were relatively small, there is no "*de minimis*" exception under our Regulation requiring us to ignore violations "likely" affecting seasonal homeowners or, as I&E contends, rendering them irrelevant to a determination whether a violation occurred. Moreover, HIKO cannot escape the fact that its decision to violate its promised guaranteed savings was a deliberate choice of top management that affected over 5,700 customers, factors that figure prominently into our determination of the appropriate level of penalty in addition to the number of violations.

We deny HIKO's Exception No. 2 and adopt the ALJs' determination that the evidence supports a finding that HIKO violated Section 54.4(a) of our Regulations 14,689 times by issuing invoices that failed to comport with its customer information.

3. HIKO Exception No. 3; I&E Exception No. 1 – The Appropriate Civil Penalty

Both HIKO and I&E take exception to the level of penalty determined by the ALJs to be appropriate. Each party's Exception and Reply is addressed below.

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a. HIKO's Exception and I&E's Reply

i. HIKO's Exception

HIKO contends that in recommending an approximate $1.8 million penalty, the ALJs failed to apply our criteria in our Section 69.1201 policy statement properly. This is especially so, contends HIKO, because the ALJs did not consider mitigating circumstances, including the fact that the Company's violations occurred during

unprecedented polar vortex weather effects and the Company has since agreed to refunds in *OAG/OCA-HIKO Settlement*.

HIKO argues that the extreme cold in the months during 2014, an unexpected and abrupt change in the regulation of the TransCanada Pipeline (TCP), and tight operating conditions in January 2014 at the applicable regional transmission organization, PJM Interconnection, LLC (PJM), were all conditions it could not have anticipated. Rather, the Company states that it studied pricing and supply costs over the eighteen months the Company was in existence before it offered those guarantees and met those guarantees until those exceptional circumstances arose, during which its wholesale costs jumped nearly 300%. Moreover, during that time period HIKO claims it was also required to satisfy increasing PJM collateral requirements or risk losing its ability to participate in PJM, effectively losing its business. HIKO Exc. at 18-22.

HIKO explains that in order to survive, its CEO placed personal assets at significant risk by personally guaranteeing a $20 million loan but could not also continue to honor its consumer contracts. HIKO asserts that the decision to exit the market, even with a requested waiver of the required ninety-day notice to do so as suggested by the ALJs, is not required by precedent, would still have caused at least some customer uncertainty and potential disruption, and also would have taken time during which the Company could not have honored the guaranteed savings. However, contends HIKO, the ALJs considered its decisions to be purely voluntary and, therefore, failed to afford sufficient weight to forces beyond HIKO's foresight and control. *Id.* at 22-23.

HIKO also challenges the ALJs' determination as excessive because nearly 65% of the overcharges were less than $100, the Company voluntarily refunded $160,000 before any regulators became involved, and it agreed to full restitution in *OAG/OCA-HIKO Settlement*, under which aggrieved customers will receive an average 3.5% savings

compared to the PTC rather than the baseline 1%.[9] Further, the ALJs' determination that customers experienced financial hardship was based upon inference unsupported by any evidence. *Id*. at 23-25.

Next HIKO accuses the ALJs of failing to consider that the Company did, in fact, modify its internal practices to address the conduct. The Company contends that as early as January 2014 it ceased offering the guaranteed price savings, causing the Company's customer base to fall from about 10,000 to about 3,000 and making financial recovery even more difficult. Plus, contends HIKO, the Company hired additional customer service staff, started issuing refunds as early as February 2014, and instituted changes to its supply policy to include some long-term purchases as a hedge against sudden volatility. Finally the Company cites to the consumer protection measures in operations and marketing that it agreed to in *OAG/OCA-HIKO Settlement*. Had the ALJs considered all these modifications, and not just those agreed to in *OAG/OCA-HIKO Settlement*, the proposed penalty would have been significantly reduced, the Company contends. *Id*. at 25-27.

HIKO also disagrees with the ALJs' finding that the Company had a history of noncompliance, challenging as unsupported by the evidence the ALJs' conclusion that the Company failed to have surety in effect at the Commission at the time of the violations. To support its contention that it at all times had the minimum-required security bond in place, HIKO requests the Commission to take judicial notice of documents attached to its Exceptions that the Company claims prove the continued effectiveness of a surety bond during the 2014 calendar year, which would have

[9] Use of the average savings of 3.5% was, according to HIKO, a proper accounting by the ALJs for the fact that unlike I&E's Complaint, the OAG/OCA complaint extended only through March 2014 rather than also including billing in April. HIKO Exc. at 24 n.10.

encompassed the January through April 2014 violation time-frame.[10] HIKO characterizes the purported failure in surety as a "minor procedural mistake" and concludes that its "inadvertent failure to submit a renewal of the surety bond for 2014 was promptly rectified without prejudice to the Commission and consumers." HIKO Exc. at 27. HIKO contends that the ALJs' determination that it has a history of noncompliance is erroneous and highly prejudicial, and unduly raised the level of civil penalty. HIKO Exc. at 27-29.

Again asserting lack of supporting evidence, HIKO also challenges the ALJs' determination that it was not a small company. HIKO contends that there is no record support for the ALJs' inference that the Company had at least $7.5 million in annual gross receipts in Pennsylvania. HIKO also contests the ALJs' conclusion that it was not small because it serves customers elsewhere where it is licensed, claiming there was not even evidence it had measurable profit margins. To the contrary, HIKO argues that the record demonstrates it was a young company rapidly growing but still relatively small and even smaller after it "***voluntarily*** terminated its marketing which led to a precipitous drop in customer enrollment" and agreed to pay millions in refunds. *Id.* at 30 (emphasis in original). The Company again points to the disparity in the level of civil penalty the ALJs assessed it compared to the penalties imposed in other settled cases. *Id.* at 31-32.

[10] HIKO explains that by order dated April 22, 2015, the ALJs notified parties that they would be taking judicial notice of certain public documents related to HIKO's licensing at Docket No. A-2012-2289944, specifically the following: 1) HIKO's Application for an EGS License filed on February 21, 2012 at A-2012-2289944; 2) the Commission's Tentative Order entered June 7, 2012 and Final Order entered July 2, 2012 at A-2012-2289944 granting HIKO a conditional EGS license; 3) letters from the Commission or its staff addressed to HIKO pertaining to HIKO's surety bond (specifically identifying a February 20, 2015 Secretarial Letter from the Commission's Bureau of Technical Utility Services (TUS) to Brian Gottesman of HIKO); and 4) HIKO's quarterly sales revenues reports filed at the Commission since 2012. The ALJs also allowed parties to argue in brief alternative documents or facts that should be noticed. April 22, 2015 Order at 1, citing 52 Pa. Code § 5.408 (c) and (d).

Finally, HIKO argues that the ALJs failed to consider the level of penalty approved against other EGSs. *Id*. at 32. First HIKO challenges the premise that it is inappropriate to consider a settlement as precedent in subsequent litigated proceedings, arguing that the 1988 *Bell* case cited by the ALJs is distinguishable on its facts because it had nothing to do with EGS billing practices. HIKO distinguishes what it refers to as the few litigated cases relied on by the ALJs as involving a single customer "rather than the thousands of customers as alleged here." *Id.* at 33. HIKO also contends that with the exception of the factor assessing whether an entity's action was intentional or negligent, the Commission's policy statement at Section 69.1201 "explicitly states that the factors evaluated in a litigated proceeding are the very same factors that are considered in approving a settled proceeding." *Id.* Moreover, claims HIKO, "the fact that the Commission is reviewing these factors in a settled proceeding is not a reason to discount the Commission's own prior statements about the penalty factors." *Id.* Relying on *MXenergy*, *PaG&E 2014 Settlement*, *Public Power*, and *Bennett v. Verizon Pa., Inc.*, Docket No. C-2010-2190280 (Order entered January 27, 2012), HIKO concludes that the ALJs failed to properly consider the level of civil penalty imposed in those cases when determining that a $1.8 million penalty was appropriate here.

ii. I&E's Reply

I&E dismisses HIKO's Exception as lacking merit. Responding to HIKO's claim that the ALJs disregarded the mitigating circumstances of the polar vortex effect on weather, the TCP, or PJM's operational restraints, I&E asserts the ALJs specifically considered but rejected those circumstances as an excuse for the Company's actions, especially because they were not included as reservations in the customer information the Company provided customers. I&E R. Exc. at 13-14.

I&E also notes the ALJs' finding several internal factors that were within the Company's control, including the language in its customer information, its supply portfolio, the CEO's personal assumption of a $20 million loan, and the Company's decisions purposefully to violate guaranteed savings contracts while initially offering redress only to customers who complained. I&E repeats the testimony of its witness Mumford, which summarized the Company's design of a guaranteed savings plan backed up exclusively by wholesale spot purchases, as a "wholesale electric supply procurement strategy and [a] product offering to [the Company's] retail customers [that] did not properly align." I&E R. Exc. at 14, quoting I&E St. 1-SR at 3-4. I&E also refutes HIKO's claim that a strategy that included exiting the market would have caused customer disruption, asserting that customers would have been "seamlessly transferred" to their EDC and not deprived of electric service. I&E R. Exc. at 15.

Incorporating its own Exception to the ALJs' determination of a civil penalty of $125 per violation, I&E responds that the penalty imposed upon HIKO by the ALJs is minimal given the seriousness of its conduct. Responding to HIKO's claim that the assessment of that penalty fails to consider the Company's agreement to refunds and the nominal nature of some overcharges, I&E argues that the policy statement at 52 Pa. Code § 69.1201 correctly excludes the issuance of refunds as a factor to be considered because refunds are no more than the rightful return to customers of money HIKO had no entitlement to in the first instance. Similarly irrelevant, contends I&E, is the amount of the overcharge. Given that customers were expecting to receive a rate guaranteed to be lower than their EDC's rate, I&E asserts that the ALJs' inference of customer hardship from the overcharge was correct and logical. *Id.* at 15-16.

I&E also disputes HIKO's contention that it modified its internal practices in ways not considered by the ALJs. According to I&E, the internal practice HIKO should have focused on fixing was the deliberate overcharging of customers, something HIKO failed to address for four consecutive months. I&E asserts that this overcharging,

coupled with the issuance of refunds only to customers who complained, counters HIKO's assertion that the practices it modified, such as hiring additional customer service employees, warranted any different consideration by the ALJs. *Id.* at 16-17.

Responding to HIKO's explanation to counter the ALJs' finding that HIKO was out of compliance with respect to its required surety, I&E emphasizes that the Company's license remained "probationary" at the time the violations occurred. *Id.* at 17. Further, referring to the February 20, 2015 Secretarial Letter of which the ALJs took judicial notice, which indicated HIKO had not yet provided evidence of continuation of its surety beyond 2014, I&E contends that HIKO's assertions that it continually maintained a certification of surety in the minimal amount is not supported by publicly available documents, which lack evidence that a "certificate or other proof of security was provided to the Commission prior to the expiration of HIKO's bond on December 22, 2014." *Id.* at 18.

As for HIKO's contention that the evidence does not support the ALJs' finding that it is not a small company, I&E contends that the ALJs' inference of gross receipts of at least $7.5 million based upon the Commission's proposed increase in its surety bond to $750,000, is appropriate. Further, contends I&E, the Company provided no evidence to demonstrate it has a small customer base despite operating in seven states plus Pennsylvania. *Id.* at 18-19.

Finally, with respect to HIKO's contention that the ALJs erred by failing to consider settlement agreements achieved in other proceedings for violations during the same time period, I&E replies that those proceedings were amicably resolved by settlement, which are properly not considered precedent in other proceedings.[11] Further, none contained "a factual pattern similar to HIKO's intentional, egregious misconduct" in

[11] As I&E further notes, none of the cases cited by HIKO had yet been resolved by the Commission.

this case, quoting the testimony of its witness Mumford that he was unaware of any case where so many customers were deliberately overcharged. *Id.* at 19-20.

b. I&E's Exception and HIKO's Reply

i. I&E's Exception

I&E takes one exception to the ALJs' Initial Decision. Contending that the ALJs' finding that HIKO's top management deliberately chose to overcharge customers on 14,689 occasions warranted a higher penalty, I&E argues that the total civil penalty assessed should have been closer to the maximum rather than the $125 per violation, or 12.5% of the maximum, imposed.

Summarizing the results of the ALJs' analysis of factors to be considered under the Commission's policy statement, I&E contends that under the majority of these factors the ALJs found that HIKO's conduct warranted a higher civil penalty. I&E concludes that if all of the ALJs' analyses of each individual factors are read together, "HIKO's misconduct is more deserving of a higher civil penalty, even if the civil penalty is less than the maximum amount per violation." I&E Exc. at 11. I&E faults the ALJs for appearing in their analysis to be affected by two concepts that are outside our policy considerations, first that their recommended $1.8 million penalty is approximately 25% of HIKO's 2014 gross receipts, and second that the $1.8 million aligns closely to the amount of overcharges that HIKO billed. *Id.* While facially a large penalty, I&E contends that the ALJs' recommended penalty is actually conservative when viewed on a per violation basis. Because of the scope and severity of the violations found, resulting from a "deliberate and intentional decision to overcharge customers," I&E requests a larger per violation civil penalty. *Id.* at 12.

ii. HIKO's Reply

HIKO responds that the fact that the ALJs found that consideration of certain factors supported the imposition of a higher penalty does not mean that the maximum of $1,000 per violation or anything close to that level is warranted. Claiming that I&E acknowledged that a penalty should fall somewhere in the range of $0 to $1,000, HIKO contends that "a 'higher penalty' can only be considered in relation to what the ALJs consider a low civil penalty given the 'facts and circumstances' of the case[.]" HIKO R. Exc. at 4. HIKO faults I&E for criticizing the ALJs' imposition of the $1.8 million penalty and seeking a higher number without suggesting what other level of penalty, other than its originally-asserted $1,000 per violation, would be appropriate. HIKO also repeats the challenge it made to I&E's evidence in its Exceptions, claiming I&E "offered no documentary evidence other than HIKO's own customer records" to support the alleged violations. *Id.* at 5.

HIKO levels against I&E the same criticism it made of the ALJs' decision, namely that both parties failed to consider the "facts and circumstances" of this case, including the unforeseen weather and wholesale price spikes, the significant number of customers whose overcharge was less than $100, and the terms contained in *OAG/OCA-HIKO Settlement*. On that last point, HIKO asserts that its settlement with the OAG/OCA imposes significant restrictions on HIKO's marketing and business practices and provides full restitution to all affected customers, and that the ALJs should have afforded greater consideration to that settlement in deriving a civil penalty in this proceeding. As HIKO states, "I&E did not at the hearing (and does not now) offer any compelling justification for why – in view of these mitigating circumstances – a multi-million dollar civil penalty is nevertheless needed to deter HIKO from committing future violations." *Id.* at 6.

The remainder of HIKO's reply essentially reargues the points HIKO made in its own Exceptions, including criticism of the ALJs' finding that customers experienced financial hardship because of the overcharges, that HIKO is not a small company, that prior decisions imposed a lower penalty for similar or more egregious conduct, that HIKO modified its internal procedures in more ways than the ALJs or I&E acknowledge, and that both the ALJs and I&E mischaracterize HIKO's compliance history because HIKO at all times had surety in place. *Id.* at 6-15.

HIKO concludes that I&E's request for a higher civil penalty would not serve the public interest or public policy. Even without an "enormous" civil penalty, HIKO claims that it is already working with other Pennsylvania regulators, and a "grossly excessive civil penalty" would be punitive.[12] *Id.* at 16-17.

c. Disposition

We reject both HIKO's and I&E's Exceptions on the issue of the appropriate level of the civil penalty. Finding the ALJs' analysis amply supports the imposition of a civil penalty of $1,836,125, we adopt the ALJs' recommendation. While we disagree with a few individual piece-parts of the ALJs' supporting analysis of factors to consider when arriving at an appropriate civil penalty under our policy statement at 52 Pa. Code § 69.1201, none of those areas of disagreement, as discussed below, rises to such a level as to persuade us that the proposed civil penalty is inappropriate or unsupported. Rather, we conclude, based upon our review of the totality of the evidence

[12] In furtherance of this point, HIKO submits for our consideration its own characterizations of its settlement discussions with I&E. *See* HIKO Exc. at 3-4, R. Exc. at 17. While acknowledging Section 5.231(d) of our Regulations, which codifies the privileged nature of settlement offers, I&E responds in order, in its view, to correct HIKO's characterization. We affirm the importance of retaining the confidentiality of settlement discussions and, therefore, confirm that we gave no consideration to either party's assertions regarding settlement discussions in our disposition.

analyzed under that policy statement, that the recommended penalty is appropriate and supported by the record.

We agree with I&E that HIKO knowingly and deliberately chose to dishonor its promised and contracted-for savings of 1% to 7% on 14,689 occasions to 5,708 customers, in direct violation of Section 54.4(a) of our Regulations. We find that in so doing, HIKO effectively treated its own customers as the financial guarantors of its own business plan, which backed contracts offering customers guaranteed savings with what was essentially a speculative supply portfolio based exclusively on spot market purchases. We also agree, however, that in consideration of *OAG/OCA-HIKO Settlement*, HIKO does not escape the consequences of its executive-level decisions unscathed. Therefore we do not believe it necessary to impose the maximum penalty sought by I&E to deter either this particular company, or the EGS industry as a whole,[13] from violating customers' rights and our Regulations in order to shield themselves from the adverse effects of their own unsound decisions.

[13] The ALJs concluded that our eighth factor, a penalty sufficient to deter future violations, applies only to the regulated entity involved in the proceeding and not the industry as a whole. I.D. at 48. We do not believe, however, that consideration of that factor under our policy statement is so limited. We acknowledge that of the ten factors, the first seven implicitly or explicitly apply to the specific conduct of or consequences from action of the specific entity. The eighth factor, however, which addresses consideration of a penalty "necessary to deter future violations," does not mention either the "specific conduct" or the "regulated entity," although it also allows for consideration of the size of the utility involved. While it does not impact our decision here because we adopt the ALJs' recommended penalty in consideration of all factors enumerated in our policy statement, we clarify that we have in past cases considered how our actions with respect to imposition of a specific penalty upon a specific entity will impact the industry as a whole. *See, e.g., Towne* at 22 (We "must continue to send a clear message to EGSs that the egregious and deliberate behavior utilized in this case . . . will not be tolerated."); *see also MXenergy* (where we acted out of concern for the retail market as a whole). Though we may more often craft penalties specific to the individual case and circumstances at hand, we have leeway to consider the impact of our actions as a deterrence to the industry as a whole. Doing so is an effective means of assuring the industry understands the importance of compliance with our Regulations to the development of a fair and reliable competitive market.

As we noted in commencing our review in this proceeding, while not formally consolidated, we do not consider and render a disposition of the parties' Exceptions and Replies in this proceeding in isolation and without regard to the settlement achieved by the OAG/OCA and HIKO in *OAG/OCA-HIKO Settlement*. As noted throughout the ALJs' Initial Decision here, in that proceeding, HIKO agreed to a comprehensive settlement that addressed refunds, contributions to the EDCs' hardship funds, and reformation of the Company's business practices. On refunds, the settlement provides for a refund pool of approximately $2 million, which includes the value of refunds the Company had already issued to all complaining customers. Customers who were guaranteed savings of 1% to 7% will realize a savings of 3.5% over their EDCs' PTCs. HIKO also agreed to several modifications to its business plan, including limitations on its solicitation of and offerings to new customers, limitations on the imposition of cancellation or termination fees for variable rate products, and tighter restrictions on its marketing practices and marketing and customer service staff, including Pennsylvania-specific training and stricter oversight and monitoring.

Notably absent from that agreement, but entirely appropriate to a full and fair disposition of both the OAG/OCA's and I&E's complaints against HIKO's behavior towards customers in January through April of 2014, is the imposition of a civil penalty as addressed here. Additionally, the ALJs declined to suspend or revoke HIKO's license in this proceeding as I&E requested because of the substantial consumer protections HIKO agreed to in *OAG/OCA-HIKO Settlement*, allowing the Company to continue to operate in Pennsylvania under strict conditions requiring it to come into and remain in compliance with our Statutes, Regulations, and Orders. As the ALJs noted, but for that settlement, revocation of HIKO's license likely would have been recommended. We agree with the ALJs' relief ordered here as it dovetails with the comprehensive settlement reached by the parties in *OAG/OCA-HIKO Settlement*. The only issue remaining, therefore, is the level of civil penalty that is appropriate under our policy statement.

We address *seriatim* the factors as they appear in our policy statement and as argued by the parties. In so doing, we are particularly compelled by one observation of the ALJs. As the ALJs described it, HIKO was obliged "to make good on its promise" to save consumers at least 1% over the effective PTC of their EDC, and had each of the 5,708 individual customers affected by HIKO's breach of that promise individually pursued his or her individual complaint, the Company could have faced this same analysis over 5,700 times, with a penalty, which is separate and distinct from restitution, of up to $1,000 for each of those individual complaints. I.D. at 33-35. It is from that perspective, and in consideration of the actions taken and remedies agreed to in *OAG/OCA-HIKO Settlement*, that we approach our disposition of HIKO's and I&E's Exceptions and Replies.

In consideration of HIKO's general defense that the ALJs failed to consider the weather, the TCP, PJM, and other dynamics HIKO considers outside its control, we reject HIKO's argument that the ALJs wrongly considered HIKO's actions to be purely voluntary and failed to consider the circumstances in which HIKO found itself in the winter of 2014. The ALJs commented upon HIKO's reliance on an eighteen-month pricing history as an adequate basis upon which to guarantee for an initial six-month period unconditional pricing savings of up to 7% as follows:

> It is not entirely unforeseeable that although a company may be seeing relatively stable and elastic market prices historically for 18 months, given 100% of its power purchases were being made on the spot market, this practice assumed certain risks regarding the volatility of the wholesale market price. Even giving HIKO witness Klein the benefit of the doubt that he did not foresee at the time of enrollment of customers in the 1-7% guaranteed savings plans the high risk HIKO or its variable rate customers were assuming because of the impending on-the-spot wholesale market price increases that were about to occur in January [] 2014, the

> surprise does not justify the fact that the end-user customers enrolled in guaranteed savings plans are shouldering a substantial portion of the burden of the increase in wholesale rates.

I.D. at 29-30. Further, as I&E noted, the ALJs specifically gave consideration to those circumstances, but found they provided no excuse, particularly because the customer information the Company provided with the guaranteed savings rate plan contained no reservations due to outside circumstances. As the ALJs concluded:

> We find that the polar vortex weather condition, the increase in natural gas prices due to the Canadian regulatory change, the increase in demand because of the weather, PJM's operational requirements, and/or the resulting spot market energy prices do not constitute a good excuse for HIKO's business decision to not honor a guaranteed discount under the terms and conditions of its Price Offering nor mitigate the warranted imposition of a civil penalty in this case.
>
> There is no evidence to suggest that HIKO's disclosure statement or welcome letter indicated to the customer that its introductory rate would be dependent upon any of these aforementioned factors. The company had other variable rate plan customers not on the guaranteed savings plan during those months. The relevance of such testimony might be plausible in a proceeding regarding the extent to which those variable rates could have increased given the terms and conditions of those disclosure statements. However, that is not the case here.

I.D. at 57; I&E R. Exc. at 14.

We agree with the ALJs that relying on the spot market for 100% of its supply exposed HIKO to known risks, if not foreseeable events, simply because so many factors upon which the wholesale market depends were outside the Company's control.

HIKO cannot credibly maintain that relying on a market subject to so many known exposures is not inherently risky, such that they were risks the Company apparently was willing to assume. Stated differently, it was or should have been foreseeable that exclusive reliance on the wholesale spot market could, depending on the confluence of several independent factors at any one time, produce less than favorable pricing conditions. In addition to the fact that HIKO knew or clearly should have known that many moving pieces affecting the wholesale spot market were outside its control, the Company also should have been able to foresee that relying on its customers as financial guarantors, when its finances were stretched because of those many circumstances outside its control, was *not* a valid option in the face of its contractual guarantees and existing regulatory protections. It was the Company's sole decision how to structure a compatible price and supply scheme.

HIKO's argument that the ALJs overstated the civil penalty because two-thirds of the overbilled customers were overcharged by less than $100 is insufficient to cause us to adjust the ALJs' finding. The $125 per violation determined by the ALJs approximates the Company's average overbilling of $124. It is thus comparable to the overbillings notwithstanding any number above or below that average. While comparability in and of itself does not justify the $125 as an appropriate amount for a penalty for each violation, we find the correlation between the two to temper HIKO's claim that the determination is too high. Also, although we find the support for the ALJs' conclusion that customers suffered financial hardship lacking on this record, consumer testimony admitted into the record to support the parties' agreement in *OAG/OCA-HIKO Settlement* addresses that issue.[14] Placing little or no weight on this particular finding by the ALJs, however, does not disturb our conclusion that the civil penalty recommended by the ALJs on the whole is appropriate.

[14] *See OAG/OCA-HIKO Settlement Initial Decision* at 46.

We also disagree with HIKO that in developing the penalty the ALJs failed to consider all modifications HIKO made to its internal practices. On this point the ALJs found that HIKO's agreement to implement internal procedural changes adopted in *OAG/OCA-HIKO Settlement* warranted in favor of a lower penalty. As for the changes HIKO asserts it made outside that settlement, the ALJs found that "in the early phases of HIKO's overbilling, the Company made no effort to voluntarily cease the overbilling[,]" but instead deliberately chose to continue the overbilling for four consecutive months while offering refunds only to customers who complained. I.D. at 43. The ALJs also expressed concern that HIKO's inclusion of six-month contracts in its supply portfolio may not provide sufficient risk management, particularly in face of the Company's continued desire to offer guaranteed savings contracts. The ALJs were unpersuaded that HIKO's actions outside of those agreed to in *OAG/OCA-HIKO Settlement* warranted consideration of a lower penalty. We agree and find most compelling the ALJs' conclusion that HIKO's illegal billing practices continued for four consecutive months with the Company beginning to issue refunds only after customers filed informal complaints with our Bureau of Consumer Services (BCS).

The next issue raised by HIKO, evidence of HIKO's compliance with our surety requirements, is unclear at best, rendering us unable to reach any conclusion on this point. HIKO contends that I&E never raised this issue and presented no evidence with respect to the Company's compliance. Rather I&E addressed untimely compliance with the bond renewal in its brief, but even then focused instead on the probationary nature of HIKO's license. HIKO Exc. at 27. Attempting to disprove the ALJs' finding that HIKO's surety had been expired during the January through March 2014 violation period and was only renewed in April 2015 (FOF No. 80, I.D. at 19, 47), HIKO attaches to its Exceptions letters between our staff and the Company, contending that the correspondence demonstrates that HIKO had the requisite surety in place during the time of the violations.

I&E on the other hand contends that no public documents support HIKO's claim that it complied with our staff's October 21, 2014 sixty-day bond renewal notice for calendar year (CY) **2015** (the CY following the violations) as evidenced by the February 20, 2015 Secretarial Letter. However, we find inconsistencies in what HIKO purports these documents represent as well as inconsistencies between the time-frame during which the surety had allegedly lapsed, January through March 2014 and the time-frame addressed in the February 20, 2015 Secretarial Letter, the surety for CY 2015.

HIKO attaches as Exhibit A to its Exceptions an October 31, **2013** sixty-day bond renewal notice for CY 2014, which it contends it responded to in Exhibit B, described as a November 5, 2013 letter notifying the Commission that it had requested a continuation certificate (for CY 2014), which would be filed upon receipt. That Exhibit B, however, is a letter dated November 5, **2014**, which may or may not have been intended to address the October 21, 2014 letter advising of the expiration of the 2014 surety on December 22, 2014, the effective expiration referred to in the February 20, 2015 Secretarial Letter, and testified to by HIKO's witness as satisfied in April 2015. Tr. at 170-71. Thus, Exhibit B does not represent what HIKO purports it represents.[15] Notwithstanding the **2014** date of Exhibit B, HIKO then contends that two days later, on November 7, **2013**, the Company filed Exhibit C, which purports to represent the continuation certificate for CY 2014, which would have been evidence of the existence of surety for CY 2014, covering the period January through April 2014 when the violations occurred. However, none of the three pages of documents comprising Exhibit C contains the "RECEIVED" stamp of our Secretary's Bureau (as did, for example, the November 2014 letter in Exhibit B), and none appears in our records. Moreover, the last two pages of Exhibit C, the purported continuation certificate, not only bear no evidence of receipt in Pennsylvania but also reference "Power Certificate No. NJ 063," New Jersey being another jurisdiction in which HIKO was a licensed EGS.

[15] HIKO makes the same incorrect representation in its replies to I&E. HIKO R. Exc. at 14-15.

To add to this confusion, while the ALJs cite to Mr. Klein's testimony and the February 20, 2015 Secretarial Letter as evidence of a failure of security in CY 2014, in fact those letters appear to reference HIKO's need to continue the security into 2015, the noncompliant year apparently referred to by I&E. *See* I&E R. Exc. at 18 (the Commission's public documents fail to evidence the provision of security "prior to the expiration of HIKO's bond on December 22, 2014."). Additionally, the October 21, 2014 sixty-day bond renewal notice letter states that "[t]he Commission's records indicate that the expiration of the bond or other approved security provided by Hiko Energy LLC occurs on December 22, 2014[,]" presumably indicating the existence of surety during CY 2014. While HIKO's renewed security for CY **2015** was not timely, as evidenced by the Secretarial Letter, the ALJs' noncompliance finding rests on their conclusion that there was a failure of security for CY **2014**.[16] However, HIKO itself also describes the ALJs' conclusion of 2014 security noncompliance (the period of the violations) as a "minor procedural mistake" and "inadvertent failure to submit a renewal of the surety bond for 2014" that was promptly rectified without prejudice, further clouding the Company's compliance history. HIKO Exc. at 27.

Given these myriad discrepancies and lack of clarity in the documents reviewed under judicial notice, we are reluctant to place much weight on the ALJs' conclusion that HIKO's security was expired at the time of the violations in CY 2014, although the Company clearly did not timely file such evidence for CY 2015. In light of our resolution of the parties' other challenges to the level of civil penalty recommended

[16] Finding of Fact No. 80 states as follows: "During the months of January – March [] 2014, HIKO's surety bond was expired and HIKO did not submit proof of a new surety bond continuation certificate to the Commission until April [] 2015." I.D. at 19 (citations omitted). *See also* I.D. at 47 (referencing the fact that HIKO overcharged approximately 5,700 customers 14,689 times over 4 consecutive months while holding a conditional license and "during a period when it had not provided proof that a bond or other approved security amount directed by the Commission had been obtained").

by the ALJs, however, our hesitation to fully embrace the ALJs' analysis with respect to this one factor does not affect our disposition because we find that consideration of the remaining factors as a whole supports the recommended penalty. Moreover, the point made by I&E when raising this issue in brief remains valid, namely that at the time of the January through April 2014 violations, HIKO was still operating in a "probationary" period of its licensure.

We are also reluctant to place much weight on the ALJs' analysis of the Company's size. We agree with the ALJs' conclusion that as a supplier licensed in eight states, the Company certainly has an opportunity to acquire a combined customer base, if not also economies of scale and scope, that may exceed that of any one individual EDC in Pennsylvania. However, we believe there is insufficient evidence on this point, and therefore we place little emphasis on its value. Again, however, we find ample support in the remainder of the ALJs' analysis to adopt the recommended $1.8 million civil penalty.

With respect to HIKO's claims that the ALJs did not properly consider the level of civil penalties approved against other EGSs, including those in settled cases, we find HIKO's argument to be erroneous. First, as to the precedential value of settlements, while the facts in *Bell* are different, that does not diminish the well-established legal principle often invoked by and before this Commission that settlements do not set precedent.[17] Cases that proceed to a settled conclusion are often incomparable in many

[17] *See, e.g., Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017,* Docket No. P-2014-2409362 (Order entered December 4, 2014) at 46 ("We are in agreement with PAIEUG that settlements are not precedential."); *Pa. PUC Bureau of Transportation and Safety v. WGM Transportation Inc.*, Docket No. A-00111651C0401 (Order entered February 3, 2009), 2009 WL 347479 (Pa.P.U.C.) at *2 (Commission policy promotes settlements as they avoid the cost of further litigation but approval of this Settlement Agreement should not be viewed as establishing precedent for future cases); *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (Final Investigatory Order entered December 18, 2006), 2006 WL 6610966

ways. For example, in *Public Power*, cited often by HIKO, the parties agreed to a settlement following an informal investigation by I&E, not the filing and full prosecution of a formal complaint as is the case here. Further, the settlement document itself in that proceeding, as is typical in settlements, stated that because settlements avoid the necessity of full litigation, all parties compromised their positions, and the investigated party, without admitting culpability, agreed to a lower penalty that avoided the possibility of more adverse consequences, including a higher fine. *See Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Order entered August 29, 2013), Attached Settlement Agreement at 15, ¶ 36.

HIKO also misstates the distinction between settled and litigated proceedings under our policy statement. While HIKO contends that our policy statement "explicitly states" that the factors to be considered in both litigated and settled proceedings are the same, that oversimplifies the requisite analysis, which also explicitly provides that consideration of the factors will be applied more strictly in litigated cases, a provision overlooked by HIKO. *See* 52 Pa. Code § 69.1201(b). While we may consider the same factors, we do not consider them as strictly in settled cases. This is not only because we encourage settlements but also, as the ALJs and I&E noted, the records in settled cases often contain substantially different evidence and no admission of wrongdoing. I.D. at 52; I&E R. Exc. at 20. We also note that the third factor we consider, whether the conduct was intentional or negligent, is as HIKO asserted only considered in evaluating litigated cases. In this case, however, the intentional nature of the conduct, from the Company's top management, combined with the magnitude of the violation, are perhaps the two factors that most underscore the egregious nature of the violation and support as a minimum the penalty recommended by the ALJs.

(Pa.P.U.C.) at *11 ("[T]he Commission's approval of a settlement does not establish legal precedent, because parties frequently waive their legal rights regarding certain issues in a settlement.").

Accordingly, we deny HIKO's Exception No. 3 and I&E's Exception No. 1 and adopt the ALJs' recommendation that a civil penalty in the amount of $1,836,125 be assessed against HIKO.

4. HIKO's Request for Oral Argument and Disposition

HIKO requests that the Commission permit oral argument pursuant to 52 Pa. Code § 5.538 "to provide the Commission an opportunity to hear the facts and evidence surrounding this matter." HIKO Exc. at 35. I&E responds that the evidentiary record was thorough and included a "clear admission by HIKO that it made a business decision not to absorb the increased energy costs of the polar vortex winter," which led to the regulatory violations. I&E R. Exc. at 5 (citation omitted). I&E further contends that no factual dispute, change in circumstance, or legal argument justifies grant of an oral argument, and that granting argument where there is such a "clear and comprehensive record" would set the bar so low that virtually every case before the Commission would warrant oral argument. *Id.*

We deny HIKO's request. Decisions on requests for oral argument are soundly within our discretion. *Application of Pennsylvania Suburban Water Company and Eagle Rock Utility Corporation*, Docket No. A-210104F0023 (Order entered March 8, 2004). HIKO presents no reason supporting why its request should be granted other than to afford us the opportunity to hear the facts and evidence. I&E, however, presents a compelling argument that given the record in this proceeding, grant of HIKO's request for oral argument here would effectively set such a low threshold for holding argument as to justify it upon every request. We agree that in consideration of the evidentiary record developed, including a day of hearing resulting in the presentation of full testimony and exhibits from all parties as well as a transcript of 228 pages, oral argument is unnecessary and would not constitute an efficient use of resources. *See Level 3 Communications, LLC*

v. Marianna & Scenery Hill Telephone Company, 98 Pa. P.U.C. 1 (2003) (in light of the record developed granting oral argument was not the most efficient course of action).

III. Conclusion

Based on our review of the record and the applicable law, we deny the Exceptions of HIKO, deny the Exceptions of I&E, sustain the Complaint in part, and adopt the ALJs' Initial Decision consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of HIKO Energy , LLC are denied.

2. That the Exceptions of the Bureau of Investigation and Enforcement are denied.

3. That the Initial Decision of Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis issued on August 21, 2015, is adopted.

4. That the Formal Complaint filed by the Bureau of Investigation and Enforcement against HIKO Energy, LLC on July 11, 2014, at Docket No. C-2014-2431410 is sustained, in part, and denied, in part, consistent with this Opinion and Order.

5. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within thirty (30) days of entry of this Opinion and Order, HIKO Energy, LLC shall pay a civil penalty in the amount of One Million Eight Hundred Thirty-Six Thousand One Hundred Twenty-Five Dollars ($1,836,125.00). Certified check or money order in that amount shall be made payable to "Commonwealth of Pennsylvania" and sent addressed as follows:

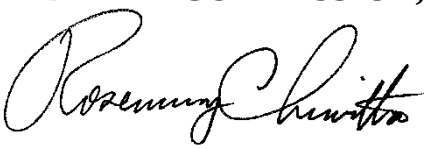
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

6. That HIKO Energy, LLC shall cease and desist from further violations of the Public Utility Commission's Regulations.

7. That a copy of this Opinion and Order be served upon the Financial and Assessment Chief, Office of Administrative Services, the Office of Competitive Market Oversight, and the Bureau of Consumer Services.

8. That the proceeding docketed at C-2014-2431410 be marked closed upon payment of the penalty described in Ordering Paragraph No. 5.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 3, 2015

ORDER ENTERED: December 3, 2015