

ORDER NO. 90208

IN THE MATTER OF THE COMPLAINT *
OF THE STAFF OF THE PUBLIC *
SERVICE COMMISSION OF *
MARYLAND v. DIRECT ENERGY *
SERVICES, LLC *

BEFORE
THE PUBLIC SERVICE
COMMISSION OF MARYLAND

CASE NO. 9614

ORDER ON APPEALS

Before: Jason M. Stanek, Chairman
Michael T. Richard, Commissioner
Anthony J. O'Donnell, Commissioner
Odogwu Obi Linton, Commissioner
Mindy L. Herman, Commissioner

Issued: May 4, 2022

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I. BACKGROUND

1. This case is before the Commission on appeals by Direct Energy Services, LLC (“Direct Energy”), and the Maryland Office of People’s Counsel (“OPC”) from the Proposed Order issued by Public Utility Law Judge (“PULJ”) Jennifer Grace on January 14, 2022.¹ This matter comprises the second phase of this case regarding complaints filed by the Commission’s Technical Staff (“Staff”) and OPC against Direct Energy.

2. Staff, OPC, and Direct Energy reached a partial settlement, which was filed with the Commission on April 21, 2021 prior to the PULJ’s evidentiary hearing, proposing a \$125,000 civil penalty against Direct Energy and an agreement for the Company to conduct a re-rate and refund for certain customers. After the parties filed testimony in support the Partial Settlement Agreement was approved in a Proposed Order on July 8, 2021, which became Commission Order No. 89900 on August 10, 2021.²

3. The parties also agreed to a Phase II related to the Maryland Telephone Solicitations Act (the “MTSA”) which is now before the Commission following the issuance of the PULJ’s January 14, 2022 Proposed Order. In the Proposed Order, the PULJ found that Direct Energy violated the *Annotated Code of Maryland*, Commercial Law Article, MTSA § 14-2203(b), as well as Code of Maryland Regulations (“COMAR”) 20.53.07.08(C)(4) and COMAR 20.59.07.08(C)(4). The PULJ determined that Direct Energy’s contracting practices fell within the scope of the MTSA, regardless of whether Direct Energy initially mailed the marketing materials that prompted a call from a potential customer. Additionally, the PULJ found that Direct Energy did not provide customers with a signed contract within three days of the

¹ Maillog No. 238559.

² Maillog No. 236516.

telephonic enrollment, nor did Direct Energy meet any of the applicable exemptions outlined in the MTSA.

4. The PULJ recommended that Direct Energy should not be allowed to benefit from the MTSA's statutory exemptions moving forward. Effectively, Direct Energy would need to obtain a signed written contract for *all* future telephonic sales in Maryland, whether outbound or initiated by inbound calls in response to mailers or other marketing.

5. In the Proposed Order finalized as Commission Order No. 89900, the PULJ further recommended that Direct Energy not be required to pay any additional civil penalty beyond the \$125,000 remitted in accordance with the terms of the Partial Settlement Agreement.³

II. EXECUTIVE SUMMARY

6. In this Order, the Commission affirms the PULJ's findings that Direct Energy violated MTSA § 14-2203(b),⁴ and alternatively, that Direct Energy violated Commission Regulations, specifically COMAR 20.53.07.08(C)(4) and COMAR 20.59.07.08(C)(4). However, for the reasons discussed below, the Commission reverses the PULJ's remedy related to requiring signatures for all future telephone enrollments regardless of the MTSA's statutory exemptions.

7. In finding that Direct Energy failed to comply with the MTSA's contracting requirements for telephone solicitations during the complaint period of 2016-2019, the Commission additionally finds that all of Direct Energy's telephonic enrollments without signed contracts are invalid. The Commission further finds that it is appropriate to provide Direct Energy with a time period to resolve the invalid enrollments by acquiring signed contracts for

³ *Id.*

⁴ Section 14-2203(b) requires that a contract made pursuant to a telephone solicitation be reduced to writing and signed by the consumer.

affected customers who are still served by the Company. Finally, in the future, the Commission will not consider an invalid enrollment that has not been remedied by acquiring a valid contract as a qualifying “prior sale” or “preexisting business relationship.” Therefore, Direct Energy may not rely on its history with an individual customer to satisfy the MTSA exemption in § 14-2202(a)(2) unless it can properly document the initial (prior) enrollment.

8. Direct Energy shall therefore send a letter to all of its Maryland customers who were solicited and enrolled by telephone during the complaint period (“Commission-required letter”), within 30 calendar days of this Order, informing them of the invalidity of their contracts and to provide them with three choices: (1) enroll with Direct Energy by signing a valid contract (which comprises all terms and conditions, contract term, rates, and right of rescission); (2) return to their utility’s standard offer service (“SOS”); or (3) switch to service from a different retail supplier. Direct Energy must share the letter with Staff and OPC for review prior to sending the letter to Direct Energy customers.

9. The Commission further orders Direct Energy—within 60 days of this Order—to file a provide to the Commission a plan to bring its invalid enrollments during the complaint period into compliance with applicable statutes, Commissioner orders, and regulations. The plan should include:

- a. The number of customers who received the Commission-required letter;
- b. An accounting of how many customers responded to the letter by either signing an enrollment contract, returning to SOS or switching to another retail supplier within the 60-day period;
- c. A timeline and process for addressing any customers who did not respond to the Commission-required letter;
- d. A reporting schedule during the proposed timeline which would include the number of customers contacted, customers enrolled with a valid contract, dropped from Direct Energy’s service, and the rates charged to all affected customers; and

- e. A description of Direct Energy’s intends to fund the costs of bringing its invalidly enrolled customers into compliance.

Once the Commission has reviewed Direct Energy’s compliance plan it will determine a process by which any customers who do not have valid contracts must be returned to SOS within 180 days.

III. PROCEDURAL HISTORY

A. Staff’s Complaint

10. On May 15, 2019, Staff filed a Complaint against Direct Energy pursuant to Public Utilities Article (“PUA”), *Annotated Code of Maryland*, § 7-507, alleging that Direct Energy committed fraud, engaged in deceptive business practices, and violated the Commission’s consumer protection regulations through the unauthorized enrollment of customers.⁵

11. On May 17, 2019, the Commission directed Direct Energy to answer Staff’s Complaint and to appear at the Commission’s July 17, 2019 Administrative Meeting for a hearing on the Complaint.⁶

B. OPC Complaint

12. OPC also filed a complaint against Direct Energy on October 31, 2019, alleging customer slamming, enrollment of customers without written contracts and without providing contract summaries, false and misleading advertising, and failure to provide customers with pricing information.⁷ With regard to its MTSA-related claims, OPC alleged that Direct Energy, through its telephone solicitations, enrolled residential customers “without obtaining a signed written

⁵ Staff Complaint, Maillog No. 225274. Staff filed supplemental exhibits to its initial complaint on July 8, 2019 (Maillog No. 225988), an Amended Complaint on July 31, 2019 (Maillog No. 226280) and a Second Amended Complaint on September 24, 2019 (Maillog No. 227145).

⁶ Maillog No. 225320.

⁷ OPC Complaint, Maillog No. 227333.

contract or making the disclosures required by the MTSA or COMAR 20.53.07.08C(1) or C(4); 20.59.07.08C(1) or C(4).”⁸

13. OPC also alleged that Direct Energy did not comply with the MTSA during its unsolicited calls to customers by failing to inform them before or during the telephone solicitations or subsequent Third-Party Verifications (“TPVs”) about key applicable terms and conditions of the contract. These key terms include “that the terms and conditions later mailed to them would supersede any oral or written statements made in connection with the sale, [that] Direct Energy [was not] liable for consequential, exemplary, punitive, incidental, or indirect damages, [and that] Direct Energy had disclaimed any type of warranty, including fitness for a particular purpose.”⁹ OPC further alleged that other disclosures not made during TPVs included failing to inform a customer about Direct Energy’s privacy policy and information about the consequences of providing consent to view a customer’s credit report.¹⁰

14. OPC further alleged that the contract summary and terms and conditions sent to customers following their enrollments did not comply with the MTSA because, among other reasons, no contracts were ever signed.¹¹

15. On December 20, 2019, Staff filed an addendum by adoption, to its second amended complaint, of the entire OPC complaint.¹²

⁸ *Id.* at 27.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 28.

¹² Adoption by Addendum, Maillog No. 227955

C. Delegation and PULJ Proceedings

16. On July 12, 2019, the Commission docketed this matter as Case No. 9614 and delegated it to the PULJ Division, finding that there were genuine issues of material fact that warranted further proceedings to determine whether Direct Energy had engaged in a pattern or practice of systemic violation of the consumer protections in the Public Utilities Article and Commission regulations.¹³

17. Prior to the evidentiary hearing, on April 29, 2021, the Parties filed a Joint Petition for Approval and Adoption of Partial Settlement Agreement and a Partial Settlement Agreement, describing the terms of the partial settlement agreement.¹⁴ The Partial Settlement Agreement set forth the terms of the civil penalty to be paid by Direct Energy and its agreement to re-rate the 21 impacted customers described in OPC witness Susan M. Baldwin's Direct Testimony.¹⁵ Under the terms of the agreement, Direct Energy would remit to the Commission a civil penalty of \$125,000 within 30 days of Commission approval of the partial settlement, for deposit into the Retail Choice Customer Education and Protection Fund.¹⁶ Additionally, Direct Energy would re-rate and issue refunds, via check, to the 21 customers.

18. Finally, the Parties agreed to proceed with litigation focused on the specific allegations in the complaint that Direct Energy violated the MTSA.

19. Specifically, the Parties agreed to reserve the following MTSA-related issues for a second phase of the litigation:

¹³ Order No. 89192 (Jul. 12, 2019). In the PULJ's Ruling on Preliminary Motions and Notice of Procedural Schedule, PULJ Flynn, in response to Direct Energy's Motion for a More Definitive Statement and Partial Dismissal of Staff's Amended Complaint, and Staff's Motion to Strike the Motion for More Definite Statement, PULJ Flynn refined the scope of the proceedings and directed Staff to identify: (1) the specific alleged behavior by Direct Energy or its agents in any of the CAD complaints involving the supplier that amounts to violations of Maryland law; and (2) for each behavior identified, identify the specific statute or COMAR section that SmartEnergy's conduct allegedly violated. Dkt. No. 18 at 4.

¹⁴ Maillog No. 235048.

¹⁵ *Id.*

¹⁶ *Id.*

- a. Whether inbound or outbound calls placed by or to customers who have received direct mail promotional materials in the form annexed hereto as Attachment A to Direct Energy and who agreed to enroll into Direct Energy's electricity or natural gas supply service during the call, fall within the MTSA's definition of "telephone solicitation";
- b. Whether Direct Energy's telephone enrollments are exempt from the MTSA; and
- c. Whether Direct Energy complied with the Commission's regulations on enrolling customers by telephone pursuant to COMAR 20.53.07.08.C(4) and COMAR 20.59.07.08.C(4), if applicable.¹⁷

20. In Order No. 89900, the PULJ approved the Partial Settlement Agreement, finding the settlement to be both reasonable and in the public interest, and found the \$125,000 civil penalty to be reasonable as well as "a deterrent to both Direct Energy and other suppliers." The penalty was significantly more than Staff recommended, and while it was less than OPC's recommendation, the PULJ found it to be a reasonable amount based on the facts and circumstances of this case.¹⁸

21. On August 20, 2021, the Parties filed a joint stipulation of facts, in which the Parties agreed to the following:

- a. From January 2016 through June 2019, Direct Energy marketed its electricity and natural gas supply services in Maryland by, among other sales and marketing channels, telephonic communications with prospective customers;
- b. Direct Energy sent direct mailers to prospective, existing, and prior customers. Individuals who responded to those mailers by calling Direct Energy are referred to as "inbound" enrollments or renewals;
- c. Direct Energy also called prospective, existing, and prior customers, with some calls resulting in an enrollment, re-enrollment, or renewal -- referred to as "outbound" enrollments because Direct Energy called the individuals;
- d. Direct Energy's telephone enrollment process included third-party verification ("TPV");

¹⁷ *Id.* at 11-12.

¹⁸ *Id.* at 14.

- e. Subsequent to the telephone conversation, Direct Energy mailed or emailed to the consumer a “welcome letter,” the terms and conditions, and the contract summary;
- f. Following the TPV, Direct Energy did not obtain signed contracts from the consumers it enrolled via telemarketing; and
- g. Direct Energy voluntarily ceased outbound telemarketing to new customers in Maryland on June 12, 2019.¹⁹

D. Proposed Order - Findings and Recommendations

22. On January 14, 2022, the PULJ entered the Proposed Order, finding that Direct Energy engaged in unlawful enrollment of customers through telephone solicitations in violation of State consumer protection laws, specifically the MTSA and, alternatively, Commission Regulations, specifically COMAR 20.53.07.08(C)(4) and COMAR 20.59.07.08(C)(4).²⁰ The PULJ recommended that the Commission require Direct Energy to obtain a signed written contract for all future telephonic sales in Maryland, whether outbound, or initiated by inbound calls in response to marketing mailers or other marketing.²¹

23. In reviewing the PULJ’s findings, the Commission affirms findings that are: (1) supported by substantial evidence; (2) within the Commission’s statutory authority or jurisdiction; (3) not arbitrary or capricious; and (4) not affected by any error of law. With regard to PULJ recommendations, it is within the Commission’s discretion to adopt or reject such recommendations as long as in doing so the Commission’s decision is not arbitrary or capricious or unreasonably discriminatory.²²

¹⁹ Maillog No. 236738 at 2-3.

²⁰ Proposed Order at 2.

²¹ *Id.*

²² *Cf. Md. Office of People’s Counsel v. Md. Pub. Serv. Comm’n*, 246 Md. App. 388, 407 (2020) (“[W]e find nothing inappropriate in the Commission adopting the findings of the PULJ, since it was they who charged the PULJ with making those findings.”)

E. Notice of Appeal

24. Direct Energy and OPC each filed a Notice of Appeal of the Proposed Order on February 14, 2022.²³

IV. APPEALS

A. Direct Energy's Appeal

1. MTSA Applicability

25. Direct Energy argues that the PULJ erred in finding that the inbound sales calls were telephone solicitations as defined by the MTSA.²⁴ Direct Energy asserts that under the plain language of MTSA § 14-2201(f) – which defines a telephone solicitation as an attempt to sell that is made entirely by telephone and initiated by the merchant – inbound customer calls can never be telephone solicitations.²⁵ Direct Energy disagrees with the recent Commission decision with a similar finding – *SmartEnergy*,²⁶ which was later affirmed by the Circuit Court of Montgomery County²⁷ – and contends that applying the MTSA to the inbound sales calls contradicts the policy intent of the MTSA to protect consumers from cold-calls from unfamiliar merchants.²⁸

26. Direct Energy points to the Commission's *SmartEnergy* decision, where the Commission determined that the applicability of the MTSA's telephone solicitation requirement should be adjudicated on a fact-specific basis, and argues that if the Commission applied the same standard

²³ Maillog Nos. 239080 (Direct Energy) and 239085 (OPC).

²⁴ Maillog 239331 at 2.

²⁵ *Id.* at 3.

²⁶ *In the Matter of the Complaint of the Staff of the Public Service Commission v. SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Case No. 9613, Order No. 89795 (Mar. 31, 2021).

²⁷ *In the Matter of SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Circuit Court for Montgomery County, Case No. 485338V, slip. op. (Dec. 20, 2021).

²⁸ *Id.* at 3.

to the present matter, the conclusion should be that the Direct Energy's inbound calls are factually distinct from *SmartEnergy* and are not telephone solicitations.²⁹

27. Direct Energy distinguishes the facts of its case from *SmartEnergy* because in this case there is no pattern and practice of fraud, misleading and deceptive practices associated with Direct Energy's telephone solicitations.³⁰ Direct Energy denies being deceptive or engaging in a pattern and practice of unlawful activities with regard to its marketing mailings. Direct Energy contends that, unlike *SmartEnergy*, whose materials tended to obscure both the identity of the company and the substance of the offer, customers knew what they were purchasing, why they were calling, and the identity of Direct Energy.³¹

2. MTSA exemptions

28. Direct Energy next argues that it is exempt from the MTSA requirements based on: previous customer sales, the existence of a preexisting relationship with customers and transactions in which a customer purchases goods or services pursuant to an advertisement or other mailing material that contains the name and address of the merchant, a description of the goods or services being sold, and any limitations or restrictions.³²

29. With regard to the first argument, Direct Energy argues that the MTSA exempts transactions where the merchant has made a previous sale to a customer, and that a significant portion of Direct Energy's business involves re-enrolling former customers. Direct Energy argues that signing new contracts with current customers are, therefore, exempt from the MTSA signed contract requirement.³³ Direct Energy contends that since there is no evidence of

²⁹ *Id.* at 4.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.* at 8. *See also*, MTSA § 14-2202(a)(2)(i), § 14-2202(a)(2)(ii) and § 14-2202(a)(5)(i)-(iii).

³³ *In the Matter of SmartEnergy Holdings, LLC d/b/a SmartEnergy* at 6.

deceptive or misleading actions with those contracts, the PULJ should not remove Direct Energy's ability to apply the exemption in the future.³⁴

30. Direct Energy next asserts that the PULJ used an incomplete analysis to support the finding that Direct Energy did not meet the preexisting business relationship exemption of the MTSA. Direct Energy states that the relationship is created by the sending of the marketing mailing, combined with the customers' informed decision to contact Direct Energy.³⁵ Direct Energy acknowledges that it is applying its own interpretation of the undefined "preexisting" business relationship.

31. Direct Energy argues that the PULJ erred in finding that it did not meet the mailing exemption of the MTSA. Direct Energy disputes the PULJ's interpretation that "'transactions initiated by marketing materials *contain all key terms of the contract,*'" noting that the statute instead requires the marketing materials to contain: "(i) The name, address and telephone number of the merchant; (ii) A description of the goods or services being sold; and (iii) Any limitation or restrictions that apply to the offer."³⁶ Direct Energy also disagrees with the PULJ's determination that the service price and contract duration were key terms that were missing from some of the marketing mailers.³⁷ Direct Energy maintains that the information included in its mailers – the no early cancellation fee policy, the "salient features of the electricity product" and the seller's name and license number – comported with the intent of the MTSA.³⁸

³⁴ *Id.*

³⁵ *Id.* at 7.

³⁶ *Id.* at 7-8

³⁷ *Id.* at 8.

³⁸ *Id.*

3. Noncompliance with Commission Contracting Regulations

32. Direct Energy argues that, contrary to the PULJ's finding, it followed both regulatory requirements that it provide a complete written contract to the customer for signature within three days of enrollment and to send a contract summary with the contract.

33. Direct Energy points to the language at the beginning of its Terms and Conditions, which mentions that the contract summary is attached and incorporates it by reference.³⁹ Direct Energy contends that Maryland law "recognizes that parties may agree to define their rights and obligations by reference to documents or rules external to the contract," and notes that Commission regulations do not prohibit contracts from consisting of multiple documents.⁴⁰ Direct Energy argues further that it mailed or emailed customers "complete written contracts" – defined as "the terms and conditions which incorporated the terms in the contract summary" – along with a welcome letter, within three business days of the contracting conversation.⁴¹ Direct Energy also disagrees with the PULJ's determination that its description of the materials mailed, as described above and in the stipulation of facts, differs markedly from Direct Energy's post-stipulation description of the items as a "welcome letter, the complete contract, and a contract summary." Direct Energy refers to the PULJ's finding as a difference of semantics.

4. PULJ's Proposed Remedy

34. Direct Energy agrees with the PULJ's finding that, given its prior payment of the \$125,000 civil penalty in Phase I of the case, no further monetary penalty is required. However, Direct Energy deems unfair the PULJ's finding that it be required to obtain a signed written contract for *all* future telephonic sales in Maryland, whether initiated by inbound or outbound

³⁹ *Id.* at 11.

⁴⁰ *Id.*

⁴¹ *Id.*

calls, in response to mailers or other marketing, regardless of whether an MTSA exemption would apply.⁴²

35. Direct Energy cites the Commission's authorized remedy options under PUA § 7-507(k)(1), and the elements of just cause under PUA § 7-507(k)(2) to argue that it did not violate COMAR or commit deceptive marketing practices; therefore the PULJ had no just cause to impose penalties.⁴³ Direct Energy contends that the PULJ's contracting requirement – to include even current customers who may need a different contract — is a permanent restraint on Direct Energy's ability to conduct telephone sales enrollments, which places it at a substantial and unfair competitive disadvantage.⁴⁴

36. On March 4, 2022, Direct Energy submitted a Reply Brief, in response to OPC's appeal memorandum, which was filed February 14, 2022 with its Notice of Appeal.⁴⁵ Direct Energy disagrees with OPC's position that the PULJ should assess an additional civil penalty and re-rate all Direct Energy customers enrolled by telephone.⁴⁶ Direct Energy emphasizes that the Parties previously agreed to the \$125,000 civil penalty in Phase I of the litigation, and re-rates of all telephone-enrolled customers, going back to 2005, is an unfair overreach. Direct Energy asserts that its alleged actions were not as severe as those suppliers where the Commission ordered substantially higher civil penalties and re-rates orders by the Commission.⁴⁷

B. OPC Appeal

37. In its Memorandum on Appeal, OPC appeals only the PULJ's finding that no additional civil penalty beyond the \$125,000 assessed in Phase I was necessary, and limiting the re-rates to

⁴² *Id.* at 13.

⁴³ *Id.* at 14.

⁴⁴ *Id.*

⁴⁵ *See* Maillog No. 239437.

⁴⁶ *Id.* at 2.

⁴⁷ *Id.* at 6-7.

the 21 customer complainants from Phase I.⁴⁸ OPC argues that the Proposed Order fails to provide any relief to the other customers affected by Direct Energy's actions, and is therefore contrary to Commission precedent. OPC cited several cases where the Commission provided relief to the entirety of customers impacted by a retail supplier's illegal actions, and imposed higher civil penalties.⁴⁹

38. With regard to sanctions, OPC argues that the Commission has just cause to impose a penalty that would provide relief for all of Direct Energy's unlawfully telephone-enrolled customers. They argue that relief should reach beyond the complaint period to all customers who enrolled, or re-enrolled, from an unlawful telephonic solicitation in violation of the MTSA.⁵⁰ OPC further asserts that the Commission should assess an additional civil penalty on Direct Energy, with a fine of \$100 per unlawful telephonic enrollment, in order to send a strong message to the State's retail suppliers.⁵¹

39. In its Reply Brief, OPC counters Direct Energy's assertions that it sent a complete contract to customers, with OPC noting that Direct Energy's terms and conditions document, sent following the telephone enrollments, contains a statement that "it supersedes any oral representations made in connection with the sale."⁵² OPC argues that the statement creates a situation where a customer consents to enrollment but has to wait to see the terms to which he or she consented.⁵³ OPC reiterates its support of the PULJ's findings and emphasizes that Direct

⁴⁸ Maillog No. 239437.

⁴⁹ *Id.* at 6-8.

⁵⁰ *Id.* at 10.

⁵¹ *Id.*

⁵² Maillog 239619 (Mar. 16, 2022) at 14-15. *See also* Maillog 238559 at 20.

⁵³ *Id.*

Energy has failed to prove that it has met an MTSA exemption or sent customers a complete signed contract.⁵⁴

C. Staff Reply Briefs

40. Staff, in its Reply Brief to Direct Energy’s appeal memorandum, emphasizes that substantial evidence existed to support the PULJ’s finding that the MTSA applied to Direct Energy’s inbound telephone enrollments, that Direct Energy did not send valid contracts to the customers, and that Direct Energy did not meet any exemptions under the MTSA. Staff supports the PULJ’s sanctions, including prohibiting Direct Energy from using an MTSA exception.⁵⁵ Staff argues that the Proposed Order is a “reasonable mechanism to punish Direct Energy’s repeated flawed and demonstrated misinterpretation of the MTSA.”⁵⁶ Staff states that the Proposed Order does not provide a time limit for the exemption prohibition, but Direct Energy is not precluded from requesting relief from the penalty by the Commission after a period of good faith compliance.⁵⁷

41. Staff, in its Reply Brief to OPC, states that substantial evidence exists to support the PULJ’s proposed findings and remedies, and the Proposed Order provides appropriate and discretionary relief.⁵⁸ Staff emphasizes that, despite previous decisions where the Commission imposed more stringent penalties, those cases differ from the present case in that “there are no such examples of blatant and consistent misrepresentations by Direct Energy’s agents in evidence in this case and, consequently OPC can cite to none.”⁵⁹

⁵⁴ *Id.* at 15.

⁵⁵ Maillog 239459 (Mar. 7, 2022) at 10.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Maillog 239616 (Mar. 16, 2022) at 7-8.

⁵⁹ *Id.* at 10.

V. DISCUSSION AND COMMISSION DECISIONS

A. **MTSA Application**

41. In the Proposed Order, the PULJ noted that in the Commission's *SmartEnergy* decision, both inbound calls resulting from marketing materials sent by a supplier, and outbound calls from a supplier, fall within the MTSA's definition of a telephone solicitation. Further, regardless of whether there was an initial mailing of marketing materials that prompted a call from a potential customer to initiate the sale, the Proposed Order found that the sale itself was made entirely by telephone, and the MTSA applies. Staff and OPC agree that the MTSA applies to the inbound calls to Direct Energy from customers who received the marketing mailings. Direct Energy disputes this finding, maintaining that the policy and purpose of the MTSA is to protect consumers from unfamiliar merchants making cold calls in an attempt to sell unfamiliar products.

Commission Decision

42. The Commission, consistent with its decision in *SmartEnergy*, and the decision of the Circuit Court of Montgomery County on appeal, affirms the PULJ's finding that the MTSA applies to the inbound customer calls to Direct Energy, in response to their marketing postcards and other mailed solicitation materials. While the Commission found that *SmartEnergy's* marketing mailings were deceptive and misleading, the fact that Direct Energy's mailings were not found to be deceptive and misleading does not distinguish this case related to this finding. The MTSA applies to all inbound calls, made pursuant to marketing materials, where the sale takes place entirely over the phone.

43. The Maryland Attorney General’s Consumer Protection Division’s (“CPD”) interpretation of the MTSA, as discussed in its amicus brief in the *SmartEnergy* matter,⁶⁰ is applicable here and remains entitled to considerable weight for two reasons. First, the Consumer Protection Division is the agency primarily charged with interpreting and enforcing Maryland’s consumer protection laws, including the MTSA. Second, PUA § 7-507(q) is clear in its directive that “[n]othing in this subtitle may be construed to affect the authority of the [CPD] to enforce violations of Titles 13 and 14 of the Commercial Law Article or any other applicable State law or regulation in connection with the activities of electricity suppliers.” The Commission agrees with the CPD’s view that the Consumer Protection Act — which includes the MTSA — is to be construed and applied liberally to promote its purpose, and the statute, when interpreted as a whole, covers transactions where a consumer calls a merchant and purchases goods or services over the telephone.

44. The MTSA defines “Telephone Solicitation” as “the attempt by a merchant to sell or lease consumer goods, services, or realty to a consumer located in this state that is: (1) made entirely by telephone; and (2) initiated by the merchant.” The CPD, in its amicus brief filed in the *SmartEnergy* matter, noted that this definition includes “sales in which the consumer calls the merchant.”

45. In *SmartEnergy*, the Commission reversed the Proposed Order and concluded that where the inbound calls to *SmartEnergy* were initiated by that supplier using false and misleading direct mail advertising, and where it was only during the call that the customer was made aware of all terms and conditions of the supplier’s service, the MTSA does apply to *SmartEnergy*’s solicitation practices.

⁶⁰ The CPD memorandum in *SmartEnergy* was filed as Exhibit A to Staffs’ Brief (Maillog No. 237562) and was incorporated by reference therein.

46. Here, the Commission not only finds that the MTSA applies to Direct Energy’s inbound sales calls but also agrees with the PULJ that the applicability of the *SmartEnergy* holding should not be limited to instances of deceptive or misleading marketing.

47. However, the Commission rejects the PULJ’s determination that Direct Energy cannot contract under the exemptions in the MTSA going forward. Should the Commission prohibit Direct Energy’s access to the exemptions, it would in effect be denying a portion of a Maryland statute’s provisions to a particular business. The Commission cannot alter the terms of a statute and therefore cannot prohibit Direct Energy from satisfying the MTSA exemptions in the future.

B. MTSA Exemptions

47. The PULJ found that the preexisting business relationship and mailed marketing materials exemptions under the MTSA do not apply to Direct Energy’s inbound telephone enrollments.⁶¹ With regard to the preexisting business relationship exemption, MTSA §14-2202(a)(2), the PULJ based her finding in part on the Circuit Court of Montgomery County’s decision in the *SmartEnergy* appeal, which determined that the mailed marketing materials did not create a preexisting business relationship between the supplier and the customer. Here, the PULJ noted that the mailed marketing materials initiated Direct Energy’s request to provide the good or service, and to receive an inbound call from a customer to discuss the good or service offered. The PULJ concluded that the mailed solicitation itself did not constitute a preexisting business relationship.⁶² Direct Energy, as discussed above, disagrees with this finding and

⁶¹ The PULJ reviewed all six MTSA exemptions and found three of them to be relevant under MTSA § 14-2202(a)(2), (a)(3) and (a)(5). MTSA § 14-2202(a)(3) is an exemption for sales which fall under Commercial Law Article, Title 14, Subtitle 3—applicable to Door to Door Sales Act—and is not relevant to this proceeding.

⁶² *See*, Proposed Order at 18, para. 46: “Direct Energy also does not qualify for an exemption based on contracting via telephone solicitation with a customer with whom they have a prior business relationship. Mailed marketing materials initiate the request by Direct Energy to offer a good or service and request receipt of an inbound call from a customer in response to the mailer, in order to discuss the good or service being offered. The mailer, itself, does not constitute a prior business relationship with the customer. Although Direct Energy offered some evidence of

deems it to be counter to the intent of the MTSA, while Staff and OPC argue that the finding is reasonable and Direct Energy's arguments are unavailing.

48. The PULJ similarly found that Direct Energy did not meet the requirements of MTSA § 14-2202(a)(5), which exempts transactions for goods and services that are purchased after a customer reviews a merchant's television, radio, or print advertisement or a sample, brochure, catalog, or other mailing material that contains the name, address, and telephone number of the merchant, a description of the goods or services being sold, and any limitations or restrictions that apply to the offer. The PULJ concluded that Direct Energy's marketing materials did not contain all key terms of the contract. She noted that some of the materials did not contain the company address, some contained misleading statements, and none contained the term of the contract, the initial rate to be charged and what happens after the initial term.

49. Direct Energy, as detailed above, appeals this finding, contending that the MTSA provision did not require all key terms of the contract on mailings. Staff and OPC support the finding and agree that the mailings did not contain adequate information.

Commission Decision

50. The Commission affirms the PULJ's finding on the MTSA § 14-2202(a)(2) preexisting relationship exemption because there is no evidence of a preexisting business relationship with regard to the customers that are the subject of this complaint, and the mailings themselves do not create such a relationship. Direct Energy's arguments notwithstanding, the evidence in this case does not show that its mailers were directed to prior or current customers – or anyone -- with whom Direct Energy had a preexisting relationship.

some contracts with prior customers, the record does not contain evidence that any of the customers in the CAD complaints were previously in a contract with Direct Energy.”

51. The Commission also affirms the PULJ's finding that the MTSA § 14-2202(a)(5) marketing exemption does not apply, since customers were not enrolled under circumstances in which they had the opportunity to examine Direct Energy's services beforehand, particularly considering that the marketing information may not have contained all the important information needed to understand the offering such as price, contract term, renewal term, or other limitations.

C. MTSA Contract Requirement and Applicability of COMAR 20.53.07.08(A) and COMAR 20.53.07.08B(2)

52. The PULJ further determined that according to the Parties' stipulation of facts, upon enrollment Direct Energy provided the customers at issue in this matter a welcome letter, terms and conditions, and a contract summary. Direct Energy argued that those documents comprised the required material contract terms and conditions to be provided in accordance with the MTSA, but later asserted that it provided a welcome letter, a complete contract and a contract summary. The PULJ determined that all parties are bound by the stipulations of facts and any parties cannot provide differing facts later in litigation. The PULJ found that, regardless of the document's name, the substance of a contract summary is different from a contract and is insufficient to meet the requirements of disclosure of material contract terms and conditions.⁶³

53. Under the MTSA, § 14-2203(b) a contract must satisfy a number of requirements including meeting applicable regulatory requirements and it cannot exclude oral or written representations made in connection with the transaction. COMAR 20.53.07.08(A) sets forth the minimum contract requirements under the Commission's competitive electricity supply regulations. Regulation .08A(2) provides a comprehensive list of "all material terms and conditions" that a retail supplier's contract must include.

⁶³ Proposed Order at 20.

54. COMAR 20.53.07.08B(2) requires “[i]f the contract is completed through telephone solicitation, the supplier shall send the contract summary to the customer along with the contract that must be signed by the customer and returned as required by the MTSA. If the contract is exempt from the MTSA, “the supplier shall send the contract summary with the contract to the customer.” In this case, since Direct Energy’s telephone enrollments are not exempt from the MTSA, the telephone-enrolled customers should have received the contract and contract summary, and the customer should have signed and returned the contract to Direct Energy. Direct Energy acknowledged in the Parties’ stipulation of facts that customers were not sent the contract.

55. The record reflects that Direct Energy’s terms and conditions includes language indicating that the document supersedes any oral representations made in connection with the service sale.⁶⁴ This in itself is a violation of MTSA § 14-2203(b)(6).

56. Staff and OPC agree that Direct Energy did not provide telephone-enrolled customers with a complete contract, while Direct Energy maintains that it provided a complete contract to all customers.

Commission Decision

57. Pursuant to MTSA § 14-2203(a) a contract made pursuant to a telephone solicitation is not valid and enforceable against a consumer unless made in compliance with MTSA § 14-2203(b). In addition to prohibiting language that excludes oral or written representations made by the merchant to the consumer, the statute also requires that the contract be in writing and signed by the consumer, comply with all other applicable laws and regulations; match the description of goods or services as those described in the telephone solicitation; and contain the name, address, and telephone number of the seller, the total price of the contract, and a detailed

⁶⁴ See Direct Testimony of OPC witness Susan B. Baldwin at 26 (Maillog No. 228970).

description of the goods or services being sold. The items that Direct Energy identified as contracts are actually a group of documents that are incorporated by reference, including terms and conditions that do not contain all of the information required by MTSA § 14-2203(b). The fact that the required information is not contained within one document that is signed by the consumer is cause for confusion. Therefore, this contract - even if signed - would not have satisfied the requirements of either the MTSA or the Commission's regulations. In addition, the PULJ clearly found that, "the record establishes that no signed contracts were produced with regards to the customers at issue in this proceeding."⁶⁵ Having failed to comply with the MTSA's requirements, and admitted that failure in the stipulation of facts, the Commission hereby finds Direct Energy's contracts with all of its Maryland customers enrolled during the complaint period of 2016-2019 are invalid.⁶⁶

D. PULJ's Proposed Remedies

58. The PULJ did not assess an additional monetary penalty for this phase of the case, determining that the \$125,000 penalty in Phase I was sufficient. All of the Parties agree except for OPC, which requests additional monetary penalties as well as a rerate for *all* customers unlawfully enrolled through the telephone following a mailing – including those customers enrolled from 2005, the year of Direct Energy's electricity and gas licensing, through 2015. OPC's states that the PULJ's finding does not provide any relief to the majority of impacted customers, who fall outside the complaint period. Staff and Direct Energy agree with the PULJ's finding. The Parties compare the monetary penalty issued in Phase I of this matter to monetary

⁶⁵ Proposed Order at 18.

⁶⁶ See, *SmartEnergy* Order at 64, para. 148: "Where competitive retail suppliers have failed to comply with the MTSA's contracting requirements, the appropriate remedy has been cancellation of the supplier's Maryland invalid customer enrollments and requiring those customers to be returned to utility standard offer service." (*Cf.*, *Blue Pilot Energy*, Proposed Order, slip op. at 70-72, *aff'd*, Order No. 87925 (Dec. 12, 2016)). The same applies in this case. Customers with invalid contracts that have not been replaced with MTSA-compliant contracts within the period provided herein, shall be disenrolled upon the expiration of the compliance period and returned to utility standard offer service or, if requested, another Maryland licensed retail supplier of the customer's choice.

finest assessed in other cases and the grounds for those assessments. Direct Energy notes that OPC's proposed expansion of penalties exceeds the time period specified in the complaints and in the stipulation of facts.

59. The PULJ additionally found that pursuant to PUA § 7-507(k)(1), in order to protect Maryland consumers from misleading telephone solicitations, Direct Energy was directed to obtain a signed written contract for *all* future telephonic sales in Maryland, where outbound or inbound calls -- in response to mailers or other marketing -- regardless of whether an exemption would be allowed under MTSA. Direct Energy disagrees with this finding, arguing that the denial of access to exemptions exceeds the Commission's authority under PUA § 7-507(k)(1) and citing a hardship on operations and telephone solicitations. OPC and Staff agree with the finding as a deterrent for suppliers who may employ practices similar to Direct Energy's when relying on mailers and telephone solicitations.

Commission Decision

60. The Commission affirms, as supplemented herein, the PULJ's decision not to assess additional civil penalties. In this case, the Commission accepts the civil penalty as established in Phase I as adequate; however, in order to address OPC's valid concern that the proposed relief would be too limited, the Commission, as discussed above, directs Direct Energy to inform its telephone-enrolled customers from 2016-2019 of this decision and that they have options to continue with Direct Energy, return to SOS or select another supplier within 30 days. After reviewing the Company's plan, the Commission shall determine a process for Direct Energy to return any customers without valid contracts to SOS within 180 days.

61. The Commission finds that, based upon the record of this case, including the stipulation of facts and the partial settlement agreement, there is no evidence in record prior to the complaint period. Therefore, the Commission has no record to determine the validity of any Direct Energy

customers enrolled by telephone from 2005 to 2016. Therefore, the Commission’s remedies are limited to the complaint period of 2016-2019.

62. It appears—based on the evidence—that Direct Energy’s actions arose from a misinterpretation of the MTSA. There is no indication that Direct Energy intended to engage in fraud, or deceptive and misleading trade practices. In considering this matter, and the statutory factors relevant to license actions under PUA § 7-507(1)(3), the Commission may consider good faith efforts, previous violations and the gravity of the current violation. While a violation of the MTSA is a serious matter and this decision reflects the Commission’s grave concern with the violation, the Commission finds that Direct Energy’s violations are neither intentionally fraudulent nor as pervasive as other suppliers against whom the Commission has assessed more stringent penalties and higher fines.

VI. CONCLUSION

63. As discussed herein, the Commission affirms in part and reverses in part, the Proposed Order in this case, adopting the Proposed Order as part of the Final Order of the Commission in all aspects except the PULJ’s finding that the MTSA contracting requirement should apply, without any exemptions available, to Direct Energy’s inbound and outbound telephone solicitations going forward. In reversing the PULJ on this issue, the Commission concludes that the MTSA applies to all inbound calls made in response to a supplier/merchant’s particular marketing effort (*e.g.*, postcard, direct mail, or other advertising), and these customers should be sent a valid contract to sign.

64. The Commission found in Case No. 9613 that the MTSA’s “Telephone Solicitation” requirements apply where a supplier/merchant’s solicitation process includes inbound calls

following delivery of postcards, flyers, or other forms of advertising. In this case, Direct Energy attempts to limit that finding to instances where the marketing materials are found to be deceptive and misleading. However, as the court concluded in the *SmartEnergy* appeal, the MTSA makes no such distinction – as the MTSA contracting requirement applies to all inbound sales calls to the supplier that result from marketing postcards and other such advertising where a statutory exemption does not apply.⁶⁷ However, the Commission finds that this contracting requirement should not prohibit Direct Energy from utilizing any applicable MTSA exemptions for which it may qualify going forward. Accordingly, the PULJ’s finding on the exemption prohibition is reversed.

65. The Commission affirms the PULJ’s finding that no further civil penalty is warranted, but finds that all customer enrollments pursuant to inbound calls from 2016-2019 are invalid, and that Direct Energy must inform those customers and provide an opportunity for them to sign a valid contract, switch suppliers, or return to SOS. Additionally, Direct Energy must provide a compliance plan within 60 days and provide information on the status of the remainder of its existing telephone-enrolled contracts.

IT IS THEREFORE, this 4th day of May, in the year of Two Thousand Twenty Two, by the Public Service Commission of Maryland,

ORDERED: (1) That the Proposed Order of the Public Utility Law Judge in this matter is affirmed in part and reversed in part, as discussed herein, and all telephone-enrolled contracts during the complaint period are invalid. The appeals of Direct Energy Services, LLC and the Office of People’s Counsel are denied;

⁶⁷ See *In the Matter of SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Circuit Court for Montgomery County, Case No. 485338V, slip. op. at 13, n.27 (Dec. 20, 2021).

(2) That Direct Energy send a letter to all of its Maryland customers who were solicited and enrolled by telephone between 2016 and 2019, within 30 calendar days of the date of this Order, informing them of the invalidity of their contracts and providing them with the choice to either sign a valid contract (which comprises all terms and conditions, contract term, rates and right of rescission, and is accompanied by a contract summary) by a date certain, switch to a different supplier, or be returned to their utility's standard offer service;

(3) That Direct Energy, within 60 days of the date of this Order, file a compliance report as outlined in Paragraph 9, above, with the Commission, containing the information discussed in the body of this Order.

(4) That Direct Energy, pursuant to forthcoming Commission direction and within 180 days of the date of this Order, shall return all customers for which it does not have validly signed contracts to utility SOS service;

(5) That any findings by the Public Utility Law Judge not expressly reversed, vacated, or modified herein, are adopted; and

(6) That any motion not otherwise granted by the Commission is hereby denied.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman

Commissioners