

ORDER NO. 89795

In the Matter of the Complaint of the Staff
of the Public Service Commission v.
SmartEnergy Holdings, LLC d/b/a
SmartEnergy

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9613

ORDER ON APPEALS AND EXCEPTIONS

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

Issued: March 31, 2021

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I. BACKGROUND AND EXECUTIVE SUMMARY

1. This case is before the Commission on Appeal by SmartEnergy Holdings, LLC (“SmartEnergy” or “the Supplier”), the Maryland Office of People’s Counsel (“OPC”) and Commission Staff (“Staff”) to the Proposed Order issued by Public Utility Law Judge (“PULJ”) Kristin Lawrence on December 16, 2020, and on Exceptions to the PULJ’s Recommendations. In the Proposed Order, the PULJ found that SmartEnergy engaged in deceptive, misleading and unfair trade practices, and systemic violations of *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 7-505(b)(7), Code of Maryland Regulations (“COMAR”) 20.53.07.07A(2); COMAR 20.53.07.08B(1); COMAR 20.53.07.08C(4)(b)(i) - (iii), (v); COMAR 20.53.08.04E; and COMAR 20.61.04.01B and C. Based on these findings, the PULJ recommended—among other things—the Commission impose upon SmartEnergy a moratorium prohibiting the Supplier from adding or soliciting new customers, impose an appropriate civil penalty (whether \$300,000 or some other amount), and require SmartEnergy to notify its current and former customers of the Commission’s decision in this case.

2. The PULJ further recommended that SmartEnergy be required to cancel its existing customer enrollments (in Maryland) and return customers to utility Standard Offer Service (“SOS”), unless the customer takes affirmative action to remain with SmartEnergy. The PULJ also recommended the Commission require the rates charged by SmartEnergy be re-rated to the utility SOS rate, and that current and former SmartEnergy customers be refunded the difference for each month of service.¹

¹ When communicating with its customers, the PULJ recommended the Commission require SmartEnergy include the renewable portfolio standard (RPS) disclosures required under COMAR 20.61.04.01B and C.

3. On December 22, 2020, the Commission entered an order taking up the Proposed Order in this matter *sua sponte*. To preserve the *status quo*, the Commission imposed a moratorium prohibiting SmartEnergy from adding or soliciting new customers, pending the consideration of exceptions to the Proposed Order – if any – by SmartEnergy or other parties.

4. On January 25, 2021, SmartEnergy, OPC and Staff filed Exceptions to the Proposed Order.² The Maryland Office of Attorney General, Consumer Protection Division (“the CPD”) filed an *amicus* brief in support of the exceptions filed by OPC and Staff.³ The parties filed reply memoranda on February 25, 2021.

Executive Summary

5. In this Order, the Commission affirms the PULJ’s findings that SmartEnergy violated PUA § 7-507(b)(7) by engaging in unfair, false, misleading and deceptive marketing, advertising and trade practices, and associated COMAR Title 20, Subsection 53 provisions. The Commission reverses the PULJ’s finding that the Maryland Telephone Solicitations Act (“MTSA”), Commercial Law (“Com. Law”) § 14-2203(b) (requiring that a contract made pursuant to a telephone solicitation be reduced to writing and signed by the consumer) does not apply to SmartEnergy’s contracting with its Maryland customers under the facts in this case.

² On January 15, 2021, SmartEnergy filed a Notice of Appeal (Maillog No. 233318). In its Memorandum on Appeal and Exceptions, SmartEnergy states that it filed a notice of appeal out of an abundance of caution – preserving its appeal rights – and that its brief doubles as support of its appeal and its response to Order No. 89683. SmartEnergy Appeal Memorandum and Exceptions, Maillog No. 233452 at 2. Since the Commission took this matter on its own motion and prescribed the schedule for filing exceptions, the parties’ filings in accordance with the Commission’s schedule are deemed timely for purposes of both exceptions and appeals.

³ Maillog No. 233453.

6. In finding that SmartEnergy failed to comply with the MTSA’s contracting requirements for contracts based on Telephone Solicitations, the Commission holds that these contracts are invalid and directs SmartEnergy to return all of its Maryland customers that were enrolled via Telephone Solicitations to the customer’s utility standard offer service within ten (10) calendar days of this Order. The Commission further directs SmartEnergy—within thirty (30) days of this Order—to re-rate and refund all Maryland customers solicited via telephone the difference between SmartEnergy’s supply charges and the applicable standard offer service (“SOS”) rate offered by the customer’s local utility for all periods these customers were served, whether the customer is an existing customer or a former customer, and provide a detailed accounting to the Commission within sixty (60) days of the refund amount sent to each of these customers.

7. The Commission also clarifies that the standard of proof applicable to this case is the “preponderance of evidence” standard, and that standard was satisfied.

II. PROCEDURAL HISTORY

A. Staff’s Complaint

8. On May 10, 2019, Staff filed a Complaint against SmartEnergy pursuant to PUA § 7-507, alleging that SmartEnergy violated Maryland law governing retail supplier activities – specifically alleging customer slamming and false and misleading advertising.⁴ In its Complaint, Staff sought the issuance of an order directing SmartEnergy to show cause why its supplier license should not be suspended or revoked, or in the alternative, why the Supplier should not be precluded from soliciting additional

⁴ Staff Complaint, Maillog No. 225227. Staff filed an Amended Complaint on July 31, 2019 (Maillog No. 226278) and a Second Amended Complaint on September 24, 2019 (Maillog No. 226946).

customers. Staff also requested that the order direct SmartEnergy to show cause why the Supplier should not be subject to a civil penalty under PUA § 7-507 and PUA § 13-201 for committing fraud, engaging in deceptive practices, slamming, and failing to comply with the Commission’s consumer protection regulations.⁵

9. On May 16, 2019, the Commission directed SmartEnergy to answer Staff’s Complaint and further directed the Supplier to appear at the Commission’s July 17, 2019 Administrative Meeting for a hearing on the Complaint.⁶

B. Delegation and PULJ Proceedings

10. On July 12, 2019, the Commission docketed this matter as Case No. 9613 and delegated the matter to the PULJ Division, finding that there were genuine issues of material fact that warranted further proceedings to determine whether SmartEnergy had engaged in a pattern or practice of systemic violation of the consumer protections contained in the Public Utilities Article and Commission regulations.⁷ OPC also filed a complaint against SmartEnergy on September 30, 2019, alleging among other things – 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.⁸ OPC and Staff filed Direct Testimonies on January 31, 2020. SmartEnergy filed Reply Testimony on March 13, 2020, followed by Rebuttal Testimonies filed by Staff and OPC on July 8, 2020.

⁵ Staff Complaint, Maillog No. 225227 at 2.

⁶ Maillog No. 225320.

⁷ Order No. 89190 (Jul. 12, 2019). In the PULJ’s Ruling on Preliminary Motions and Notice of Procedural Schedule, PULJ Lawrence refined the scope of the proceedings and directed Staff to identify: (1) the specific alleged behavior by SmartEnergy 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. 16 at 4.

⁸ OPC Complaint, Maillog No. 226988.

11. On August 21, 2020, Staff filed a Motion for Summary Judgment, requesting that the PULJ find that SmartEnergy engaged in a pattern and practice of systemic violations of the consumer protections contained in the Public Utilities Article and the Commission's regulations.⁹ In its Motion for Summary Judgment, Staff also requested that the PULJ revoke SmartEnergy's license to do business as an electricity supplier in Maryland, impose a civil penalty of \$500,000, and order whatever additional relief the PULJ finds equitable and just.

12. Following responses by SmartEnergy and OPC, on September 11, 2020, the PULJ entered a ruling, granting in part and denying in part Staff's Motion for Summary Judgment. The PULJ's ruling granted summary judgment against SmartEnergy for violations of COMAR 20.53.07.08B—requiring contract summaries at the time of the completion of the contracting process—from its start of business in Maryland in February 2017 until Staff filed its Complaint in May 2019.¹⁰ Summary judgment on Staff's request to revoke SmartEnergy's supplier license and request to impose Staff's requested \$500,000 civil penalty was denied, pending further litigation.

13. An evidentiary hearing was held on October 28-29, 2020. Briefs and reply briefs were filed by SmartEnergy, Staff and OPC, respectively on November 25, 2020 and December 11, 2020.

C. Proposed Order - Findings and Recommendations

14. On December 16, 2020, the PULJ entered a Proposed Order, finding that SmartEnergy engaged in systemic violations of PUA § 7-505(b)(7) and various

⁹ Staff Motion for Summary Judgment, Maillog No. 231563 at 6.

¹⁰ PULJ Ruling on Motion for Summary Judgment, Dkt. No. 60, Ordering Paragraph 2.

Commission regulations – finding that SmartEnergy engaged in deceptive, misleading and unfair trade practices.¹¹ The Proposed Order recommended that the Commission:

- (1) Impose a moratorium prohibiting SmartEnergy from adding or soliciting additional customers in Maryland;
- (2) Require SmartEnergy to communicate with its current customers, in a format approved through consultation with OPC and Staff, informing them of the Commission’s decision in this case;
- (3) Direct an opt-in procedure where SmartEnergy would be required to inform its customers that it will cancel their enrollments and return them to utility SOS unless they take affirmative action to remain SmartEnergy customers;
- (4) Direct SmartEnergy to re-rate and refund the difference between the rate charged by SmartEnergy and its customers’ utility SOS rates for each month of service, if a customer chooses to return to utility SOS;
- (5) Direct SmartEnergy to provide an accounting to the Commission of the number of accounts that opted to remain with SmartEnergy, and provide an accounting—within ninety (90) days—of refunds sent to SmartEnergy’s current and former customers who did not opt-in; and
- (6) Address whether \$300,000 or some other amount is the appropriate civil penalty to be imposed, after it has an opportunity to review SmartEnergy’s compliance with the directives of the Commission’s final order with respect to re-rating and refunding customers and returning customers to utility SOS.

15. 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

¹¹ Proposed Order at 46-56.

reject such recommendations as long as in doing so the Commission’s decision is not arbitrary or capricious or unreasonably discriminatory.¹²

D. Notice of Appeal and Exceptions

16. SmartEnergy filed a Notice of Appeal of the Proposed Order on January 15, 2021, and filed its Memorandum of Appeal on January 25, 2021. Staff and OPC filed exceptions to the Proposed Order on January 25, 2021.¹³ Also on January 25, 2021, the Maryland Office of Attorney General, Consumer Protection Division (“the CPD”) filed an *amicus* brief in support of the exceptions filed by OPC and Staff.¹⁴ SmartEnergy, OPC and Staff filed reply exceptions on February 25, 2021.

E. Motion for Leave to Comment by Retail Electric Supply Association

17. On February 25, 2021, at the time when reply exceptions were filed by SmartEnergy, OPC and Staff, the Retail Energy Supply Association (“RESA”) filed a Motion for Leave to File Comments (“Motion”).¹⁵ In its Motion, RESA notes that it represents a broad group of licensed competitive retail electricity and natural gas suppliers in Maryland, and the Commission’s decision in this matter will affect the interests of competitive suppliers, including its members that transact sales over the telephone with Maryland customers.¹⁶ Although RESA did not intervene during the

¹² *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.”)

¹³ On January 15, 2021, SmartEnergy filed a Notice of Appeal (Maillog No. 233318). In its Memorandum on Appeal and Exceptions, SmartEnergy states that it filed a notice of appeal out of an abundance of caution – preserving its appeal rights – and that its brief doubles as support of its appeal and its response to Order No. 89683. SmartEnergy Appeal Memorandum and Exceptions, Maillog No. 233452 at 2.

¹⁴ Maillog No. 233453.

¹⁵ Maillog No. 233929.

¹⁶ RESA Motion at 2.

PULJ proceedings, RESA argues that no party will be prejudiced by its late filing during these appeal proceedings.

F. Ruling on RESA’s Motion to Comment

18. PUA § 3-106 governs intervention in Commission proceedings, requiring an application to intervene in order to obtain the rights of parties under § 106(c). Pursuant to PUA § 3-107, only parties in Commission proceedings have the right to present arguments by way of comments, briefs or memoranda.¹⁷ Having failed to timely intervene in this proceeding, RESA is not a party and its Motion for Leave to Comment is denied.

III. APPEALS AND EXCEPTIONS

A. SmartEnergy’s Appeal and Exceptions

1. Standard of Proof

19. In its Memorandum on Appeal and Exceptions, SmartEnergy argues that multiple findings in the Proposed Order are arbitrary and capricious, are not supported by the evidence in the record, and do not satisfy the “clear and convincing” standard of proof.¹⁸ SmartEnergy argues further that “[i]f allowed to stand, the findings and the proposed remedy in the Proposed Order would unconstitutionally and unduly penalize [SmartEnergy].”¹⁹ While arguing that the evidence supporting the PULJ’s findings was

¹⁷ See, e.g., *Sprenger v. PSC*, 400 Md. 1 (2006) (a person who failed to intervene was not a “party in interest” to the proceeding because he was not a “party” to the proceeding.)

¹⁸ SmartEnergy Appeal Memorandum and Exceptions at 2.

¹⁹ *Id.*; SmartEnergy Reply Memorandum at 2.

not clear and convincing, SmartEnergy argues that “clear and convincing” is the appropriate evidentiary standard to use in this case.²⁰

20. Noting that this is a complaint proceeding, but one involving more than penalties (*i.e.*, also involving potential suspension or revocation of its supplier license), SmartEnergy argues that a high level of scrutiny is warranted. SmartEnergy argues that a supplier license as a “property interest” may not be taken away without satisfying procedural due process requirements.²¹

21. Specifically, SmartEnergy argues that the Proposed Order erred by proposing “outrageously” excessive remedies that should be dramatically reduced to be consistent with: (a) the factual record as it pertains to the alleged violations; (b) Commission precedent; (c) the un-refuted evidence of remediation measures taken by SmartEnergy in response to specific communications from the Commission’s Consumer Affairs Division (“CAD”) and on its own accord to ensure compliance with Maryland laws as a whole.²² SmartEnergy’s further arguments include, among others: (1) the remedies recommended in the Proposed Order are inconsistent with prior Commission orders; (2) the finding that SmartEnergy made a significant amount of money from deceiving Maryland customer is arbitrary and capricious; (3) any remedies imposed by the Commission in this case should apply only to the Complaint Period which it defines as February 2017 through May 2019; (4) the remedy set forth in the Proposed Order is not an accurate calculation; and (5) the opt-in remedy recommended in the Proposed Order is unprecedented and unjustified.

²⁰ SmartEnergy Reply Memorandum at 19.

²¹ SmartEnergy Reply Memorandum at 20. SmartEnergy requested the opportunity to advance oral argument in support of its position. *Id.* at 33.

²² SmartEnergy Appeal Memorandum and Exceptions at 2-3.

2. Retention of Audio Recordings

22. With regard to retention and accurately communicating recorded customer enrollments, SmartEnergy argues that it complied with COMAR 20.53.07.08C(4)(b)(iii) by contracting with third-party vendors to record and maintain phone calls. SmartEnergy also appeals or takes exception to the PULJ's finding regarding enrollment of non-account holders, and argues that its sales script is compliant with COMAR requirements. SmartEnergy further argues that it did not "thwart" customers' attempts to cancel their enrollments, that its agent training and supervision is compliant with Commission requirements, and that the Proposed Order improperly dismissed SmartEnergy's selection bias argument – without discussion or analysis.

23. In its Reply Memorandum, SmartEnergy emphasizes that it sent over six million postcard advertisements to Marylanders and handled over 104,000 telephone calls, but submits that Staff's initial complaint relied on only four consumer complaints – which was only *later* expanded to include the 34 CAD complaints filed against SmartEnergy before May 2019.²³ In arguing that the evidence suffers from selection bias, SmartEnergy contends that Staff and OPC listened to fewer than 50 calls out of over 100,000 total calls, and that Staff did not compare the statements in the recordings to SmartEnergy's script.²⁴ SmartEnergy acknowledged, however, that problems arose when sales agents went "off-script."²⁵

²³ SmartEnergy Reply Memorandum at 1.

²⁴ *Id.* at 28.

²⁵ *Id.*

3. MTSA Contracting Requirements

24. SmartEnergy argues that the PULJ correctly held that the MTSA’s contracting requirements do not apply to the Supplier’s inbound customer call enrollments, because these calls “do not constitute telephone solicitations within the purview of the MTSA.”²⁶ In response to OPC and CPD’s arguments, SmartEnergy portrays their argument as follows: According to OPC and CPD, the MTSA applies to “all calls, inbound or outbound--because the ‘attempt to sell’ is initiated by the SmartEnergy representative *after* the customer calls SmartEnergy.”²⁷ SmartEnergy continues, noting that it is OPC and CPD’s view that “it is always the merchant that initiates the ‘attempt to sell,’ so there is no scenario in which a customer can initiate the ‘attempt to sell.’”²⁸ SmartEnergy adds that “Staff [also] views the mailing of the postcard as an ‘initiation’ of the solicitation,” but argues that this presents a conflicting argument because, “[e]ither: (1) the attempt to sell includes the postcard, in which case the solicitation is not ‘made entirely by telephone,’ or (2) the attempt to sell includes only the telephone call, which in this case was ‘initiated’ by the customer and not SmartEnergy.”²⁹

25. SmartEnergy also argues that if the Commission were to find that SmartEnergy’s contracts resulted from Telephone Solicitations, then MTSA exemptions apply rendering the MTSA’s contract requirements under Com. Law § 14-2203(b) inapplicable. Here, SmartEnergy argues: (1) that the customer’s purchase of electricity from SmartEnergy was “pursuant to examination of a ... print advertisement ... of [SmartEnergy]” that contains the required information regarding the merchant, the goods or services being

²⁶ *Id.* at 3.

²⁷ *Id.* at 7.

²⁸ *Id.*

²⁹ *Id.* at 8-9.

sold, and any limitations that apply to the offer; and (2) a preexisting relationship existed between SmartEnergy and the customer.³⁰ With regard to the former, SmartEnergy notes that its postcards include: (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. It contends that OPC only disputed whether the postcards contained “a description of the goods or services being sold” and “any limitations or restrictions that apply to the offer.”³¹ Additionally, SmartEnergy relies on the PULJ’s finding that SmartEnergy did not violate COMAR 20.53.07.08A(2) – in reference to providing customers with a contract containing all terms and conditions.³²

26. As to the latter, SmartEnergy argues that the pre-existing business relationship that it claims to have with the postcard recipients was “the exchange between SmartEnergy and the customer that happens in advance of the telephone contract.”³³ This “exchange” it argues “involves both the mailing of the postcard advertisement (a marketing communication to the customer) and the customer calling SmartEnergy after reviewing the postcard to learn more about SmartEnergy’s offer and possible enrollment.”³⁴

27. In response to OPC Exception 2, SmartEnergy contends that from the outset of its business in Maryland, SmartEnergy sent a welcome letter along with the contract to each customer enrolled. SmartEnergy states that the welcome letter included much – but not all – of the same information that appears in a contract summary. Information such as

³⁰ *Id.* at 10.

³¹ *Id.* at 11.

³² *Id.* at 13.

³³ *Id.* at 12.

³⁴ *Id.*

SmartEnergy’s contact information (name, website, toll-free customer service number); the price structure (fixed price); the supply price per kWh; and the duration of the contract (6 months) was included.³⁵ SmartEnergy adds that it plants a tree for every customer through the Arbor Day Foundation.³⁶

4. Good Faith Compliance

28. SmartEnergy also appeals or takes exception to the PULJ’s finding that “SmartEnergy did not always act in good faith in attempting to achieve compliance” when notified by CAD of alleged violations, noting that when CAD requested documentation in order to address customer complaints alleging misrepresentation and/or deceptive trade practices, SmartEnergy selectively edited the phone recording and provided to CAD only the final confirmation question portion of the recording.³⁷ SmartEnergy submits that the evidence is to the contrary; arguing that in Maryland, suppliers have the option of third-party verification or a recorded sales call for telephone contracting purposes. SmartEnergy argues further that COMAR 20.53.07.08C(4)(b)(iii) does not require a supplier to record the entire conversation and also perform a third-party verification, but rather requires one or the other. SmartEnergy states it downloads the sales recordings and separates it from the confirmation portion of the call before sending the call to CAD, arguing that this is the “accepted practice in other jurisdictions.”³⁸ SmartEnergy states that it saved the entire recording with 100 percent of its calls, and that “the sales confirmation portion” of the recording is used for regulatory

³⁵ *Id.* at 14-15.

³⁶ *Id.* at 1; Direct Testimony of Lloyd Spencer, Ex. 4 at 3.

³⁷ SmartEnergy Appeal Memorandum and Exceptions at 18, referencing Proposed Order at 78.

³⁸ *Id.* at 23.

complaints.³⁹ It states that in this case CAD never asked for the entire sales call, and that such a request was never denied.⁴⁰

29. SmartEnergy submits that there was “no mal-intent” in not providing the full content of its sales calls in response to CAD’s request. Based on its argument that COMAR 20.53.07.08C(4)(b)(iii) requires suppliers to *either* record the entire conversation with a customer *or* perform a third-party verification, but not both, SmartEnergy takes issue with the Proposed Order *penalizing* SmartEnergy for its ability to alter or delete recordings before producing them in response to a request by CAD.⁴¹ SmartEnergy also argues that the PULJ’s ruling ignores the fact that the entire (unedited) call is maintained on third-party servers for the duration of the customers’ contract.⁴²

5. Precedents Regarding Remedies and Sanctions

30. SmartEnergy argues further that OPC and Staff ignore Commission precedent when arguing that the PULJ should have revoked (or recommended revoking) SmartEnergy’s supplier license.⁴³ SmartEnergy protests any comparison of its conduct—by OPC and Staff—to that of another supplier, Smart One Energy, and urges the Commission to compare any penalties in this case to those imposed in the *Starion Energy*, *Major Energy* and *Blue Pilot Energy* cases.

B. OPC Appeal and Exceptions

31. In its Memorandum on Appeal, OPC appeals or takes exception to a number of the PULJ’s findings. OPC argues that: (1) the Proposed Order was erroneous in holding

³⁹ *Id.* at 18, citing testimony of witness Daniel Kern, October 28, 2020, Hearing Transcript at 109.

⁴⁰ *Id.* at 19.

⁴¹ *Id.* at 23.

⁴² *Id.* at 24.

⁴³ SmartEnergy Reply Memorandum at 22.

that the requirements of the MTSA, Com. Law § 14- 2203(b), do not apply to any solicitation unless that solicitation begins with a merchant making a telephone call to the consumer; (2) the Proposed Order was incorrect in holding that SmartEnergy provided its customers with a contract containing all material terms and conditions as required by COMAR 20.53.07.08A(2); (3) the Proposed Order was incorrect in allowing customers to remain enrolled with SmartEnergy, because—it argues—none of SmartEnergy’s enrollments were valid; (4) the Proposed Order should have recommended a specific civil penalty pursuant to PUA § 7-507(k); and (5) the Proposed Order should have recommended the ultimate revocation of SmartEnergy’s supplier license pursuant to PUA § 7-507(k).⁴⁴ Additionally, OPC requests that the Commission clarify that the standard of proof applicable to supplier complaint proceedings is the “preponderance of evidence” standard rather than the “clear and convincing” standard, which OPC states was used in the Proposed Order.⁴⁵

32. In its Reply Memorandum, OPC submits that the record in this case demonstrates that SmartEnergy engaged in a “deceptive and misleading” marketing campaign for nearly two years before the Staff and OPC complaints were brought to the Commission’s attention.⁴⁶ OPC reasserts that SmartEnergy’s misconduct involved misleading mailings to Maryland electricity consumers, deceptive marketing scripts used by SmartEnergy’s sales representatives, and a “widespread” failure by SmartEnergy to provide contract summaries to consumers.⁴⁷

⁴⁴ OPC Memorandum on Appeal and Exceptions at 1-2.

⁴⁵ *Id.* at 26-28.

⁴⁶ OPC Reply Memorandum at 1.

⁴⁷ *Id.*

33. OPC contends that SmartEnergy incorrectly relies on the number of complaints addressed in Staff’s and OPC’s complaints in order to minimize a “marketing scheme” that evidenced a widespread pattern and practice of violations of Maryland’s consumer protection laws, and argues that SmartEnergy’s contention that it did not “knowingly” violate the Commission’s regulations is flawed.⁴⁸

34. With regard to the PULJ’s finding on summary judgment that SmartEnergy failed to provide contract summaries, OPC argues that SmartEnergy’s contention that its failure was unknowing is not credible and, moreover a mistake—as SmartEnergy alleges in this case—or ignorance of the law is not an excuse.⁴⁹

35. OPC argues further that nothing in SmartEnergy’s sales script, or in the audio recordings in the record in this case, alerted customers that they were calling a third-party energy supplier, and that SmartEnergy’s sales agents did not clarify to customers that they did not work for any utility.⁵⁰ OPC also contends that SmartEnergy’s agents ignored statements from customers saying they did not want to switch from their utility.⁵¹ OPC also argues that the PULJ properly concluded that SmartEnergy’s ability to alter or delete phone recordings violated the Commission’s regulations, and that SmartEnergy did not always act in good faith in its dealings with CAD.⁵²

36. With regard to sanctions, OPC argues that the Commission should require customer refunds using the utility’s prevailing SOS rate at the time of SmartEnergy’s customer enrollment, and that since SmartEnergy’s contracts were invalid, the Supplier

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* See also, Staff Ex. 1B-C (audio file associated with Complaint 819345035-W).

⁵² *Id.* at 6-7.

should not benefit from these transactions by calculating refunds on the basis of “renewable or green energy.”⁵³ Instead OPC argues that refunds should be calculated solely based on the difference between the applicable utility’s SOS rate and the price actually charged to the consumer by SmartEnergy.⁵⁴ OPC argues that the Commission should use its decisions in the *Smart One Energy*⁵⁵ and *SunSea Energy*⁵⁶ cases as precedent in adopting customer remedies in this case, as well as in imposing sanctions against SmartEnergy.⁵⁷

C. Staff Appeal and Exceptions

37. Staff appeals the PULJ’s finding that SmartEnergy’s sales activities do not constitute Telephone Solicitations, and therefore do not require signed contracts pursuant to the MTSA.⁵⁸ Staff also argues that the Proposed Order should have gone farther by imposing a civil penalty of at least \$500,000. Additionally, Staff recommends that the Commission revoke SmartEnergy’s license to supply energy in Maryland.

38. In its Reply Memorandum, Staff states that SmartEnergy has provided no persuasive evidence that the PULJ erred in her findings in this case in regard to the “multitude” of violations committed by SmartEnergy.⁵⁹ Like OPC, Staff notes that the evidentiary standard applicable to this case is the “preponderance of evidence” standard, arguing, however, that “[n]owhere during the course of this proceeding or in the

⁵³ *Id.* at 10.

⁵⁴ *Id.*

⁵⁵ *In the Matter of Complaint of the Staff of the Public Service Commission Against Smart One Energy, LLC*, Case No. 9617.

⁵⁶ *In the Matter of the Complaint of the Maryland Office of People’s Counsel Against SunSea Energy, LLC*, Case No. 9647.

⁵⁷ OPC Reply Memorandum at 11-12.

⁵⁸ Staff Memorandum on Appeal and Exceptions at 2-3.

⁵⁹ Staff Reply Memorandum at 2.

Proposed Order did the PULJ rule that the more stringent standard of ‘clear and convincing’ was applicable ...”⁶⁰ Staff contends that rather than applying a standard greater than “preponderance of evidence,” the PULJ simply emphasized the “overwhelming” nature of proof against SmartEnergy.⁶¹

39. With regard to SmartEnergy’s sales calls and the sales script used by SmartEnergy’s agents, Staff contends that while SmartEnergy customers were not always aware of all of their rights or the consumer protections available to them, “many [SmartEnergy customers] filed complaints with CAD when they became aware that the sales representations made to them by SmartEnergy were false or did not result in the savings or ‘free electricity’ which SmartEnergy and its agents led them to believe they would receive.”⁶² Staff notes that SmartEnergy did not appeal the PULJ’s findings that its sales recordings demonstrate numerous misrepresentations and consumer protection violations.⁶³ Staff adds that SmartEnergy “tellingly” edited the objectionable sales portions of the calls from its recordings and provided CAD only with a portion of the call.⁶⁴ Staff argues further that SmartEnergy’s deceptive postcard, misleading sales script, and the “off-script” representations by its sales agents worked together to deceive SmartEnergy’s customers.⁶⁵

40. Staff notes that by listening to the audio recordings produced in this case, and comparing them to the sales script, the PULJ could conclude (and reasonably did) that

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 3.

⁶³ *Id.* at 4; noting that in a prior filing SmartEnergy admitted to violations in 18 cases where “its sales agents provided information that was false and/or inadequate, and that those enrollments were improper.” *Id.* at 4, n.8.

⁶⁴ *Id.* at 4.

⁶⁵ *Id.* at 5.

SmartEnergy preyed upon the “often elderly or disadvantaged,” customer—customers who were confused—and whose questions were not answered, and who expressed misconceptions or misgivings about the sales pitch they were hearing.⁶⁶ Staff argues that SmartEnergy’s appeal and exceptions seek to ignore “tens of thousands” of instances of Maryland law consumer protection violations, against 100 percent of its Maryland customers – violations that were established in the PULJ’s Ruling on Summary Judgment, and which were not appealed by SmartEnergy.⁶⁷ Staff also notes that while providing legal argument on its assertion of “selection bias,” SmartEnergy did not sponsor a witness to place evidence in the record on the issue.⁶⁸ Thus, Staff contends that it was correct for the PULJ to disregard SmartEnergy's argument.

41. Alternatively, Staff argues that the “pattern and practice” finding, which SmartEnergy argues is flawed due to selection bias, is simply a common sense standard that the PULJ could conclude based on her observation that SmartEnergy committed tens of thousands of violations of the State’s consumer protection laws in its transaction with electricity supply consumers in Maryland.⁶⁹

42. Staff argues that the \$300,000 civil penalty suggested by SmartEnergy is inadequate given the magnitude of the PULJ’s findings against SmartEnergy in this case.⁷⁰ Staff submits instead that customer remedies and penalties akin to those directed and imposed in the *Smart One Energy* and *SunSea* cases are more in line with what

⁶⁶ *Id.* at 6. *See e.g.*, Staff Ex. 1B-C (audio files associated with Complaints 1018341028-L and 319343303-W).

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 11-12.

⁶⁹ *Id.* at 12.

⁷⁰ *Id.*

should be adopted by the Commission in this case.⁷¹ Staff argues that regardless whether the record distinguished between SmartEnergy’s gross and net revenues, “SmartEnergy’s \$12.1 million in revenue represents money flowing out of Maryland as a result of SmartEnergy’s deceptive and illegal practices.”⁷² Thus, Staff argues, SmartEnergy should not be allowed to retain its supplier license in Maryland and should be assessed a civil penalty of \$500,000 or greater.⁷³

43. Finally, Staff reiterates its argument that the MTSA applies to the inbound calls from customers to SmartEnergy in response to SmartEnergy’s postcard mailings.⁷⁴ Staff relies on the CPD’s interpretation and enforcement of the MTSA, and argues that upholding the PULJ’s finding that these calls are not Telephone Solicitations pursuant to the MTSA would undercut the CPD’s consumer protection enforcement efforts.

D. CPD Memorandum in Support of Staff and OPC Appeal

44. In support of Staff and OPC, the CPD argues that the PULJ’s holding in this case, with regard to the MTSA, irreconcilably conflicts with the plain meaning of the statute. The CPD argues that the MTSA’s definition of Telephone Solicitations includes sales in which the consumer calls the merchant, and that the PULJ’s holding improperly makes MTSA, Com. Law § 14-2202(g) nugatory.⁷⁵

45. The CPD argues: (1) that where the relevant sales transactions “began” with SmartEnergy sending false and misleading mailers to consumers that tricked them into calling SmartEnergy, rather than with SmartEnergy calling the consumers first, the result

⁷¹ *Id.* at 13.

⁷² *Id.* at 14.

⁷³ *Cf.* Staff Reply Memorandum at 14.

⁷⁴ Staff Reply Memorandum at 14-15,

⁷⁵ CPD *Amicus* Brief at 2.

of the PULJ's holding is to absolve SmartEnergy from having had to comply with the requirements of the MTSA and Consumer Protection Act ("CPA") because of SmartEnergy's own deceptive conduct; (2) that holding vendors liable for in-bound calls is consistent with the CPD's long-standing interpretation of the MTSA and its enforcement practices, and creates a baseless loophole in the statute's coverage that allows any number of deceptive telemarketing scams to escape liability under the MTSA; and (3) that the PULJ's holding must be reversed as a matter of law because it irreconcilably conflicts with the MTSA's plain meaning, and improperly renders certain of its provisions "superfluous or nugatory." (citing *City of Baltimore Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 318 (2006)).⁷⁶

46. Additionally, the CPD argues that the General Assembly directed that the CPA "shall be construed and applied liberally to promote its purpose," and further argues that MTSA, Com. Law § 14-2205, holds that a violation of the MTSA is an "unfair or deceptive trade practice" under the CPA. The result of the CPA and the MTSA each deeming a violation of the MTSA to be an "unfair trade practice" under the CPA is that the Attorney General's Consumer Protection Division is the agency primarily responsible for enforcing and administering the MTSA. Thus, according to the CPD, its interpretation of the MTSA "is entitled to considerable weight."⁷⁷

47. The CPD argues that, when the MTSA definition of Telephone Solicitations is harmonized with the exemption to the MTSA found in Com. Law § 14-2202(a)(5), there is no credible doubt that the MTSA covers transactions in which a consumer calls a

⁷⁶ *Id.* at 1-2.

⁷⁷ *Id.* at 4, citing *Consumer Publishing*, 304 Md. at 759.

merchant and purchases something over the phone, and, thus, that the PULJ's holding that the MTSA excludes everything but merchant calls to consumers is wrong. Noting that the MTSA covers consumers who purchase goods pursuant to the examination of marketing materials that fail to comply with the requirements of MTSA, Com. Law § 14-2202(a)(5), the CPD argues that SmartEnergy sent postcards to consumers that: (a) the Supplier had designed to falsely make them appear to have been sent from the consumers' distribution utility, Baltimore Gas and Electric ("BGE"); (b) that misleadingly promised a free month of electricity and other costs savings; and (c) that were otherwise devoid of the information necessary for them to qualify for the exception in MTSA, Com. Law § 14-2202(a)(5).⁷⁸

48. The CPD contends that SmartEnergy, in a classic bait-and-switch tactic, subjected unwitting consumers – who were tricked into calling the number that the Supplier provided on its postcards – to a pressurized and highly misleading sales pitch aimed at convincing customers to switch their energy service from the utility to SmartEnergy.⁷⁹ The CPD argues that unless the PULJ's decision is reversed, it will create a large "loophole" in the MTSA that unscrupulous companies and individuals will quickly take advantage of in order to evade compliance with MTSA consumer protections.

IV. DISCUSSION AND COMMISSION DECISIONS

A. Standard of Proof

49. In this case, the burden of proof is not in dispute; however, the parties dispute the

⁷⁸ *Id.* at 7.

⁷⁹ *Id.* at 8. The CDP notes that in many cases, SmartEnergy's services were more expensive than the utility's or the supplier's services from which they were being switched.

applicable standard of proof applied by the PULJ in finding multiple violations of the PUA and COMAR.

50. The PULJ found that SmartEnergy violated a number of COMAR provisions, including COMAR 20.53.07.08C(4)(b)(iii), 20.53.07.07B(1), 20.53.07.07A(2), 20.53.07.08C(4)(b)(i), (ii), (iii), and (v), and COMAR 20.53.08.04E, finding repeatedly a pattern or practice of systemic violations. Contrary to SmartEnergy and OPC’s assertions, however, the PULJ did not state that the “clear and convincing” standard of proof was the standard being applied in the case.

51. In this case, the PULJ – while not expressly stating the applicable standard of proof – found the existence of “clear and convincing” evidence of numerous consumer protection violations by SmartEnergy.⁸⁰ In doing so, she concluded *per se* that the lesser standard had been met and exceeded. As Staff notes, nowhere in the Proposed Order did the PULJ rule that the more stringent “clear and convincing” standard was applicable.

Commission Decision

52. Citing the Maryland Court of Appeals decision in *Coleman v. Anne Arundel County*,⁸¹ the Commission noted in its 2017 *Offshore Wind Order*⁸² that the standard of proof is—in most cases—the preponderance of the evidence standard. Moreover, in two

⁸⁰ Proposed Order at 30, 40, 45, 64 and 65.

⁸¹ *Coleman v. Anne Arundel County Police Dep’t.* (“*Coleman*”), 396 Md. 108 (2001). (“To prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.” (*Coleman* HN22)).

⁸² *In the Matter of the Applications of U.S. Wind, Inc. and Skipjack Offshore Energy, LLC for a Proposed Offshore Wind Project(S) Pursuant to the Maryland Offshore Wind Energy Act of 2013* (Order No. 88192) Case No. 9431, 2017 Md. Lexis 32 (2017) *Offshore Wind Order* at 38, n.93 citing *Coleman* (stating that the standard of review in contested cases in Maryland is a ‘preponderance of evidence.’)

prior supplier complaint cases, the *Major Energy* and *Blue Pilot Energy* cases,⁸³ the PULJ—in those cases— expressly applied the preponderance of evidence standard as the applicable evidentiary standard of proof for these cases. In each case, the PULJ noted that this is the standard of proof in administrative proceedings and found no basis for applying a higher standard of proof.⁸⁴ Thus, as a settled matter of Commission law, the evidentiary standard of proof in enforcement matters against a competitive retail supplier (investigating violations of Maryland law governing the conduct of the supplier) is the preponderance of the evidence standard.⁸⁵

53. While SmartEnergy insists that the more stringent standard—or an even higher standard (and other unspecified due process requirements)—should apply; no standard, other than the preponderance of evidence standard and the due process accorded in this proceeding applies. The proceedings in this case, before the PULJ and consideration of the matter on appeal and exceptions from the Proposed Order, satisfy the “notice and opportunity for a hearing” requirement of PUA § 7-507(1), where “fines, or revocation or suspension” of the Supplier’s retail supplier license has been proposed. Except as

⁸³ Case Nos. 9346(b) and 9346(c) -- *In the Matter of the Investigation Into the Marketing, Advertising, and Trade Practices of American Power Partners, LLC; Blue Pilot Energy, LLC; Major Energy Electric Services, LLC; and Major Energy Services, LLC and Xoom Energy Maryland, LLC*. The application of the preponderance of evidence standard of proof in the *Blue Pilot* Proposed Order was specifically upheld by the Commission in Order No. 87925, slip op. at 3 (Dec. 12, 2016).

⁸⁴ The suppliers in those cases also argued that the higher “clear and convincing” standard of proof should apply. (“To be clear and convincing, evidence should be “clear” in the sense that it is certain, plain to the understanding, and unambiguous and “convincing” in the sense that it is so reasonable and persuasive as to cause you to believe it.” (*Coleman* HN23)). The suppliers, however, did not appeal this issue and (with the exception of Major Energy’s appeal on the issue of whether the supplier was required to wait for OPC and Staff’s concurrence that its marketing materials were compliant prior to using the materials) the Proposed Orders were affirmed. (*See*, Commission Order Nos. 87418 and 87910.)

⁸⁵ This standard of proof is similarly well-settled in other Maryland administrative hearing venues, as noted in State Government § 10-217, which states: “[t]he standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution. The “clear and satisfactory” standard of proof applies to applications for approval considered by the Commission under PUA § 5-104, §§ 5-201 through 5-203, or §§ 6-101 through 6-103.

provided herein, the Commission finds that the Proposed Order is well supported by substantial evidence of record that meets and exceeds the preponderance of evidence standard of proof. OPC's request for clarification regarding the standard of proof is granted and SmartEnergy's request for a standard of proof more stringent than the preponderance of evidence standard is denied.

B. Maryland Telephone Solicitation Act

54. With regard to the MTSA, the PULJ found that "because the solicitations began with something other than a phone call to the consumer from SmartEnergy, the transactions do not constitute Telephone Solicitations within the purview of the MTSA."⁸⁶ The Proposed Order states further, "[t]herefore, the requirements of Com. Law § 14-2203(b) do not apply."⁸⁷ Nonetheless, the PULJ held that even if SmartEnergy was not required by the MTSA to obtain a signed contract prior to enrolling customers, the Supplier's enrollments were invalid because SmartEnergy did not follow the requirements of COMAR 20.53.07.08.⁸⁸

55. In invalidating SmartEnergy's enrollments, based on the Supplier's failure to comply with the Commission's COMAR telephone contracting requirements, the PULJ found that on several of the calls for which recordings were provided, SmartEnergy agents did not disclose all material contract terms and conditions to the customer over the telephone, in violation of COMAR 20.53.07.08C(4)(b)(v), concluding that SmartEnergy's violation of COMAR 20.53.07.08C(4)(b)(i) (requiring that suppliers comply with this

⁸⁶ Proposed Order at 33.

⁸⁷ *Id.*

⁸⁸ COMAR 20.53.07.08B(2) provides that if a contract is exempt from the MTSA, the supplier shall send the contract summary with the contract to the customer.

Regulation .08C(4)) operated to invalidate SmartEnergy's customer enrollments.⁸⁹

1. OPC, CPD and Staff Positions

56. OPC argues the Proposed Order errs in finding that the MTSA did not apply to SmartEnergy's contracting method, asserting that the plain language of the MTSA covers SmartEnergy's transactions by telephone and that there are no exemptions available under the MSTTA that allow SmartEnergy to avoid the signed contract requirement of Com. Law § 14-2203(b).⁹⁰ Additionally, OPC argues that SmartEnergy's postcards fail to meet the MTSA exception or exemption requirements because they contained insufficient information and because the SmartEnergy postcard sent to Maryland customers does not establish a pre-existing business relationship.⁹¹

57. The CPD argues that the PULJ's holding irreconcilably conflicts with the plain meaning of the MTSA, and that the PULJ's decision is contrary to the CPD's established interpretation of the MTSA and conflicts with the statute's purpose of providing broad consumer protections.

58. Staff argues that the Proposed Order ignores recent Commission precedent and denies Maryland consumers an important protection against Telephone Solicitations scams. Staff notes that if looked at as a single, entire transaction, SmartEnergy is clearly engaged in Telephone Solicitations.⁹²

⁸⁹ Proposed Order at 41-42. COMAR 20.53.07.08C(4)(b)(ii) requires that suppliers confirm that customer questions relating to the contract are answered, COMAR 20.53.07.08C(4)(b)(iii) requires that suppliers confirm that an independent third party verifies the contract or records the entire telephone conversation and maintains the recording for the duration of the contract, and COMAR 20.53.07.08C(4)(b)(v) requires that suppliers disclose all material contract terms and conditions to the customer over the telephone. COMAR 20.53.07.08C(4)(b)(i) requires that suppliers comply with the entirety of Regulation .08C(4).

⁹⁰ OPC Memorandum on Appeal and Exceptions at 6-8.

⁹¹ *Id.* at 8-13.

⁹² Staff Memorandum on Appeal and Exceptions at 3.

59. Staff submits that SmartEnergy initiates the contact which leads to the telephone call by sending the consumer a postcard enticing them to call SmartEnergy in order to receive a “month of free electricity.” A solicitation is then conducted by SmartEnergy’s sales agent on the telephone call. According to Staff, under this scenario, SmartEnergy clearly is the party soliciting the consumer, not the other way around.

2. SmartEnergy Position

60. SmartEnergy argues that Staff and OPC advance a novel legal interpretation of the MTSA in an attempt to overturn what the Supplier argues is the PULJ’s correct finding that SmartEnergy’s enrollments did not require a signed contract.⁹³ Arguing that Staff, OPC, and the CPD’s interpretation of the MTSA ignores the plain language of the statute, SmartEnergy submits that this interpretation would mean that the MTSA would have to be read to state something other than what it says.⁹⁴ Instead, SmartEnergy argues that the plain and obvious example of an attempt to sell that is initiated by a customer, not a merchant, is when a customer calls a merchant to inquire about a product or service and makes a purchase, arguing that either: (1) the attempt to sell includes the postcard, in which case the solicitation is not “made entirely by telephone;” or (2) the attempt to sell includes only the telephone call, which in this case was “initiated” by the customer and not SmartEnergy.⁹⁵

61. SmartEnergy argues further that even if the Commission was to find that its telephone contracts resulted from “Telephone Solicitations,” two MTSA exemptions apply: (1) the consumer’s purchase of electricity supply services “pursuant to

⁹³ SmartEnergy Reply Memorandum at 3.

⁹⁴ *Id.* at 6.

⁹⁵ *Id.* at 8.

examination of a ... print advertisement ... of [SmartEnergy] that contains” the required information regarding the merchant, the goods or services being sold, and any limitations that apply to the offer; and (2) a preexisting business relationship between SmartEnergy and the consumer, rendering the MTSA’s contract requirements inapplicable.⁹⁶

Commission Decision

1. Applicability of the MTSA to Inbound Sales Calls

62. In its Answer to Staff’s Complaint, SmartEnergy stated that its primary method of marketing to Maryland residential customers was by direct mail to customers. It stated that customers could respond to these mailings by calling SmartEnergy’s toll-free number on the postcard sent by the Supplier to discuss SmartEnergy’s offer and to enroll.⁹⁷ Additionally, in its Reply Testimony, SmartEnergy witness Daniel Kern stated that “[b]y sending a postcard and fielding an inbound call from the customer (or, in some cases, the customer leaves a voicemail and SmartEnergy returns the customer’s call), SmartEnergy has established a preexisting business relationship with the customer.”⁹⁸ In this case, SmartEnergy’s customer enrollments were based on inbound calls to the Supplier from prospective customers in response to SmartEnergy’s direct mailings.

2. “Telephone Solicitation” Defined

63. 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)

⁹⁶ *Id.* at 10.

⁹⁷ SmartEnergy’s Answer, Maillog No. 225795 at 2.

⁹⁸ SmartEnergy Ex. 2, Reply Testimony of Daniel Kern at 18.

Made entirely by telephone; and (2) Initiated by the merchant.”⁹⁹ The CPD submits that this definition includes “sales in which the consumer calls the merchant.”¹⁰⁰

64. MTSA, Com. Law § 14-2202(a), exempts certain transactions, including transactions “[i]n which the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, catalogue, or other mailing material of the merchant that contains: (i) the name, address, and telephone number of the merchant; (ii) a description of the goods or services being sold; and (iii) any limitations or restrictions that apply to the offer.”¹⁰¹

65. In the *Blue Pilot Energy* case, the PULJ found that the supplier—whose principle method of marketing was “outbound” Telephone Solicitations—violated the MTSA in the contracting process by not conforming to the requirements of the Com. Law § 14-2203 to form a “valid contract,” holding therefore that unless the supplier’s transaction met one of the “exemptions,” the supplier’s failure to comply with the contractual requirements of the MTSA is “deemed a ‘false and deceptive sales practice.’”¹⁰²

66. Here, by finding that the MTSA did not apply to “in-bound” calls in response to the Supplier’s postcard, the PULJ determined that the MTSA did not govern the contractual requirements applicable to the Supplier under the Commission’s regulations. Under the Proposed Order, contract summaries were required to be sent to the customers, but signed contracts—with wet signatures returned by the customers—were not required. However, the Commission has never ruled that the MTSA applies only to “out-bound”

⁹⁹ MTSA, Com. Law § 14-2202(f)(1)-(2).

¹⁰⁰ CDP *Amicus* Brief at 4.

¹⁰¹ MTSA, Com. Law § 14-2202(a)(5).

¹⁰² *Blue Pilot Energy*, Proposed Order at 70-72, *aff’d*, Order No. 87925 (Dec. 12, 2016).

calls. In this case, where the in-bound calls to SmartEnergy were initiated by the 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 Commission finds that the MTSA does apply to SmartEnergy's solicitation practices.

67. The clear intent of the MTSA, as the CPD notes, is "to protect consumers who are subject to deceptive telemarketing tactics from being stuck with products or services that they ultimately do not want, or pursuant to terms that they did not understand or agree to."¹⁰³ SmartEnergy's primary argument is that the MTSA somehow differentiates between inbound and outbound calls. However, the plain language of the MTSA does not express such a distinction. Rather, 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."¹⁰⁴ The inbound/outbound distinction conflates the "initiation" of the telephone call and the initiation of the attempt by the merchant to sell or lease consumer goods.¹⁰⁵ In this instance, it is clear that SmartEnergy initiated the attempt to sell its retail supply product to customers by sending the postcard to the customer. In addition, it is clear that the sales process selected by SmartEnergy was consummated entirely over the telephone without the customer receiving the core benefit of the MTSA - the ability to review and reject the contract without interference by a telephone sales agent. The MTSA also clearly contemplates inbound telephone calls within its scope. In fact,

¹⁰³ CPD *Amicus* Brief at 9-10.

¹⁰⁴ MTSA, Com. Law § 14-2202(f)(1)-(2).

¹⁰⁵ *Cf.* CPD *Amicus* Brief at 6.

MTSA, Com. Law § 14-2202(b) (relating to credit services), mentions an offer where “the customer is required to call a telephone number.” Thus it is clear that, as the CPD argues,¹⁰⁶ calls made by both the seller and the consumer are within the scope of the statute.¹⁰⁷

68. In addition to the clear inclusion of inbound calls in other sections of the statute, adopting the inbound/outbound distinction would render certain sections of the statute meaningless, contradictory and unenforceable. A cardinal rule of statutory interpretation is that no section of the statute should be read such that it renders another section without effect. First, the exception under MTSA, Com. Law § 14-2202(a)(5) would be rendered meaningless if written materials put into the marketplace by a seller rendered all subsequent sales outside the scope of the MTSA. If the provision of marketing materials via print media, television or mail is not initiating an attempt to sell or somehow negates the fact that a sale is consummated entirely by telephone then this exception would not be necessary. Effectively, if providing marketing materials removes sales from the scope of the MTSA, because the sale was therefore not “initiated” by an outbound telephone call, then there is no need for this exception - all such sales would already be outside of the statute. Finally, as the CPD noted, it would be nonsensical for a postcard which manifestly fails to qualify for an exemption to the statute to make the statute inapplicable.¹⁰⁸

69. In this case, SmartEnergy initiated the attempt to sell an energy supply product to Maryland consumers by sending postcards offering a month of free electricity. This

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *See*, CPD *Amicus* Brief at 8.

postcard provided minimal information about the offer and did not include essential information such as price, renewal terms, or other items outlined in COMAR 20.53.07.08. The postcard also failed to provide any of the limitations and restrictions on the free month of electricity, such as the length of service required to qualify or how the “free month” would be calculated and provided. When customers called in response to this postcard they were subject to a sales pitch and entered into a contract for consumer goods. The Commission agrees with Staff, OPC, and the CPD that SmartEnergy’s sales process is within the definition of a telephone solicitation and that this type of sales process is precisely what the legislature intended to encompass within the legislation.

3. False and Misleading Advertising Used to Solicit Customer Calls

70. In this case, SmartEnergy sent over six million postcards to prospective Maryland customers, *soliciting* a call back from these customers by offering a “free month of electricity,” and a six-month guaranteed rate protection plan.¹⁰⁹ “Free Month of Electricity” was prominent on these postcards, along with “Important Notice,” “Eligibility Code,” a “Redeem Before Date,” and often “Time Sensitive” and/or “Act Now.”¹¹⁰ Over 100,000 prospective customers called SmartEnergy in response to these postcards, during which SmartEnergy’s “attempt to sell ... [its] services to a consumer located in this state” was “Made entirely by the telephone”, and was “Initiated by the merchant.”

71. In finding that SmartEnergy’s sales attempts were made entirely by telephone, the Commission notes that – only *during* the telephone calls did SmartEnergy sales agents

¹⁰⁹ SmartEnergy Ex. 2, Reply Testimony of Daniel Kern at 48.

¹¹⁰ The audio recordings for many of the calls made by consumers indicate that they were placed prior to major holidays (Independence Day, Thanksgiving and New Year’s).

(1) explain the terms and conditions of the service, (2) state the rate that would be charged during the six-month guaranteed rate protection plan, (3) explain the requirement that customers must remain on the Supplier's fixed rate plan for the full six months before being eligible for one free month of electricity, (4) explain the method required for claiming the refund check for the free month of electricity, and (5) note the customer's right to cancel the service and return to their utility supplier.

72. In finding that the sales attempt was initiated by the merchant, the Commission notes that SmartEnergy solicited the customers' calls using a postcard deceptively (1) using the phrase "as a [utility] customer ... you are **eligible to receive one free month of electricity**," (2) implying that the offer was being made by the customer's current utility, greeting customers with offering "free" electricity with phrases such as "yes, I see that as a [utility] customer, you are eligible to receive one free month of electricity," reinforcing the implication that the customer is dealing with his or her current utility, (3) assisting and often times coaching customers through customer service calls with the customer's utility to obtain the customer choice identification number needed by the Supplier in order to enroll the customer with SmartEnergy,¹¹¹ and (4) suggesting electricity rates in an upcoming season will likely fluctuate, adding that what SmartEnergy is offering will give the customer "**peace of mind.**"¹¹²

4. Deference to CPD's Interpretation of the MTSA

73. Just as the Commission is charged with interpreting the Public Utilities Article, the CPD is the agency primarily charged with interpreting and enforcing Maryland's

¹¹¹ See, e.g., Staff Ex. 1B-C -- audio file associated with Complaint 319343370-L. (Emphasis added.)

¹¹² See, e.g., Staff Ex. 1B-C -- audio file associated with Complaint 918340575-W, where customer responded to SmartEnergy's sales agent -- stating, "Is this a joke ... why did they pick me?" (Emphasis added.)

consumer protection laws, including the MTSA.¹¹³ The consistent construction of a statute by the agency responsible for administering it is entitled to considerable weight.¹¹⁴ Additionally, PUA § 7-507(q) provides 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.” Therefore, the Commission gives deference to the CPD’s interpretation that in this case SmartEnergy’s Telephone Solicitations is covered by the MTSA and that SmartEnergy violated Com. Law § 14-2205.

74. As the CPD notes, the Consumer Protection Act—which includes the MTSA—must be construed and applied liberally to promote its purpose. The MTSA (Com. Law § 14-2205) holds that a violation of the MTSA constitutes an “unfair or deceptive trade practice” under the Consumer Protection Act, and—the CPD argues—when the MTSA’s definition of Telephone Solicitations is harmonized with the exemption to the MTSA found in § 14-2205(a)(5), “there is no credible doubt that the MTSA covers transactions in which a consumer calls a merchant and purchases something over the phone.”¹¹⁵

75. Here, SmartEnergy’s postcards were not directed to customers with whom the Supplier had a pre-existing relationship, and its enrollments were not made under circumstances in which the customers had the opportunity to examine SmartEnergy’s

¹¹³ See, *Md. Office of People’s Counsel v. Md. PSC*, 226 Md. App. 483 (2014) (“When the Maryland Public Service Commission has clearly demonstrated that it has focused its attention on the statutory provisions in question, thoroughly addressed the relevant issues, and reached its interpretation through a sound reasoning process, its interpretation should be accorded the persuasiveness due a well-considered opinion of an expert body.”)

¹¹⁴ *Consumer Protection Div. Office of Attorney Gen. v. Consumer Pub. Co.*, 304 Md. 731 (1985).

¹¹⁵ CPD *Amicus* Brief at 4. (MTSA, Com. Law § 14-2202(a)5 relates to offers in which the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, catalogue, or other mailing material.)

services beforehand. As to the latter, it was only during the Telephone Solicitation and sale “made entirely by telephone” that customers were apprised of: the terms and conditions of the service; the rate applicable to the 6-month guaranteed price protection plan; the requirement needed to obtain one free month of service; and the customer’s right to cancel. Under these circumstances, the exemptions under MTSA, Com. Law §§ 14-2202(a)(2)(ii) and 14-2202(a)(5), do not apply.

76. SmartEnergy’s argument that a pre-existing business relationship (Com. Law § 14-2202(a)(2)(ii)) exemption was established between SmartEnergy and the customers in advance of the telephone contract is equally unavailing. Its assertion that customers had the opportunity to research SmartEnergy and then voluntarily call SmartEnergy, which it argues is distinct from a scenario where a supplier cold calls a customer that might have received some marketing collateral or visited the Supplier’s website in the past, contradicts the Supplier’s assertion that a pre-existing business relationship was established by virtue of both the mailing of the postcard advertisement (a marketing communication to the customer) and the customer calling SmartEnergy after reviewing the postcard to learn more about SmartEnergy’s offer and possible enrollment.

77. While the CPD explains that the MTSA’s definition of Telephone Solicitation includes sales in which the customer calls the merchant,¹¹⁶ the CPD interprets the plain language of this definition as including any situation in which “the merchant is the instigator of an effort to sell consumer goods, [or] services ... over the telephone, regardless of which party ultimately places the phone call.”¹¹⁷ The Commission reads

¹¹⁶ CPD *Amicus* Brief at 4.

¹¹⁷ *Id.* at 4-5.

the CPD's interpretation as applicable not necessarily to all in-bound sales calls by customers to competitive retail suppliers, but at a minimum to those "instigated" by the supplier, especially those instigated by deceptive, false and misleading advertising. Therefore, the Commission's reversal of the PULJ's finding is on the fact-specific basis of this case.

78. Here, the Commission finds that the customers to whom SmartEnergy mailed postcards were not pre-existing SmartEnergy customers, which may have made the Supplier's Telephone Solicitations exempt under MTSA, Com. Law § 14-2202(a)(2)(ii). Additionally, the postcards sent by SmartEnergy were so misleading that it would have been difficult—if not impossible—for customers to research the Supplier before calling to inquire about the "free month of electricity" they were being offered "as an "eligible" "[utility]" customer," which the Supplier asserts is a form of telephone solicitation that is exempt under MTSA, Com. Law § 14-2202(a)(5). The description "SmartEnergy for [utility] Customers," along with a 1-800 number to SmartEnergy would hardly lead to research beyond dialing the 1-800 number to SmartEnergy, where the telephone solicitation in this case occurred. Moreover, SmartEnergy failed to conspicuously include its supplier license number on its postcards (as is required by COMAR 20.53.07.07B(1)), which if this information had been included may have enabled customers to conduct the research that SmartEnergy argues they had the opportunity to conduct.

79. SmartEnergy's failure to comply with COMAR.53.07.07B(1) will be addressed in further detail in subpart J, below.

80. For the foregoing reasons, the Commission finds that SmartEnergy’s telephone solicitations in this case are governed by the MTSA, and that the exemptions for purchasing goods or services pursuant to an examination of a print, advertisement, brochure or other mailing material, or the pre-existing business relationship do not apply. Therefore, the PULJ’s finding that “because the solicitations began with something other than a phone call to the customer from SmartEnergy, the transactions do not constitute Telephone Solicitations within the purview of the MTSA,”¹¹⁸ under the facts of this case is reversed.

C. Written Contract/Contract Summaries

81. 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.

82. 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.”

83. OPC takes exception to the absence of a finding in the Proposed Order that SmartEnergy violated COMAR 20.53.07.08A(2) by failing to obtain customers’ signatures on returned copies of the contracts.¹¹⁹ OPC notes that in the *Starion* case,¹²⁰

¹¹⁸ Proposed Order at 33.

¹¹⁹ OPC Memorandum on Appeal and Exceptions at 1, noting Proposed Order at 29.

the Commission stated that in order to meet the MTSA exemption, all Commission-required terms and conditions, as well as information related to the supplier's proposed contract, must be mailed to a prospective customer prior to telephone sales calls.

84. In reversing the Proposed Order regarding the applicability of the MTSA, the Commission preserves the PULJ's finding that SmartEnergy failed to provide contract summaries to 100% of its customers, the Commission—however—finds further; *i.e.*, that SmartEnergy violated the contracting requirements of the MTSA by failing to send contracts – inclusive of all material terms and conditions – to customers, obtaining the customer's wet signature, and having a signed contract returned to the supplier. OPC's exception that the PULJ failed to find SmartEnergy in violation of COMAR 20.53.07.08A(2) is granted.

85. Pursuant to MTSA, Com. Law § 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, Com. Law § 14-2203(b). Having failed to comply with these requirements, the Commission hereby finds SmartEnergy's contracts with all of its Maryland customers invalid. Subject to the additional findings below, SmartEnergy is directed to refund all of its Maryland retail supply customers the difference between the rates charged by SmartEnergy and the applicable utility's SOS rate.

86. While SmartEnergy notes that it admitted the contract summary violation when it met with Staff in June 2019,¹²¹ adding that once notified that it had not sent contract summaries to customers enrolled pursuant to its telephone sales efforts and it took

¹²⁰ *In the Matter of the Investigation Into the Marketing Practices of Starion Energy PA, Inc.*, Case No. 9324, Order No. 86211 (Mar. 7, 2014).

¹²¹ SmartEnergy Appeal Memorandum and Exceptions at 21.

measures to send these to its current and former customers,¹²² this admission does not supplant the Commission’s finding that SmartEnergy’s contracts—as a whole—are invalid based on SmartEnergy’s failure to comply with the contracting requirements applicable to Telephone Solicitations governed by the MTSA.

D. Enrollment of Non-Account Holders

87. The Proposed Order found that SmartEnergy enrolled customers based on transactions with persons who were not the account holder in violation of COMAR 20.53.07.08C(1) and COMAR 20.53.07.05A.¹²³ SmartEnergy admits two instances in which this occurred, but objects to the PULJ’s suggestion that the content of the Supplier’s call script reflects “a tendency” to enroll persons other than the customer.¹²⁴ OPC and Staff do not specify the number of customers that were enrolled by SmartEnergy who were not the utility account holder.

Commission Decision

88. In reviewing the record, the Commission found no more than two direct instances in which non-account holders were enrolled by SmartEnergy, and in reviewing the audio recordings provided by SmartEnergy, and the Commission notes that the Supplier was fastidious in confirming that callers were either themselves, the account holder, or had the authority to make decisions on the customer’s account. Although confirming the caller’s authorization to make decisions on the account was not among the “confirmation” questions to which callers were asked to provide a clear “yes or no,” the Commission does not find that the Supplier’s call script reflects a tendency to enroll

¹²² *Id.* at 18.

¹²³ Proposed Order at 43.

¹²⁴ SmartEnergy Reply Memorandum at 26.

persons other than the customer. However, the violation of COMAR 20.53.07.08C(1) and COMAR 20.53.07.05A found by the PULJ for the two instances for which SmartEnergy admits enrolling persons other than the customer is affirmed.

E. SmartEnergy Sales Script

89. SmartEnergy appeals or takes exception to what it describes as 10 errors in the Proposed Order with regard to its sales script. For purposes of this discussion, these are collapsed to seven.

1. Recording Disclosure

90. *First*, noting that SmartEnergy’s written sales script (1) instructed agents to say that the call may be recorded for training purposes, when in fact these calls were recorded for the purpose of verifying the contract pursuant to COMAR 20.53.07.08C(4)(iii), and by (2) instructing agents to tell customers that they were eligible to receive one month of free electricity on their bill by using Smart Energy, where BGE has a Commission-approved “Smart Energy Rewards®” program, the PULJ found that the script had the “capacity, tendency, or effect of deceiving or misleading customers, whether or not any consumer in fact was misled, deceived, or damaged as a result of the agent following the script.”¹²⁵

91. As to the latter, SmartEnergy argues that this finding is arbitrary and capricious, and is based solely on OPC and Staff’s “unfounded” presentation of the evidence.¹²⁶ SmartEnergy also argues that the PULJ’s finding ignores that customers are calling

¹²⁵ Proposed Order at 51.

¹²⁶ SmartEnergy Appeal Memorandum and Exceptions at 25.

SmartEnergy because they received a postcard disclosing, among other things, that SmartEnergy is not affiliated with the utility.¹²⁷

Commission Decision

92. There is substantial evidence in the record to support the PULJ's finding that the portion of SmartEnergy's sales script pertaining to recording the call had the "capacity, tendency, or effect of deceiving or misleading customers," whether or not any customer was in fact misled, deceived, or damaged as a result of the agent following the script. In many cases, the sales agent began the call with a phrase such as "this call is being recorded for quality and training purposes," when in fact the calls were being recorded by the Supplier as a means of verifying the contract that SmartEnergy was seeking to confirm through its two-question confirmation questionnaire. Often the Supplier's sales agent began the call as noted, but would later restate other phrases such as "now I'm going to place this call on a recorded line" or "do I have permission to record this call for quality and training purposes," immediately before asking the contract confirmation questions.¹²⁸

93. The Commission finds that this portion of the written sales script had the capacity or tendency to mislead customers into believing that the purpose of the recording was solely for quality and training purposes, rather than for purposes of verifying the caller's "yes or no" response to the Supplier's two-question confirmation questionnaire. The PULJ's finding is affirmed.

¹²⁷ *Id.* at 27.

¹²⁸ There was no discernable "electronic" transition from the sales script to the recording.

94. With regard to the PULJ's finding that SmartEnergy's sales script instructing agents to tell customers that they were eligible to receive one month of free electricity on their bill by using SmartEnergy had the capacity, tendency, or effect of deceiving or misleading customers – whether or not any consumer in fact was misled, deceived or damaged – there is substantial evidence in the record to support this finding. While SmartEnergy's postcards note that the Supplier is not affiliated with the utility, during its sales calls SmartEnergy's agents did not reiterate the Supplier's non-affiliation with "the" utility. Even when customers expressed confusion, SmartEnergy's sales agents only responded with a phrase such as "you must remain with the utility" in order to guarantee the price protection plan.¹²⁹

95. As to SmartEnergy's suggestion that it predated BGE's Smart Energy Rewards® Program, noting that SmartEnergy was formed in 2012 before BGE's Smart Energy Rewards® Program existed, this is false. The Commission first approved BGE's Peak Rewards and Smart Energy Savings Programs as pilot programs in August 2008, and later reapproved these programs as part of BGE's implementation efforts in response to the EmPOWER Maryland Act.¹³⁰ In many of the audio recordings produced in this case, customers were repeatedly confused by SmartEnergy's price protection plan (fixed rate) offer, many asking whether they were being asked to switch from their utility. In response, while the Supplier assured customers that they must in fact remain with their current utility in order to participate in SmartEnergy's price protection plan, the Supplier dodged the question of whether the customer was being asked to switch to a competitive

¹²⁹ See, e.g., Staff Ex. 1B-C (audio file associated with Complaint 218336540-W).

¹³⁰ *In the Matter of Baltimore Gas and Electric Company's Energy Efficiency, Conservation and Demand Response Programs Pursuant to the EmPOWER Maryland Energy Efficiency Act of 2008*, Case No. 9154 - Order No. 82384 (Dec. 31, 2008).

electricity supplier.¹³¹ As supported by the record in this case, the PULJ's finding is affirmed.

2. Disclosure of Restriction on Free Month of Electricity

96. *Second*, noting that SmartEnergy did not always disclose (in the calls for which recordings were provided) the restriction that the free month was based on the consumer's seventh month of SmartEnergy's retail supply in the telephone transaction, the PULJ found that this was a material condition and that therefore SmartEnergy engaged in a pattern or practice of systemic violations of COMAR 20.53.07.08C(4)(b)(v) which requires the disclosure of all material terms during a telephone solicitation.¹³²

97. SmartEnergy argues that there is no evidence in the record that this occurred outside the CAD complaints that were under review in this proceeding, and states that the disclosure was included in the postcards that SmartEnergy mailed to customers.¹³³

Commission Decision

98. Having found SmartEnergy's postcard to be deceptive and misleading for purposes of soliciting sales calls and that the MTSA applies to the Supplier's Telephone Solicitations, COMAR 20.53.07.08C(4)(b)(v) is inapplicable to SmartEnergy's disclosure of material contract terms and conditions over the telephone. Nonetheless, the record supports the PULJ's finding that the Supplier did not always disclose in its sales calls the restriction that the free month of electricity offered by SmartEnergy was based on the customer's seventh month of SmartEnergy's retail supply, which supports the finding that

¹³¹ In one case, while leading the customer to believe that the Supplier's offer was being made by the customer's utility, in response to the customer's inquiry regarding how long he would have to stay on the price protection plan to get the free month refund, the Supplier's sales agent *mistakenly* replied "two-six weeks" rather than six months. (Staff Ex. 1B-C audio file associated with Complaint 219343107).

¹³² Proposed Order at 41.

¹³³ SmartEnergy Appeal Memorandum and Exceptions at 26.

SmartEnergy engaged in a pattern and practice of false and misleading conduct. In the audio recordings produced in this case, there are numerous instances in which – after the initial reference to “one month of free electricity” -- there is no mention at all as to the seven-months of service requirement. In some cases, only after repeated questioning by the caller does the SmartEnergy sales agent explain that after being a SmartEnergy customer for six months, in order to receive the free month of service, the customer must mail a copy of his or her utility bills (for the three month period after the sixth month of service)—along with a “free month of electricity” redemption coupon in order to qualify. Then, the caller is told that the “free month of electricity” is provided in the form of a check, not a refund on the customer’s utility bill.

99. The audio recordings produced in this case are indicative of a pattern and practice by SmartEnergy’s sales agents engaging in false and misleading behavior by neglecting to fully explain the restriction applicable to customer’s eligibility for the Supplier’s offer of a free month of electricity. As to whether this conduct established a violation of COMAR 20.53.07.08C(4)(v), the PULJ’s finding is reversed. However, the Commission finds that SmartEnergy’s conduct violated Com. Law §§ 13-301(1)(3) and 13-303, prohibiting false and misleading practices which have the capacity, tendency, or effect of deceiving or misleading consumers.

3. Variable Rate Disclosure

100. *Third*, noting that the script had SmartEnergy agents tell consumers that they would also get six months of price protection had the tendency to mislead customers into thinking their price would not increase from their current rate. SmartEnergy promised that the price customers were paying for the electricity would be protected. The PULJ

found that these statements in SmartEnergy’s script had the capacity or tendency to mislead or deceive customers into thinking that the price that would not increase was the rate they were currently paying for electricity. The PULJ also found that a statement in the script that implied that the customer’s current rate would go up during high usage periods like winter and summer was false and deceptive with respect to actual trends in the SOS rate.¹³⁴

101. SmartEnergy argues that the script reveals its price in two places; in one, the script states “We can get you started with a price protection rate of [price per kWh] for 6 months and then you are eligible to receive the next month of electricity for FREE.”¹³⁵ SmartEnergy adds that a supplier is not required to advise a customer of the utility’s SOS rate during a marketing call. With regard to the PULJ’s finding that the script contained a false and deceptive statement regarding utility SOS high usage rates during winter and summer periods, SmartEnergy states that the script says: “You will also get 6 months of price protection so that means the price you pay for the electricity will be protected and is not going to increase. This can give you peace of mind, especially during the high usage period like the winter/summertime, knowing that your rate won’t go up.”¹³⁶

Commission Decision

102. SmartEnergy’s postcard, which emphasized a “free month of electricity,” included the Supplier’s reference to a “6-month guaranteed rate protection” plan. As noted above, the Commission finds that the postcards mailed by SmartEnergy to solicit customer calls were deceptive and misleading. While during the SmartEnergy sales calls,

¹³⁴ Proposed Order at 55.

¹³⁵ SmartEnergy Appeal Memorandum and Exceptions at 28.

¹³⁶ *Id.* at 28.

the Supplier's agents disclosed the fixed rate that customer would pay during the six-month guaranteed protection plan period, sales agents often characterized the future energy usage period as highly volatile—using such terminology as “crazy high”—to describe variable electricity rates during winter and summer months,¹³⁷ thus, projecting higher rates for customers who chose not to switch, while not disclosing that SmartEnergy's six-month guaranteed price protection plan fixed rate would result in an increase from what many customers were currently paying.

103. SmartEnergy is not obligated to advise a customer of the utility's SOS rate during a marketing call. However, the Supplier may not falsely portray its rates as a non-increase in rates from those charged by the customer's utility or current supplier. In addition, by characterizing seasonal changes in usage rates as “crazy high”¹³⁸ SmartEnergy does misrepresent the nature of the utility SOS offering. The PULJ's finding is affirmed.

4. Price Protection Compared to Current Rates

104. *Fourth*, noting that the script contained statements that all utility services would remain the same and that the only difference would be that the price customers paid for the electricity would be protected, because the script did not have disclosure of the rate customers would pay once they switched to SmartEnergy as their supplier *before* this point, the PULJ found the sales script had the capacity or tendency to mislead or deceive customers into thinking that the price that would not increase was the rate they were currently paying for electricity. The PULJ added that by having its agents say that they

¹³⁷ See e.g., Staff Ex. 1B-C (audio files associated with Complaints 419343692-L, 119342595-W, 918340575-W, 519344041-W).

¹³⁸ See, e.g., Staff Ex. 1B-C (audio file associated with Complaint 419343692-L).

wanted to make sure that the price protection was applied to the correct account, Smart Energy reinforced the deception that the price that would not increase was the rate the customers were currently paying for electricity.¹³⁹

105. SmartEnergy argues that the PULJ’s reading of the sales script statements here is out of context.¹⁴⁰

Commission Decision

106. SmartEnergy’s postcard, which the Commission finds deceptive and misleading, bears many *indicia* of an offer – purporting to be from the customer’s utility, beginning with “as a [utility] customer,” coupled with “free month of electricity on your [utility] bill.” When supplemented with SmartEnergy’s sales calls—which the Commission also finds deceptive and misleading—there is substantial evidence in the record in this case supporting the PULJ’s finding. As the PULJ notes, SmartEnergy reinforced the implication that it was the customer’s current rates that would be “protected,” and not increase, by having its agents say that they wanted to make sure that the price protection was applied to the correct account.

107. This implication, and deception, was further reinforced by SmartEnergy’s sales agents reiterating repeatedly that in order to secure the six-month guaranteed protection plan, the customer must remain a utility customer. Therefore, the PULJ’s finding is affirmed.

5. **Confirmation Based on Information not Discussed**

108. *Fifth*, the PULJ also noted that once SmartEnergy agents believed the customer had agreed to the promotion being offered, the agents proceeded to the confirmation

¹³⁹ Proposed Order at 56.

¹⁴⁰ SmartEnergy Appeal Memorandum and Exceptions at 29.

questions which included information pertaining to: (1) the fixed rate being offered by SmartEnergy and; (2) the customer's right to cancel -- two pieces of information that frequently were not previously discussed, therefore rendering the agents' statement false and misleading.

109. SmartEnergy states that the only "new" information in the first confirmation question of the script is that "at the end of six months, the price becomes a competitive market-based rate that may change from month-to-month."¹⁴¹ It states that the second confirmation question is largely telling the customer that they will receive a "Welcome Kit," a separate letter from the utility, and information about cancellation.¹⁴²

Commission Decision

110. The audio recordings produced in this case reveal instances in which SmartEnergy's sales agents proceeded to the contract confirmation questions without ever mentioning SmartEnergy's per-kWh rate prior to the "Do you understand? Yes or no?" confirmation question. As OPC witness Susan M. Baldwin's testimony suggests, the occasions in which the per-kWh rate was discussed before the "yes or no" confirmation question was asked were rare.¹⁴³ Therefore, the PULJ's finding is affirmed.

6. Focus of SmartEnergy Telephone Transactions

111. *Sixth*, noting that a review of SmartEnergy's audio recordings reflects that the initial focus of the telephone transactions was the promotional free month of electricity, and use of the phrase "as a [utility name] customer ... you are eligible to receive one free

¹⁴¹ SmartEnergy Appeal Memorandum and Exceptions at 30.

¹⁴² *Id.*

¹⁴³ *See also*, Staff Ex. 1B-C (audio file associated with Complaint 918340682-L), where SmartEnergy's sales agent enrolled the customer after resuming the call after the connection was lost but did not repeat the Supplier's confirmation questions before completing the enrollment.

month of electricity” by SmartEnergy agents in this context, especially when coupled with the promotional “price protection” pursuant to which agents told customers their rate would not change, the PULJ found that SmartEnergy’s sales script was deceptive, potentially misleading customers into believing that they were dealing with their utility company, not an electricity supplier.¹⁴⁴

112. SmartEnergy argues that its postcard already stated that SmartEnergy is not affiliated with the utility, and that therefore there is no evidence that any confusion occurred in *all* of the calls in which the sales script was used, or even the calls reviewed by Staff and OPC in this case.

Commission Decision

113. This is primarily a question of fact and the Commission gives deference to the PULJ as the initial factfinder who had the opportunity to examine, observe the witnesses under cross examination on the stand, and assess witnesses’ credibility. The Commission affirms the PULJ’s finding—as supported by substantial evidence—that SmartEnergy’s marketing tool, *i.e.*, the postcard, was deceptive and misleading.

7. Customer Questions

114. *Seventh*, noting that some callers had questions and/or were confused, and that SmartEnergy failed to confirm that customer questions relating to the contract were answered, the PULJ found SmartEnergy in violation of COMAR 20.53.07.08C(4)(b)(ii) – providing that when telephone contracts entered into between suppliers and customers

¹⁴⁴ Proposed Order at 46.

that are exempt from the MTSA, the supplier is required to confirm that customer questions relating to the contract are answered.¹⁴⁵

115. In response, SmartEnergy states that its script includes a statement: “If you have any further questions, please call our Customer Service Center at 1-800-443-4440.”¹⁴⁶ It argues that customers were free to ask whatever questions they wanted during the call, and that customers did.

Commission Decision

116. The audio recordings produced in this case reveal instances in which customer questions were not answered, or responses were given by SmartEnergy’s sales agents that deflected the customer’s questions. In some cases, SmartEnergy’s agents deflected the customer’s question by restating (and emphasizing) the six-month guaranteed price protection plan – when the upcoming seasonal usage would typically be “crazy high.” In other instances, rather than attempt to answer a customer’s questions, SmartEnergy’s sales agent simply emphasized calling the Customer Service Center with any questions.

117. Having found SmartEnergy’s postcard to be deceptive and misleading for purposes of soliciting sales calls and that the MTSA applies to the Supplier’s telephone solicitations, COMAR 20.53.7.08C(4)(b) is inapplicable. The PULJ’s finding with regard to COMAR 20.53.07.08C(4)(b)(ii) is therefore reversed. However, the PULJ’s discussion with regard to this issue supports the finding that SmartEnergy engaged in a pattern and practice of false and misleading conduct in violation of Com. Law §§ 13-

¹⁴⁵ Proposed Order at 50.

¹⁴⁶ SmartEnergy Appeal Memorandum and Exceptions at 31.

301(1)(3) and 13-303, prohibiting false and misleading practices which have the capacity, tendency, or effect of deceiving or misleading consumers.

E. Placement of Supplier License Number

118. The license number provided on SmartEnergy's postcards is placed on the last line at the bottom of the cards in font significantly smaller than that used for the "FREE MONTH OF ELECTRICITY." COMAR 20.53.07.07B(1) requires that the suppliers' Maryland license number on all marketing or solicitation materials in a "clear and conspicuous manner." Com. Law § 1-201(b)(10) defines "conspicuous" as whether it is noticeable using a reasonable person standard. The statute includes examples such as using capital letters in font sizes larger or the same size font as surrounding text or using contrasting type, colors or fonts to surrounding text of equal or lesser size, or using symbols or marks to draw attention from the surrounding text. The determination of whether text is "conspicuous" is a matter for the court to decide. In this case, the Supplier's license number is smaller than the text in the main portion of the solicitation. It is placed at the bottom of the postcards within the "fine print" and is less noticeable than the offer of "FREE ELECTRICITY" and SmartEnergy's toll-free 1-800 phone number.

Commission Decision

119. The Commission finds that SmartEnergy's supplier license number is not provided in a "conspicuous" manner as defined in Com. Law § 1-201(b)(10) and that SmartEnergy therefore violated the requirements of COMAR 20.53.07.07B(1).

F. Attempts to Thwart Customers' Attempts to Cancel

120. Citing a number of Staff and OPC exhibits containing audio files of consumer complaints, the PULJ found that SmartEnergy's agents thwarted customers' attempts to cancel their enrollments. The PULJ found that this was an unfair trade practice that was *particularly egregious* — because during the contracting process when potential customers expressed doubts about enrolling — agents had stressed the ability to cancel at any time.¹⁴⁷

121. SmartEnergy argues that the PULJ failed to weigh any evidence submitted by SmartEnergy in this regard, and unfairly adopted OPC's assessment.¹⁴⁸ SmartEnergy pointed to the testimony of witness Dehan Basnayake concerning how the company trains its agents to process cancellations and produced a comprehensive set of policies it utilized and continues to use to process cancellations.¹⁴⁹ According to the witness' testimony, all of SmartEnergy's "care agents" are authorized to process cancel/drop customer enrollment requests. When a customer calls to cancel—the witness states—the care agent will "politely" ask for a reason for the customer's request to cancel, and attempt to retain the customer by explaining, answering questions, or providing more information.¹⁵⁰ According to SmartEnergy's witness, if the customer still wants to cancel, the sales agent will initiate the enrollment cancellation. On the other hand, OPC witness Susan M. Baldwin described in detail a number of instances in which the training that SmartEnergy suggests wasn't actually utilized by its sales agent.

¹⁴⁷ Proposed Order at 63.

¹⁴⁸ SmartEnergy Appeal Memorandum and Exceptions at 32.

¹⁴⁹ SmartEnergy Memorandum at 32; Ex. 5, Reply Testimony of Dehan Basnayake at 6-11.

¹⁵⁰ SmartEnergy Ex. 5, Reply Testimony of Dehan Basnayake at 6.

Commission Decision

122. Without recounting the details and evidence presented in Ms. Baldwin's testimony, OPC's testimony supports the PULJ's finding that SmartEnergy's sales agents regularly thwarted customers' attempts to cancel the Supplier's service.¹⁵¹ Further, the Commission will give deference to the PULJ as the initial factfinder in how to weigh the value and veracity of competing evidence. The PULJ's finding is affirmed.

G. Training and Supervision

123. The PULJ noted recurring instances where SmartEnergy's agents failed to provide accurate and complete information to customers and failed to answer customers' questions. Based on this evidence, the PULJ found what she described as clear and convincing evidence that SmartEnergy failed to monitor the sales calls as required, and thus violated COMAR 20.53.08.04E.¹⁵²

124. SmartEnergy admits that while there may be problems with a subset of calls, there is no evidence of problems in all or even most instances. SmartEnergy argues that it is arbitrary for the PULJ to conclude that because some agents failed to provide accurate and complete information or failed to answer customers' questions, that all of SmartEnergy's agents failed to do so.¹⁵³ SmartEnergy submits that the record in this case includes hundreds of pages documenting SmartEnergy's training program and mandatory agent standards.¹⁵⁴

¹⁵¹ SmartEnergy also ignored statements from customers saying they did not want to switch from their utility. See e.g., Staff Ex. 1B-C (audio files associated with Complaints 819345035-W and 1218342494-W).

¹⁵² Proposed Order at 66.

¹⁵³ SmartEnergy Appeal Memorandum and Exceptions at 33.

¹⁵⁴ SmartEnergy Memorandum at 33.

Commission Decision

125. The record supports the PULJ's finding that the Supplier failed to monitor its agents' sales calls as required. Moreover, the audio recordings produced in this case demonstrate a variety of "off-script" messages by SmartEnergy's sales agents that were crafted to deceive and mislead customers,¹⁵⁵ which further supports the PULJ's conclusion that SmartEnergy failed to monitor its sales calls as required. The PULJ's finding is affirmed.

H. Retention of Audio Recordings

126. The PULJ found that SmartEnergy did not have an independent third party verify customer confirmations for purposes of its enrollments and contracts.¹⁵⁶ Instead, the PULJ found that SmartEnergy's phone conversations with consumers were recorded and these recordings were saved pursuant to SmartEnergy's contract(s) with its telephone service provider and/or cloud space service. Additionally, the PULJ found that SmartEnergy had access to the recordings, and could alter or delete recordings.

Commission Decision

127. The record supports the PULJ's finding that not only does SmartEnergy have access to and control over these audio recordings, it also has the ability to edit the recordings in-house.¹⁵⁷ The PULJ's finding is therefore affirmed.

I. SmartEnergy's Selection Bias Argument

128. In its initial brief before the PULJ, SmartEnergy argued that OPC witness Baldwin and Staff witness Kevin D. Mosier's analyses were compromised by selection

¹⁵⁵ See e.g., Staff Ex. 1B-C (audio files associated with Complaints 419343692-L, 119342595-W, 918340575-W, 519344041-W).

¹⁵⁶ Proposed Order at 40.

¹⁵⁷ October 29, 2020 Hearing Transcript at 266:10-13 (SmartEnergy witness Jackie Kern).

bias, arguing that “[w]here a sample is drawn from a subsection of the overall population that possesses some trait not shared by the remainder of the population, a study of that sample will tend to produce inaccurate results if this subsection-specific trait affects or correlates with the dependent variable in some way.”¹⁵⁸ On appeal, SmartEnergy submits that this argument was dismissed and not addressed in the Proposed Order. SmartEnergy argues that selection bias renders the assessment based on 34 complaints unreasonable, and argues that the findings in the Proposed Order are therefore arbitrary and capricious.¹⁵⁹

129. Staff responds that SmartEnergy’s selection bias argument was offered only in legal filings, without expert support and without possibility of cross examination by the parties. As such—Staff argues—there is no evidence in the record supporting or validating this theory, and the PULJ was correct to disregard or dismiss the argument.¹⁶⁰

Commission Decision

130. The burden of proof is on the party asserting the affirmative of an issue.¹⁶¹ Having failed to present testimony on the issue of selection bias the PULJ was not obliged to consider SmartEnergy’s selection bias argument. Moreover, as an evidentiary matter, SmartEnergy—which was in possession of all 34,000+ audio recordings from which OPC’s and Staff’s “sample” was taken—had the ability, if it wished, to present an opposing sample for the PULJ’s consideration. Any due process that SmartEnergy was

¹⁵⁸ SmartEnergy Initial Brief, Maillog No. 233452 at 47-48.

¹⁵⁹ SmartEnergy Appeal Memorandum and Exceptions at 33.

¹⁶⁰ Staff Reply Memorandum at 11.

¹⁶¹ See, e.g., *Bernstein v. Real Estate Com.*, 221 Md. 221 (1959); see also, *Maryland Comm’r of Labor & Indus. v. Bethlehem Steel Corp.*, 106 Md. App. 243 (1994).

entitled to—and which it asserts was denied¹⁶²—must also take into account that the Supplier failed to produce any evidence challenging OPC’s and Staff’s evidence. SmartEnergy’s exception to the PULJ’s dismissal of its argument is therefore denied.

V. CUSTOMER REFUNDS, SANCTIONS AND CIVIL PENALTIES

129. The Proposed Order directed that SmartEnergy’s Maryland customer bills be re-rated and that customers be refunded the difference between the rate charged by SmartEnergy and the utility SOS rate for each month of service if they choose to return to SOS.¹⁶³ SmartEnergy was also directed to inform customers of the renewable nature of SmartEnergy’s electricity product, and the higher price associated with its product. The PULJ proposed that customers who wished to continue as SmartEnergy customers could remain after providing an affirmative opt-in after receiving notice of the Commission’s decision from SmartEnergy.

130. Ordering Paragraph 2 of the Proposed Order provided that at a later date the Commission will address whether a civil monetary penalty of \$300,000 (as proposed by SmartEnergy) or some other amount should be imposed.¹⁶⁴ This determination would occur after the Commission has an opportunity to review SmartEnergy’s compliance with the directives of the Commission’s final order with respect to communicating with its customers, re-rating and refunding of customers, and returning customers to utility SOS who do not opt to remain customers of SmartEnergy. The Proposed Order noted that pursuant to PUA § 7-507(1), SmartEnergy could be subject to a civil penalty of not more

¹⁶² SmartEnergy Reply Memorandum at 16.

¹⁶³ Proposed Order, Ordering Paragraph (1)(ii).

¹⁶⁴ Proposed Order at 75.

than \$10,000 for each violation, with each day of continued violation being a separate violation.

A. SmartEnergy Objections

131. While SmartEnergy proposed a civil penalty in the amount of \$300,000, it argues that the proposed refund remedy recommended in the Proposed Order is not an accurate calculation. Rather than all of SmartEnergy's customers switching to SmartEnergy from SOS, it argues that 30-35% of SmartEnergy's customers switched to SmartEnergy from another retail supplier.¹⁶⁵ SmartEnergy then argues that requiring it to re-rate customer bills and provide refunds based on utility SOS rates is arbitrary and capricious, since SmartEnergy has no way of knowing the price customers were paying their former suppliers.¹⁶⁶ SmartEnergy further argues that any comparison of its rate, which is for a renewable product, results in an "apples to oranges" comparison with utility SOS rates.

132. SmartEnergy also argues that the PULJ's proposed opt-in timeline is unprecedented and unjustified.¹⁶⁷ SmartEnergy argues that the proposed remedy encompasses more than the customers enrolled during the Complaint period, and would effectively eliminate all of its customers in Maryland by requiring the customer to take affirmative action to remain enrolled as a customer with SmartEnergy. Additionally, SmartEnergy seeks clarification on whether the remedies recommended in the Proposed Order go beyond the Complaint period, stating that it assumes the Proposed Order applies only to the Complaint period, arguing that there were no findings regarding violations (or

¹⁶⁵ SmartEnergy Appeal Memorandum and Exceptions at 12.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 13.

alleged violations) after the Complaint period.¹⁶⁸ SmartEnergy notes that there is no analysis or assessment of the script that went into effect in April 2019, and notes that customers enrolling after June 2019 did receive contract summaries.¹⁶⁹

133. SmartEnergy acknowledges that it made “certain errors” and proposes to pay a civil penalty of \$300,000 and to adopt other measures going forward,¹⁷⁰ but argues that the re-rate and refund recommendations in the Proposed Order exceed the penalties warranted in the case, and is inconsistent with Commission precedent. In a list of eight supplier complaint cases provided in SmartEnergy’s Memorandum on Appeal and Exceptions, SmartEnergy identified only three cases in which the Commission ordered refunds.¹⁷¹ The list notes a range of civil penalties from \$40,000 (in the case of Xoom Energy Maryland) to \$561,000 (in the case of Smart One Energy). Where refunds were included, SmartEnergy noted that the Commission ordered \$510,000 *in refunds* only to a subset of *Xoom Energy Maryland* customers due to a deficient renewal letter.¹⁷²

134. In its Memorandum on Appeal and Exceptions, SmartEnergy argues that based on a comparison with prior Commission cases, a civil penalty of significantly less than the \$300,000 that it offered is warranted, with no mandatory widespread refunds.¹⁷³ SmartEnergy also argued that its remediation efforts will enhance SmartEnergy’s

¹⁶⁸ SmartEnergy Appeal Memorandum and Exceptions at 12.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 14.

¹⁷¹ *Id.* at 15.

¹⁷² *Id.* In two other cases (*Smart One Energy* and *SunSea Energy*), the list indicates that refunds were ordered by the Commission, but the amount of refunds was not stated. Unlike this case, in the *Xoom Energy* case, there was no finding of unfair, misleading, false or deceptive trade practices, and no civil penalty was assessed.

¹⁷³ *Id.* at 10.

compliance with the Commission’s regulations and distinguish SmartEnergy from other “show cause” suppliers.

135. SmartEnergy takes exception to a comment (which SmartEnergy argues is a finding) in the Proposed Order that -- based on SmartEnergy’s annual reporting of Maryland gross revenues for 2019¹⁷⁴ -- it appears that SmartEnergy has made a significant amount of money from deceiving Maryland customers.¹⁷⁵ SmartEnergy argues the exhibit does not indicate how much money SmartEnergy made in Maryland, in that the exhibit represents gross rather than net revenues.¹⁷⁶ At the Hearing, SmartEnergy witness Daniel Kern stated that “we’re currently doing around 8 million dollars in sales a year in the State of Maryland.”¹⁷⁷ Nonetheless, SmartEnergy argues that the PULJ’s comment (or finding) is subjective, inaccurate, and unsupported by the record.¹⁷⁸

136. Additionally, SmartEnergy argues that the Proposed Order fails to account for the remediation measures it has taken and its response to notification of potential violations.¹⁷⁹ In terms of voluntary remediation efforts by SmartEnergy, SmartEnergy states that it has undertaken a complete audit of its customer-facing documents, including scripts and contracts, and internal systems and practices, to ensure continued future compliance with Maryland law.¹⁸⁰

¹⁷⁴ See, Exhibit 1 to Staff’s Reply Brief.

¹⁷⁵ SmartEnergy Memorandum on Appeal and Exception, referencing Proposed Order at 75.

¹⁷⁶ SmartEnergy Appeal Memorandum and Exceptions at 11.

¹⁷⁷ October 28, 2019 Hearing Transcript at 158.

¹⁷⁸ SmartEnergy Appeal Memorandum and Exceptions at 11.

¹⁷⁹ *Id.* at 17.

¹⁸⁰ *Id.* at 16.

B. Staff and OPC Positions

137. In addition to seeking refunds for SmartEnergy’s customers, Staff requests that SmartEnergy’s retail supplier license be revoked. Staff also recommends a civil penalty of at least \$500,000.¹⁸¹

138. OPC supports the Proposed Order in recommending that SmartEnergy be directed to refund amounts paid by customers in excess of each customer’s utility SOS rate. However, OPC objects to the PULJ’s recommended opt-in process that would allow customers to continue with SmartEnergy based on affirmative customer action, after notice by SmartEnergy of the Commission’s decision in this case.¹⁸²

139. OPC recommends a civil penalty in the amount of \$3,164,000 based on a per-customer penalty of \$100 multiplied by SmartEnergy’s 31,164 Maryland customers.¹⁸³ OPC submits that this amount is conservative – in that it does not take into account the deceptive marketing and false statements of the Supplier to each of the 31,164 customers that the PULJ found were unlawfully enrolled by SmartEnergy.

140. OPC urges the Commission to model the remedies in this case to those applied in the *Smart One Energy* and *SunSea Energy* cases. OPC requests that the Commission suspend SmartEnergy’s license, as the Commission did in the *Smart One Energy* case, and after the full re-rate amount is determined, consider revoking SmartEnergy’s license in light of “the extent of SmartEnergy’s pattern and practice violations.”¹⁸⁴ Referencing the Commission’s actions in the *SunSea Energy* case, OPC notes that the SunSea Energy flyer—which resulted in in-bound calls that lead to customer enrollment contracts that

¹⁸¹ Staff Memorandum on Appeal and Exceptions at 6.

¹⁸² OPC Memorandum on Appeal and Exceptions at 23.

¹⁸³ *Id.* at 24.

¹⁸⁴ OPC Reply Memorandum at 11.

violated the MTSA—are comparable to the postcards mailed by SmartEnergy to solicit in-bound customer calls.¹⁸⁵

141. In the *SunSea Energy* case (which remains pending),¹⁸⁶ the Commission: (1) imposed a moratorium prohibiting the supplier from marketing to and soliciting new customers in Maryland until further direction of the Commission; (2) directed the supplier to return all customers that have been solicited via telephone to utility SOS service; (3) directed the supplier to re-rate and refund all customers solicited via telephone the difference between the supplier’s supply charges and the applicable SOS rate from the local utility for all periods these customers were served, whether the customers are an existing customer or a former customer, and provide an accounting to the Commission of the number of accounts and refunds sent to each of these customers; and (4) directed that the supplier send a letter to all remaining customers, explaining (i) that violations of State law and Commission regulations were found by this Commission, (ii) that all of the supplier’s customers can return to the utility’s standard offer service without penalty, and (iii) the details of the supplier’s renewable product.

142. In that case, the Commission noted it would address the assessment of any civil monetary penalty after refunds are made to those customers that had invalid contracts, noting further that the supplier’s compliance with the refund process will factor into the consideration of any penalty amount.¹⁸⁷

¹⁸⁵ *Id.* at 12.

¹⁸⁶ Nothing in this Order should be construed as prejudging any future decisions by the Commission in the *SunSea Energy* case, or any other pending matter.

¹⁸⁷ *In the Matter of the Complaint of the Maryland Office of People’s Counsel Against SunSea Energy, LLC*, Case No. 9647, October 7, 2020 Hearing Transcript at 191-193.

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143. PUA § 7-507(k) provides that the Commission may revoke or suspend the license of an electricity supplier, impose a civil penalty or other remedy, order a refund or credit to a customer, or impose a moratorium on adding or soliciting additional customers by the electricity supplier, for just cause on the Commission's own investigation or on a complaint of the Office of People's Counsel, the Attorney General, or an affected party.

144. As noted above, the Proposed Order is supported by substantial evidence of systemic violations by SmartEnergy of multiple statutes and regulations, including: (1) PUA § 7-505(b)(7) (prohibiting electricity suppliers from engaging in marketing, advertising, or trade practices that are unfair, false, misleading, or deceptive); (2) COMAR 20.53.07A(2) (prohibiting marketing or trade practices that are unfair, false, misleading, or deceptive); (3) COMAR 20.53.07.08C(4)(b)(i) – (iii) (*i.e.*, (i) requiring—where applicable—requiring compliance with the MTSA contracting regulation, (ii) requiring that the supplier confirm that customer questions relating to the contract are answered, and (iii) requiring that the supplier confirm that an independent third party verifies the contract or records the entire telephone conversation and maintains the recording for the duration of the contract); (4) COMAR 20.53.07.08C(b)(v) (requiring that the supplier disclose all material contract terms and conditions to the customer over the telephone); (5) COMAR 20.53.07.08B(1) (where applicable, requiring that at the time of completion of the contracting process, a supplier shall provide the customer a copy of the executed contract and completed contract summary on the form provided by the Commission); (6) COMAR 20.53.08.04E (requiring the supplier to monitor telephonic sales calls); and (7) COMAR 20.61.04.01B (requiring suppliers that market renewable

products to include required RPS information in their contracts) and 20.61.04.01C (requiring the disclosure of renewable product compliance fees).

145. Additionally, the record clearly supports findings that SmartEnergy violated Com. Law, MTSA § 14-2203(b) (requiring that a contract made pursuant to a Telephone Solicitation be reduced to writing and signed by the consumer), Com. Law §§ 13-301(1)(3) and 13-303, prohibiting false and misleading practices which have the capacity, tendency, or effect of deceiving or misleading consumers, and COMAR 20.53.07.07B(1) (requiring that all supplier marketing or solicitation information, include the suppliers' Maryland license number in a clear and conspicuous manner).

146. Based on these findings, the Commission concludes that the record in this case warrants cancellation of all customer enrollments that occurred via telephone by SmartEnergy in Maryland, the return of all such customers to utility standard offer service and full refunds to affected customers. The Commission also concludes that the record in this case warrants continuation of the moratorium prohibiting SmartEnergy from adding or soliciting new customers in Maryland.

1. Cancellation of SmartEnergy's Customer Enrollments, and Customer Refunds

147. A contract made pursuant to a telephone solicitation is not valid and enforceable against a consumer unless made in compliance with the provisions of the MTSA.¹⁸⁸ Having reversed the PULJ regarding the applicability of the MTSA and finding SmartEnergy's contracts with its Maryland customers invalid due to SmartEnergy's failure to comply with the MTSA contracting requirements, the opt-in proposal

¹⁸⁸ MTSA, Com. Law § 14-2203(a). *See, e.g., Blue Pilot Energy*, Order No. 87925 at 4 (Dec. 12, 2016).

recommended by the PULJ allowing SmartEnergy to perfect contracts with its Maryland customers solicited via telephone is therefore moot.

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.¹⁸⁹ Therefore, the Commission directs SmartEnergy to—within ten (10) calendar days of this Order—return all of its Maryland customers that were enrolled via Telephone Solicitations to the customer's utility standard offer service. SmartEnergy is further directed—within thirty (30) days of this Order—to re-rate and refund all Maryland customers solicited via telephone the difference between SmartEnergy's supply charges and the applicable SOS rate from the local utility for all periods these customers were served, whether the customer is an existing customer or a former customer, and provide a detailed accounting to the Commission within sixty (60) days of the refund amount sent to each of these customers.

149. While SmartEnergy attempted remediation of violations alleged in Staff's Complaint; *i.e.*, by providing contract summaries retroactively to its customers, the Commission's finding that SmartEnergy violated MTSA, Com. Law § 14-2203(b) renders SmartEnergy's remediation efforts in this instance insufficient since a full contract -- reduced to writing and signed by the consumer is also required. Therefore, SmartEnergy's request for clarification that any remedies imposed by the Commission in this case should apply only to the Complaint Period in this case is denied. Moreover, SmartEnergy may not rely upon contracts which the Commission has found invalid under

¹⁸⁹ See, *Blue Pilot Energy*, Proposed Order at 70-72, *aff'd*, Order No. 87925 (Dec. 12, 2016); see also, *SunSea Energy*, Oct. 7, 2020 Hearing Transcript at 191-193.

the MTSA to assert a pre-existing business relationship with Maryland customers as the basis for an MTSA exemption under Com. Law § 14-2202(a)(2).

150. SmartEnergy is directed to consult with Staff and OPC, and within thirty (30) days of this Order send a letter to all of its current and former Maryland customers which explains (i) that violations of State law and Commission regulations were found by this Commission, (ii) that all of SmartEnergy's customers have been (or are being) returned to their utility's standard offer service without penalty, and (iii) how refunds (if any) were (or will be) calculated.

2. License Suspension, Revocation and Civil Penalties

151. The Commission will address arguments regarding the possibility of license suspension and/or revocation—and the assessment of a civil monetary penalty—after SmartEnergy has complied with the directives in this Order, including making refunds to all customers that have invalid contracts. SmartEnergy's compliance with these directives will be considered in the assessment of any civil monetary penalty.

VI. CONCLUSION

152. As discussed herein, the Commission affirms in part, reverses in part, and clarifies 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 SmartEnergy's solicitations do not constitute Telephone Solicitations within the purview of the MTSA. In reversing the PULJ on this issue, the Commission does not *per se* conclude 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). However, where

postcards, flyers, or other forms of advertising are found to be deceptive and misleading—and the prospective customer initiates the call to the supplier/merchant—the MTSA’s “Telephone Solicitation” requirements apply, subjecting the supplier/merchant to the contracting requirement provisions thereunder. This case, and each case considered by the Commission, must be adjudicated on a fact-specific basis.

153. Additionally, the PULJ’s findings with regard to COMAR 20.53.07.08C(4)(b)(ii) and (v) are also reversed consistent with the Commission’s reversal of the PULJ’s finding the MTSA inapplicable. However, with regard to SmartEnergy’s failure to disclose restrictions relating to its offer of “free electricity,” and its failure to fully answer customer questions, the Commission finds that SmartEnergy’s conduct violated Com. Law §§ 13-301(1)(3) and 13-303, prohibiting false and misleading practices which have the capacity, tendency, or effect of deceiving or misleading consumers. Finally, it is clarified that the standard of proof applicable to this case is the preponderance of evidence standard.

IT IS THEREFORE, this 31st day of March, in the year of Two Thousand Twenty One, 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, reversed in part, and clarified in part, as discussed herein;

(2) That the moratorium prohibiting SmartEnergy, LLC from soliciting or enrolling new customers in Maryland shall continue until further order of the Commission;

(3) That SmartEnergy is directed to return all of its Maryland customers that were solicited and enrolled via telephone, in response to the Supplier's direct mail advertising, to utility standard offer service within ten (10) calendar days of this Order. This Order shall have the effect of a drop transaction, and the utilities are directed to process SmartEnergy's customer returns to as provided under COMAR 20.53.04.04;

(4) That SmartEnergy is directed—within thirty (30) days—to re-rate and refund all of its Maryland customers solicited via telephone the difference between the Supplier's supply charges and the applicable SOS rate from the local utility for all periods these customers were served, whether the customers are an existing customer or a former customer, and provide an accounting to the Commission within sixty (60) days of the refund amount sent to each of these customers;

(5) That SmartEnergy is directed to consult with Staff and OPC, and within thirty (30) days of this Order, the Supplier is directed to send a letter to all of its Maryland customers which explains: (i) that violations of state law and Commission regulations were found by this Commission; (ii) that all of SmartEnergy's customers have been (or are being) returned to their utility's standard offer service without penalty, and (iii) how refunds (if any) were (or will be) calculated.

(6) That SmartEnergy shall submit a filing within sixty (60) days of this Order certifying compliance with the Commission's directives; and

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

(8) That the Motion for Leave to Comment filed by the Retail Energy Suppliers Association is hereby denied; and

(9) 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