

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

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9613

Issued: September 12, 2019

**PUBLIC UTILITY LAW JUDGE’S RULING ON PRELIMINARY
MOTIONS AND NOTICE OF PROCEDURAL SCHEDULE**

A pre-hearing conference in the above-captioned matter was held on Wednesday, September 11, 2019.¹ Appearing at the pre-hearing conference were the following persons: Brian R. Greene, Esquire and Eric J. Wallace, Esquire, on behalf of SmartEnergy Holdings, LLC d/b/a SmartEnergy (“SmartEnergy” or the “Company”); William Fields, Deputy People’s Counsel and Jacob Ouslander, Assistant People’s Counsel, on behalf of the Maryland Office of People’s Counsel (“OPC”);² and Peter Woolson, Assistant Staff Counsel, on behalf of the Staff (“Staff”) of the Public Service Commission of Maryland (the “Commission”).³

On September 5, 2019, SmartEnergy filed a Motion for a More Definite Statement of Staff’s Amended Complaint (“Motion for More Definite Statement”), and on September 10, 2019, Staff filed a Motion to Strike the Motion for More Definite Statement (“Motion to Strike”). The Motion to Strike was essentially a response in opposition to the

¹ At the request of the parties, the prehearing conference was held jointly with Case Nos. 9614 and 9615.

² Phillip Sheehan has also entered his appearance on behalf of OPC.

³ Mr. Woolson also entered the appearance of Lloyd Spivak, Deputy Staff Counsel on behalf of Staff.

Motion for More Definite Statement requesting that the motion be denied, however, since the Motion to Strike was filed as a motion, it was denied for the reasons stated at the prehearing conference.

SmartEnergy's Motion for More Definite Statement was granted in part, and denied in part. From the extensive argument heard at the prehearing conference, it was apparent that the Motion for More Definite Statement was about defining the scope of this proceeding.

Order No. 89190 issued on July 12, 2019 (the "Delegation Order") provides:

Upon a review of the record, the Commission finds that the submissions provided by the parties are insufficient to resolve the issues set forth in Staff's Complaint and the Company's Answer and Response. Specifically, the Commission finds that there are genuine disputes of material fact and that further proceedings are warranted to determine whether the Company has engaged in a pattern or practice of systemic violations of the consumer protections contained in the Public Utilities Article and the Commission's regulations.

OPC and Staff would like to read the phrase "whether the Company has engaged in a pattern or practice of systemic violations of the consumer protections contained in the Public Utilities Article and the Commission's regulations" broadly, as opening a full investigation into SmartEnergy's entire supplier business in Maryland. The phrase cannot be read in isolation however, particularly since it was modifying what came before to add specificity: The Commission reviewed Staff's Complaint and the Company's Answer and Response and found disputes of material fact. Staff's Complaint listed four (4) Consumer Affairs Division (CAD) complaints which it supplemented with exhibits including those 4 CAD files; SmartEnergy's Answer and Response filed on June 18, 2019 states that since 2017, 27

customers filed complaints with CAD involving SmartEnergy⁴ and appended exhibits containing the 4 CAD files, a thumb drive of sales recordings and confirmations, training materials, and mandatory compliance policy. The Commission found these submissions insufficient to resolve the issues set forth therein. From the entirety of the paragraph, the proper interpretation is that the Commission found further proceedings were warranted to determine whether the issues *set forth in Staff's Complaint and the Company's Answer and Response* might lead to finding that SmartEnergy engaged in a pattern or practice of systemic violations of the consumer protections contained in the Public Utilities Article and the Commission's regulations [emphasis added].

In its quest to broaden the scope of this investigation, OPC cites to Case No. 9346 as an example. However, Staff was unable to explain why SmartEnergy was initially targeted for a complaint, along with four other suppliers, or provide complaint statistics. The information in the record does not render this case analogous to Case No. 9346 (see the confidential statistics at page 3-4 of SmartEnergy's Answer and Response). And neither Staff nor OPC provided any convincing argument otherwise.

Moreover, decretal paragraph 3 provides:

That a new docket, Case No. 9613, is hereby initiated for all subsequent proceedings *deriving* from the Staff Complaint against the Company and the Company's Answer and Response [emphasis added].

The scope of this proceeding is therefore limited by what can be derived from Staff's original Complaint and the Company's Answer and Response, and not an open-ended investigation into any and all practices of SmartEnergy in Maryland.

⁴ Answer and Response, p. 3-4. This information was filed as confidential, however, as OPC's non-confidential filing of September 11, 2019 mentions 34 complaints (inclusive of the original 4 in Staff's Complaint), this number will no longer be treated as confidential.

On July 31, 2019, Staff amended its Complaint, alleging, “[t]he above cited CAD complaints, in and of themselves, indicate that the Company has engaged in a pattern or practice of systematic violations of the consumer protections contained in the Public Utilities Article and the Commission’s regulations, *as do numerous other violations and complaints concerning the Company and its Maryland operations*” [emphasis added] SmartEnergy clarified at the prehearing conference that it was this last phrase to which it objected by the Motion for More Definite Statement.

Staff is directed to, within thirty (30) days of the date of this Ruling, file a second amended complaint to:

- (1) Identify the specific alleged behavior by SmartEnergy or its agents in any of the CAD complaints involving the Company that amounts to violations of Maryland law;
- (2) Identify, for each behavior identified, the specific statute or COMAR section that SmartEnergy’s conduct allegedly violated;⁵

The remainder of SmartEnergy’s Motion for More Definite Statement is denied for the reasons stated at the prehearing conference.

OPC indicated that it intended to conduct discovery in this proceeding (which commenced months ago), then file its own complaint against SmartEnergy, and seek to consolidate the actions. To simplify matters, OPC is directed to file a third-party complaint in this case. OPC stated that it received the 34 CAD files on August 26, 2019. Accordingly, OPC shall file its third-party complaint on or before September 30, 2019. OPC’s third-party complaint shall plead with specificity as Staff is directed above. Discovery between OPC and SmartEnergy is suspended until ten (10) calendar days after OPC files its third-party

⁵ Amendments to Staff’s Complaint are not limited to the more definite statement.

complaint. Discovery between Staff and SmartEnergy is suspended until ten (10) calendar days after Staff files its second amended complaint.

Based on the schedules proposed by the parties and discussion at the pre-hearing conference, the following procedural schedule, which may be modified for good cause shown, is hereby set in this matter:

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| January 31, 2020 | Staff and OPC Direct Testimony |
| March 13, 2020 | Reply Testimony |
| April 10, 2020 | Rebuttal testimony |
| May 1, 2020 | Surrebuttal testimony |
| May 8, 2020 | Pretrial Statement with Stipulations of Fact, if any, and Witness List |
| Week of May 18, 2020 | Evidentiary hearing |
| June 19, 2020 | Initial Briefs |
| July 10, 2020 | Reply Briefs |

No party may file any testimony other than that provided by the procedural schedule unless a motion seeking leave to file the additional testimony, including the reasons for the need to file, is submitted and the motion is granted by the Public Utility Law Judge.

The evidentiary hearing will be held in the Commission's 19th Floor Hearing Room, William Donald Schaefer Tower, 6 St. Paul Street, Baltimore, Maryland, and will begin at 10:00 a.m. every day except for Wednesday, May 20, 2020 when it will be begin at 1:00 p.m.

The parties also proposed various discovery procedures and, based on these proposals and discussion at the prehearing conference, the following discovery guidelines are adopted:

1. Responses to all data requests sent before January 31, 2020 shall be due within ten (10) business days of service of the request. Objections to these data requests will be due orally within four (4) business days.
2. Responses to data requests sent on or after January 31, 2020 through and including March 13, 2020 shall be due within seven (7) business days of service of the request. Objections to these data requests will also be due orally within four (4) business days.
3. Responses to all data requests sent after March 13, 2020 through and including April 10, 2020 shall be due within five (5) business days. Objections to these data requests will be due orally within three (3) business days. This 5-day response deadline is applicable only to follow-up data requests concerning the contents of discovery already propounded and does not apply to new issues. If the data request is directed at a new issue, which is not part of discovery that has already been propounded, the seven (7) business day response deadline applies.
4. Responses to all data requests sent after April 10, 2020 through and including May 1, 2020 shall be due within three (3) business days. Objections to these data requests will be due orally within one (1) business day. This 3-day response deadline is applicable only to data requests directed to the contents of the respective surrebuttal testimonies. If the data request is not directed to the surrebuttal testimony, the five (5) business day response deadline applies.
5. Objections to discovery that are not resolved when asserted must be confirmed in writing as soon as practicable and included with the written response to the data request.
6. For purposes of determining the deadline for responses, data requests served prior to 4:00 p.m. on a business day shall be considered served on that business day. Data requests served on and after 4:00 p.m. on a business day shall be considered to have been served on the next business day.

7. A motion to compel discovery shall be filed only after the applicable parties have discussed and attempted to resolve the issues.
8. Data requests will not be limited in number; rather, all data requests must be reasonably calculated to lead to the discovery of evidence admissible in this proceeding.

/s/ Kristin Case Lawrence
Kristin Case Lawrence
Public Utility Law Judge
Public Service Commission of Maryland

Reasonable accommodations will be made at Public Service Commission proceedings for qualified persons with disabilities, if requested 5 days in advance of the proceeding. (Dial 410-767-8000 or 1-800-492-0474 or access the prior numbers through the Maryland Relay Service at 1-800-735-2258.)

COMMISSIONERS

JASON M. STANEK
CHAIRMAN

MICHAEL T. RICHARD
ANTHONY J. O'DONNELL
ODOGWU OBI LINTON
MINDY L. HERMAN

STATE OF MARYLAND



PUBLIC SERVICE COMMISSION

September 12, 2019

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

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Case No. 9613

To All Parties of Record:

Enclosed is a copy of the "Public Utility Law Judge's Ruling on Preliminary Motions and Notice of Procedural Schedule" issued today in the above-entitled matter.

Very truly yours,

/s/ Leatrice Williams

Leatrice Williams
Administrative Aide

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Enclosure