

**ORDER NO. 90515**

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

BEFORE  
THE PUBLIC SERVICE  
COMMISSION OF MARYLAND

\_\_\_\_\_  
CASE NO. 9613  
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**Issued: February 22, 2023**

**ORDER ON REHEARING AND  
ESTABLISHING PRE-COMPLIANCE DIRECTIVES**

1. The Commission issued Order No. 89795 (the final Order on Appeals) in Case No. 9613 on March 31, 2021, and issued an order granting a stay of that order (“Stay Order”) on April 9, 2021, Order No. 89800.<sup>1</sup> The Maryland Office of People’s Counsel (“OPC”) filed a Request for Rehearing of the Stay Order on April 23, 2021, and a Renewed Request for Rehearing on February 2, 2023.<sup>2</sup> SmartEnergy Holdings, LLC d/b/a SmartEnergy (“SmartEnergy”) responded to OPC’s renewed request for rehearing on February 10, 2023<sup>3</sup> and OPC filed reply comments on February 16, 2023.<sup>4</sup>

2. This Order grants, in part, OPC’s Request for Rehearing; supplementing the Stay Order with pre-compliance directives, directing SmartEnergy to prepare, in advance,

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<sup>1</sup> Order on Motion for Stay (“Stay Order”).

<sup>2</sup> Maillog No. 234947 (“OPC Request for Rehearing”) and Maillog No. 301149 (“OPC Renewed Request for Rehearing”).

<sup>3</sup> Maillog No. 301263 (“SmartEnergy Response,” response to OPC Renewed Request for Rehearing).

<sup>4</sup> Maillog No. 301376 (“OPC Reply Comments,” reply to OPC Renewed Request for Rehearing).

customer letters<sup>5</sup> and customer refund measures (spreadsheets and refund distribution procedures) to accelerate the review of customer-correspondence and remittance of customer-refunds, in the event the Supreme Court of Maryland denies SmartEnergy’s petition for certiorari or grants certiorari and subsequently affirms the decision of the Appellate Court of Maryland of SmartEnergy’s appeal. OPC’s request to increase the appeal bond amount is denied.

### **BACKGROUND**

3. In Order No. 89795 the Commission affirmed the Public Utility Law Judge’s (“PULJ”) findings that SmartEnergy Holdings, LLC d/b/a SmartEnergy (“SmartEnergy”) engaged in a pattern or practice of systemic violations of Maryland law<sup>6</sup> and Commission regulations,<sup>7</sup> by engaging in marketing, advertising, or trade practices that are unfair, false, misleading or deceptive,<sup>8</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>9</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 and signed by the customer) did not apply to the enrollment contracts entered into between SmartEnergy and its customers.

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<sup>5</sup> The customer letters required in Order No. 89795 (ordering paragraph no. 5) can be sent with refunds, as well as before or after refunds have been issued.

<sup>6</sup> *Md. Ann. Code*, Pub Util Art., § 7-507(b)(7).

<sup>7</sup> Code of Maryland Regulations (“COMAR”) Title 20, Subtitle 53.07 and .08, and Title 20, Subtitle 61.04.

<sup>8</sup> Order No. 89795 (Mar. 31, 2021) at para. 144.

<sup>9</sup> *Id.* at para. 46 and 74.

4. On April 5, 2021, SmartEnergy filed a Petition for Judicial Review of the Commission’s decision in the Circuit Court for Montgomery County, and a motion requesting the Court stay Order No. 89795, pending judicial review. Subsequently, on April 8, 2021, SmartEnergy filed a Motion for Stay with the Commission.<sup>10</sup>

5. In support of the Motion for Stay, SmartEnergy offered that – if the relief that it requested was granted – SmartEnergy agreed 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 million.<sup>11</sup> SmartEnergy offered that this additional financial security shall remain in place until the Circuit Court rules on the merits of its appeal.

6. OPC urged that the Commission not grant SmartEnergy’s Motion for Stay, arguing that in requesting a stay SmartEnergy failed to demonstrate irreparable harm, and that granting a stay was not in the public interest.<sup>12</sup> OPC also argued that the conditions offered by SmartEnergy for obtaining a stay were insufficient.<sup>13</sup> OPC also argued that the \$2.5 million additional financial security offered by SmartEnergy was insufficient, and argued that the amount of the additional financial security should be \$6 million, which is the

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<sup>10</sup> Maillog No. 234681 (“SmartEnergy Motion for Stay”).

<sup>11</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>12</sup> Maillog No. 234693 (“OPC Comments,” comments on SmartEnergy Motion for Stay).

<sup>13</sup> *Id.* The core of SmartEnergy’s Motion for Stay objected 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 for Stay, Attachment 1 at 2 para. 1, 9, 16-31.)

amount that SmartEnergy estimated would be the cost of customer refunds when it is obliged to remit them.<sup>14</sup>

7. On April 9, 2021, pursuant to *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 3-205, the Commission granted the Motion for Stay subject to the terms and conditions proposed by SmartEnergy—and certain modifications recommended by OPC—directing that: (1) SmartEnergy shall cause to be filed with the Commission within 10 calendar days of the Stay 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; (2) the additional financial security directed by the Commission 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 (3) SmartEnergy shall notify the Commission within 60 days of any notice to its supplier license surety of an intent to cancel its existing bond in Maryland.<sup>15</sup> In compliance with Order No. 89800, SmartEnergy filed its Appeal Bond with the Commission on April 19, 2021.<sup>16</sup>

8. After the Stay Order issued and after SmartEnergy filed its appeal bond, OPC filed a request for rehearing, arguing that the Commission should not have granted the stay because—SmartEnergy’s appeal of the Commission’s finding that MTSA applies to inbound customer telephone call enrollments, and SmartEnergy’s enrollments failed to qualify for the MTSA’s “marketing materials” and “preexisting customer” exemptions—

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<sup>14</sup> OPC Comments at 2; (SmartEnergy Motion for Stay, Attachment 1 at para. 1.)

<sup>15</sup> Order No. 89800 at 8, ordering paragraphs 3-5.

<sup>16</sup> Maillog No. 234862 (“Appeal Bond”).

Order No. 89795 is “independently supported” by the findings of non-MTSA violations.<sup>17</sup> OPC reasserted that SmartEnergy failed to demonstrate irreparable harm to the company, and argued that even if the Commission denies rehearing, the Commission should nonetheless address SmartEnergy’s “ineffective” bond and modify the bond amount to preserve the status quo *ante* under the Proposed Order.<sup>18</sup>

9. The Commission requested comments on OPC’s request for rehearing on April 27, 2021. SmartEnergy filed responsive comments on May 5, 2021,<sup>19</sup> which were followed by: (1) reply comments filed by OPC on May 11, 2021;<sup>20</sup> (2) a motion to strike filed by SmartEnergy on May 13, 2021;<sup>21</sup> (3) a response by OPC filed on May 18, 2021;<sup>22</sup> and (4) additional reply comments filed by SmartEnergy on May 20, 2021.<sup>23</sup>

10. During the pendency of SmartEnergy’s litigation regarding Order No. 89795 in the Circuit Court for Montgomery County, which affirmed the Commission’s Order on November 28, 2021,<sup>24</sup> and in the Appellate Court of Maryland (or “ACM”), which also affirmed the Order,<sup>25</sup> the Commission chose not to address OPC’s request for rehearing and the filings related thereto. The circuit court and intermediate appeals have now concluded, and the Circuit Court and the Appellate Court of Maryland have both affirmed Order No. 89795. SmartEnergy’s final appeal is pending in the Supreme Court of

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<sup>17</sup> Maillog No. 234947 at 4.

<sup>18</sup> *Id.* at 15-17.

<sup>19</sup> Maillog No. 235160.

<sup>20</sup> Maillog No. 235205.

<sup>21</sup> Maillog No. 235248.

<sup>22</sup> Maillog No. 235319.

<sup>23</sup> Maillog No. 235341.

<sup>24</sup> *In the Matter of SmartEnergy Holdings, LLC d/b/a SmartEnergy*, Civil Action No. 485338-v.- Circuit Court, slip op. (Dec. 20, 2021).

<sup>25</sup> *In the Matter of SmartEnergy Holdings, LLC d/b/a SmartEnergy* (“*SmartEnergy*”), 256 Md. App. 20 (2022).

Maryland, where SmartEnergy filed a Petition for a Writ of Certiorari on January 19, 2023.<sup>26</sup>

11. On this background, OPC has now renewed its request for rehearing of Order No. 89800. OPC states that it files this request to protect current and former SmartEnergy customers, who – OPC argues – are “at risk” of foregoing any compensation because of the “inadequacy” of the appeal bond ordered by the Commission as a condition for granting the stay.<sup>27</sup>

**I. OPC’s RENEWED REQUEST FOR REHEARING**

12. Citing both PUA” § 3-205 and Maryland appellate case law, OPC notes that the Commission retains jurisdiction to modify or supplement the terms of the Stay Order.<sup>28</sup> Hence, OPC argues that the Stay Order is defective – inasmuch as OPC argues “[it] does not require a bond that delivers on what it promises—that is, refunds if SmartEnergy does not prevail in its appeal.”<sup>29</sup> OPC argues that the appeal bond obtained by SmartEnergy and filed with the Commission allows SmartEnergy to cancel the bond – after the conclusion of any appeals – but before the Commission has had an opportunity to begin to assess whether SmartEnergy has properly calculated customer rerates and issued refunds.<sup>30</sup>

13. OPC argues that “should the Supreme Court of Maryland deny SmartEnergy’s petition for certiorari, the language of the current Stay Order provides SmartEnergy a basis to terminate the bond or to at least direct the surety to refuse to exercise the bond ...”<sup>31</sup>

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<sup>26</sup> Docket No. SCM-0363-2022. The Commission and OPC both have filed answers in the Supreme Court of Maryland opposing SmartEnergy’s petition for certiorari.

<sup>27</sup> OPC Renewed Request for Rehearing at 1.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10.

OPC adds that “[a] further flaw in the bond leaves the surety with apparent responsibility to determine whether SmartEnergy has complied with the Final Order’s customer refund requirements.”<sup>32</sup> OPC asserts that – in the event there is a dispute over its compliance with the refund requirement – this benefits SmartEnergy.

14. OPC argues further that the requirement of the Stay Order (and the associated bond provision) that the surety give the Commission 60 days notice before terminating the bond is defective, arguing that the Commission has no recourse once the surety provides notice of its intent to terminate the bond.<sup>33</sup>

15. OPC also argues—as it did in its initial request for rehearing—that the bond amount directed by the Commission’s Stay Order fails to preserve the status quo *ante* under the Proposed Order.<sup>34</sup> OPC submits that the Proposed Order states that refunds should be provided to both current and former customers – arguing that this includes the “so-called ‘complaint period’ as well as up to the present ...”<sup>35</sup> Noting that Order No. 89795 states that “refunds will be for ‘all of its Maryland customers’ and ‘for all periods these customers were served[,]’” OPC argues that \$2.5 million will not be sufficient to cover the refunds required by the Commission.<sup>36</sup>

16. OPC submits that more than 21 months ago, as of April 2021, the refund noted in pleadings filed by SmartEnergy in the Circuit Court amounted to approximately \$6 million.<sup>37</sup> OPC requests that the Commission require SmartEnergy’s appeal bond be

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 12.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* citing, SmartEnergy Motion for Stay, Dkt. No. 121 (Apr. 8, 2021), Attachment 2: SmartEnergy Motion for Stay in Montgomery County Circuit Court, (Apr. 6, 2021) para. 33.

increased to \$6.5 million, to “more accurately” reflect the status quo *ante* under the Proposed Order.<sup>38</sup>

## II. SMARTENERGY RESPONSE

17. In its response, SmartEnergy submits that the arguments raised in OPC’s renewed request for rehearing have already been considered and rejected by the Commission. SmartEnergy notes that in granting the Stay Order, the Commission found that some of the concerns raised by OPC regarding SmartEnergy’s Motion for Stay had merit, and the Commission modified SmartEnergy’s proposed bond conditions – to address some of those concerns.<sup>39</sup>

18. As in its response to OPC’s initial request for rehearing, SmartEnergy argues that OPC’s reading of the terms of the appeal bond and the provisions of the Stay Order recited therein is flawed.<sup>40</sup> SmartEnergy reiterates that the appeal bond is “irrevocable” and subject to the terms and conditions of Order No. 89800; the bond provides additional financial security in the amount of \$2.5 million that “guarantees remittance of funds to the Commission to satisfy refunds (if any) directed by the Commission pursuant to Order No. 89795,” provides that the surety must “permit the Commission to direct the proceeds of [the] bond to be paid and/or disbursed to satisfy SmartEnergy’s obligation” and the surety must “give the Commission sixty (60) days written notice prior to the termination of the bond.”<sup>41</sup>

19. SmartEnergy submits that OPC’s concerns that it might use the court dates to manipulate or cancel the bond are “baseless,” stating that such a scenario – as OPC suggests

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<sup>38</sup> OPC Renewed Request for Rehearing at 13.

<sup>39</sup> SmartEnergy Response at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4; Appeal Bond at 2.



– cannot occur, not only because the bond is irrevocable, “but also because the Surety must give the Commission 60 days’ written notice prior to terminating the bond and during that period, the Commission has absolute authority to order distributions.”<sup>42</sup> As a “preventative failsafe” to allay OPC’s concerns regarding the risk of under-refunding customers, SmartEnergy submits that “[t]o the extent that SmartEnergy underpays customers ... the Commission would have sufficient time to instruct the Surety ... that the bond should not be cancelled to the extent that less than \$2.5 million has been refunded to customers.”<sup>43</sup>

20. With regard to the \$2.5 million bond amount, SmartEnergy submits that the bond amount should not be modified, as requested by OPC, and reiterates that it is the amount sufficient to reflect the status quo *ante* under the Proposed Order – which applied only to the Complaint Period, from February 2017 through May 10, 2019.

### **III. OPC REPLY**

21. In reply to SmartEnergy’s response, in addition to reiterating its request that the Commission increase SmartEnergy’s bond requirement to \$6.5 million to “more accurately” reflect the Order No. 89795-refund obligation required of SmartEnergy, OPC submits that neither the Stay Order nor SmartEnergy’s bond protect and guarantee the Commission-ordered refunds directed in Order No. 89795.

22. According to OPC, the bond language (as recited from the Stay Order) allows the surety to argue that it has no obligation to pay out the bond’s proceeds after appeals have run their course.<sup>44</sup> OPC also argues that the 60-day notice period does not provide the Commission with express authority to control what happens to the bond once the surety

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<sup>42</sup> SmartEnergy Response at 4.

<sup>43</sup> *Id.*

<sup>44</sup> OPC Reply at 2.

gives the Commission written notice of its intention to terminate the bond.<sup>45</sup> OPC states that “even if the surety does not argue that it has no obligation to pay the proceeds once all appeals have been concluded, the surety could give 60 days notice, then decline to release the bond’s proceeds to pay for customer refunds once the period has run.”<sup>46</sup>

23. OPC submits that the 30-day refund period allowed SmartEnergy under Order No. 89795, coupled with a 60-day period allowed to account for the full disbursement of refunds, means the Commission would not know until 90 or more days after the surety has potentially given 60 days notice of its intent to terminate the bond, that SmartEnergy did not fully refund customers.<sup>47</sup>

### **COMMISSION DECISION**

24. Pursuant to PUA § 3-205, “[t]he Commission may, on terms it considers appropriate, stay the enforcement of a regulation or order that is the subject of a proceeding for review ....” In conditioning the SmartEnergy Stay Order, based on some of the concerns raised by OPC, the Commission modified SmartEnergy’s conditions to (1) extend the moratorium directed by the Commission in Order No. 89683 to the conclusion of any 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. SmartEnergy does not dispute that the Commission has jurisdiction to modify or supplement the Stay Order—if it considers it appropriate to do so—but argues that there is no reason to do so.

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<sup>45</sup> *Id.* at 2-3.

<sup>46</sup> *Id.* at 3.

<sup>47</sup> *Id.*

25. In considering OPC’s renewed request for rehearing, the Commission is mindful that litigation has persisted in this matter for nearly two years, through the Circuit Court for Montgomery County, which affirmed Order No. 89795 and through the Appellate Court of Maryland, which has also affirmed the Order. At this juncture, the Commission and the parties await the outcome of SmartEnergy’s petition for certiorari, which was filed in the Supreme Court of Maryland on January 19, 2023. Should the Supreme Court deny SmartEnergy’s petition, or grant the petition and also affirm Order No. 89795, compliance proceedings will be required to consider whether SmartEnergy’s conduct warrants suspension or revocation of the supplier’s Maryland retail supplier license and/or the assessment of civil penalties “after SmartEnergy has complied with the directives in this Order, including making refunds to all customers that have invalid contracts.”<sup>48</sup> OPC’s renewed request for rehearing brings into focus whether SmartEnergy’s appeal bond, after 21 months of litigation and the refund-compliance requirements that it is intended to secure, is sufficient to guarantee the refunds for which it was issued.

26. In its response to OPC, SmartEnergy notes that the bond is “irrevocable,” secures \$2.5 million—guaranteeing “remittance of funds to the Commission to satisfy customer refunds (if any) directed by the Commission pursuant to Order No. 89795,”<sup>49</sup> and the “Condition” clause in SmartEnergy’s bond “is standard in surety bonds.”<sup>50</sup> The Commission notes further, in response to OPC’s concerns that the surety might cancel the bond before all customer refunds—which the bond secures—have been made, that “[the surety] has no incentive to prematurely cancel the bond.”<sup>51</sup>

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<sup>48</sup> Order No. 89795 at 65, para. 151.

<sup>49</sup> SmartEnergy Response at 4-5.

<sup>50</sup> *Id.* at 5.

<sup>51</sup> *Id.*

27. As it did regarding some of OPC's initial concerns regarding granting the stay, the Commission again finds that some of OPC's concerns have merit. To address these concerns, the Commission will grant OPC's request for rehearing, in part – by directing pre-compliance requirements that will accelerate Staff and OPC's opportunity to review SmartEnergy's customer-correspondence and customer-refund preparedness. The Commission however denies OPC's request to increase the bond amount above the current amount of \$2.5 million – even though SmartEnergy's refund obligation may be significantly more than that.<sup>52</sup>

28. OPC also argues the Stay Order and the sufficiency of SmartEnergy's appeal bond may be susceptible to some risk of gamesmanship – especially SmartEnergy's refund-reporting obligation under Order No. 89795, which directed reporting within 60 days (after allowing the supplier 30 days to remit refunds). While the Commission will not increase the bond amount, the Commission will, however, supplement the Stay Order to require accelerated reporting by SmartEnergy in the event its petition for certiorari is denied or the Supreme Court of Maryland grants the petition and affirms the ACM's published opinion in *SmartEnergy*.

29. Under Order No. 89795, SmartEnergy is directed to: return all of its Maryland customers that were solicited and enrolled via telephone in response to its direct mail advertising, to utility standard offer service within 10 calendar days of the Order;<sup>53</sup> within

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<sup>52</sup> Although the \$2.5 million appeal bond was set to ensure that funds were guaranteed to cover the refund amount reflective of the status quo ante - under the Proposed Order, the refund amount has most assuredly grown since SmartEnergy did not disenroll customers while its appeals have remained pending. However, the Commission is not inclined—at this stage of the proceedings—to increase the bond amount or require a replacement bond providing for additional protective provision.

<sup>53</sup> Order No. 89795 provides that it has the effect of a drop transaction, and the utilities were/are directed to process SmartEnergy's customer returns as provided under COMAR 20.53.04.04.

30 days of the Order, to send a letter to all of its Maryland customers explaining: (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.<sup>54</sup> Also, within 30 days of the Order SmartEnergy is required 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.<sup>55</sup> Order No. 89795 further requires SmartEnergy within 60 days to provide an accounting to the Commission of the refund amount sent to each of these customers.<sup>56</sup>

30. The Stay Order is supplemented to also require as follows: (1) within three calendar days of an order of the Supreme Court denying certiorari or if certiorari is granted and the ACM's opinion in *SmartEnergy* is affirmed, SmartEnergy shall begin remitting customer refunds, and providing a series of weekly auditable reports accounting for refunds remitted to customers; (2) failure to comply with customer-refund and the weekly reporting requirements set forth in this Order shall constitute default of this Order, and may cause the Commission to declare SmartEnergy in default, in whole or in part; (3) breach of any portion of SmartEnergy's customer refund obligations—as demonstrated in a motion filed by Commission Staff, OPC or on the Commission's own motion—may be deemed a default of the Stay Order.

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<sup>54</sup> Order No. 89795 at 67, ordering paragraph 5.

<sup>55</sup> *Id.* at ordering paragraph 4.

<sup>56</sup> *Id.*

31. For purposes of granting the stay while Order No. 89795 was pending judicial review, the Commission found that \$2.5 million—as reflective of the status quo *ante* under the Proposed Order—was reasonable. Therefore, OPC’s request to increase the bond amount to guarantee all customer refunds is denied. This by no means suggests that the bond amount accepted by the Commission in the Stay Order relieves SmartEnergy from its requirement under Order No. 89795 to refund all customers that were enrolled in violation of the MTSA.<sup>57</sup> As noted in Order No. 89795, SmartEnergy’s compliance with the directives therein will be considered in the assessment of any civil monetary penalty,<sup>58</sup> and any other enforcement efforts the Commission may consider.

32. In this Order, assuming that SmartEnergy’s petition for certiorari will be denied by the Supreme Court of Maryland or that the ACM’s opinion in *SmartEnergy* will be affirmed, the Commission also adopts pre-compliance procedures intended to help accelerate customer refunds, and to preserve the Commission’s rights to call upon any and all bond proceeds necessary to secure payment of refunds to SmartEnergy’s customers, in the event SmartEnergy fails to comply with this Order.

33. The Commission views the appeal bond as a fail-safe to protect customers in the event that SmartEnergy fails to remit customer-refunds as required by Order No. 89795. The obligation to remit customer refunds as directed by the Commission belongs to SmartEnergy directly, bond or no bond – regardless of the amount. The bond expressly states that the obligation of the surety—is in the event that SmartEnergy fails—to “*satisfy*

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<sup>57</sup> While the magnitude to SmartEnergy’s total refund obligation is unknown at this time, it is significantly more than \$2.5 million. In its renewed request for rehearing, OPC requested that the bond amount be increased to \$6.5 million asserting that that amount more accurately “reflect[s] the status quo *ante* under the Proposed Order.” Maillog No. 301149 at 13.

<sup>58</sup> Order No. 89795 at 65, para. 151.

*the customer refunds ordered by the Commission in Order No. 89795, or [any] part thereof*  
[].”<sup>59</sup>

**IT IS THEREFORE**, this 22<sup>nd</sup> day of February, in the year of Two Thousand Twenty-Three, by the Public Service Commission of Maryland, **ORDERED**:

(1) That the Office of People’s Counsel’s Request for Rehearing of the Order No. 89800 is granted in part and denied in part, as discussed in this Order;

(2) That in the event the Supreme Court of Maryland denies SmartEnergy’s Petition for a Writ of Certiorari pertaining to the Appellate Court of Maryland’s decision affirming Order No. 89795, or grants certiorari and subsequently denies SmartEnergy’s appeal on the merits, the directives of Order No. 89795 are deemed reinstated, immediately;

(3) That Order No. 89800 is supplemented, adding the following conditions:

(i) in the event that an order of the Supreme Court denying certiorari or if certiorari is granted and the ACM’s opinion in *SmartEnergy* is affirmed, SmartEnergy shall immediately commence remitting customer refunds, and within three days of the shall fully remit refunds as required under Order No. 89795 within 30 days thereof; and within three days of the Court’s order shall submit for Staff and OPC review (a) the draft “customer letter” required in Order No. 89795 (ordering paragraph no. 5) that is to be sent to customers, and (b) a proposed refund compliance spreadsheet, as described herein and begin providing a series of weekly reports accounting for refunds remitted to customers;

(ii) failure to comply with the weekly reporting requirements set forth in this Order shall constitute default of the Stay Order, and may cause the Commission to declare SmartEnergy in default, in whole or in part;

(iii) breach of any portion of SmartEnergy’s customer refund obligations—as demonstrated in a motion filed by Commission Staff, OPC or on the Commission’s own motion—may be deemed a default of the Stay Order.

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<sup>59</sup> Appeal Bond at 2 (emphasis added); SmartEnergy Response at 5. Refunds by SmartEnergy in the amount of \$2.5 million do not offset the surety’s obligation under the bond until all refunds required under Order No. 89795 have been remitted.

(4) That upon notification of an order of the Supreme Court of Maryland to the effect set forth in ordering paragraph no. 2, the Executive Secretary shall list Case No. 9613 – Order No. 89795 – for initial compliance proceedings at the first Administrative Meeting following the issuance of the Court’s order;

(5) That in preparation for returning customers to utility SOS, remitting customer refunds and initial compliance proceedings, SmartEnergy is directed to prepare for Staff and OPC review a draft customer letter, and a spreadsheet of its Maryland customers enrolled from 2017 to date by utility with the per-customer monthly rates charged by SmartEnergy along with the pre-customer monthly utility SOS rates – the difference of which shall be the presumptive customer amount when aggregated over each customer’s enrollment period. The draft customer letter and proposed refund compliance spreadsheet shall be provided to Staff and OPC within three calendar days following the Executive Secretary’s listing of Case No. 9613 – Order No. 89795 – for initial compliance proceedings on an Administrative Meeting;

(i) SmartEnergy will be required to retain a Maryland-based independent auditor to confirm the remittance of customer refunds;

(ii) a report by the independent auditor of SmartEnergy’s weekly refund reports, and remittance of refunds shall be filed with the Commission 55 days following the submission of SmartEnergy’s first weekly refund report. SmartEnergy shall provide the independent auditor full access to all records and correspondence needed to inform the auditor’s report;

(6) That at the Administrative Meeting, SmartEnergy, Staff and OPC shall provide a status report pertaining to: (i) the draft customer letter, (ii) the proposed refund spreadsheet, and (iii) a schedule for remittance of customer refunds and weekly refund reports, and shall present a proposed schedule for the Commission’s consideration of any remaining compliance issues; and



(7) That failure to comply with the provisions of this Order shall constitute default of Order No. 89800, which may cause the Commission to initiate proceedings to call upon the proceeds of the appeal bond executed as a condition of the Stay Order in this case.

*/s/ Jason M. Stanek* \_\_\_\_\_

*/s/ Michael T. Richard* \_\_\_\_\_

*/s/ Anthony J. O'Donnell* \_\_\_\_\_

*/s/ Odogwu Obi Linton* \_\_\_\_\_

*/s/ Patrice M. Bubar* \_\_\_\_\_

Commissioners