

IN THE MATTER OF THE COMPLAINT OF THE  
STAFF OF THE PUBLIC SERVICE COMMISSION  
OF MARYLAND AGAINST SMARTENERGY  
HOLDINGS LLC D/B/A SMARTENERGY

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**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND**

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**CASE NO. 9613**

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**REPLY BRIEF**  
  
**OF THE STAFF**  
  
**OF THE**  
  
**PUBLIC SERVICE COMMISSION**

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## **REPLY BRIEF**

The Staff of the Public Service Commission of Maryland (“Staff”) files this Reply Brief in Case No. 9613 in accordance with the Procedural Schedule in this case.

### **I. INTRODUCTION**

#### **A. Background**

Md. Ann. Code, Public Utilities Article (“PUA”) §7-507(k) empowers the Commission to impose a civil penalty and license revocation on a licensed electricity supplier for just cause. Just cause includes “violating a Commission regulation or order;” “engaging in deceptive practices;” and “violating a provision of this article or any other applicable consumer protection law of the State.”<sup>1</sup> Even before the evidentiary hearing in this matter, summary judgment was entered against SmartEnergy Holdings LLC d/b/a SmartEnergy (“SmartEnergy or the Company”) for its violations of the consumer protection laws against over 32,000 of its Maryland customers.<sup>2</sup> In its Post Hearing Brief, SmartEnergy admits to violating additional consumer protection laws for all of its Maryland customers.<sup>3</sup> SmartEnergy also admits to deceptive acts and practices by its telephone sales agents for which it is legally responsible.<sup>4</sup> These admitted violations alone rival those of the recent case of *Smart One*, CN 9617, Order No. 89219 (Aug. 9, 2019) and Order No. 89526 (Mar. 6, 2020) in which the Commission found violations of consumer laws and levied a civil penalty of \$561,000 , license revocation, and customer refunds. Even if no further

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<sup>1</sup> PUA §7-507(k)

<sup>2</sup> PULJ’s Ruling on Motion for Summary Judgment (Sept. 11, 2020) (ML231808)

<sup>3</sup> SmartEnergy Post Hearing Brief, pp. 67-8. (ML232727)

<sup>4</sup> In its Post Hearing Brief, Smart Energy admits to violations in 20 of the 34 specific sales recordings at issue in this case. *Id.* At trial, SmartEnergy admitted that all 34 calls violated its own quality assurance standards. Hear Tr. at p.367, l.4-13.

violations were to be considered against SmartEnergy, the same verdict and penalties are warranted here.

Still at issue, though, is the Company's core method of operation, enrolling customers by telephone without obtaining a signature on a written contract or even first informing the consumer of the essential terms of the contract. As is apparent from the sales recordings entered into evidence, Maryland consumers often did not know what they were buying (renewable energy) or that it was going to cost them more than their current electric rate, and in many cases they didn't even know their supply account was being switched from their utility to a different company, SmartEnergy. The consumers didn't know because they weren't told; they weren't told the nature of the product, they weren't told the price, they were led to believe they were dealing with their utility. Consumers called SmartEnergy because they received a postcard telling them they were entitled to free electricity, and they rightfully expected savings. As is clear from the sales recordings, these Maryland consumers were routinely misled and manipulated by the deceptive practices of SmartEnergy and its agents into switching to the higher priced product of SmartEnergy.

Although SmartEnergy paints itself as a responsible company, it does not explain why it has had such difficulty obeying the laws of Maryland and of other jurisdictions in which it operates. Instead, it downplays the importance of the consumer laws it has trampled and the protections the laws afford Maryland's citizens. Rather than accepting actual responsibility for its wrongdoing, SmartEnergy continues to blame others for its misdeeds: its sales agents, the Maryland Public Service Commission ("Commission"), Office of People's Counsel ("OPC"), the Consumer Affairs Division ("CAD"), and ultimately the consumers themselves.

SmartEnergy's suggested remedy for its violations is a fine of \$300,000 and a promise to reform and operate within the law under a temporary monitoring program. The \$300,000 does not compare to the millions of dollars (and growing) of revenues SmartEnergy is taking from Maryland and Maryland consumers. Its assurance that it will reform and obey Maryland law as a remedy rings hollow because that has always been its obligation. Nevertheless, SmartEnergy has been shown to break knowingly both its oath and the law tens of thousands of times over a period of years. SmartEnergy now again vows it will obey the law, but with a catch; it proposes to obey only its version of the law in which it is unencumbered by the need to obtain wet signatures on consumer contracts in contradiction of recent Commission precedent. In essence, SmartEnergy asks in this case that Commission precedent be overturned or ignored and that it be allowed to pay a fine and continue with business as usual on its terms.

## **II. ARGUMENT**

### **A. SmartEnergy's Telephone Sales Require a Signed Written Contract.**

Throughout the course of this litigation, Staff has maintained that SmartEnergy's practice of initiating sales calls by sending a coded postcard to specific electric account holders requires SmartEnergy to obtain signed contracts under the Maryland Telephone Solicitation ("MTSA") act and under COMAR 20.53.07.08C(2). SmartEnergy, however, believes that it has found an elaborate, winding path through the statutes and regulations to exempt it from compliance with these important consumer protections.

SmartEnergy claims its telephone sales were not "telephone solicitations" at all and therefore are unfettered by the MTSA. To reach this conclusion, it imposes an "inbound or

outbound” distinction to the definition of “telephone solicitation” in the statute that does not exist. The MSTA definition of “Telephone solicitation” states:

(f) “Telephone solicitation” means 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.

MD Code, Commercial Law, §14-2201 (1)

Although SmartEnergy claims the phone call was not “initiated by the merchant” because the consumer placed the telephone call, it ignores the fact the phone call is not the issue. In SmartEnergy’s telephone sales method, the initiation of the encounter (the “attempt of the merchant to sell”) is made by the merchant by direct mail to a specific, targeted account holder about which the Company already has specific, coded information. The sales solicitation then takes place entirely by telephone as the sales agent takes the consumer through the SmartEnergy sales script. SmartEnergy itself argues that the receipt of the postcard is not part of the sales solicitation which is made entirely by telephone.<sup>5</sup> There is no mention in the statute of the technicality of who places the call. In fact, when SmartEnergy calls the consumer after receiving a message, it still defines this as an exempt, incoming call. The call, however, is initiated by SmartEnergy’s attempt to sell and is subject to the MTSA.

In its Post Hearing brief, SmartEnergy claims it is entitled to two exemptions to the wet signature requirement of the MSTA. The first exemption it claims is in Md. Comm. Law §14-2202(5) which provides an exemption when:

the consumer purchases goods or services pursuant to ... mailing material of the merchant that contains:

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<sup>5</sup> SmartEnergy Post Hearing Brief at p. 8.

- (i) The name, address, and telephone number of the merchant;
- (ii) A description of the goods and services being sold;
- (iii) Any limitations or restrictions that apply to the offer;

SmartEnergy has already argued that the postcard is not part of the sales solicitation and is separate from the sale.<sup>6</sup> So it follows that any purchase is made “pursuant to” the sales call and not the mailing. Hence, this exemption can not apply to SmartEnergy’s solicitation method. Even if the purchase were made pursuant to the mailing, the mailing does not contain sufficient information to qualify for this exemption. It does not contain SmartEnergy’s real address, providing only one that makes the New York based company appear to reside in Maryland. It does not contain a “description of the goods or services being sold” as it fails to mention the actual product the consumer will receive from SmartEnergy, renewable energy (which is higher cost).<sup>7</sup> It does not contain “Any limitations or restrictions that apply to the offer,” such as the requirement that in order to qualify for the “free month of electricity” SmartEnergy is touting, the consumer will first experience a rate increase and then must remain a SmartEnergy customer at elevated prices for six months and then send a refund form and utility bill to SmartEnergy after the seventh month.<sup>8</sup>

SmartEnergy’s argument that it is also entitled to an exemption to the MTSA at Md. Comm. Law §14-2202(2) is incorrect. SmartEnergy claims it has established a “preexisting business relationship with the customer” when it sends a postcard to a Maryland consumer offering free electricity. There is no business relationship, let alone a preexisting one, simply because the

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<sup>6</sup> *Id.*

<sup>7</sup> Neither will the consumer learn this from the sales call. Listen to the recordings provided on thumb drive as Staff Ex. 1, Ex. KDM-2. Additionally, SmartEnergy has admitted it has failed to provide consumers with RPS information, and even the body of SmartEnergy’s Post Hearing Brief makes only an obscure, passing reference to the actual renewable energy product.

<sup>8</sup> The vast majority of SmartEnergy customers never collect their “free month of electricity.”

consumer makes a telephone call after receiving a postcard promising rewards. The common meaning of the words of the statute as well as its context would require the minimum of a prior sale or ongoing relationship to form a “preexisting business relationship,” not receipt of a mailing. SmartEnergy is not exempt from the MTSA, and a signed contract is necessary.

SmartEnergy is also wrong that COMAR 20.53.07.08C(2) conflicts with the MTSA and does not require it to obtain signed written contracts. Of course the SmartEnergy postcard is not a contract; it lacks the required basic terms of a contract and even enough basic information to qualify for a Md. Comm. Law §14-2202(5) exemption under the MSTA as explained above. However, the postcard is a writing that is used to entice or solicit the unwary consumer to call SmartEnergy to receive promised, free electricity. SmartEnergy itself has characterized it as a “direct mail solicitation.”<sup>9</sup> The direct mail solicitation is not a mere marketing advertisement like a billboard, magazine advertisement, or internet popup ad as SmartEnergy suggests. It is, in fact, targeted to a particular unique consumer about which SmartEnergy has already obtained consumer specific information cataloged through the postcard’s individual code for the sales agent to utilize in the sales call. The result of that direct mail solicitation is the sales call in which SmartEnergy obtains the consumer’s electric choice id number which allows the agent to switch the supplier account. COMAR 20.53.07.08C(2) is consistent with the MTSA. If enough information were provided to the consumer in written form before the telephone call, a telephonic contract could be formed. The postcards here do not even approach providing that level of detail. The sales recordings make it obvious that the consumers do not receive sufficient information either from the postcard or the sales call to understand the terms and consequences

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<sup>9</sup> See SmartEnergy Answer and Response, ML225795, p. 8-9.

of the transaction. COMAR 20.53.07.08C(2) exists as a consumer protection from just this sort of deceptive practice.

But no matter how SmartEnergy parses Maryland law and past Commission Orders in an attempt to provide itself a safe haven from Maryland consumer law, the Commission has recently expressly ruled that both the MTSA and COMAR 20.53.07 apply to the “inbound call” marketing scheme that SmartEnergy uses to enroll Maryland consumers. In *OPC v. SunSea*, CN 9647 (Oct.7, 2020), the Commission considered telemarketing practices of an energy supplier which included one identical to SmartEnergy’s, applied the MTSA and COMAR 20.53.07 to both inbound and outbound telemarketing calls, and found that both forms of telemarketing require a signed written contract. SmartEnergy’s contention that it is exempt from the requirement to obtain a signed written contract before enrollment of customers by telephone flies in the face of this recent Commission precedent. The Commission has determined that these consumer protections apply to the very marketing practices employed by SmartEnergy and has sent a strong signal that Maryland’s consumer protection laws must be enforced.

#### **B. SmartEnergy blames others for its own violations of law and deceptive practices.**

SmartEnergy is owned and run by two intelligent and sophisticated individuals, Daniel Kern and Jackie Kern, both of whom are well educated and experienced in marketing and business.<sup>10</sup> SmartEnergy operates in fifteen states and has offices in New York and the Dominican Republic, where it operates its own sales call center.<sup>11</sup> It consults lawyers, has a regulatory compliance department, and a quality assurance program.<sup>12</sup> Nevertheless, it has a problem complying with consumer protection and contracting laws, not just in Maryland, but in

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<sup>10</sup> See SmartEnergy Ex. 2, pp. 1-2 and Hearing Trans. p. 297.

<sup>11</sup> See SmartEnergy Ex. 2, p. 1. 5-8 and p. 4, l. 3.

<sup>12</sup> Smart Energy Ex. 7, p. 6 and p. 8.



other states. SmartEnergy has already been investigated and sanctioned in Illinois and Ohio.<sup>13</sup> It has been found to have committed tens of thousands of violations in Maryland in this case. It has admitted to tens of thousands of more Maryland violations in its Post Trial Brief.<sup>14</sup> These violations presumably have not been remediated and are ongoing. Despite having received legal advice and admitting to having actual and specific knowledge of its obligations under Maryland law, SmartEnergy attributes its failure to provide contract summaries to all of its customers over a course of years as “human error” or mistake. For other violations, it blames others rather than taking responsibility for its actions.

### **1. SmartEnergy blames its Sales Agents.**

SmartEnergy admits in its Post Hearing Brief that its sales agents in 18 CAD cases provided “false and/or inadequate” information resulting in improper enrollments and admits to two other improper enrollments.<sup>15</sup> At the hearing, SmartEnergy admitted that all 34 of the specific sales calls at issue should have been quality assurance fails.<sup>16</sup> SmartEnergy distances itself from these practices by pointing to its employee training and quality assurance programs and claims that Staff and OPC did not prove these programs were inadequate. The proof, as it is in so much of this case, is in listening to the sales recordings. Every single sales call illustrates deceptive practices and violations of Maryland law which SmartEnergy’s training and quality assurance programs failed to prevent. Jackie Kern, in charge of responding to Maryland CAD complaints, admits that for some period of time she did not even listen to the sales portions of

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<sup>13</sup> Hearing Trans, pp. 152-55.

<sup>14</sup> SmartEnergy Post Hearing Brief, pp. 67-8.

<sup>15</sup> SmartEnergy Post Hearing Brief, pp. 67-8.

<sup>16</sup> Hearing Trans, p. 346, l. 17-22.

recordings when CAD forwarded complaints to the Company.<sup>17</sup> In addition to admitting that the 34 recorded calls in this case all should have been quality assurance fails, SmartEnergy failed to adduced evidence that any of its 100,000 or more sales calls in Maryland were any different than those in evidence in this case. All of its calls were based on the same deceptive sales script provided by the Company to its sales agents which obscured the identity of the seller, the product being sold, and the increased rate being imposed. Further, the agents were encouraged by the company to go “off script.”<sup>18</sup> SmartEnergy is responsible for the script and regardless of training, SmartEnergy is responsible by law a “for any fraudulent, deceptive, or unlawful marketing acts performed by its agent in the conduct of marketing or sales activities...”<sup>19</sup> Just as SmartEnergy accepted the profits generated by its sales agents, SmartEnergy must accept the full brunt of the misrepresentations, lies, and deceit of those agents.

## **2. SmartEnergy blames CAD.**

During the period when the 34 CAD complaints were generated, CAD was concerned with resolving individual consumer complaints between Maryland customers and third party suppliers. CAD is not and was not a judicial or legislative body providing legal advice or business guidance to suppliers. SmartEnergy cites three CAD cases in which it claims CAD concluded that a signed contract was not necessary. SmartEnergy was already doing business using its no wet signature method and it does not seem credible that the Company, with its access to its own legal counsel, relied on CAD’s resolutions of these complaints to continue the practice. SmartEnergy certainly did not alter its practices when CAD suggested in many other

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<sup>17</sup> See SmartEnergy’s Post Hearing Brief, p.36.

<sup>18</sup> See SmartEnergy’s Post Hearing Brief, p.37 and OPC Ex. 1, Ex. SMB-9 p. 37, 10-14.

<sup>19</sup> COMAR 20.53.08.02 B.

cases that it provide signed written agreements or found in favor of the customer.<sup>20</sup> Indeed, there are fact dependent circumstances where either of these seemingly contradictory suggestions could be correct. As pointed out above, there are contracting methods where a signed contract is not required, and although SmartEnergy clings to its contrary belief, SmartEnergy's inbound call theory is not one of them.<sup>21</sup> CAD was never privy to all the facts surrounding the enrollment of these accounts by telephone. SmartEnergy went so far as to edit the sales calls it provided for CAD review to just provide the "confirmation" portion.<sup>22</sup> SmartEnergy could not reasonably rely on CAD to confirm the legitimacy of its contracting methods. If anything, the perceived contradiction in CAD rulings should have alerted SmartEnergy to take active steps to ensure it was operating within Maryland law.

### **3. SmartEnergy blames the Commission and OPC.**

In its brief, SmartEnergy suggests that it relied on the Commission's and OPC's websites for its belief that no written contract was necessary. The information cited by SmartEnergy is directed to consumers; it is not legal advice giving *carte blanche* to sophisticated suppliers on contracting methods. The Commission and OPC warn the consumer how to avoid contracting problems with suppliers, they are not instructing suppliers how to set a legal trap for consumers. Nor are those sites a reasonable substitution for Maryland statutes and regulations. The guidelines set forth on these sites are consumer warnings, red flags alerting consumers of possible consequences when contacting a supplier. They are broadly drawn for the protection of the consumer. The websites can not possibly analyze the specific facts of a particular case. Staff sets forth in its Hearing Brief and above the reasons why Smart Energy fails to qualify for

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<sup>20</sup> OPC Ex. 1, p.18 and e.g. Ex. SMB-2 Bates (12)

<sup>21</sup> See *SunSea*, supra.

<sup>22</sup> Hearing Trans, Confidential Testimony of J. Kern, p. 97-99.

exceptions to the wet signature otherwise required by MTSA and COMAR. SmartEnergy's telephone solicitation method fails to meet every one of these criteria for an exception for the reasons discussed above. The Commission and OPC rightly alert Maryland consumers who may not have legal advice or sophistication in broad and general terms of possible pitfalls when dealing with a third party supplier by telephone. SmartEnergy strangely misconstrues these consumer warnings as permission to flaunt Maryland consumer law. If SmartEnergy, in fact, relied on these broad consumer warnings in developing its corporate telephone sales solicitation stratagem it did so at its peril.

#### **4. SmartEnergy blames Maryland consumers.**

Ultimately, SmartEnergy blames Maryland consumers for falling for the ruse of its contracting stratagem. The SmartEnergy postcards and sales calls based on the SmartEnergy sales script at best encouraged consumer confusion by obscuring or failing to reveal the identity of the seller (SmartEnergy, not the utility), the product being sold (renewable energy) and the cost (an increase in the consumer's current rate.) On the call, after being congratulated on qualifying for free electricity, the consumer was told in a variety of ways (paraphrasing), that "Nothing will change," except that they would receive "price protection, meaning the rate will not increase for six months," and they would receive "a free month of electricity."<sup>23</sup> Maryland consumers come from all walks of life, sophistication, cultural backgrounds, levels of education, economic circumstances, and English language skills. SmartEnergy defends its sales script and sales calls by suggesting the consumer should have known the very things SmartEnergy was cleverly going to lengths to obscure; it would switch the consumer from the utility to SmartEnergy and the consumer would receive renewable energy at an increased rate.

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<sup>23</sup> Staff Ex. 1, Ex. KDM-3, p.1-4.

In its Post Trial Brief, SmartEnergy explains the logic of its argument, first quoting its sales script (emphasis added by SmartEnergy):

“You *will* also get 6 months of price protection so that means the price you pay for the price of electricity *will* be protected and is not going to increase.” To say will, implies a condition that does not exist contemporaneously with the premise by the sales agent.<sup>24</sup>

Even to a grammarian with a graduate degree, that does not make much sense, let alone to an elderly great grandmother who has just been congratulated for qualifying for free electricity and has **not** been told her rate *will* first increase before she *will* receive “price protection.” This is the skillful deceit of a company that knows it can not sell its renewable, higher priced product to a market segment, like the elderly subsisting on fixed incomes, by simply telling the truth to the consumer in plain and easy to understand language. In the hearing, CEO Kern was asked,

Why don’t you just tell them that? Why do you choose not to tell them that and say we’re selling renewable energy and as a result you’ll be paying a higher price, but you’ll be getting a great responsible product. And you’ll be getting a tree planted in your honor.

Why don’t you tell them that?<sup>25</sup>

Mr. Kern provides no acceptable answer as to why the consumer is not told in simple, clear language the basic terms of the transaction and the truth about SmartEnergy and its product in an understandable way. Furthermore, because SmartEnergy never followed up its telephone enrollments by providing a contract summary, required by law so the costumer could understand the contract in a simple form, SmartEnergy denied the consumer another chance to understand

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<sup>24</sup> SmartEnergy Post Hearing Brief, p.43

<sup>25</sup> Hearing Trans, p.173.

what they were “agreeing” to. Maryland consumers should not be held responsible for SmartEnergy’s chicanery.

### **C. SmartEnergy Engaged in a Pattern and Practice of Violation of Maryland Consumer Protection Laws.**

SmartEnergy devotes eight or so pages of its sixty plus page brief to refuting the opinions of Staff witness Mosier and OPC witness Baldwin that SmartEnergy engaged in a pattern and practice of violations of Maryland consumer law. The essence of SmartEnergy’s attack is that these witnesses’ opinions are based on a flawed or inadequate statistical sample size and suffer from selection bias.<sup>26</sup> This statistical analysis, which purports to be based on the “science of inferential statistics,”<sup>27</sup> is of the sort that requires an expert’s testimony, but was not raised in evidence at trial. Instead it has appeared only in legal filings as argument without expert sponsorship and without possibility of cross examination by either the parties or the Commission. As such, it must be disregarded. SmartEnergy had ample opportunity to bring an expert witness to give mathematical or statistical evidence if it so choose, but it did not. Both Mr. Mosier and Ms. Baldwin gave opinion testimony and each opined that SmartEnergy engaged in a pattern and practice of systemic violations. Not one of the Company’s five witnesses was qualified in mathematics, statistical methodology or any other area of expertise.

But more to the point, while an expert is necessary to give testimony of statistical analysis, an expert is not necessary to discern a pattern or practice of violations. Staff’s original complaint was not based on a “pattern or practice” but merely on a number of CAD complaints. The “pattern and practice” claim was added by Amended Complaint when it was made a required determination by the Commission in its Delegation to the Public Utility Law Judge

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<sup>26</sup> SmartEnergy Post Hearing Brief, pp. 47-55.

<sup>27</sup> *Id.* at 49.

Division in Order No. 89190, July 2019. The Delegation provided no specific guidance as to the elements of a “pattern and practice” which seems to be a common sense standard. SmartEnergy has not adduced any testimony that “pattern and practice” is a term of art, a standard defined by law or anything but a common sense finding. Here, Staff has proven, and the PULJ has ruled, that SmartEnergy committed tens of thousands of violations of the consumer protection laws applicable to 100 percent of its 32,000 account holders (a pattern). SmartEnergy knowingly committed these violations on a consistent and continuous basis over a period of years (a practice). In addition, thirty four CAD complaint files with recordings memorializing misrepresentations and deceptive practices were placed in evidence, more than were introduced in the *SunSea* case and far in excess of the three introduced in *Smart One*. In neither of those cases was expert statistical evidence deemed necessary for the Commission to find the violations had occurred and to assess substantial penalties. Such is also the case here; SmartEnergy’s statistical attack is both unsubstantiated by expert testimony and irrelevant. Whether dubbed a “pattern or practice” or merely tens of thousands violations, SmartEnergy’s disregard of the law and deceptive acts warrants penalties recommended by Staff.

#### **D. The Remedies Proposed by SmartEnergy are Inadequate.**

At the conclusion of the evidentiary hearing, the PULJ requested each of the parties to propose penalties for the Company. Remarkably, SmartEnergy has used this opportunity to bargain with the Commission and suggest relief be granted itself. In its first item under “SmartEnergy Proposed Relief,” SmartEnergy requests a blanket ruling by the PULJ that the MTSA requirement for wet signatures does not apply to “inbound” calls to supplier call

centers.<sup>28</sup> Such a ruling would contradict Commission precedent and Maryland law. If the PULJ is unwilling to take this step, however, SmartEnergy proposes to bargain with the PULJ. As part of its proposed relief, SmartEnergy states that if the Commission will forego ruling on the wet signature issue and establish another case to examine the matter, then SmartEnergy will begin placing on its postcards basic information about its contract offer, such as price and the identity of the product as renewable energy.<sup>29</sup> This is a tacit admission that this is the information that was lacking and needed in order to qualify SmartEnergy's postcard solicitations for a wet signature exemption. SmartEnergy goes on to promise to reform its sales calls, to submit to monitoring, and to pay a civil penalty of \$300,000. SmartEnergy does not suggest that it will obtain wet signatures on its contracts or that it will redress the harms already suffered by Maryland consumers.

SmartEnergy bases its suggested \$300,000 fine on the Commission penalties levied in *Starion*, CN 9324 (\$350,000 in 2014) and *Major*, CN 9346(b) (\$300,000 in 2016.)<sup>30</sup> In doing so, SmartEnergy simply ignores the Commission's more recent decisions in *Smart One*, CN 9617 (\$561,000, license rescission, rerates and refunds in 2019)<sup>31</sup> and *SunSea*, CN 9647 (rerates and refund, return of customers to SOS, civil penalty pending in 2020).<sup>32</sup> Clearly what seemed as stiff fines at the time of earlier cases, such as *Starion* and *Major*, did not have a deterrent effect on SmartEnergy, SunSea or the other suppliers currently awaiting hearings on the Commission

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<sup>28</sup> SmartEnergy Post Hearing Brief, p. 67.

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

<sup>30</sup> *In the Matter of the Investigation into the Marketing Practices of Starion Energy PA, Inc.*, CN 9234, (Mar. 7, 2014) and *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*, CN 9346(b) Order No. 87418, (Feb. 2, 2016).

<sup>31</sup> *Smart One*, CN 9617, Order No. 89219 (Aug. 9, 2019)

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



docket. There is no reason to believe that the same civil penalties as levied six years ago will be effective today. Given the profits available to these companies by engaging in unlawful and deceptive practices, a civil penalty of \$300,000 may just be a cost of business, rather than an inducement for individual supplier and industry reform.

At the evidentiary hearing, SmartEnergy testified to receiving \$8,000,000 dollars a year in Maryland revenues.<sup>33</sup> Commission filings show that its take is really much greater than that and growing.<sup>34</sup> It is no wonder then that a company would be willing to pay a substantial amount, as long as it can continue with the business practices with which it can generate profits. That is the bargain that SmartEnergy has proposed to strike with the Commission.

For this very reason, Staff believes license revocation with other injunctive relief is important here in addition to a civil penalty. SmartEnergy has claimed that enforcing the requirement to obtain wet signatures on contracts would upset the entire third party supplier industry and presumably destroy competitive energy supply in Maryland.<sup>35</sup> That result seems unlikely, but its suggestion highlights what is missing from SmartEnergy's testimony and Post Hearing Brief, regard for the consumer and Maryland's consumer laws. SmartEnergy has not displayed any concern for the consumers it has harmed or a willingness to operate in good faith and fair dealing. SmartEnergy has made promises to obey the law, but despite alleged reforms and over a period of years, it has failed to comply. In fact, SmartEnergy's business practices are not in compliance today, and it is treating future compliance as a bargaining chip for retaining its license. There is no evidence that the Company will change.

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<sup>33</sup> Hearing Trans. p. 158.

<sup>34</sup> See Confidential Exhibit 1

<sup>35</sup> SmartEnergy Ex. 2, p. 21, 5-22 and p. 22, 1-13

SmartEnergy has produced no evidence or suggestion that it has provided a unique, needed, or beneficial service to either Maryland consumers or the State of Maryland. It is one of over a hundred licensed third party suppliers in Maryland and there is nothing to suggest that its absence from the Maryland energy supply landscape would harm competitive balance or consumers in any way. In its recent cases, the Commission has ordered strong injunctive relief in addition to civil penalties to intransigent offenders. Revocation of SmartEnergy's license is a just and fitting penalty for the multitude of violations proven here.

### **III. CONCLUSION**

For the reasons stated above, Staff continues to recommend that Public Utility Law Judge find that SmartEnergy engaged in a pattern and practice of systemic consumer protection violations. Staff further recommends that the Public Utility Law Judge rescind SmartEnergy's license as an electricity supplier in the State of Maryland and assess a civil penalty of \$500,000.

*/S/ Peter A. Woolson*

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