

ORDER NO. 90268

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

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BEFORE
THE PUBLIC SERVICE
COMMISSION OF MARYLAND

CASE NO. 9614

ORDER ON MOTION TO STAY

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

Issued: June 27, 2022

Background

1. On May 4, 2022, the Commission issued Order No. 90208, affirming in part and reversing in part the Proposed Order of the Public Utility Law Judge (“PULJ”) in the above-captioned proceeding.¹ The Commission affirmed the PULJ’s findings that Direct Energy Services, LLC (“Direct Energy”) violated the Maryland Telephone Solicitations Act (“MTSA”), Commercial Law Article (“Com. Law”), *Annotated Code of Maryland*, § 14-2203(b), and alternatively, that Direct Energy violated Commission Regulations, specifically Code of Maryland Regulations (“COMAR”) 20.53.07.08(C)(4) and COMAR 20.59.07.08(C)(4) by engaging in marketing, advertising, or trade practices that are unfair, false, misleading or deceptive. The Commission reversed the PULJ’s remedy related to requiring signatures for all future telephone enrollments regardless of the MTSA’s statutory exemptions.

2. In finding that Direct Energy failed to comply with the MTSA’s contracting requirements for telephone solicitations during the complaint period of 2016-2019, the Commission additionally found that all of Direct Energy’s telephonic enrollments without signed contracts were invalid. The Commission further found that it would provide Direct Energy with a time period to resolve the invalid enrollments by acquiring signed contracts for affected customers who are still served by the Company.

3. Specifically, the Commission directed the supplier to send a letter to all of its Maryland customers who were solicited and enrolled by telephone during the complaint period within 30 calendar days of the Order, informing them of the invalidity of their contracts and to provide them with the option to either enroll with Direct Energy by signing a valid contract, return to their

¹ Order No. 90208, *In the Matter of the Complaint of the Staff of the Public Service Commission of Maryland v. Direct Energy Services, LLC*, Case No. 9614 (May 4, 2022) (“the Order”).

utility's standard offer service ("SOS"), or switch to a different retail supplier for service. Direct Energy was required to share the letter with Staff and the Maryland Office of People's Counsel ("OPC") (the other parties to the complaint) for review before sending it to the customers.²

4. The Commission further ordered Direct Energy to provide to the Commission, within 60 days of the Order, a detailed plan to bring its invalid enrollments during the complaint period into compliance with applicable statutes, Commission orders, and regulations. The Commission reserved the authority to decide to return any invalidly enrolled customers to SOS after reviewing the report. This Order grants in part Direct Energy's Motion for Stay ("Direct Energy Motion"), and also grants in part OPC's request for a partial stay of the Order ("OPC Response and Motion for Stay").

1. Direct Energy Motion for Stay

5. On May 20, 2022, pursuant to Public Utilities Article ("PUA") § 3-205, Direct Energy filed with the Commission a Motion for Stay of Order No. 90208 ("Direct Energy Motion"), requesting expedited consideration. The motion was contemporaneous with Direct Energy filing a Petition for Judicial Review of the Commission's decision in the Circuit Court for Anne Arundel County.

6. In its Motion for Stay, Direct Energy asserts that it is likely to prevail on the merits of its administrative appeal, and if a stay of enforcement of Order No. 90208 is not granted pending judicial review of the Commission's decision, it will suffer irreparable harm. Direct *Energy argues further that if the Commission grants the stay, other parties will not be* substantially harmed, and the public interest will be served.³

² Direct Energy has not submitted the letter for review nor mailed it to customers to date, due to filing the supplier's Motion to Stay. However, the Commission deems this compliance requirement in Order No. 90208 tolled in order to consider the Motion for Stay.

³ Direct Energy Motion at 3.

7. Direct Energy contends that the Commission stayed the enforcement of its order in the *SmartEnergy* case⁴ – a matter with similar findings, pending SmartEnergy’s appeal.⁵ Direct Energy adds that it is likely to succeed in its appeal of the novel issue of the applicability of MTSA to inbound telephone enrollments, and should the Company be forced to send the letters to impacted customers before the appeal has run its course, Direct Energy’s reputation would be irreparably harmed in the industry and with its current and prospective customers.⁶

8. Additionally, Direct Energy argues that staying the enforcement of the Order will not harm the other parties’ interests or future enforcement of the Order.⁷ It adds that the appellate court’s consideration of the first-impression MTSA issue on inbound calls would impact more than just the retail supplier industry and therefore a stay would provide the time for the appellate courts to decide the MTSA and contract interpretation issues.⁸

2. OPC Response and Motion for Stay

9. On June 2, 2022, OPC filed a Response and Motion for Stay.⁹ OPC also filed its own petition for judicial review, in the Circuit Court for Baltimore City.¹⁰

10. In response to Direct Energy’s Motion, OPC contends generally that Direct Energy’s motion does not meet the criteria to support a stay, and the Commission should not delay its directive that Direct Energy comply with the MTSA in enrolling new customers via telephone.¹¹

⁴ Order No. 89800, *In the Matter of the Complaint of the Staff of the Public Service Commission Against SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Case No. 9613 (Apr. 9, 2021) (Order on Motion for Stay).

⁵ *In the Matter of SmartEnergy Holdings, LLC*, No. 1675, September Term 2021, CSA-REG-1675-2021, Circuit Court No. 485338V (“*SmartEnergy*”).

⁶ *Id.*

⁷ *Id.* at 5.

⁸ *Id.*

⁹ Maillog No. 240937 (“Response and Motion for Stay”), filed by OPC.

¹⁰ OPC’s petition for judicial review was filed in the Circuit Court for Baltimore City. The Commission and OPC have filed motions to transfer Direct Energy’s petition for judicial review from the Circuit Court for Anne Arundel County to the Circuit Court for Baltimore City.

¹¹ OPC Response and Motion for Stay at 1.

However, OPC states that it supports a stay of a portion of the Order that requires, as a remedy for past MTSA violations, Direct Energy to execute new contracts with its invalidly enrolled customers.¹² In support of a proposed partial stay, OPC argues that its petition for judicial review of Order No. 90208 is likely to succeed on the merits. OPC also contends that the Commission-ordered communications are “misleading” and will cause “serious confusion” resulting in irreparable harm to the Company’s residential customers if the stay is not granted.¹³ OPC further argues that the other parties will not be substantially harmed by the stay, and the stay would serve the public interest.¹⁴

11. With regard to likelihood of success on the merits, OPC disputes Direct Energy’s claims that the MTSA applicability to inbound sales calls is a case of first impression, as the Commission made a similar ruling in the *SmartEnergy* case – a ruling later upheld by the Circuit Court for Montgomery County. OPC also notes a recent Public Utility Law Judge decision regarding another retail supplier and similar facts, which upholds the Commission’s Direct Energy Order.¹⁵

12. While urging a partial stay, based on its assertion that the communications to customers directed in the Order could be “misleading” and will cause “serious confusion,” OPC asserts nonetheless that Direct Energy does not address the irreparable harm it would suffer with regard to the enrollment of new customers. Rather, Direct Energy focuses only on the requirement to inform current customers about the Commission Order.¹⁶ OPC notes that the Commission clearly found that Direct Energy engaged in deceptive trade practices, and to allow continuation of the

¹² *Id.*

¹³ OPC Response and Motion for Stay at 8.

¹⁴ *Id.*

¹⁵ *Id.* at 4.

¹⁶ *Id.*

practices for new customers during its appeal would be substantially harmful to them, and detrimental to the public interest.¹⁷ OPC contends that a stay “would signal other suppliers engaging in deceptive practices that they can easily avoid or postpone the consequences of these actions to the detriment of their customers.”¹⁸

13. OPC requested that the Commission grant a stay of enforcement of its Order No. 90208 regarding the letter to customers with the opportunity re-enroll them with a valid contract, while denying the stay with regard to the provisions of the Order that prohibit Direct Energy from enrolling customers in violation of the MTSA going forward.¹⁹

3. Direct Energy Reply

14. On June 7, 2022, Direct Energy filed its reply to OPC’s response, asking that the Commission reject OPC’s requested partial stay and to grant Direct Energy a stay of the entire Commission Order. Direct Energy repeats its arguments in favor of the Motion, adding that a partial stay would confuse customers. Direct Energy further argues that with regard to the *SmartEnergy* appeal pertaining to the MTSA issue, which is now pending with the Court of Special Appeals, the Court will review the initial Commission decision (Order No. 89795) and not give any deference to the intermediate—Circuit Court—decision.²⁰

Commission Decision

15. 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 of a proceeding for review under this subtitle.”

16. Under this provision, the Commission applies the standard set forth in Maryland

¹⁷ *Id.* at 5.

¹⁸ *Id.*

¹⁹ *Id.* at 7.

²⁰ Direct Energy Reply at 3.

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.²¹

17. The Commission does not find merit in Direct Energy's arguments regarding the likelihood of success on the merits. As OPC aptly pointed out in its response to the Motion, the Commission has ruled on the applicability of the MTSA to inbound sales calls, with support from the Office of the Attorney General's Consumer Protection Division, and the Circuit Court for Montgomery County has affirmed the Commission's findings. Direct Energy has provided no evidence of its likely success on the merits of its own appeal. However, since the *SmartEnergy* decision is on appeal before the Court of Special Appeals, and the decision could impact pending Commission cases with similar facts, it is reasonable to stay the enforcement of Order No. 90208 pending the *SmartEnergy* appeal. It is also reasonable for Direct Energy's petition for judicial review to be held in abeyance pending the resolution of the *SmartEnergy* appeal.

18. Direct Energy argues that the contract interpretation issue that is part of its own appeal is also a novel issue that should proceed without interruption. While this particular interpretation issue—as it relates to retail supplier contracts—is a matter of first impression, contract interpretation, in general, is not a novel issue. The Commission's regulations clearly describe the required contents of a supplier contract, and Direct Energy must adhere to the requirements when enrolling new customers. Therefore, if the Order is to be stayed, it would be reasonable for Direct Energy's petition for judicial review to also be held in abeyance pending the *SmartEnergy* appeal.

19. In its Motion, Direct Energy described the risk of damage to its reputation and the loss of its customer base in Maryland. However, that risk existed upon the public issuance of the

²¹ 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. See also *In the Matter of the Complaint of the Staff of the Public Service Commission v. SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Case No. 9413, Order No. 89800 (Apr. 9, 2021).

Order, which prompted articles in industry publications and other media, many of which customers can access. Therefore, a stay would not prevent or reverse any adverse reputational harm that has already occurred. The Commission does not find any potential irreparable harm to Direct Energy that would support a stay.

20. While Direct Energy argues that other parties would not be harmed if a stay is granted, any new telephonically enrolled customers would likely not be validly enrolled because they would not be aware of the material terms of the supplier contract before enrolling and would not be required to sign a valid contract. However, based on OPC's argument citing the risk of customer confusion in the absence of a partial stay, the Commission will grant a stay of its requirement for Direct Energy to notify certain customers of their invalid contracts within 30 days of the Order and have Direct Energy report back to the Commission in 60 days of the Order. However, pending this partial stay, Direct Energy must adhere to the MTSA and Commission regulations when enrolling new customers by telephone as of the date of this Order.

21. 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 Direct Energy's Motion to Stay is to preserve the status quo, and provide Direct Energy the opportunity to later comply with the MTSA for its current, complaint period customers – while prohibiting Direct Energy from adding new customers without complying with the MTSA or COMAR contracting requirements – during the pendency of its appeal as well as the *SmartEnergy* appeal.

22. Accordingly, the Commission will grant a partial stay of Order No. 90208, provided that Direct Energy request that the Circuit Court hold its petition for judicial review in abeyance pending the resolution of the *SmartEnergy* appeal decision and enroll new telephone customers in compliance with the requirements of the MTSA, or the contract formation requirements specified by COMAR 20.53.07.08(C)(4) and COMAR 20.59.07.08(C)(4).

IT IS THEREFORE, this 27th day of June, in the year of Two Thousand Twenty-Two, by the Public Service Commission of Maryland, **ORDERED**:

(1) That Direct Energy Services, LLC's Motion For Stay regarding enforcement of Order No. 90208 is hereby granted in part, subject to the terms and conditions below:

(a) Direct Energy, within seven days of the date of this Order, request that the Circuit Court hold its petition for judicial review in abeyance pending the resolution of the *SmartEnergy* appeal decision in the Court of Special Appeals, or any further appeals taken by SmartEnergy;

(b) Direct Energy discontinues telephone enrollments that are not compliant with the MTSA, directed by the Commission in Order No. 90208; and

(c) Direct Energy enrolls any new customers using the contract formation requirements specified by COMAR 20.53.07.08(C)(4) and COMAR 20.59.07.08(C)(4);

(2) That Direct Energy shall inform the Commission in writing within five days whether it agrees to these conditions; and

(3) That the Maryland Office of People's Counsel's Motion for Stay is granted, in part, consistent with the Order.

By Direction of the Commission,

/s/ Andrew S. Johnston

Andrew S. Johnston
Executive Secretary