

**ORDER NO. 91626**

In the Matter of the Complaint of the  
Staff of the Public Service Commission  
v SmartEnergy Holdings, LLC D/B/A  
SmartEnergy

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BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF MARYLAND

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Case No. 9613  
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**ORDER ON MOTIONS TO ENFORCE AND/OR MODIFY**

Before: Frederick H. Hoover, Jr., Chair  
Michael T. Richard, Commissioner  
Kumar P. Barve, Commissioner  
Bonnie A. Suchman, Commissioner  
~~{Odogwu Obi Linton, Commissioner}~~

**Issue Date: April 28, 2025**

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In Order No. 89795 (the Commission’s Order on Appeals and Exceptions, or “Order on Appeals”), the Commission found that SmartEnergy, a licensed retail energy supplier marketing electricity services to residential customers in Maryland since 2017, had committed widespread violations of Maryland laws designed to protect customers.<sup>1</sup> The Commission ordered SmartEnergy to re-rate and refund affected customers, and deferred consideration of civil penalties, until after SmartEnergy’s compliance with remitting refunds to customers. The Order on Appeals was appealed by SmartEnergy and was affirmed by the Circuit Court for Montgomery County, the Appellate Court of Maryland, and by the Maryland Supreme Court.

The Commission stayed enforcement of the Order on Appeals until SmartEnergy exhausted its appeal rights. With SmartEnergy’s request for reconsideration of the Supreme Court’s decision affirming the Order on Appeals having been denied, and the Court’s Mandate having been issued on April 18, 2024, now before the Commission are competing motions regarding the enforcement of the refunds previously ordered.

In this Order, the Commission accepts Staff’s and OPC’s recommendations that SmartEnergy be held accountable for \$15.97 million in customer refunds. However, the Commission suspends \$9.47 million of the full refund obligation, pending SmartEnergy’s prompt and satisfactory remittance of the remaining refunds to affected customers. The Commission also directs the forfeiture of SmartEnergy’s \$250,000 financial security bond as a civil penalty, the proceeds of which shall be deposited to the Customer Education and Protection Fund. Subject to the suspended amount, the required customer refunds along with the civil penalty in this case amount to \$6.75 million.

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<sup>1</sup> SmartEnergy charged its Maryland customers fixed and variable rates above various utilities’ standard offer service rates from February 2017 until its appeals were exhausted in April 2024.

## **I. Procedural History**

On May 10, 2019, Staff filed a complaint against SmartEnergy alleging fraud, deceptive practices, and violations of Commission regulations.<sup>2</sup> The Commission delegated the matter to the Public Utility Law Judge (“PULJ”) Division for further proceedings. Staff made subsequent amendments, and a separate complaint was filed by the Maryland Office of People’s Counsel (“OPC”), adding additional claims of violations of Code of Maryland Regulations (“COMAR”) and the Maryland Telephone Solicitations Act (“MTSA”), *Annotated Code of Maryland*, Commercial Law Article § 14-2201.<sup>3</sup>

On December 16, 2020, the PULJ issued her Proposed Order.<sup>4</sup> In the Proposed Order, the PULJ found that SmartEnergy engaged in deceptive, misleading, and unfair trade practices, and systemic violations of *Annotated Code of Maryland*, Public Utilities Article (“PUA”) § 7-505(b)(7); COMAR 20.53.07.07A(2); COMAR 20.53.07.08B(1); COMAR 20.53.07.08C(4)(b)(i)–(iii), (v); COMAR 20.53.08.04E; and COMAR 20.61.04.01B and C. Despite Staff’s and OPC’s arguments, the PULJ concluded that the MTSA did not apply to SmartEnergy’s inbound customer telephone call enrollments.

Based on the PULJ’s findings, notwithstanding her finding regarding the applicability of the MTSA, the PULJ recommended—among other things—that the Commission impose upon SmartEnergy a moratorium prohibiting SmartEnergy from adding or soliciting new customers, impose an appropriate civil penalty (whether \$300,000

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<sup>2</sup> Maillog No. 225227.

<sup>3</sup> Maillog Nos. 226988, 226278, 226946, and 227954.

<sup>4</sup> Maillog No. 232992.

or some other amount), and require SmartEnergy to notify its current and former customers of the Commission's decision in this case.

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

**A. Order No. 89795—the Order on Appeals and Exceptions**

Following briefing by the parties, and the Consumer Protection Division of the Office of the Attorney General, on March 31, 2021, the Commission issued the Order on Appeals, affirming the PULJ findings that SmartEnergy violated:

1. PUA § 7-507(b)(7) by engaging in unfair, false, misleading and deceptive marketing, advertising and trade practices;
2. Associated COMAR Title 20, Subsection 53 provisions; and
3. Commercial Law ("Com. Law") §§ 13-301(1)(3) and 13-303, prohibiting false and misleading practices which have the capacity, tendency, or effect of deceiving or misleading consumers.

The Commission disagreed with the PULJ, however, with respect to the MTSA and found that the MTSA (requiring that a contract made pursuant to a telephone solicitation

be reduced to writing and signed by the consumer) applied to SmartEnergy's contracting with its Maryland customers under the facts in this case and had been violated.<sup>5</sup>

Based on those findings, the Commission held that SmartEnergy's contract enrollments were invalid and directed SmartEnergy to return to utility SOS all of SmartEnergy's Maryland customers that had been enrolled via telephone solicitations. The Commission further directed SmartEnergy to re-rate and refund all current and former Maryland customers solicited via telephone the difference between SmartEnergy's supply charges and the applicable SOS rate for all periods these customers were served. The Commission further directed SmartEnergy to provide a detailed accounting of the refund process.

**B. Appeal From and Stay of the Order on Appeals**

On April 5, 2021, SmartEnergy filed a petition for judicial review of the Order on Appeals in the Circuit Court for Montgomery County, followed by a motion requesting the court to stay the Commission's Order pending the outcome of the proceedings on judicial review.<sup>6</sup>

On April 8, 2021, SmartEnergy filed a Motion for Stay with the Commission, subject to certain conditions. That Motion proposed that SmartEnergy would refrain from

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<sup>5</sup> With regard to the MTSA issue, the Maryland Office of Attorney General, Consumer Protection Division ("CPD") filed an *amicus* memorandum of law in support of the exceptions of Staff and OPC to the Proposed Order on the MTSA issue. Maillog No. 233543.

In its filing, the CPD argued that the PULJ's holding on the issue "irreconcilably conflicts with the plain meaning of the MTSA," and that the PULJ's decision on the issue was "contrary to the [CPD's] established interpretation of the MTSA and conflicts with the statute's purpose of providing broad consumer protections." Maillog No. 233453 at 4 and 8 (CPD Memorandum).

<sup>6</sup> On judicial review and through subsequent appeals, the CPD repeatedly filed memoranda and briefs reiterating that the Commission's decision in this case was correct both with regard to the plain meaning of the MTSA and the statute's purpose of providing broad consumer protections.

enrolling new customers during the pendency of the judicial review if the Commission stayed enforcement of the Order on Appeals, requiring SmartEnergy to return its Maryland customers to utility SOS. The Motion further proposed that SmartEnergy would provide the Commission with security in the form of a surety bond, irrevocable letter of credit, or other acceptable security in the amount of \$2.5 million to secure customer refunds in the event that its petition for judicial review and any subsequent appeals failed.

On April 9, 2021, the Commission issued Order No. 89800 (the “Stay Order”), granting SmartEnergy’s Motion for Stay, requiring that the additional financial security remain in place until the conclusion of any appeals taken by SmartEnergy or any other party responding to SmartEnergy’s petition for judicial review. The Stay Order also required SmartEnergy to notify the Commission within 60 days of any notice to its supplier license surety of an intent to cancel its appeal bond. SmartEnergy filed its \$2.5 million appeal bond with the Commission on April 19, 2021.<sup>7</sup>

On judicial review, the circuit court affirmed the Order on Appeals, except with regard to the Commission’s finding that SmartEnergy violated the Commission’s regulations relating to retention of audio recordings.<sup>8</sup>

Thereafter, OPC filed a request for rehearing of the Stay Order on April 23, 2021, and following the Appellate Court of Maryland’s decision affirming the Order on Appeals,<sup>9</sup> a renewed request for rehearing on February 2, 2023, while the matter was pending appeal on SmartEnergy’s petition for a writ of *certiorari* in the Supreme Court of Maryland.

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<sup>7</sup> Maillog No. 234862.

<sup>8</sup> Circuit Court for Montgomery County Case No. 485338V, Dec. 20, 2021.

<sup>9</sup> *In re SmartEnergy Holdings, LLC*, 256 Md. App. 20 (2021).

SmartEnergy responded to OPC's renewed request for rehearing on February 10, 2023,<sup>10</sup> and OPC filed reply comments on February 16, 2023.<sup>11</sup>

On February 22, 2023, the Commission issued Order No. 90515, granting in part and denying in part OPC's renewed request for rehearing. In ruling on OPC's renewed request for rehearing, the Commission adopted pre-compliance procedures that would take effect in the event that the Order on Appeals was affirmed by the Supreme Court of Maryland. The Commission noted that the pre-compliance procedures were 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 failed to comply with its obligations under the Order on Appeals and Order No. 89800.

In Order No. 90515, the Commission further directed that, upon the issuance of a decision by the Supreme Court of Maryland affirming the Order on Appeals, SmartEnergy shall immediately commence remitting customer refunds, and shall fully remit refunds as required under the Order on Appeals within 30 days thereof.

Additionally, Order No. 90515 directed that within three days of the issuance of the Supreme Court's affirmance order, SmartEnergy shall submit for Staff and OPC review: (a) the draft "customer letter" required in the Order on Appeals (ordering paragraph no. 5), and (b) a proposed refund compliance spreadsheet, as described therein, and begin providing a series of weekly reports accounting for refunds remitted to customers. That Order further directed that upon notification of an order of the Supreme Court of Maryland

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<sup>10</sup> Maillog No. 301263.

<sup>11</sup> Maillog No. 301376.



affirming the Order on Appeals, the matter should be set for initial compliance proceedings at an Administrative Meeting.

On February 22, 2024, the Supreme Court of Maryland affirmed the Order on Appeals<sup>12</sup> and denied SmartEnergy's request for reconsideration on April 18, 2024.

**C. Post-Appeal Motions on Refunds**

On March 4, 2024, upon a motion by OPC, the Commission issued a letter Order directing SmartEnergy to, among other things, supply information concerning the potential amount of refunds it owes and address concerns raised by OPC regarding the appeal bond.<sup>13</sup> SmartEnergy filed a response on March 22, 2024.<sup>14</sup>

On April 23, 2024, the Commission directed SmartEnergy to make a filing that contained the total amount of customer refunds owed in order to satisfy its refund obligation under the Order on Appeals, the support for that amount, and a statement of intention to satisfy this obligation and how it intends to do so.<sup>15</sup> The Commission also directed the parties to work together toward a solution.

On August 5 and August 12, 2024, Staff filed comments and exhibits, recommending that the Commission proceed to enforce its orders against SmartEnergy.<sup>16</sup>

Also on August 5, SmartEnergy filed a motion requesting that the Commission modify the remedy portion of the Order on Appeals to limit the obligation by SmartEnergy

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<sup>12</sup> *In the Matter of SmartEnergy Holdings, LLC*, 486 Md. 502, 311 A.3d 919 (2024) (“*SmartEnergy*”).

<sup>13</sup> Maillog No. 307975.

<sup>14</sup> Maillog No. 308381.

<sup>15</sup> Maillog No. 309205.

<sup>16</sup> Maillog Nos. 311430 and 311580.

to a maximum of \$3 million.<sup>17</sup> On August 12, 2024, OPC filed an opposition to SmartEnergy’s motion to modify the remedy.<sup>18</sup>

On August 14, 2024, the Commission held a hearing on the pending motions regarding the resumption of refunds, as part of its weekly Administrative Meeting.

On September 3, 2024, SmartEnergy filed an “amended motion” demanding a jury trial.<sup>19</sup>

On September 11, 2024, Staff filed a motion to strike SmartEnergy’s amended motion.<sup>20</sup>

On October 1, 2024, SmartEnergy filed a response to Staff’s motion to strike.<sup>21</sup>

On October 4, 2024, OPC filed a supplemental response to SmartEnergy’s amended motion to modify.<sup>22</sup>

On October 9, 2024, SmartEnergy filed a further response.<sup>23</sup>

## **II. Party Positions**

This Order will consider and address in turn the two open questions in this matter:

(1) the enforcement of the Order on Appeals against SmartEnergy, and (2) SmartEnergy’s jury trial request.

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<sup>17</sup> Maillog No. 311444.

<sup>18</sup> Maillog No. 311615.

<sup>19</sup> Maillog No. 312054.

<sup>20</sup> Maillog No. 312249.

<sup>21</sup> Maillog No. 312616.

<sup>22</sup> Maillog No. 312712.

<sup>23</sup> Maillog No. 312802.

**A. Enforcement of the Order on Appeals Against SmartEnergy**

**1. Staff's initial recommendation**

In its initial comments, Staff stated that SmartEnergy had returned its customers to SOS utility service and had provided a spreadsheet of re-rated amounts due to customers, but had failed or refused to make any refunds.<sup>24</sup> Staff recommended that the Commission immediately call (or draw upon) the \$2.5 million appeal bond and the \$250,000 financial integrity bond<sup>25</sup> posted by SmartEnergy, and further recommended that the Commission again order SmartEnergy to re-rate and refund all customers within 30 days as previously ordered, and impose a civil penalty in the amount of the unpaid balance of any refunds at the end of the 30-day period.<sup>26</sup>

In its amended comments, Staff explained that the \$2.5 million appeal bond was negotiated by SmartEnergy to “partially secure” what SmartEnergy alleged at the time was a then-estimated \$6 million re-rate obligation. Staff stated that, because SmartEnergy continued to service customers during the years in which its appeals remained pending, the refund amount had increased to \$15.97 million.<sup>27</sup> Staff recommended that the Commission impose a civil penalty in the amount of the unpaid balance of any refunds at the end of the 30-day period up to an additional \$15.97 million.<sup>28</sup>

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<sup>24</sup> Prior to filing its comments, Staff noted in its July 10, 2024 biweekly report that the parties had not scheduled any further meetings and are at an impasse concerning compliance issues. (Maillog No. 310759).

<sup>25</sup> As part of its licensure requirements pursuant to COMAR 20.51.02.08, SmartEnergy previously posted a \$250,000 security bond as proof of financial integrity.

<sup>26</sup> Staff Comments at 6.

<sup>27</sup> Staff Amended Comments at 4.

<sup>28</sup> Staff Comments at 6; Staff Amended Comments at 6; and Staff Opposition at 5.

2. SmartEnergy's motion to modify the remedy

SmartEnergy stated that it has the ability to pay only \$3 million toward satisfaction of the remedy portion of the Order on Appeals and requested that the Commission modify the refund requirement to limit it to \$3 million.<sup>29</sup> SmartEnergy requested that the Commission modify the Order on Appeals to require SmartEnergy to pay a total of \$3 million as the “total compliance amount,” including refunds and a civil penalty.<sup>30</sup> SmartEnergy stated that it is willing to work with the Commission, Staff, and OPC, to identify various subsets of customers that would receive full or partial refunds, send checks or digital payments to these customers up to the aggregate amount of \$3 million, provide periodic reports and a final spreadsheet to the Commission accounting for the distribution of refunds, and remit the remaining balance of any refunds not claimed as a payment to the Fuel Fund of Maryland (“FFM”).<sup>31</sup>

Regarding its inability to pay, SmartEnergy submitted financial reports and statements. Daniel Kern, SmartEnergy's President, asserted that the financial statements submitted in support of its proposal were audited and prepared under generally accepted accounting principles (“GAAP”).<sup>32</sup> SmartEnergy stated that after paying its other outstanding obligations, it has only a limited amount of equity available to pay its refund obligation to Maryland customers. The remaining “member's equity,” it stated, is attributable to deposits and other collateral posted to counterparties of its power supply

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<sup>29</sup> SmartEnergy Motion at 7.

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.* at 10-11. SmartEnergy offered to remit the unpaid refund balance to the Fuel Fund of Maryland. The FFM serves households in Baltimore City as well as counties in Baltimore Gas and Electric Company's service territory but it does not provide assistance to customers of Delmarva Power and Light Company, Potomac Electric Power Company, or The Potomac Edison Company.

<sup>32</sup> August 14, 2024 Administrative Meeting Tr. (“Tr.”) at 43-44.

contracts and to regional transmission organizations (“RTOs”) and independent system operators (“ISOs”), including the PJM RTO, the Midwest ISO, New York ISO, New England ISO, and ERCOT.<sup>33</sup> The sole sources of its ability to pay, according to SmartEnergy, are: the \$2.5 million appeal bond posted by SmartEnergy in this case on April 19, 2021, which SmartEnergy stated it backed with cash, its current \$250,000 financial integrity bond, and an additional \$250,000 in cash.<sup>34</sup>

SmartEnergy argued that committing to or being obligated to pay more than \$3 million in refunds would jeopardize its credit position and subject the company to potential default with its secured lender, which requires SmartEnergy to maintain a minimum monthly net worth in order for SmartEnergy to remain in good standing.<sup>35</sup>

SmartEnergy argued that its proposal to modify the refund requirement established in the Order on Appeals is in the public interest, even though it is significantly less than the obligation asserted by Staff and OPC, because it ensures prompt payments to customers.<sup>36</sup> SmartEnergy stated that bankruptcy is a serious risk facing SmartEnergy if the Commission demands full refund satisfaction for all of SmartEnergy’s affected customers in Maryland, arguing:

Even if the Commission is successful in accessing the bonds [by pursuing the company through bankruptcy], it might not recover any further funds ... and, furthermore, the bond proceeds could be subject to a clawback because [secured creditors] would have the first claim in SmartEnergy’s assets over unsecured claims lacking priority.<sup>37</sup>

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<sup>33</sup> SmartEnergy Motion at 8. ERCOT refers to the Electric Reliability Council of Texas.

<sup>34</sup> SmartEnergy Motion at 1 and 8; Maillog No. 234862.

<sup>35</sup> *Id.* at 8.

<sup>36</sup> *Id.* at 11.

<sup>37</sup> *Id.* at 1.

Finally, SmartEnergy stated that a \$3 million payment would be the largest supplier customer-refund requirement since the advent of retail energy choice in Maryland.

During discussion of the matter at the Commission's August 14, 2024, Administrative Meeting, counsel for SmartEnergy again argued that the Commission's finding in this case—that its inbound telephone call customer enrollments were subject to the MTSA—went against the guidance that it received from the Commission's Consumer Affairs Division ("CAD") in other cases, as well as information on the Commission's website.<sup>38</sup> SmartEnergy also argued that retail suppliers in other MTSA-violation cases fared far better than SmartEnergy, referring to the decisions in the matter of Direct Energy (Case No. 9614) and in the matter of U.S. Gas & Electric and Energy Services Providers, Inc., d/b/a Maryland Gas & Electric ("MDG&E") (Case No. 9615).

During the Administrative Meeting, as part of a public recap of information designated as confidential or proprietary by SmartEnergy, SmartEnergy's counsel summarized how the company arrived at the \$3 million refund and civil penalty proposal and presented rebuttal to arguments made by Staff and OPC regarding SmartEnergy equity members' extracting monies from the company; employee call options; employee buyouts at payments less than specified in the employment agreements); loans from equity investors for a period of six to seven years and subsequent loan repayments by the company to its equity investors; and payments covering the tax obligations of the equity investors.<sup>39</sup>

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<sup>38</sup> Tr. at 12.

<sup>39</sup> Tr. at 17-18.

3. Staff's opposition to SmartEnergy's motion to modify

Staff recommended that the Commission deny SmartEnergy's motion to modify the remedy portion of the Order on Appeals, arguing that SmartEnergy's proposal would benefit only SmartEnergy, compensate customers at pennies on the dollar, and overstates the risks of bankruptcy.

Staff argued that under SmartEnergy's proposal, individual partial customer refunds would amount "to a mere 18.8 cents on the dollar ... [and] SmartEnergy would be relieved from paying \$13.22 [million] of the disgorgement ordered by the Commission" while leaving SmartEnergy free to carry on its profitable business in the other states where it does business.<sup>40</sup>

Staff also argued that SmartEnergy failed to explain how it prepared for compliance with the Commission's order requiring refunds. Staff noted that during the appeal period, SmartEnergy continued to draw revenues from its Maryland customers, therefore "knowingly inflat[ing]" its refund liability from approximately \$6 million to \$15.97 million, while simultaneously draining those assets out of the company and into the pockets of shareholders.<sup>41</sup>

Relatedly, Staff argued that the clawback concerns raised by SmartEnergy—which SmartEnergy asserted would jeopardize the proceeds of its \$2.5 million appeal bond if the full \$15.9 million in refunds recommended by Staff and OPC were ordered—could apply equally to the salaries, bonuses, and buyouts that SmartEnergy owners awarded themselves.<sup>42</sup> Staff also argued that bankruptcy could result in the discovery of additional

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<sup>40</sup> Staff Opposition at 2-3.

<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* at 4.

assets available for collection, which could result in a higher return to Maryland consumers than the \$3 million amount that SmartEnergy is proposing. Staff argued that SmartEnergy has every incentive to avoid bankruptcy in order to continue its operations in other states unfettered by court or trustee intervention.<sup>43</sup>

During the August 14, 2024, Administrative Meeting, Staff reiterated that the Commission previously confirmed SmartEnergy's obligation to refund customers to the full extent required in the Order on Appeals. Staff argued that the ability to pay is not the standard for determining the remedies for consumer violations, and therefore the threat of bankruptcy or further litigation should not be a factor in what remedy remains. Accordingly, Staff objected to the relevance of SmartEnergy's financials, arguing they have no bearing on the reduction of the remedy required by the Commission's orders.<sup>44</sup>

Finally, in response to SmartEnergy's arguments related to the MTSA, Staff emphasized that the MTSA was *only a small part of this case*. Staff noted that, although the PULJ proposed finding that SmartEnergy did not violate the MTSA (a proposed finding rejected by the Commission), the PULJ still recommended the full refunds Staff now requests, and based her refund requirement on her extensive findings that SmartEnergy engaged in false, misleading, and deceptive practices in violation of the Commission's regulations and the Consumer Protection Act.

#### 4. OPC's opposition to SmartEnergy's motion to modify

OPC joined Staff in urging the Commission to reject SmartEnergy's motion to modify. OPC additionally argued that SmartEnergy misled the Commission and the courts

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

<sup>44</sup> Tr. at 15.



as to the amount of the refund at various times during this proceeding and ignored the Commission's initial request that it provide a spreadsheet that showed the total amount of the refund, forcing the Commission to address the issue at the Administrative Meeting of April 14, 2024.<sup>45</sup> OPC noted further that the \$16 million refund amount reflected in SmartEnergy's spreadsheet has not been audited.

OPC argued that the Commission should reject SmartEnergy's efforts to negotiate away part of its refund obligations in this case, and that the Commission should give little weight to SmartEnergy's financials, both as filed and as discussed during the August 14, 2024, Administrative Meeting, in calculating the refund obligation. OPC argued that enforcement of the Commission's refund order requires only the number of customers that SmartEnergy enrolled through false and misleading marketing practices adjudicated by the Commission, and the amount charged above utility SOS.<sup>46</sup>

OPC further argued that, to the extent the Commission does consider SmartEnergy's financials, SmartEnergy's positive net profits belie the company's arguments that its financial integrity will be jeopardized as a result of its customer refund obligations in this case.<sup>47</sup>

OPC further argued that the Commission should note the extensive attempts by SmartEnergy to impune the efforts of Staff and OPC in this case, in the face of repeated findings of wrongdoing by the PULJ, the Commission, and the courts.

Ultimately, OPC requested that the Commission give SmartEnergy a direct order enforcing refunds by a date-certain.

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<sup>45</sup> OPC Response at 2.

<sup>46</sup> Tr. at 7.

<sup>47</sup> Tr. at 21.

**B. SmartEnergy’s Amended Motion to Modify to Add Jury Trial Right Claims**

On September 3, 2024, SmartEnergy filed an Amended Motion to Modify, which added additional language asserting that the refund amount and potential civil penalties for what approximate common law fraud claims are punitive to SmartEnergy and therefore subject to the right to a jury trial under the United States Constitution and Article 23 of the Maryland Constitution.<sup>48</sup>

a. Staff’s motion to strike

Staff requested that the Commission strike SmartEnergy’s amended motion based on the alleged denial of jury trial rights.<sup>49</sup> Staff argued that any request to add a jury trial request would be untimely because SmartEnergy should have been aware of the issue long before the August 2024 motion to amend. Staff also argued that SmartEnergy waived any right to a jury trial by failing to timely assert such a right, arguing that Maryland Rule 2-325 required SmartEnergy to assert a jury trial right “within 15 days after the time for answering the petition of appeal.” Staff argued that period passed in 2020, when SmartEnergy appealed this issue to the Maryland courts.

b. OPC’s response

OPC argued that SmartEnergy’s jury trial theory is not supported under Maryland law.<sup>50</sup> OPC cited *Maryland Aggregates Ass’n, Inc. v. State*, 337 Md. 658, 680 (1994) for the rule that “the jury trial guarantee [is] inapplicable where the legislature has committed

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<sup>48</sup> Maillog No. 312054, citing *Sec. & Exch. Comm’n v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024).

<sup>49</sup> Maillog No. 312249. (Staff Motion to Strike)

<sup>50</sup> Maillog No. 312712.

to an administrative agency the initial decision-making function with respect to a particular class of disputes.” OPC also cited *Consumer Prot. Div. v. Morgan*, 387 Md. 125 (2005), where the court upheld a denial of a jury trial request by an administrative law judge in a case concerning violations of the Maryland Consumer Protection Act and that involved both restitution and civil penalties. OPC argued that the Maryland General Assembly, in enacting PUA § 7-507 and § 13-201, has given the Commission the authority to impose remedies, including refunds and civil penalties, in cases such as this, and therefore the reasoning of *Maryland Aggregates Ass’n* and *Morgan* apply to this present dispute and require the Commission to reject SmartEnergy’s jury trial claims.

OPC also argued that SmartEnergy’s theory, in reliance on *Jarkesy*, does not apply in this case because *Jarkesy* applied the Seventh Amendment of the United States Constitution to a federal agency action, but the Seventh Amendment has not been applied to the states.<sup>51</sup>

c. SmartEnergy’s opposition to Staff’s motion to strike and reply in support of amended motion

In reply, SmartEnergy argued that its jury trial claim is controlled by the federal Seventh Amendment, has not been decided by Maryland courts, and has not been waived.

SmartEnergy argued that the Maryland jury trial right is “co-extensive” with the federal Seventh Amendment and that the issue is therefore controlled by *Jarkesy*.<sup>52</sup> SmartEnergy further stated that numerous state and federal appellate courts have already

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<sup>51</sup> *Id.* at 4-5.

<sup>52</sup> Maillog No. 312802, citing Attorney General v. Johnson, 282 Md. 274, 291 (1978).

cited *Jarkesy*.<sup>53</sup> SmartEnergy also argued that the Maryland jury trial right and the federal Seventh Amendment have common ancestry.<sup>54</sup>

SmartEnergy also argued that *Maryland Aggregates Ass’n*, cited by OPC, concerned a “public rights” claim (for which there is no jury trial right under the Seventh Amendment) and is therefore not controlled by *Jarkesy* or applicable to this case.<sup>55</sup> SmartEnergy similarly challenged the applicability of *Morgan*, also cited by OPC, arguing that it was decided nearly two decades ago and did not address the specific issues raised in *Jarkesy* concerning common law fraud.<sup>56</sup>

SmartEnergy also argued that the Commission’s order is not final because the Commission has not finally ruled on the questions of what the amount of refunds should be, and the appropriate civil penalty to be imposed on SmartEnergy.<sup>57</sup>

SmartEnergy argued further that Staff’s reliance on Maryland Rule 2-325(d) is misplaced because the Public Utilities Article does not create a specific jury trial right, and Rule 2-325(d) provides that “[i]n an appeal from the Workers’ Compensation Commission or other administrative body when there is a right to trial by jury, the failure of any party to file the demand within 15 days after the time for answering the petition of appeal constitutes a waiver of trial by jury.” SmartEnergy argued that the lack of a statutory jury

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<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 6

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 5.

trial right means that Rule 2-325(d)'s timing for demanding a jury trial does not apply, regardless of whether there exists a constitutional jury trial right.<sup>58</sup>

### **Commission Decision**

#### **1. SmartEnergy's Jury Trial Rights Arguments**

The Commission finds no merit in SmartEnergy's argument that it has been unlawfully and unconstitutionally denied a jury trial and that, as a result, the judgment and refund order contained in the Order on Appeals and any civil penalty order are invalid. The Commission reaches this conclusion for three reasons: (a) because the civil jury trial rights under the United States Constitution have not been applied to the States, (b) because the Maryland Constitution does not recognize a right to a jury trial in administrative proceedings, and (c) because, even assuming a jury trial right existed, the issue was waived by SmartEnergy failing to raise it in a timely manner.

##### **a. The civil jury trial rights under the United States Constitution do not apply to Maryland**

SmartEnergy's chief argument relies on *Sec. & Exch. Comm'n v. Jarkesy*, 144 S. Ct. 2117, 2127 (2024), wherein the United States Supreme Court found that a federal administrative agency's judgment on a claim analogous to common law fraud was subject to the U.S. Constitution's Seventh Amendment guarantee of a jury trial in certain civil matters.

The Seventh Amendment civil jury trial right has not been applied to the states, however. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 217, 36 S. Ct. 595, 596

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<sup>58</sup> *Id.* at 9.

(1916).<sup>59</sup> In other words, *Jarkesy* does not control this case because the Commission is not a federal administrative agency.

b. Maryland law does not recognize a constitutional jury trial right before administrative agencies like the Commission

The Commission therefore looks to Maryland law to determine SmartEnergy's rights on this question. Maryland does not recognize a State constitutional right to a jury trial where the Maryland General Assembly has committed to an administrative agency the initial decision-making function with respect to a particular class of disputes. *Consumer Prot. Div. v. Morgan*, 387 Md. 125, 193, 874 A.2d 919, and 959 (2005); *Md. Aggregates Ass'n v. State*, 337 Md. 658, 680-81, 655 A.2d 886, and 897 (1995).

The Commission is the initial decision-maker concerning the type of disputes at issue in this case. PUA § 7-507. That section establishes the Commission's jurisdiction and responsibility for the regulation of retail electric suppliers, like SmartEnergy. It further authorizes the Commission, upon a finding of just cause, to take all of the actions taken or considered in this case, including "order[ing] a refund or credit to a customer" and "impos[ing] a civil penalty or other remedy." PUA § 7-507(k)(1). It further defines "just cause" to include (among other things): "committing fraud or engaging in deceptive practices;" "violating a Commission regulation or order;" and "violating a provision of this article or any other applicable consumer protection law of the State." PUA § 7-507(k)(3).

This interpretation of PUA § 7-507 was affirmed by the Maryland Supreme Court

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<sup>59</sup> See also, *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007) (citing *Bombolis*, 241 U.S. at 217) ("If the case was brought in a state court and the Attorney General declines to remove, the Seventh Amendment would not figure in the case, for it is inapplicable to proceedings in state court."); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) ("The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment.").

in its review of the judgment in this case. *In re Smart Energy Holdings, LLC*, 486 Md. 502, 552, 311 A.3d 919, 948 (2024) (“[T]he General Assembly granted the Commission the express authority to determine whether electricity suppliers under its jurisdiction have violated Maryland’s consumer protection laws, including the MTSA, and to impose statutory remedies when it determines that the supplier has violated any applicable consumer protection law of this State.”).

Moreover, notwithstanding SmartEnergy’s claim that Maryland’s civil jury trial rights—contained in Article 23 of the Maryland Declaration of Rights—are co-extensive with the Seventh Amendment, the sole 1978 decision cited by SmartEnergy for that proposition nowhere contains that conclusion. Similarly, SmartEnergy’s argument that Article 23 and the Seventh Amendment share common ancestry that should support the application of *Jarkesy* to Article 23 must be rejected because the Commission is bound by the decisions of the Maryland Court of Appeals (now the Maryland Supreme Court), cited above. The Commission also finds SmartEnergy’s argument unpersuasive that *Md. Aggregates Ass’n* and *Morgan* should be factually distinguished because they might not directly address the specific narrow facts of this case. Nothing in those opinions indicates an intention by the Court to issue narrow factually bound holdings that would not apply here.

Because the Maryland General Assembly has committed to the Commission the initial decision-making function over the underlying dispute, the Maryland Constitutional right to a jury trial does not apply.

c. SmartEnergy waived its claim that it was denied a right to a jury trial

Finally, the General Assembly has not legislatively provided for a right to a jury

trial in cases of judicial review of Commission decisions,<sup>60</sup> but in the event that SmartEnergy was entitled to a jury trial under Maryland law, SmartEnergy nonetheless would have waived any such claim by failing to raise it in a timely manner.

The Maryland Court of Appeals summarized the relevant law thusly: “The right to a trial by jury in civil proceedings is enshrined in the Maryland Declaration of Rights and further guaranteed in Maryland Rule 2-511. But the Legislature and Courts may impose reasonable limitations on that right. One such limitation is found in Maryland Rule 2-325[.]” *Scarfield v. Muntjan*, 444 Md. 264, 266, 119 A.3d 745, and 746 (2015).

Maryland Rule 2-325(d) provides in pertinent part: “Appeals from administrative agencies — In an appeal from the Workers' Compensation Commission or other administrative body when there is a right to trial by jury, the failure of any party to file the demand within 15 days after the time for answering the petition of appeal constitutes a waiver of trial by jury.”

The Commission is an administrative body established under PUA §§ 2-101 *et seq.* Accordingly, under Maryland Rule 2-325(d), SmartEnergy’s jury trial issue should have been timely raised on judicial review in the Maryland circuit court. It was not. And having failed to do so, SmartEnergy waived any possible right to demand a jury trial at this late hour.

Because the Order on Appeals contained all relevant factual findings as to SmartEnergy’s wrongdoing and also contained the directive to provide full customer refunds,<sup>61</sup> both the Commission’s judgment and remedy were final, and any jury trial right

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<sup>60</sup> The scope of judicial review of Commission decisions is defined at PUA §§ 3-201 *et seq.* Those sections do not provide for any right to a jury trial.

<sup>61</sup> Order No. 89795 at 64,



that may have existed as to them is waived, per Rule 2-325(d). The Commission finds no merit in SmartEnergy’s assertion that the refund order was not final merely because an exact dollar amount was not specified in the Order on Appeals. The Commission notes that SmartEnergy’s pending motion, in which it is requesting a lower refund amount, is a motion to modify the existing, final, appealed, and affirmed remedy ordered in the Order on Appeals.

The Commission has not previously determined whether a civil penalty is appropriate in this case, however.<sup>62</sup>

## **2. SmartEnergy’s Motion to Modify the Remedy**

In the Order on Appeals, the Commission directed “SmartEnergy to—within ten (10) calendar days of this Order—... re-rate and refund all Maryland customers solicited via telephone the difference between SmartEnergy’s supply charges and the applicable SOS rate from the local utility for all periods these customers were served, whether the customer is an existing customer or a former customer, and provide a detailed accounting to the Commission within sixty (60) days of the refund amount sent to each of these customers.”<sup>63</sup> SmartEnergy did not comply with that directive, choosing instead to file a petition for judicial review. The Maryland Supreme Court ultimately affirmed the Commission’s Order and returned jurisdiction to the Commission to enforce that judgment and ensure the refunds it ordered for SmartEnergy’s former customers are provided for.

Although SmartEnergy acknowledges that the amount of customer refunds owed has grown to \$15.97 million, its Motion to Modify asks the Commission to reduce that

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<sup>62</sup> Order No. 89795 at 65.

<sup>63</sup> *Id.* at 64.

amount to \$3 million. In support of its Motion, SmartEnergy makes the following arguments: (1) that requiring it to pay the full amount of accrued refunds owed would be excessive and contrary to other law, and (2) that it cannot afford to pay the full amount.

a. Whether the \$15.97 million refund amount is excessive or contrary to other law

Regarding SmartEnergy's argument that requiring it to pay the full amount of accrued refunds owed would be excessive and contrary to other law, the Commission is unpersuaded. Rather, requiring SmartEnergy to repay the full refund amount is both within the Commission's authority and justified by SmartEnergy's unlawful marketing practices, for all the reasons stated in the Order on Appeals and affirmed by the Maryland Supreme Court.<sup>64</sup> SmartEnergy's repeated argument that this would be the largest ever consumer protection refund ordered by the Commission is an isolated and meaningless statement that fails to consider the context of both the size and scope of SmartEnergy's unlawful conduct and the resulting harm to SmartEnergy's customers. The full refund amount of \$15.97 million is not excessive but rather directly proportional to the harm caused by SmartEnergy's unlawful customer marketing and contracting practices that resulted in customers overpaying SmartEnergy by that amount compared to utility default service.

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<sup>64</sup> "[T]he remedies imposed by the Commission in this case are within its statutory discretion and are not arbitrary or capricious. The Commission had just cause to order that partial refunds be issued and customers be returned to their prior utility's standard offer service based upon its multiple finding ... that SmartEnergy (1) unlawfully enrolled customers, (2) engaged in deceptive trade practices, (3) violated the Commission's regulations, and (4) violated Maryland consumer protection laws." *Smart Energy Holdings, LLC*, 486 Md. at 576-77.

Any refund payment to customers would, therefore, be entirely remedial of the direct and calculable financial harms caused by SmartEnergy.

b. Whether SmartEnergy’s ability to pay should limit the Commission in ordering refunds

Regarding SmartEnergy’s argument that it is unable to afford the full refund amount and can only afford the \$2.5 million appeal bond plus an additional \$250,000 in cash and the value of its \$250,000 financial integrity bond, the Commission finds, based on consideration of the record as a whole, that although it might take several years to do so, SmartEnergy has access to sufficient resources to satisfy the full \$15.97 million refund requirement, were it required to do so.

As noted in Order No. 90515, OPC’s renewed request for rehearing brought into focus that SmartEnergy’s appeal bond was insufficient to guarantee the full customer refunds in this case.<sup>65</sup> In that Order, the Commission explained that 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 PULJ’s proposed order—not the company’s full refund obligation.<sup>66</sup> However, the Commission emphasized that, even though the appeal bond would not be subject to revision during the pendency of litigation, SmartEnergy was still responsible for the full amount of its customer refund obligation, with or without the security of the appeal bond.<sup>67</sup>

The Commission further explained that it viewed the company’s appeal bond as only “a fail-safe” mechanism to protect customers in the event that SmartEnergy itself

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<sup>65</sup> Order No. 90515 at 10.

<sup>66</sup> *Id.* at 14.

<sup>67</sup> *Id.*

failed to remit customer refunds as required by the Order on Appeals, emphasizing that “[t]he obligation to remit customer refunds as directed by the Commission belongs to SmartEnergy directly, bond or no bond—regardless of the amount.”<sup>68</sup> While the magnitude of SmartEnergy’s total refund obligation at that time was not precisely known, OPC’s renewed request for rehearing asserted a \$6.5 million liability.<sup>69</sup>

For these reasons, SmartEnergy knew or should have known by February 2023 (and long before the Supreme Court of Maryland’s decision rejecting its appeal) that its refund liability could be \$6.5 million, if not higher.

SmartEnergy’s claims of poverty are also undercut by the evidence of its payments to company insiders and investors of millions of dollars during the period in question. During the August 14, 2024, hearing, Staff argued that, while knowing of its liability to Maryland customers, SmartEnergy’s investors continued to profit and made no provision for its customer refund obligation. Instead, SmartEnergy continued to pay out millions in distributions, salaries, and bonuses, while at the same time ignoring the company’s “huge contingent liability” to Maryland consumers.<sup>70</sup> Instead of adequately preparing for the acknowledged potential magnitude of its refund obligation, SmartEnergy made extensive distributions to its investors.<sup>71</sup> These distributions show complete indifference with regard to the company’s duty to preserve funds to ensure full refunds to its Maryland customers. These actions perfectly demonstrate SmartEnergy’s predatory practices toward Maryland customers in order to illegally stuff the pockets of the companies’ insiders.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at n. 57 (citing Maillog No. 301149 at 13).

<sup>70</sup> Tr. at 33. In its audited financial statements, SmartEnergy acknowledged a contingent liability exceeding the \$2.5 million appeal bond amount for SmartEnergy’s Maryland customer refunds.

<sup>71</sup> *See* Tr. at 18.

The Commission is concerned, however, that a protracted refund process over years would add uncertainty and delay, risk non-compliance, and create challenges to administering refunds to customers, factors which are not in the public interest. Accordingly, while the Commission finds that the full \$15.97 million refund amount is correct and appropriate, the Commission will suspend all but \$6.5 million of that amount, subject to SmartEnergy's full and timely satisfaction of the compliance directives set forth herein. In the event of non-compliance, this suspension shall be rescinded, and the Commission will utilize any means necessary to collect full refunds for SmartEnergy's Maryland customers, including the transfer of any unpaid refunds to the Maryland Office of Attorney General for enforcement and the State's collection agency for collection, as well as the possible imposition of an additional civil penalty.

SmartEnergy is hereby directed to make full refunds, less the amount suspended, to all affected customers within no less than 90 days. The Commission further directs that beginning 30 days after this Order, partial refunds that remain unpaid shall accrue interest at the rate set forth in Md. Courts and Judicial Proceeding Code Ann. § 11-107(a).<sup>72</sup> It is the Commission's clear intent that going forward, any indiligence by SmartEnergy in satisfying the partial refunds directed in this Order shall not redound to the benefit of SmartEnergy's investors. The Commission expects SmartEnergy to immediately initiate the process for refunds. Delays in responding to this Order will be viewed as non-compliance.

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<sup>72</sup> Interest shall accrue separately on both the suspended and non-suspended refund amounts, but interest on suspended refund amounts shall be suspended per the same terms as other suspended refunds described herein.

SmartEnergy shall utilize best efforts to remit refunds directly to each of its former Maryland customers based on the difference between the amount charged by SmartEnergy and the SOS rate that would have been charged by each customer's utility for the period during which each customer was enrolled with SmartEnergy. Where possible, customer refunds shall be made to customers via the same method used by each customer in paying SmartEnergy for the supplier's charges, such as check, electronic funds transfer, or utility consolidated bill credit.

Any refunds not remitted to customers due to the customers' change of address or refund checks returned to SmartEnergy uncashed, shall be remitted to the Fuel Fund of Maryland in utility service areas where the FFM operates, or to other energy assistance programs in areas where the FFM does not operate.

The Commission further directs that SmartEnergy cooperate with Staff and OPC in developing a satisfactory method of communicating with SmartEnergy's former customers, for delivering refunds, and ensuring and verifying the completeness of the customer refunds ordered herein, consistent with the directives contained below. As part of that process, SmartEnergy shall submit a draft "customer letter" to Staff and OPC for review, and shall thereafter send a letter approved by Staff and OPC to each of SmartEnergy's former 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 returned to their utility's standard offer service without penalty, and (iii) that explains how refunds for each customer have been calculated. Wherever possible, SmartEnergy shall remit refunds to each former Maryland customer by the method with

which the customer originally made payment to SmartEnergy for the supplier charge, such as check, electronic funds transfer, or utility consolidated bill credit.

The Commission further directs SmartEnergy to maintain its appeal bond until further Commission direction. When the Commission is satisfied that SmartEnergy has fully completed its refund obligations, SmartEnergy may petition the Commission to release the appeal bond.

The Commission directs SmartEnergy to file bi-weekly reports on its progress of making the refunds ordered herein. The Commission directs Staff to file monthly status reports until such time as Staff deems it appropriate to recommend that this case be closed on the Commission's docket.

SmartEnergy shall, at its own expense, retain a Maryland-based independent auditor to confirm the remittance of customer refunds; the management of SmartEnergy's refund accounting; the disbursement of any remaining funds to the Fuel Fund of Maryland or to other customer energy assistance programs serving customers within utility service areas not served by the FFM;<sup>73</sup> the review of SmartEnergy's biweekly refund reports, with its first report filed by SmartEnergy with the Commission not less than 55 days following the submission of SmartEnergy's first biweekly refund report, and each 30 days thereafter until all refunds are disbursed. SmartEnergy shall provide the independent auditor with full access to all records and correspondence needed to inform the auditor's reports.

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<sup>73</sup> SmartEnergy shall include in its first bi-weekly report an analysis of the utility service areas where affected customers were located and identify possible customer energy assistance programs for those service areas.

### 3. Civil Penalty

Under the version of PUA § 7-507(l) in effect at the time of the violations found herein, the Commission is empowered to impose a civil penalty of not more than \$10,000 per violation, with each affected customer being a separate violation, and each day that a violation continues also being a separate violation. Given the number of customers affected in this case, the maximum civil penalty could be very large. However, the criteria for establishing a civil penalty also requires consideration of: “(i) the number of previous violations of any provisions of [the Public Utilities Article], (ii) the gravity of the current violation, and (iii) the good faith of the electricity supplier or person charged in attempting to achieve compliance after notification of the violation.” PUA § 7-507(l)(5).

Regarding the first and third factors, concerning previous violations and compliance efforts, the Commission notes the factual findings of the PULJ that SmartEnergy had an “egregious” pattern of systemic violations of the Public Utilities Article and Commission regulations and a poor record of good faith compliance once violations were identified by the Commission’s Consumer Affairs Division.<sup>74</sup> The Commission also notes that, in June 2019, SmartEnergy began to issue contract summaries to new customers.<sup>75</sup> During the course of this proceeding, there was also an effort by SmartEnergy to revise its sales scripts to address some of the issues raised by Staff and OPC. However, according to OPC witness Susan M. Baldwin, the sales scripts and the quality assurance process that SmartEnergy introduced in Maryland would not have likely occurred absent the actions taken by Staff in this case.<sup>76</sup>

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<sup>74</sup> Proposed Order at 24-26.

<sup>75</sup> Maillog No. 233452 at 19-20.

<sup>76</sup> OPC Rebuttal Testimony of Susan M. Baldwin (Maillog No. 231045) at 20.



Regarding the second factor, concerning the gravity of the current violations, the Commission notes SmartEnergy's widespread disregard for Commission regulations and Maryland law, including but not limited to false and misleading marketing documents and sales scripts; enrollment of non-account holders; unlawful attempts to thwart customers' attempts to cancel service; and failure to monitor sales calls.<sup>77</sup> The Commission gives limited weight to SmartEnergy's argument that the Maryland Telephone Solicitation Act was applied in a novel way in this case, given the other widespread and persistent violations and the argument presented by the Office of Attorney General Consumer Protection Division, based on CPD's expertise in enforcing the MTSA and other consumer protection laws as discussed above.

In its post-hearing brief at the conclusion of the PULJ proceedings, SmartEnergy proposed a civil penalty of \$300,000.<sup>78</sup> Staff recommended a civil penalty in the amount of \$500,000,<sup>79</sup> while OPC recommended a civil penalty in the amount of \$3,158,900, representing a civil penalty of \$100 per day for 31,589 then-current SmartEnergy customers.<sup>80</sup> In its Motion, SmartEnergy urges that the Commission's monetary determination in this case be *inclusive of* refunds and any civil penalties that the Commission intends to impose, but that the total monetary determination total no more than \$3 million.

In determining the amount of SmartEnergy's civil penalty in this case, the Commission finds that forfeiting SmartEnergy's financial security bond—in the amount of

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<sup>77</sup> See Order No. 89795 at 32-54.

<sup>78</sup> Maillog No. 232727, Attachment 4.

<sup>79</sup> *Id.*, Staff Brief at 18.

<sup>80</sup> Maillog No. 232738, OPC Brief at 31.

\$250,000—is an appropriate civil penalty. This amount is consistent with the civil penalty imposed by the Commission in other supplier enforcement proceedings.<sup>81</sup>

### **CONCLUSION**

As discussed herein, the Commission finds that accepting Staff's recommendations to enforce the refund requirements set forth in the Order on Appeals, subject to the partial refund suspension as specified in this Order, is in the public interest. SmartEnergy's request to modify the refund portion of the Order on Appeals, limiting its refund obligation to \$3 million, is denied. Failure of SmartEnergy to promptly commence remitting customer refunds, as directed herein, will result in the reinstatement of the full amount of SmartEnergy's refund obligation of \$15.97 million, with interest. In total, subject to the suspended amount, the required customer refunds along with the civil penalty in this case amount to \$6.75 million.

**IT IS THEREFORE**, this 28<sup>th</sup> day of April, in the year of Two Thousand Twenty-Five, by the Public Service Commission of Maryland, **ORDERED**:

(1) that the Commission accepts Staff's and OPC's recommendations to enforce compliance with Order No. 89795, holding SmartEnergy in default in the amount of \$15.97 million in customer refunds;

(2) that SmartEnergy's Motion to Modify Order No. 89795 is denied;

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<sup>81</sup> See Maillog No. 232727 at 58 and Maillog No. 233452 at 14-15.

(3) that all but \$6.5 million of SmartEnergy's refund liability is hereby suspended, subject to SmartEnergy's timely and full remittance of partial refunds to satisfy its refund liability within 90 days;

(4) that failure of SmartEnergy to timely and fully satisfy its Maryland customer refund obligations as directed herein shall result in further action by the Commission, including the referral of any unrefunded amount of the \$15.97 million liability found by the Commission in this case to the Office of Attorney General for enforcement and the State's collection agency for collection;

(5) that SmartEnergy shall direct the appeal bond surety in this matter to confirm to the Commission within ten days of this Order that the funds guaranteeing SmartEnergy's bond remain in escrow pending the full remittance of refunds to SmartEnergy's Maryland customers pursuant to this Order;

(6) that SmartEnergy shall submit a draft "customer letter" to Staff and OPC for review, and shall thereafter send a letter approved by Staff and OPC to each of SmartEnergy's former 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 returned to their utility's standard offer service without penalty, and (iii) that explains how refunds for each customer have been calculated;

(7) that SmartEnergy shall remit refunds to each former Maryland customer by the method with which the customer originally made payment to SmartEnergy for the supplier charge, such as check, electronic funds transfer, or utility consolidated bill credit;<sup>82</sup>

(8) that SmartEnergy shall, at its own expense, retain a Maryland-based independent auditor to confirm the remittance of customer refunds; the management of SmartEnergy's refund accounting; the disbursement of any remaining funds to the Fuel Fund of Maryland or to other customer energy assistance programs serving customers within utility service areas not served by the FFM; the review of SmartEnergy's biweekly refund reports, with its first report filed by SmartEnergy with the Commission not less than 55 days following the submission of SmartEnergy's first biweekly refund report, and each 30 days thereafter until all refunds are disbursed. SmartEnergy shall provide the independent auditor full access to all records and correspondence needed to inform the auditor's reports;

(9) that SmartEnergy's financial security bond in the amount of \$250,000 is deemed forfeited as a civil penalty, and the proceeds thereof shall be deposited into the Customer Education and Protection Fund pursuant to PUA § 7-310;

(10) that SmartEnergy shall submit biweekly compliance filings in this matter until 30 days have passed following the final disbursement of the partial refunds directed herein;

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<sup>82</sup> For cases where it is determined that a customer's original payment method will not be usable for refunds, SmartEnergy should work with OPC and Staff to identify alternative refund methods and make an appropriate filing with the Commission seeking approval.

(11) that, upon satisfying the refund directives in this Order, SmartEnergy may request that its suspended refund obligation be discharged; and

(12) that beginning 30 days from the date of this Order, unpaid refund amounts shall accrue interest at the interest rate prescribed under Md. Courts and Judicial Proceedings Code Ann. § 11-107(a), as described herein.

/s/ Frederick H. Hoover, Jr.

/s/ Michael T. Richard

/s/ Kumar P. Barve

/s/ Bonnie A. Suchman

**/s/ Odogwu Obi Linton]**

Commissioners<sup>83</sup>

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<sup>83</sup> Commissioner Odogwu Obi Linton participated in the Commission's decisions in Order Nos. 89795, 89800 and 90515, but did not participate in this decision.