

**ORDER NO. 89800**

In the Matter of the Complaint of the Staff	*	BEFORE THE
of the Public Service Commission v.	*	PUBLIC SERVICE COMMISSION
SmartEnergy Holdings, LLC d/b/a/	*	OF MARYLAND
SmartEnergy	*	_____
	*	
	*	CASE NO. 9613
	*	_____

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**Issue Date: April 9, 2021**

**ORDER ON MOTION FOR STAY**

1. On March 31, 2021, the Commission issued Order No. 89795 affirming in part, reversing in part, and clarifying in part, the Proposed Order of the Public Utility Law Judge (“PULJ”) in the above-captioned proceeding. The Commission affirmed the PULJ’s findings that SmartEnergy Holdings, LLC d/b/a SmartEnergy (“SmartEnergy”) engaged in a pattern or practice of systemic violations of Maryland law<sup>1</sup> and Commission regulations,<sup>2</sup> by engaging in marketing, advertising, or trade practices that are unfair, false, misleading or deceptive,<sup>3</sup> and made additional findings that in its dealings with its customers – SmartEnergy violated the unfair or deceptive trade practice provisions of the Maryland Consumer Protection Act, *Annotated Code of Maryland*, Commercial Law (“Com. Law”) §§ 13-301 and 13-303.<sup>4</sup> The Commission reversed the PULJ’s finding that the Maryland Telephone Solicitations Act (“MTSA”), Com. Law § 2203(b) (requiring that a contract made pursuant to a telephone solicitation be reduced to writing

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<sup>1</sup> MD. ANN. CODE, Pub. Util. Art., § 7-507(b)(7).

<sup>2</sup> Code of Maryland Regulations (“COMAR”) Title 20, Subtitle 53.07 and .08, and Title 20, Subtitle 61.04.

<sup>3</sup> Order No. 89795 (Mar. 31, 2021) at 62-63.

<sup>4</sup> *Id.* at 44 and 63.

and signed by the customer) applied to the enrollment contracts entered into between SmartEnergy and its customers.

2. In reversing the Proposed Order regarding the applicability of the MTSA, however, the Commission *preserved* the PULJ's finding that SmartEnergy failed to provide contract summaries to 100% of its customers.<sup>5</sup> SmartEnergy did not appeal the PULJ's ruling on summary judgment.<sup>6</sup>

3. Notwithstanding SmartEnergy's efforts to remediate its failure to provide contract summaries to its customers, the Commission affirmed the PULJ's finding that the violations of COMAR 20.53.07.08C(4)(b)(ii),<sup>7</sup> (iii),<sup>8</sup> and (v),<sup>9</sup> and hence COMAR 20.53.07.08C(4)(b)(i), operated to invalidate SmartEnergy's enrollments.<sup>10</sup> The PULJ's finding invalidated SmartEnergy's customer enrollments/contracts within the Complaint Period, and the Commission's finding that the MTSA applied to SmartEnergy's contracts entered into via Telephone Solicitations invalidated both the customer enrollment/contracts both within the Complaint Period (from February 2017 through May 2019) and beyond. Pursuant to these findings, the Commission directed SmartEnergy to return all customers enrolled by "Telephone Solicitations" to utility standard offer service within ten (10) calendar days of the Commission's Order.<sup>11</sup>

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<sup>5</sup> Order No. 89795 at 38; PULJ Ruling on Motion for Summary Judgment, Dkt. No. 60, Ordering Paragraph 2.

<sup>6</sup> Staff Reply Memorandum on Appeal at 10. Also, SmartEnergy acknowledges that it admitted the contract summary violations when it met with Staff in June 2019. SmartEnergy Memorandum on Appeal and Exceptions at 21.

<sup>7</sup> Failing to confirm that customer questions relating to the contract are answered.

<sup>8</sup> Failing to 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.

<sup>9</sup> Failing to disclose all material contract terms and conditions to the customer over the telephone.

<sup>10</sup> Proposed Order at 13, affirmed at Order No. 89795 (Ordering Paragraph 7).

<sup>11</sup> Under the terms of Order No. 89795, absent a stay, SmartEnergy is obliged to return customers enrolled by Telephone Solicitations to utility standard by midnight on April 10, 2021.

4. On April 5, 2021, SmartEnergy filed a Petition for Judicial Review of the Commission’s decision in the Circuit Court for Montgomery County. Also on April 5, 2021, SmartEnergy filed with the Circuit Court a Motion for Stay of the Commission’s Order pending judicial review.

**1. SmartEnergy Motion For Stay**

5. On April 8, 2021, SmartEnergy filed a Motion for Stay with this Commission (“Motion”).<sup>12</sup> In its Motion, SmartEnergy asserts that it will suffer irreparable harm if a stay of enforcement of Order No. 89795 is not granted pending judicial review of the Commission’s decision, and that other parties will not be substantially harmed if a stay is granted.

6. In further support of its Motion, SmartEnergy offers that – if the relief that it requests is granted – SmartEnergy agrees to (1) continue the moratorium imposed upon it by the Commission in Order No. 89683 prohibiting SmartEnergy from adding or soliciting new customers in Maryland, until the Circuit Court rules on the merits of its appeal, and (2) provide additional financial security in the form of a surety bond, irrevocable letter of credit, or other acceptable security in an amount not to exceed \$2.5

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<sup>12</sup> Maillog No. 234681 (SmartEnergy Motion).

million.<sup>13</sup> SmartEnergy offers that this additional financial security shall remain in place until the Circuit Court rules on the merits of its appeal.

## 2. OPC Comments

7. The Maryland Office of People’s Counsel (“OPC”) filed Comments on April 8, 2021, addressing SmartEnergy’s Motion.<sup>14</sup> In its Comments, OPC argues that SmartEnergy has not shown that it meets the criteria for a Stay, arguing that “SmartEnergy alleges only economic harm to its business,”<sup>15</sup> while ignoring the harm its customers suffered (and continue to suffer) from SmartEnergy’s conduct of enrolling customers unlawfully and engaging in unfair, deceptive, and misleading trade practices.<sup>16</sup>

8. OPC suggests that the Commission not grant SmartEnergy’s Motion **without** additional safeguards in place that “protect the integrity of Order No. 89795,” and ensure that refunds are available to [SmartEnergy’s] unlawfully enrolled consumer.”<sup>17</sup> OPC argues that both conditions offered by SmartEnergy are insufficient, in that they fail to account for the possibility of appeals by SmartEnergy and others, beyond any ruling by the Circuit Court, and fail to acknowledge the Commission’s “discretion to impose the moratorium” directed in Order No. 89683 “remains—for SmartEnergy’s non-MTSA

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<sup>13</sup> The financial security offered by SmartEnergy is in addition to the existing bond posted by SmartEnergy to secure its commitments to the Commission and the State of Maryland as a licensed retail supplier (“supplier license surety”), and such additional financial security must be underwritten payable to the Commission for the remittance of customer refunds (if any) directed by the Commission pursuant to Order No. 89795 (Mar. 31, 2021).

<sup>14</sup> Maillog No. 234693 (OPC Comments).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.* OPC adds that while the matter is on appeal, customer “refunds are likely disappearing” as a result of the fact that “people due refunds move, pass away or otherwise become unavailable.” *Id.*

<sup>17</sup> *Id.*

violations—even outside of the MTSA claims that are the subject of the appeal.”<sup>18</sup>

9. OPC also argues that the \$2.5 million additional financial security offered by SmartEnergy is insufficient, and argues that the amount of the additional financial security should be \$6 million, which is the amount that SmartEnergy estimated in Attachment 1 to its Motion would be the cost of customer refunds when it is obliged to remit them.<sup>19</sup>

### 3. SmartEnergy Reply Comments

10. SmartEnergy filed Reply Comments on April 9, 2021,<sup>20</sup> in response to OPC’s Comments. In its Reply Comments, SmartEnergy again disputes the merits of the Commission’s findings regarding the MTSA and insists that irreparable harm – without a stay – is both “economic *and* beyond all forms of compensation.”<sup>21</sup> With regard to the sufficiency of its proposed conditions, SmartEnergy addresses OPC’s claim that the \$2.5 million in additional financial security offered by SmartEnergy is insufficient by stating that the \$2.5 million amount offered by SmartEnergy “is higher, as of January 2021, than the cost to SmartEnergy to refund all customers enrolled during the complaint period.”<sup>22</sup>

### Commission Decision

11. *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 3-205 provides that “the Commission may, on terms it considers appropriate, stay the enforcement of a regulation or order that is the subject to a proceeding for review under this subtitle.”

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<sup>18</sup> *Id.* The core of SmartEnergy’s Motion *objects* to the Commission’s ruling that SmartEnergy’s “telephone solicitations” were subject to the MTSA, and that its failure to comply with the “wet signature” rendered its enrollments/contract entered into with Maryland consumers invalid. SmartEnergy Motion, Attachment 1 at 2 para. 1, 9, 16-31.

<sup>19</sup> OPC Comments at 2; SmartEnergy Motion, Attachment 1 at para. 1.

<sup>20</sup> Maillog No. 234696 (SmartEnergy Reply Comments).

<sup>21</sup> *Id.* at 2. Even in its reply to OPC’s Comments, SmartEnergy continues to focus on the MTSA as if it were the Commission’s sole ground for invalidating its customer enrollment/contracts. *Id.* at 1-2.

<sup>22</sup> *Id.* at 2.

Under this provision, the Commission applies the standard set forth in Maryland appellate decisions: (1) likelihood of the petitioner's success on the merits; (2) irreparable harm; (3) interests of the parties; and (4) the public interest.<sup>23</sup>

12. SmartEnergy appended to its Motion a copy of its Motion for Stay filed in the Circuit Court, describing the risk of “reputational” damage and the loss of its customer base in Maryland.<sup>24</sup> Despite SmartEnergy’s claim that other parties in this matter will not bear significant harm, SmartEnergy’s customers will likely be deprived of the refunds ordered by the Commission while this case is on appeal and will continue to be subject to SmartEnergy’s rates.

13. While SmartEnergy agrees to continue the moratorium imposed by the Commission prohibiting adding or soliciting new customers in Maryland until a ruling on the merits of its appeal is entered in the Circuit Court, and offers additional financial security in the amount of \$2.5 million to satisfy refunds to some customers if its appeal is rejected, OPC’s comments have merit; *i.e.*, that SmartEnergy’s conditions – as proposed – are insufficient to protect the integrity of Order No. 89795 and ensure that refunds are available to SmartEnergy’s consumer should SmartEnergy not prevail in its appeal. Therefore, the Commission will modify SmartEnergy’s conditions to (1) extend the moratorium directed by the Commission in Order No. 89683 to the conclusion of any

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<sup>23</sup> See, e.g. *In the Matter of the Formal Complaint and Petition of CAT Communications International, Inc. v. Verizon Maryland Inc.*, Case No. 8972, Order No. 79502 (Sep. 29, 2004), 2004 Md. PSC LEXIS 23.

<sup>24</sup> Attachment 1 at 11. The affidavit of Dan Kern, CEO and co-founder of SmartEnergy also included an attachment-email from “Delmarva Supplier” of Pepco Holdings, Inc. dated April 5, 2021 to [Dan.Kern@smartenergy.com](mailto:Dan.Kern@smartenergy.com) advising SmartEnergy that “due to the Delmarva Power and Pepco three business day accelerating switching process,” SmartEnergy Holdings, LLC must submit “drop transactions [for the customers] that were solicited via telephone by 5pm tomorrow, April 06, 2021, in order to meet the return date of April 10, 2021, as required by the Maryland Public Service Commission ruling of April 01, 2021.” SmartEnergy’s Petition for Judicial Review and Motion for Stay were filed in the Circuit Court also on April 5, 2021.

appeals taken by SmartEnergy or any other party responding to its Petition for Judicial Review, and (2) extend the additional \$2.5 million financial security obligation to remain in effect until the conclusion of any appeals taken by SmartEnergy or any other party responding to SmartEnergy's Petition for Judicial Review.

14. The Commission will maintain the amount of SmartEnergy's additional financial security at \$2.5 million rather than increasing the amount to \$6 million as requested by OPC, to reflect the status quo *ante* under the Proposed Order – which applied only to the Complaint Period, from February 2017 through May 10, 2019.

15. With these modifications, the Commission finds that granting a stay subject to these terms and conditions is appropriate. Additionally, SmartEnergy is hereby directed to notify the Commission within sixty (60) days of any notice to its existing surety of an intent to cancel its surety bond in Maryland.

16. For purposes of granting a stay under PUA § 3-205, the statute does not expressly require a “public interest” finding. The Commission's paramount interest in granting SmartEnergy's Motion in this case is – preservation of the status quo – prohibiting SmartEnergy from adding or soliciting new customers while its appeal (and any others) remain pending in court, and ensuring that a significant refund amount is preserved for SmartEnergy's customers in the event that SmartEnergy does not prevail in its appeal.<sup>25</sup>

**IT IS THEREFORE**, this 9<sup>th</sup> day of April, in the year of Two Thousand Twenty One, by the Public Service Commission of Maryland,

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<sup>25</sup> Chairman Stanek dissents from this Order. His statement is appended to this Order.

**ORDERED:** (1) That SmartEnergy Holding, LLC's Motion For Stay regarding enforcement of Order No. 89795 is hereby granted, subject to the terms and conditions proposed by SmartEnergy in its Motion;

(2) That SmartEnergy is prohibited from adding or soliciting new customers in Maryland until the earlier of a further order of this Commission or until the conclusion of any appeals taken by SmartEnergy or any other party responding to SmartEnergy's Petition for Judicial Review;

(3) That SmartEnergy shall cause to be filed with the Commission within ten (10) calendar days of this Order proof of additional financial security in the amount of \$2.5 million – in the form of a surety bond, irrevocable letter of credit or other facility – that guarantees remittance of funds to the Commission to satisfy customer refunds (if any) directed by the Commission pursuant to Order No. 89795;

(4) That the additional financial security directed by the Commission in this Order shall remain in place until the conclusion of any appeals taken by SmartEnergy or any other party responding to SmartEnergy's Petition for Judicial Review; and

(5) That SmartEnergy shall notify the Commission within sixty (60) days of any notice to its supplier license surety of an intent to cancel its existing bond in Maryland.

By Direction of the Commission,

*/s/ Andrew S. Johnston*

Andrew S. Johnston  
Executive Secretary



### **Dissenting Statement of Chairman Jason M. Stanek**

I respectfully dissent from the Commission's Order granting SmartEnergy's Motion for Stay Pending Judicial Review of Order No. 89795. At the core of this matter is SmartEnergy's failure to abide by rules specifically intended to protect Maryland consumers. Specifically, the Commission found that SmartEnergy had engaged in marketing, advertising, or trade practices that are unfair, misleading or deceptive. The fact that SmartEnergy disagrees with, and now appeals, our findings should not create a temporary pass for SmartEnergy to continue violating Maryland law and the Code of Maryland Regulations (COMAR).

Contemporaneous with its Petition for Judicial Review filed in Circuit Court, SmartEnergy also filed a motion to stay the enforcement of Order No. 89795. Now, SmartEnergy seeks to leverage that request to obtain a similar remedy from the Commission. Maryland law sets a high burden for granting the type of injunctive relief sought here. Among other things, SmartEnergy must demonstrate substantial likelihood that it will succeed on the merits of its appeal, and it will suffer irreparable injury if a stay is denied. SmartEnergy even states that these two factors are the most critical in determining whether a court should grant a stay. Yet, I am unconvinced that SmartEnergy can meet these criteria.

SmartEnergy's court-filed motion addresses only the Commission's application of the Maryland Telephone Solicitation Act (MTSA), which raises a question of first impression for the Maryland court. While SmartEnergy claims it can demonstrate likelihood of success on its MTSA argument, it fails to acknowledge, let alone disprove, the statutory interpretation offered by the Office of the Attorney General, Consumer Protection Division, the primary agency charged with enforcing the MTSA. Furthermore, SmartEnergy's motion is silent as to the Commission's other findings and affirmations of the Public Utility Law Judge. Indeed, SmartEnergy makes no mention of its admission that it violated Commission regulation by failing to provide required contract summaries to customers enrolled by telephone. Nor does SmartEnergy attempt to rebut other findings of COMAR violations concerning, for example, SmartEnergy's sales scripts, marketing materials, and training and supervision of sales agents.

I also find OPC's response to SmartEnergy's PSC-filed stay request compelling. In both motions, SmartEnergy alleged "irreparable harm"—absent a stay—is primarily economical harm to its business. As cited in OPC's response, mere economic injury is not enough for the stay. SmartEnergy also alleges the possibility of suffering reputational harm, but in my view SmartEnergy has alleged nothing more than the ordinary risk of

doing business, particularly when it has already admitted to violating specific COMAR requirements.

While I do not believe SmartEnergy's court-filed motion would pass muster for a stay, based on today's decision to grant an indefinite stay, it is incumbent on SmartEnergy to notify its customer base of Order No. 89795 and the pending appeal in the Circuit Court for Montgomery County. Given the evidence of SmartEnergy's misconduct before this Commission, it is in the public interest for SmartEnergy to be transparent and provide notice to its customers of the pending regulatory and legal actions.

For the above reasons, I respectfully dissent.