

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF SMARTENERGY
HOLDINGS, LLC.

CASE NO. 19-1590-EL-UNC

FINDING AND ORDER

Entered in the Journal on November 6, 2019

I. SUMMARY

{¶ 1} The Commission finds that the stipulation between SmartEnergy Holdings, LLC, and Staff regarding SmartEnergy Holdings, LLC's marketing and enrollment practices is reasonable and should be adopted.

II. DISCUSSION

{¶ 2} SmartEnergy Holdings, LLC (SmartEnergy or the Company) is an electric services company as defined in R.C. 4928.01(A)(9) and, as such, is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16.

{¶ 3} On July 13, 2018, Staff issued a Notice Letter to SmartEnergy alleging that the Company was in noncompliance with the Commission's marketing and enrollment regulations for competitive retail electric service (CRES) providers. Staff's review of several SmartEnergy sales calls revealed that SmartEnergy sales agents were using misleading and deceptive practices to market to and enroll customers, including referring to the enrollment as merely entering a sweepstakes contest. In its July 13, 2018 Notice Letter, Staff states that it reached out to SmartEnergy with concerns and represents that SmartEnergy did not agree to change its process. As a result of its investigation, Staff determined that SmartEnergy was in probable noncompliance with Ohio Adm.Code 4901:1-21-03(A), 4901:1-21-05(C), 4901:1-21-06(D)(2)(a)(i), and 4901:1-21-06(D)(2)(a)(iii).

{¶ 4} In its Notice Letter, Staff proposed corrective action to address the issues of probable non-compliance and instructed SmartEnergy to: (1) review all complaints regarding misleading information and re-rate customers enrolled due to the sweepstakes marketing offer, using each customer's price-to-compare re-rate; (2) provide Staff with the

contracts, welcome letters, standard communications, scripts, and marketing materials related to the sweepstakes marketing offer; and (3) cease marketing and enrollments using the sweepstakes marketing offer while Staff reviews the above-listed materials for compliance. Lastly, Staff proposed a forfeiture in the amount of \$32,500.00 for the alleged failure to comply with the above-cited requirements. SmartEnergy was instructed to respond to Staff by July 27, 2018, regarding its plans to come into compliance and implement Staff's proposed corrective action.

A. Stipulation

{¶ 5} On August 16, 2019, Staff and SmartEnergy (Signatory Parties) filed a joint stipulation and recommendation (Stipulation). The Stipulation signed by Staff and SmartEnergy purports to resolve all of the issues identified by Staff in its July 13, 2018 Notice Letter. The following is a summary of the provisions agreed to by the Signatory Parties and is not intended to replace or supersede the Stipulation:

- (1) In its July 13, 2018 Notice Letter, Staff included a statement that SmartEnergy did not agree to change its processes after Staff reached out to a SmartEnergy representative. Staff and SmartEnergy agree that this statement was a mischaracterization of the events and that SmartEnergy responded appropriately to Staff at that time.
- (2) SmartEnergy has implemented all of the corrective actions proposed in the Staff's July 13, 2018 Notice Letter. Specifically, SmartEnergy has: (1) reviewed all complaints brought to its attention by Staff and resolved said complaints to Staff's satisfaction, including re-rating customers; (2) provided Staff with the contracts, welcome letters, standard communications, scripts, and marketing materials related to current marketing offers and agreed with all of Staff's recommended changes to

these materials; and (3) ceased marketing and enrollments using the sweepstakes marketing offers that Staff believes to be out of compliance with applicable Ohio Administrative Code provisions.

- (3) SmartEnergy agrees to pay a forfeiture of \$19,000 and agrees to submit payment within 30 days of the issuance of this Finding and Order, by certified check or money order made payable to "Treasurer, State of Ohio," to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, Columbus, Ohio 43215-3793. Case number 19-1590-EL-UNC should be written on the face of the check or money order.

B. Consideration of the Stipulation

{¶ 6} Ohio Adm.Code 4901-1-30 authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such an agreement are accorded substantial weight. *See Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978). This concept is particularly valid where the stipulation is unopposed by any party and resolves all issues presented in the proceeding in which it is offered.

{¶ 7} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re W. Res. Tel. Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re The Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and

effort by the Signatory Parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

{¶ 8} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 561, 629 N.E.2d 423 (1994), citing *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126, 592 N.E.2d 1370 (1992). Additionally, the Court stated that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 9} The Signatory Parties opine that the Stipulation is supported by adequate data and information, is a just and reasonable resolution of the issues raised in this proceeding, and is the product of serious bargaining and negotiations among knowledgeable and capable parties to resolve those issues. Further, the Signatory Parties state that the Stipulation does not necessarily reflect the position that any of the Signatory Parties would have adopted if this matter had been fully litigated. Upon review, we find that the first prong of the test is met.

{¶ 10} In regards to the second prong, the Signatory Parties aver that the Stipulation, as a package, benefits customers and the public interest. Specifically, the Signatory Parties recognize that it is not in the public interest to subject the Signatory Parties and the

Commission to the burden associated with litigating the issues raised in Staff's Notice Letter when a reasonable and acceptable outcome can be achieved through settlement negotiations. The Commission agrees and finds the Stipulation also satisfies the second prong of the test.

{¶ 11} Lastly, with respect to the third prong, the Signatory Parties state that the Stipulation violates no regulatory principle or precedent. The Commission finds that there is no evidence that the Stipulation violates any important regulatory principle or practice, and, therefore, the Stipulation meets the third criterion. Accordingly, the Commission finds that the Stipulation meets the criteria used by the Commission to evaluate stipulations, is reasonable, and should be adopted.

III. ORDER

{¶ 12} It is, therefore,

{¶ 13} ORDERED, That the Stipulation filed in this proceeding be approved and adopted. It is, further,

{¶ 14} ORDERED, That SmartEnergy takes all necessary steps to carry out the terms of the Stipulation and this Finding and Order. It is, further,

{¶ 15} ORDERED, That nothing in this Finding and Order shall be binding upon the Commission in any future proceeding or investigation. It is, further,

{¶ 16} ORDERED, That a copy of this Finding and Order be served upon each party of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

LLA/hac

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Case No(s). 19-1590-EL-UNC

Summary: Finding & Order that the Commission finds that the stipulation between SmartEnergy Holdings, LLC, and Staff regarding SmartEnergy Holdings, LLC's marketing and enrollment practices is reasonable and should be adopted. electronically filed by Docketing Staff on behalf of Docketing.