



DIS Case Number: 13-0373-EL-CRS

## Section A: Application Information

### A-1. Provider type:

☐ Power Broker    ☐ Aggregator    ☒ Retail Generation Provider    ☐ Power Marketer

### A-2. Applicant's legal name and contact information.

**Legal Name:** SmartEnergy Holdings LLC

**Country:** United States

**Phone:** 2127797000    **Extension (if applicable):**

**Street:** 400 Madison Ave, Suite 9A

**Website (if any):** www.smartenergy.com

**City:** NY

**Province/State:** NY

**Postal Code:** 10017

### A-3. Names and contact information under which the applicant will do business in Ohio

Provide the names and contact information the business entity will use for business in Ohio. This does not have to be an Ohio address and may be the same contact information given in A-2.

Name	Type	Address	Active?	Proof
SmartEnergy Holdings, LLC	Official Name	400 Madison Ave, Suite 9A New York, NY 10017	No	File

### A-4. Names under which the applicant does business in North America

Provide all business names the applicant uses in North America, including the names provided in A-2 and A-3.

Name	Type	Address	Active?	Proof
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### A-5. Contact person for regulatory matters

Lidia Chavez  
400 Madison Ave, Suite 9A



## Public Utilities Commission

NY, NY 10017

US

regulatory@smartenergy.com

2127797000

### A-6. Contact person for PUCO Staff use in investigating consumer complaints

Lidia Chavez

400 Madison Ave, Suite 9A

NY, NY 10017

US

regulatory@smartenergy.com

2127797000

### A-7. Applicant's address and toll-free number for customer service and complaints

**Phone:** 8004434440

**Extension (if  
applicable):**

**Country:** United States

**Fax:**

**Extension (if applicable):**

**Street:** 106 Maplewood Drive

**Email:** customer.care@smartenergy.com

**City:** Hazleton

**Province/State:** PA

**Postal Code:** 18202

### A-8. Applicant's federal employer identification number

45-4166532

### A-9. Applicant's form of ownership

**Form of ownership:** Limited Liability Company (LLC)

### A-10. Identify current or proposed service areas

Identify each service area in which the applicant is currently providing service or intends to provide service and identify each customer class that the applicant is currently serving or intends to serve.

#### Service area selection

AEP Ohio

Duke Energy Ohio

FirstEnergy - Cleveland Electric Illuminating

FirstEnergy - Ohio Edison

FirstEnergy - Toledo Edison  
AES Ohio

### **Class of customer selection**

Commercial  
Industrial  
Mercantile  
Residential

### **A-11. Start date**

Indicate the approximate start date the applicant began/will begin offering services: 03-13-2013

### **A-12. Principal officers, directors, and partners**

Please provide all contacts that should be listed as an officer, director or partner.

Name	Email	Title	Address
Ann Marie Toss			400 Madison Ave Suite 9A New York, NY 10017 US
Dan Kern	regulatory@smartenergy.com	CEO	400 Madison Ave suite 9A NY, NY 10017 US
Lidia Chavez	regulatory@smartenergy.com	Director of Regulatory Compliance	400 Madison Ave, Suite 9A NY, NY 10017 US
Jackie Kern	regulatory@smartenergy.com	CMO	400 Madison Ave, Suite 9A NY, NY 10017 US

### **A-13. Company history**

SmartEnergy Holdings, LLC was formed originally in January of 2012 as Nationwide Energy, LLC, under the laws of the State of Delaware as a Domestic Limited Liability. Several months after its formation in, 2012, the company changed its name to SmartEnergy Holdings, LLC. The company's principal business interest is operating as a Competitive Retail Electric and Natural Gas Service (CRES and CRNGS) to residential, commercial and industrial customers.



**A-14. Secretary of State**

Secretary of State Link: <https://businesssearch.ohiosos.gov?=businessDetails/2168433>

## **Section B: Applicant Managerial Capability and Experience**

### **B-1. Jurisdiction of operations**

List all jurisdictions in which the applicant or any affiliated interest of the applicant is certified, licensed, registered or otherwise authorized to provide retail natural gas service or retail/wholesale electric service as of the date of filing the application..

Jurisdiction of Operation: Electric: DE, DC, IL, ME, MA, MD, NH, NJ, NY, OH, PA, RI, TX Gas: MA, NJ, NY, OH, PA.

### **B-2. Experience and plans**

Describe the applicant's experience in providing the service(s) for which it is applying (e.g., number and type of customers served, utility service areas, amount of load, etc.). Include the plan for contracting with customers, providing contracted services, providing billing statements and responding to customer inquiries and complaints in accordance with Commission rules adopted pursuant to Sections 4928.10 and/or 4929.22 of the Ohio Revised Code.

File(s) attached

### **B-3. Disclosure of liabilities and investigations**

For the applicant, affiliate, predecessor of the applicant, or any principal officer of the applicant, describe all existing, pending or past rulings, judgments, findings, contingent liabilities, revocation of authority, regulatory investigations, judicial actions, or other formal or informal notices of violations, or any other matter related to competitive services in Ohio or equivalent services in another jurisdiction..

File Attached

### **B-4. Disclosure of consumer protection violations**

Has the applicant, affiliate, predecessor of the applicant, or any principal officer of the applicant been convicted or held liable for fraud or for violation of any consumer protection or antitrust laws within the past five years?

**No**



**B-5. Disclosure of certification, denial, curtailment, suspension or revocation**

Has the applicant, affiliate, or a predecessor of the applicant had any certification, license, or application to provide retail natural gas or retail/wholesale electric service denied, curtailed, suspended, revoked, or cancelled or been terminated or suspended from any of Ohio's Natural Gas or Electric Utility's Choice programs within the past two years?

**No**

**B-6. Environmental disclosures**

Provide a detailed description of how the applicant intends to determine its generation resource mix and environmental characteristics, including air emissions and radioactive waste. Include the annual projection methodology and the proposed approach to compiling the quarterly actual environmental disclosure data. See 4901:1-21-09 of the Ohio Administrative Code for additional details of this requirement.

**File(s) attached**

## **Section C: Applicant Financial Capability and Experience**

**C-1. Financial reporting**

Provide a current link to the most recent Form 10-K filed with the Securities and Exchange Commission (SEC) or upload the form. If the applicant does not have a Form 10-K, submit the parent company's Form 10-K. If neither the applicant nor its parent is required to file Form 10-K, state that the applicant is not required to make such filings with the SEC and provide an explanation as to why it is not required.

Does not apply

**C-2. Financial statements**

Provide copies of the applicant's two most recent years of audited financial statements, including a balance sheet, income statement, and cash flow statement. If audited financial



statements are not available, provide officer certified financial statements. If the applicant has not been in business long enough to satisfy this requirement, provide audited or officer certified financial statements covering the life of the business. If the applicant does not have a balance sheet, income statement, and cash flow statement, the applicant may provide a copy of its two most recent years of tax returns with **social security numbers and bank account numbers redacted**.

If the applicant is unable to meet the requirement for two years of financial statements, the Staff reviewer may request additional financial information.

Preferred to file this information confidentially

### **C-3. Forecasted financial statements**

Provide two years of forecasted income statements **based solely on the applicant's anticipated business activities in the state of Ohio**.

Include the following information with the forecast: a list of assumptions used to generate the forecast; a statement indicating that the forecast is based solely on Ohio business activities only; and the name, address, email address, and telephone number of the preparer of the forecast.

The forecast may be in one of two acceptable formats: 1) an annual format that includes the current year and the two years succeeding the current year; or 2) a monthly format showing 24 consecutive months following the month of filing this application broken down into two 12-month periods with totals for revenues, expenses, and projected net incomes for both periods. Please show revenues, expenses, and net income (revenues minus total expenses) that is expected to be earned and incurred in **business activities only in the state of Ohio** for those periods.

If the applicant is filing for both an electric certificate and a natural gas certificate, please provide a separate and distinct forecast for revenues and expenses representing Ohio electric business activities in the application for the electric certificate and another forecast representing Ohio natural gas business activities in the application for the natural gas certificate.

Preferred to file confidentially

### **C-4. Credit rating**

Provide a credit opinion disclosing the applicant's credit rating as reported by at least one of the following ratings agencies: Moody's Investors Service, Standard & Poor's Financial Services,



Fitch Ratings or the National Association of Insurance Commissioners. If the applicant does not have its own credit ratings, substitute the credit ratings of a parent or an affiliate organization and submit a statement signed by a principal officer of the applicant's parent or affiliate organization that guarantees the obligations of the applicant. If an applicant or its parent does not have such a credit rating, enter 'Not Rated'.

This does not apply

#### C-5. Credit report

Provide a copy of the applicant's credit report from Experian, Equifax, TransUnion, Dun and Bradstreet or a similar credit reporting organization. If the applicant is a newly formed entity with no credit report, then provide a personal credit report for the principal owner of the entity seeking certification. At a minimum, the credit report must show summary information and an overall credit score. **Bank/credit account numbers and highly sensitive identification information must be redacted.** If the applicant provides an acceptable credit rating(s) in response to C-4, then the applicant may select 'This does not apply' and provide a response in the box below stating that a credit rating(s) was provided in response to C-4.

Preferred to file this information confidentially

#### C-6. Bankruptcy information

Within the previous 24 months, have any of the following filed for reorganization, protection from creditors or any other form of bankruptcy?

- Applicant
- Parent company of the applicant
- Affiliate company that guarantees the financial obligations of the applicant
- Any owner or officer of the applicant

No

#### C-7. Merger information

Is the applicant currently involved in any dissolution, merger or acquisition activity, or otherwise participated in such activities within the previous 24 months?

No

#### C-8. Corporate structure



Provide a graphical depiction of the applicant's corporate structure. Do not provide an internal organizational chart. The graphical depiction should include all parent holding companies, subsidiaries and affiliates as well as a list of all affiliate and subsidiary companies that supply retail or wholesale electricity or natural gas to customers in North America. If the applicant is a stand-alone entity, then no graphical depiction is required, and the applicant may respond by stating that it is a stand-alone entity with no affiliate or subsidiary companies.

File(s) attached

### C-9. Financial arrangements

Provide copies of the applicant's financial arrangements to satisfy collateral requirements to conduct retail electric/natural gas business activities (e.g., parental guarantees, letters of credit, contractual arrangements, etc., as described below).

Renewal applicants may provide a current statement from an Ohio local distribution utility (LDU) that shows that the applicant meets the LDU's collateral requirements. The statement or letter must be on the utility's letterhead and dated within a 30-day period of the date the applicant files its renewal application.

First-time applicants or applicants whose certificate has expired must meet the requirements of C-9 in one of the following ways:

1. The applicant itself states that it is investment grade rated by Moody's Investors Service, Standard & Poor's Financial Services, or Fitch Ratings and provides evidence of rating from the rating agencies. If you provided a credit rating in C-4, reference the credit rating in the statement.
2. The applicant's parent company is investment grade rated (by Moody's, Standard & Poor's, or Fitch) and guarantees the financial obligations of the applicant to the LDU(s). Provide a copy of the most recent credit opinion from Moody's, Standard & Poor's or Fitch.
3. The applicant's parent company is not investment grade rated by Moody's, Standard & Poor's or Fitch but has substantial financial wherewithal **in the opinion of the Staff reviewer** to guarantee the financial obligations of the applicant to the LDU(s). The parent company's financials and a copy of the parental guarantee must be included in the application if the applicant is relying on this option.
4. The applicant can provide evidence of posting a letter of credit with the LDU(s) listed as the beneficiary, in an amount sufficient to satisfy the collateral requirements of the LDU(s).

Preferred to file confidentially





## Section D: Applicant Technical Capacity

### **D-1. Operations**

Power Marketers/Generators: Describe the operational nature of the applicant's business, specifying whether operations will include the generation of power for retail sales, the scheduling of retail power for transmission and delivery, the provision of retail ancillary services, as well as other services used to arrange for the purchase and delivery of electricity to retail customers.

Operations Description: SmartEnergy is a retail electric supplier authorized to do business in 13 states. SmartEnergy purchases energy supply and delivers it via the PJM pool to utilities who ultimately deliver it to SmartEnergy's residential retail customers. SmartEnergy buys all ancillary services directly from the PJM ISO, and in most cases pays utilities a Network Interchange Transmission Service [NITS] charge to make low voltage delivery to the end use customer.

Separately, SmartEnergy contracts to purchase renewable energy credits [RECs]. SmartEnergy maintains a compliance account with PJM-EIS to track this obligation and record purchases and transfers of certificates.

### **D-2. Operations Expertise & Key Technical Personnel**

Given the operational nature of the applicant's business, provide evidence of the applicant's experience and technical expertise in performing such operations. Include the names, titles, e-mail addresses, and background of key personnel involved in the operations of the applicant's business.

File(s) attached

### **D-3. FERC Power Marketer and License Number**

Provide a statement disclosing the applicants FERC Power Marketer License Number (Power Marketers Only).



# Application Attachments

**\*201302501035\***

DATE	DOCUMENT ID	DESCRIPTION	FLING	EXPED	PENALTY	CERT	COPY
01/28/2013	201302501035	REGISTRATION OF FOREIGN FOR PROFIT LLC (LFP)	125.00	100.00	.00	.00	.00

**Receipt**

This is not a bill. Please do not remit payment.

SMARTENERGY HOLDINGS, LLC  
DANIEL KERN  
575 LEXINGTON AVE, 4TH FL  
NEW YORK, NY 10022

**STATE OF OHIO  
CERTIFICATE**

Ohio Secretary of State, Jon Husted

2168433

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

**SMARTENERGY HOLDINGS, LLC**

and, that said business records show the filing and recording of:

Document(s):  
**REGISTRATION OF FOREIGN FOR PROFIT LLC**

Document No(s):  
**201302501035**



United States of America  
State of Ohio  
Office of the Secretary of State

Witness my hand and the seal of the  
Secretary of State at Columbus, Ohio this  
25th day of January, A.D. 2013.

*Jon Husted*

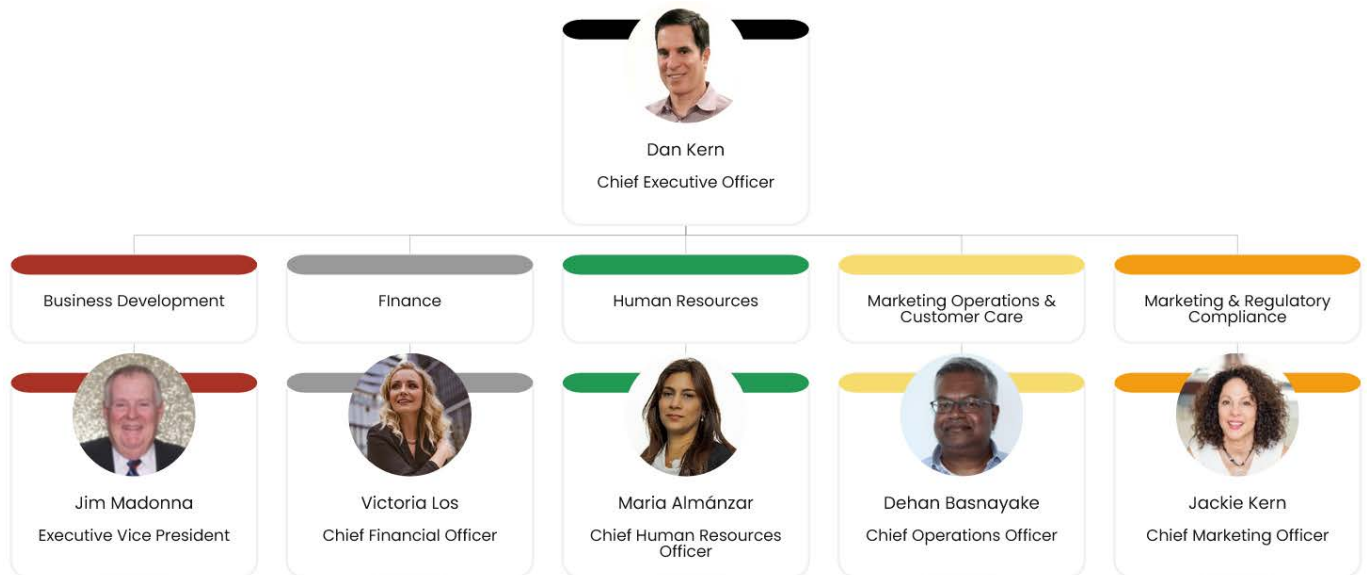
Ohio Secretary of State



Exhibit B-2  
Experience and plans

## Exhibit B-2

### Experience and plans.



Vendor	Responsibility	Contact	Telephone
Shell Energy North America	Supply & Scheduling	James Choi	713-767-5609
Hansen Technologies	EDI & Billing	Chris Neal	416-388-2052
Powwr/Cognitive	Forecast	Rusell Morris	610-844-6422

SmartEnergy uses the internet and mailings to contact and enroll customers. Customer enrollment is conducted under the auspices of Commission rules Section 4901:1-21-06. Billing is typically conducted via the existing utility bill. This is performed using Electronic Data Interchange [EDI] supported by a 3rd party contractor, Hansen Technologies. In circumstances where an overdue amount is written off by the utility, we invoice the customer directly. SmartEnergy's customer inquiries and complaints are handled first through a toll free number: 800-443-4440 option 2, 8am to 8pm EST, Monday through Friday, 9am to 6pm EST Saturday and Sunday. This covers billing inquiries, general questions, complaints and service transfer issues. SmartEnergy records all sales and customer service calls for quality assurance purposes. Calls are regularly screened by managers; salespeople and agents are subject to sanctions including termination for failure to comply with protocols and scripts.



Exhibit B-6  
Environmental Disclosure

### **Exhibit B-6 "Environmental Disclosure"**

**Exhibit B-6 "Environmental Disclosure"**, provide a detailed description of how the applicant intends to determine its (a) generation resource, mix, and (b) environmental characteristics, including air emissions and radioactive waste. This information shall include sufficient discussion so as to detail both the annual projection methodology and proposed approach to compiling the quarterly actual environmental disclosure data. Additional details on this requirement may be obtained by referring to 4901:1-21-09.

SmartEnergy Holdings, LLC. will determine its generation resource mix and environmental mix by referring to PJM data. Annual projection methodology and proposed approach to compiling quarterly actual environmental disclosure data, will follow 4901:1-21 attachment 99-1611-EC-ORD, (refer to next page).



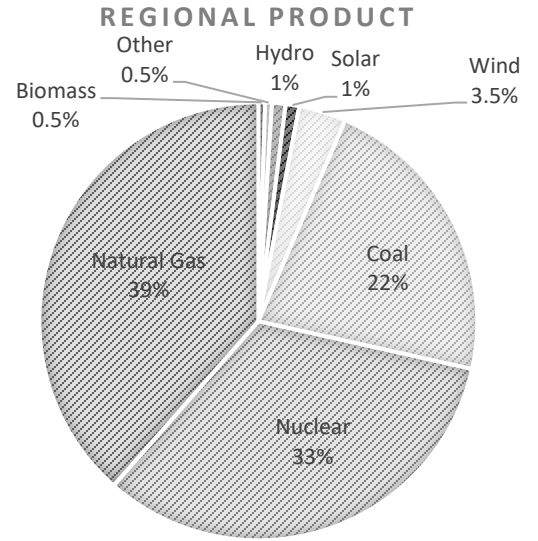
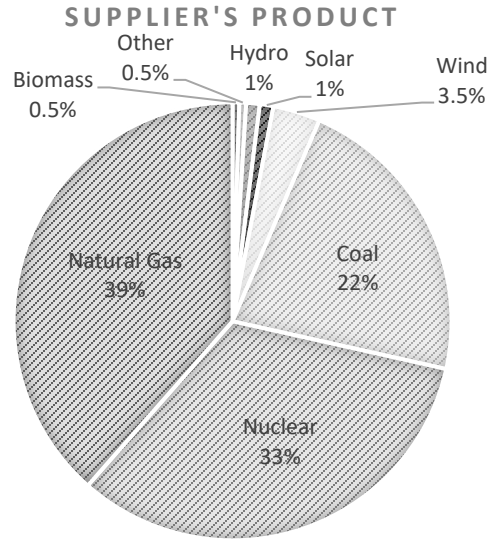
## Environmental Disclosure Information

SmartEnergy Holdings, LLC

### Projected Data for the 2023 Calendar Year

#### Generation Resource Mix

A comparison between the sources of generation used to produce this product and the historic regional average supply mix.



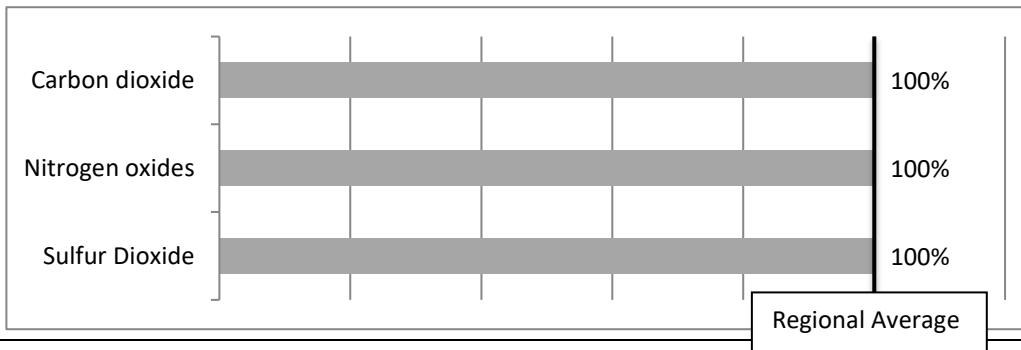
#### Environmental Characteristics

A description of the characteristics associated with each possible generation resource.

Biomass Power	Air Emissions and Solid Waste	
Coal Power	Air Emissions and Solid Waste	
Hydro Power	Wildlife Impacts	
Natural Gas Power	Air Emissions and Solid Waste	
Nuclear Power	Radioactive Waste	
Oil Power	Air Emissions and Solid Waste	
Other Sources	Unknown Impacts	
Solar Power	No Significant Impacts	
Unknown Purchased Resources	Unknown Impacts	
Wind Power	Wildlife Impacts	

#### Air Emissions

A comparison between the air emissions related to this product and the regional average air emissions.



#### Radioactive Waste

Radioactive waste associated with the product.

Type:	Quantity:
High-Level Radioactive Waste	Lbs./1,000 kWh
Low-Level Radioactive Waste	Ft <sup>3</sup> /1,000 kWh

With in-depth analysis, the environmental characteristics of any form of electric generation will reveal benefits as well as costs. For further information, contact SmartEnergy at [www.SmartEnergy.com](http://www.SmartEnergy.com) or by phone at 1-800-443-4440.

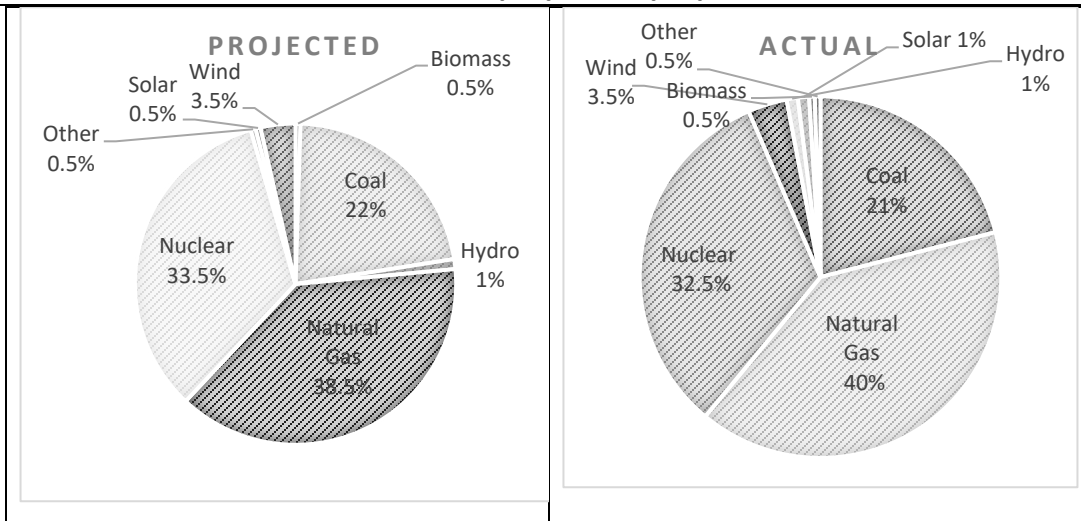
## Environmental Disclosure Information – Quarterly Comparisons

### SmartEnergy Holdings, LLC

#### Projected Data for the 2022 Calendar Year

#### Actual Data for the Period 01/01/22 to 9/30/22

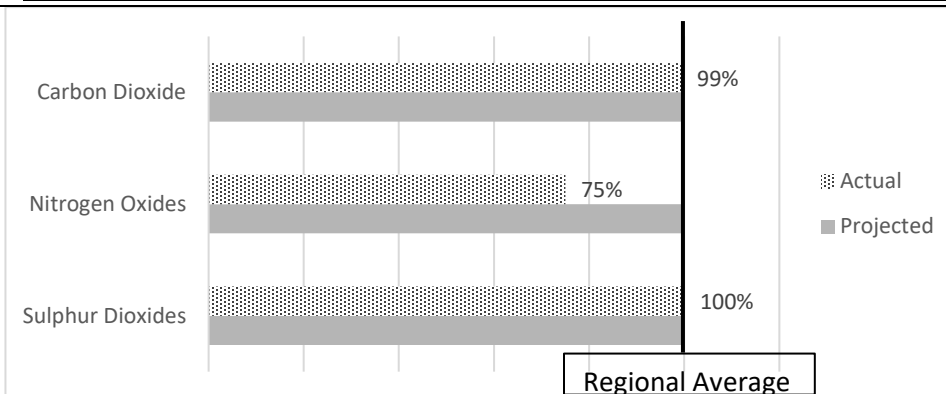
**Generation Resource Mix -**  
A comparison between the sources of generation projected to be used to generate this product and the actual resources used during this period.



**Environmental Characteristics–**  
A description of the characteristics associated with each possible generation resource.

Biomass Power	Air Emissions and Solid Waste
Coal Power	Air Emissions and Solid Waste
Hydro Power	Wildlife Impacts
Natural Gas Power	Air Emissions and Solid Waste
Nuclear Power	Radioactive Waste
Oil Power	Air Emissions and Solid Waste
Other Sources	Unknown Impacts
Solar Power	No Significant Impacts
Unknown Purchased Resources	Unknown Impacts
Wind Power	Wildlife Impacts

**Air Emissions –**  
Product-specific projected and actual air emissions for this period compared to the regional average air emissions.



**Radioactive Waste –**  
Radioactive waste associated with the product.

Type:	Quantity:	
High-Level Radioactive Waste	Unknown	Lbs./1,000 kWh
Low-Level Radioactive Waste	Unknown	Ft <sup>3</sup> /1,000 kWh

With in-depth analysis, the environmental characteristics of any form of electric generation will reveal benefits as well as costs. Updates to this disclosure document will be made electronically at [www.smartenergy.com](http://www.smartenergy.com). For further information, contact SmartEnergy at [customer.care@smartenergy.com](mailto:customer.care@smartenergy.com) or 1-800-443-4440.



Exhibit C-8  
Corporate structure.



400 Madison Avenue, New York, NY 10017

tel 212 779 7000 fax 212 779 3061

**SmartEnergy Holdings LLC's sole affiliate is SmartDirect, SRL which provides administrative services to SmartEnergy Holdings LLC.**



Exhibit D-2

Operations expertise and key technical personnel.



400 Madison Avenue, New York, NY 10017

tel 212 779 7000 fax 212 779 3061

### **Operations Expertise**

The founders and executive team of the company have significant experience with the marketing and provision of operations in the energy business. The company's Chief Executive Officer is the former CEO of an advertising agency that served over 50 of the fortune 500 companies, and acquired 2 million customers annually in both regulated and deregulated industries. The company's Chief Marketing Officer is the former Senior VP of Sales and Marketing for MX Energy, a CRS that had 500,000 customers nationwide. Her background includes marketing, compliance work, and customer care. SmartEnergy's EDI transactions are managed by Hansen Technologies. Among other services, Hansen Technologies provides back office support for account assignments, payments, customer enrollments, tracking current and historical usage, and remittance advice to SmartEnergy.



400 Madison Avenue, New York, NY 10017

tel 212 779 7000 fax 212 779 3061

### Key Technical Personnel

**Name:** Daniel Kern  
**Position:** CEO  
**Business Address:** 400 Madison Avenue, Suite 9A.  
New York, NY 10017  
**Business Phone:** (212) 779-7000  
**Email:** daniel.kern@smartenergy.com

**Name:** Jackie Kern  
**Position:** CMO  
**Business Address:** 400 Madison Avenue, Suite 9A.  
New York, NY 10017  
**Business Phone:** (212) 779-3000  
**Email:** processes@smartenergy.com

**Company:** Hansen Technologies  
**Name:** Amanda Grube  
**Position:** Client Operations Manager  
**Business Address:** Independence Square  
10361 Linn Station Road  
Louisville, KY 40223  
**Business Phone:** 484-235-5873  
**Email:** amanda.grube@hansencx.com

**Company:** Powwr  
**Name:** Stephanie Puntel  
**Address:** 75 Glen Rd. Suite 200  
Sandy Hook, CT 06482  
**Phone:** 203-913-9683  
**Email:** spuntel@escoadvisors.com



## Dan Kern

400 Madison Avenue, Suite 9 A.  
New York, New York

### Summary

I'm currently serving as CEO to SmartEnergy Holdings (smartenergy.com), a retail energy startup that sells electricity in deregulated energy markets. I'm also co-founder of Main Street Direct, a full-service direct response ad agency. We provide customer acquisition and retention marketing services for companies both large and small. Our client roster includes over 50 Fortune 500 companies.

### Experience

<b>SmartEnergy</b> <b>CEO</b>	New York, NY	2012 - Present
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SmartEnergy is an independent energy supplier committed to providing customers with low-cost, reliable electricity, and excellent customer service. In addition to offering fixed rates, SmartEnergy provides 100% renewable energy from sources like wind, solar, and hydro generators, making us a cleaner energy option. The company was founded in 2013 and is financed by Shell Energy North America.

Responsibilities include:

- Communicating, on behalf of the company, with shareholders, government entities, and the public
- Leading the development of the company's short- and long-term strategy
- Creating and implementing the company's vision and mission
- Evaluating the work of other executive leaders within the company
- Maintaining awareness of the competitive market landscape, expansion opportunities, industry developments, etc.
- Ensuring that the company maintains regulatory compliance and social responsibility wherever we do business
- Assessing risks to the company and ensuring they are monitored and minimized
- Setting strategic goals and making sure they are measurable and describable

<b>Main Street Direct</b> <b>Managing Director</b>	New York, NY	1991 - Present
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<b>Russ Berrie &amp; Company, Inc.</b> <b>Director of Marketing</b>	New York, NY	1985-1992
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### Education

The Ohio State University	BSBA, Accounting & Marketing	1984
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## Jackie Kern

400 Madison Ave, Suite 9 A.  
New York, New York

### Summary

I'm currently serving as CMO to SmartEnergy Holdings (smartenergy.com), a retail energy provider that sells electricity in deregulated energy markets. I'm also co-founder of Main Street Direct, a full-service direct response ad agency. We provide customer acquisition and retention marketing services for companies both large and small. Our client roster includes over 50 Fortune 500 companies.

### Experience

<b>SmartEnergy</b> <b>CMO</b>	New York, NY	2012 - Present
----------------------------------	--------------	----------------

SmartEnergy is an independent energy supplier committed to providing customers with low-cost, reliable electricity, and excellent customer service. In addition to offering fixed rates, SmartEnergy provides 100% renewable energy from sources like wind, solar, and hydro generators, making us a cleaner energy option. The company was founded in 2013 and is financed by Shell Energy North America.

Responsibilities include:

- Oversee all customer acquisition efforts
- Work with design, finance and operations to develop overall consumer marketing strategy
- Develop and evaluate key performance metrics
- Provide strategic guidance, insight and knowledge about market trends and competition
- Evaluating the work of other executive leaders within the company
- Ensure that the company maintains regulatory compliance and social responsibility wherever we do business

<b>Main Street Direct</b> <b>Managing Director</b>	New York, NY	1991 - Present
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<b>Cooper Rand, Inc.</b> <b>Director of Sales</b>	New York, NY	1985-1991
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### Education

The Ohio State University	BSBA, Marketing	1985
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# **Competitive Retail Electric Service Affidavit**

County of NY :

State of NY :

Jacqueline Kern, Affiant, being duly sworn/affirmed, hereby states that:

1. The information provided within the certification or certification renewal application and supporting information is complete, true, and accurate to the best knowledge of affiant, and that it will amend its application while it is pending if any substantial changes occur regarding the information provided.
2. The applicant will timely file an annual report of its intrastate gross receipts, gross earnings, and sales of kilowatt-hours of electricity pursuant to Sections 4905.10(A), 4911.18(A), and 4928.06(F), Ohio Revised Code.
3. The applicant will timely pay any assessment made pursuant to Sections 4905.10, 4911.18, and 4928.06(F), Ohio Revised Code.
4. The applicant will comply with all applicable rules and orders adopted by the Public Utilities Commission of Ohio pursuant to Title 49, Ohio Revised Code.
5. The applicant will cooperate fully with the Public Utilities Commission of Ohio, and its Staff on any utility matter including the investigation of any consumer complaint regarding any service offered or provided by the applicant.
6. The applicant will fully comply with Section 4928.09, Ohio Revised Code regarding consent to the jurisdiction of Ohio Courts and the service of process.
7. The applicant will comply with all state and/or federal rules and regulations concerning consumer protection, the environment, and advertising/promotions.
8. The applicant will use its best efforts to verify that any entity with whom it has a contractual relationship to purchase power is in compliance with all applicable licensing requirements of the Federal Energy Regulatory Commission and the Public Utilities Commission of Ohio.
9. The applicant will cooperate fully with the Public Utilities Commission of Ohio, the electric distribution companies, the regional transmission entities, and other electric suppliers in the event of an emergency condition that may jeopardize the safety and reliability of the electric service in accordance with the emergency plans and other procedures as may be determined appropriate by the Commission.
10. If applicable to the service(s) the applicant will provide, it will adhere to the reliability standards of (1) the North American Electric Reliability Council (NERC), (2) the appropriate regional reliability council(s), and (3) the Public Utilities Commission of Ohio.
11. The Applicant will inform the Public Utilities Commission of Ohio of any material change to the information supplied in the application within 30 days of such material change, including any change in contact person for regulatory purposes or contact person for Staff use in investigating consumer complaints.

12. The facts set forth above are true and accurate to the best of his/her knowledge, information, and belief and that he/she expects said applicant to be able to prove the same at any hearing hereof.

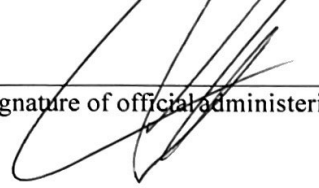
13. Affiant further sayeth naught.

Jacqueline Kern, CMO  
Signature of Affiant & Title



**DANTE ERNESTO BAYONA**  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 01BA6273311  
Qualified in Queens County  
Commission Expires December 10, 2024

Sworn and subscribed before me this 10<sup>th</sup> day of February, 2023  
Month Year

  
Signature of official administering oath

DANTE E. BAYONA.  
Print Name and Title

My commission expires on 12-10-2024

**SmartEnergy Holdings, LLC**  
**Response to Renewal Application Question B-3**

**B-3. Disclosure of liabilities and investigations :**

For the applicant, affiliate, predecessor of the applicant, or any principal officer of the applicant, describe all existing, pending or past rulings, judgments, findings, contingent liabilities, revocation of authority, regulatory investigations, judicial actions, or other formal or informal notices of violations, or any other matter related to competitive services in Ohio or equivalent services in another jurisdiction.

**Response:**

1. Ohio

- a. On September 6, 2022, Commission Staff issued a notice of probable non-compliance (PNC) to the Company, followed by an amended PNC on January 12, 2023. The matters alleged in the PNC and amended PNC are currently being addressed by the Company and Staff.
- b. The Company incorporates by reference the disclosure made in response to Question B-3 of its CRNG license renewal application submitted on July 8, 2022, in Case No. 20-1253-GA-CRS, regarding Case No. 19-1590-EL-UNC.

2. Maryland

The Company incorporates by reference the disclosure made in response to Question B-3 of its CRNG license renewal application submitted on July 8, 2022, in Case No. 20-1253-GA-CRS and offers the following update: On October 31, 2022, the Maryland Court of Special Appeals affirmed the Commission's Order. A copy of the Court's opinion is attached as Attachment B-3(1). On January 19, 2023, the Company filed a petition for certiorari with the Maryland Supreme Court. The Court has not yet acted on the petition.

3. New York

The Company incorporates by reference the disclosure made in response to Question B-3 of its CRNG license renewal application submitted on July 8, 2022, in Case No. 20-1253-GA-CRS and offers the following update: On September 13, 2022, Staff of the New York Public Service Commission issued a recommendation of denial of the Company's eligibility to operate as an electric services company (ESCO) in New York. On October 14, 2022, the Company filed objections to Staff's recommendations, attached as Attachment B-3(2). The NY PSC has not issued a final decision regarding Staff's recommendation.

4. Illinois

The Company incorporates by reference the disclosure made in response to Question B-3 of its CRNG license renewal application submitted on July 8, 2022, in Case No. 20-1253-GA-CRS.

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October 14, 2022

## ***Via Electronic Mail***

Hon. Michelle L. Phillips  
Secretary  
New York State Public Service Commission  
Empire State Plaza, Agency Building 3  
Albany, NY 12223-1350

**Re: SmartEnergy Holdings, LLC – Eligibility Review  
Case 15-M-0127 – In the Matter of Eligibility Criteria for Energy Service  
Companies, et al.**

SmartEnergy Holdings LLC (“SmartEnergy”) hereby submits this timely response to the New York State Department of Public Service staff's ("Staff") September 13, 2022 recommendation to deny SmartEnergy's application for eligibility to operate as an energy services company (“ESCO”) in New York State (the "Denial Recommendation"). For the reasons, facts and authorities discussed herein, the New York State Public Service Commission ("Commission" or "PSC") should reject the Denial Recommendation and approve SmartEnergy's eligibility to serve as an ESCO.

## **I. Background**

SmartEnergy obtained its original authorization to operate as an ESCO in New York on July 1, 2014, when the Commission first granted the company's eligibility. SmartEnergy subsequently commenced services in New York, dedicating immense care and resources to ensure its operations, sales representatives and customer-facing materials are fully compliant with the Uniform Business Practice ("UBP") and any Commission orders related thereto. From the inception of its service in New York to present, SmartEnergy has demonstrated exemplary standards of conduct, received no New York customer complaints, and — until this matter — no disciplinary action or sanction from the Commission.

On December 12, 2019, the Commission issued an Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (the "2019 Order").<sup>1</sup> Any ESCO seeking

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<sup>1</sup> See Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process (Issued Dec. 12, 2019).

to continue serving mass-market customers after the 2019 Order took effect was required to submit a new eligibility application.<sup>2</sup> The 2019 Order set forth the process for such applications,<sup>3</sup> and Staff subsequently issued guidance regarding the eligibility application review process.<sup>4</sup>

On November 17, 2020, SmartEnergy filed a new eligibility application.<sup>5</sup> Staff contacted SmartEnergy via email on several occasions requesting further information regarding SmartEnergy's marketing materials, third party verification scripts and other information. SmartEnergy provided the requested information and modified SmartEnergy's marketing materials and rate products in response to Staff's suggestions.<sup>6</sup> Staff approved SmartEnergy's application on January 25, 2021, thereby confirming SmartEnergy's continued eligibility to operate as an ESCO in New York State.

Yet, just some months later, on September 9, 2021, the Commission issued an Order to Show Cause requiring SmartEnergy to demonstrate why its eligibility to serve as an ESCO should not be revoked. On October 22, 2021, SmartEnergy filed a response to Commission's Order to Show Cause.<sup>7</sup>

On March 21, 2022, the Commission issued an Order denying SmartEnergy's application and directed the company to return each of its mass-market customers to full utility service (the "Denial Order"). Yet just weeks before the Denial Order, SmartEnergy received a letter from Staff on March 4, 2022 authorizing it to continue operating as an ESCO in New York, contradicting the subsequent Denial Order and showcasing the arbitrary and capricious handling of this case.

On April 21, 2022, SmartEnergy filed a timely Petition for Rehearing and Reconsideration of the Denial Order, alleging that the Commission committed errors of law and fact. SmartEnergy's Petitioner for Rehearing contested the grounds on which the Commission based its Denial Order, including but not limited to, the Commission having an insufficient basis to find that SmartEnergy knowingly provided false information and omitted information regarding regulatory sanctions in other states on its retail access application form ("RAAF"), and that the Commission's interpretations of certain RAAF questions contradicted their plain reading and logical understanding.

On July 15, 2022, the Commission granted SmartEnergy's Petition, reconsidered portions of the Denial Order, and remanded this matter to Staff for further proceedings ("2022 Remand

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<sup>2</sup> 2019 Order, Ordering Clause 6.

<sup>3</sup> 2019 Order at 26-30.

<sup>4</sup> Department of Public Service Staff Guidance Regarding ESCO Eligibility Review (Nov. 20, 2020).

<sup>5</sup> See Matter 19-02972, *In the Matter of Revised ESCO Applications in Compliance with Commission Order in Case 15-M-0127 et al. Issued and Effective 12/12/2019*, SmartEnergy Holdings LLC, Retail Access Application Form and attachments (Nov. 17, 2020) ("Application").

<sup>6</sup> See Matter 19-02972, *In the Matter of Revised ESCO Applications in Compliance with Commission Order in Case 15-M-0127 et al. Issued and Effective 12/12/2019*, SmartEnergy Holdings LLC, Application Revisions (Jan. 8, 2021).

<sup>7</sup> The facts, arguments and points and authorities in the OSC Response are incorporated herein in full by reference.

Order"). The 2022 Remand Order found, among other things, that SmartEnergy's purported failure to disclose regulatory sanctions in other states (i.e., Illinois, Ohio, and Maryland) did not constitute a "knowing[ly] false statement in violation of UBP 2.B.3.26."<sup>8</sup> The 2022 Remand Order specifically directed Staff to determine whether SmartEnergy's application for eligibility demonstrates a likelihood that SmartEnergy will comply with the UBP.<sup>9</sup>

On September 13, 2022, Staff filed the Denial Recommendation with the Commission. The two-page Denial Recommendation was devoid of any new facts or information warranting denial of SmartEnergy's application, but merely repurposed allegations of misconduct in other states (i.e., Illinois, Ohio and Maryland) from the Order to Show Cause. The Denial Recommendation contends that "[SmartEnergy] has not demonstrated a *likelihood of compliance* with the [UBP] and, as a result, should not be granted eligibility to operate as an [ESCO] to serve mass market customers in New York State. Staff states it made this determination as a result of SmartEnergy's material pattern of complaints and violations in other states."<sup>10</sup>

## **II. SmartEnergy Has Not Committed Any Misconduct in the State of New York to Warrant a Denial of its Eligibility.**

Since commencing its services in New York, SmartEnergy has exemplified upstanding standards of conduct with its customers. SmartEnergy has never been subject to a Commission investigation or imposition of regulatory penalties in its operation as an ESCO in New York, and Staff has not cited to one iota of alleged misconduct occurring in New York. As a result, Staff's Denial Recommendation is predicated entirely on speculation, chiefly, that *if* alleged out-of-state misconduct (which has not been proven true) took place in New York, it *would* result in violations of the UBP.

Despite exhaustive research of case law and administrative agency decisions, we are unable to find any public service commission ever denying licensing, entitlements or other rights to a company predicated entirely on out-of-state conduct. Neither has Staff cited to a single legal authority for this proposition. Rather, case law and other state commission orders have consistently acknowledged the limited jurisdiction that state commissions have related to out-of-state conduct.<sup>11</sup>

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<sup>8</sup> See, 2022 Remand Order at 8.

<sup>9</sup> UBP, Case 98-M-1343 (September 2020 Version), available at [https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/8dd2b96e91d7447e85257687006f3922/\\$FILE/September%202020%20UBP%20CLEAN.pdf](https://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/8dd2b96e91d7447e85257687006f3922/$FILE/September%202020%20UBP%20CLEAN.pdf)

<sup>10</sup> Denial Recommendation at 1.

<sup>11</sup> See, e.g., *In the Matter of Rulemaking Proceeding to Implement Session L. 2007-397*, No. E-100, 2008 WL 619061 (Feb. 29, 2008) (North Carolina Utilities Commission has authority to review out-of-state facilities when a utility attempts to recover costs from North Carolina ratepayers, but the Commission could not impose regulations on out-of-state conduct without an express grant of Legislative authority," as it did in the context of in-state facilities.").



### **III. The Ohio and Illinois Matters Cited by Staff Do Not Demonstrate a "Pattern of False and Misleading Conduct."**

SmartEnergy has, and continues to have, a sound track record of regulatory compliance in other states, including Ohio and Illinois. On August 26, 2022, SmartEnergy provided a spreadsheet listing customer complaints in each state that SmartEnergy (or an affiliate) provides retail electric service to customers. In Ohio, SmartEnergy received complaints from only 0.25%, 0.25%, 0.32%, and 0.69% of customers in 2019, 2020, 2021 and 2022,<sup>12</sup> respectively. Similarly, in Illinois, SmartEnergy received complaints from only 0.25%, 0.10%, 0.7%, and 0.1% of its customers for those same years. Thus, SmartEnergy has yet to experience a year where *a mere 1%* of its customers in either Ohio or Illinois submitted complaints. Staff does not attempt to explain how a "pattern and practice of false and misleading conduct" could be present with such acceptable levels of customer satisfaction.

Perhaps conceding that the Commission's 2022 Remand Order precludes Staff from relying on *how* SmartEnergy reported information in its RAAF, Staff doubles down on SmartEnergy's dealings in these other states, arguing that they still demonstrate a "material pattern of complaints and violations...." (See, Denial Recommendation at 1.) This is patently false.

For Ohio, in its Response to Order to Show Cause, SmartEnergy conceded that it did not originally disclose a settlement agreement reached with staff of the Public Utilities Commission of Ohio ("PUCO") in its RAAF supplement. On July 13, 2018, PUCO staff issued a Notice of *Probable* Non-Compliance alleging a refusal by SmartEnergy to implement certain customer service practices. Ohio Admin Code 4901-1-30 provides that two or more parties to a PUCO proceeding may enter into a written stipulation, which PUCO staff and SmartEnergy entered into on August 16, 2019. Pursuant to the Stipulation Agreement, the parties agreed that PUCO staff's initial statements alleging that SmartEnergy refused to make certain changes to its business practices "was a mischaracterization of the events" and, in fact, SmartEnergy "responded appropriately to staff." While SmartEnergy did make a voluntary \$19,000 payment to the PUCO and agreed to implement certain corrective measures, such payment and measures were part of a negotiated agreement by both parties to avoid future litigation. No admission of fault was made by SmartEnergy, and no formal regulatory finding or order was issued by the PUCO.

Staff has not cited any evidentiary support to deduce that SmartEnergy's alleged conduct occurred in Ohio — or that it would constitute a violation of the UBP had it occurred in New York. Further, Staff has not explained why it should be allowed to disregard a stipulation agreement that was entered into to the satisfaction of another state regulatory agency. Simply put, the PUCO stipulation should be given preclusive effect in this matter. See, e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (United States Supreme Court explaining that "issue preclusion is not limited to those situations in which the same issue is before two courts. Rather, where a single issue is before a court and an administrative agency, preclusion

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<sup>12</sup> From January to August 2022.

also often applies.); *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 496 (1984) (New York Court of Appeals holding that doctrine of collateral estoppel applies “to the quasi-judicial determinations of administrative agencies when rendered pursuant to adjudicatory authority of an agency to decide issues brought before its tribunals employing procedures substantially similar to those used in a court of law.”); *State v. Seaport Manor A.C.F.*, 797 N.Y.S.2d 538, 539 (2005) (two Department of Health administrative enforcement proceedings which were discontinued with prejudice upon stipulations of settlement had res judicata effect as to state's subsequent action). The weight of legal authority and the facts therefore establish that Staff cannot rely on the PUCO matter and Stipulation Agreement as a basis for sanctioning SmartEnergy in New York.

Reliance on the Illinois matter is similarly misplaced. As SmartEnergy has explained in supplemental submittals to Staff, on July 2, 2019, SmartEnergy and the Illinois Attorney General entered into an Assurance of Voluntary Compliance pursuant to Section 6.1 of the Illinois Consumer Fraud and Deceptive Business Practices Act. This agreement required SmartEnergy to make certain modifications to its business practices, agree to additional auditing measures, as well as issue refunds to customers. The agreement states that SmartEnergy’s execution of the agreement “shall not be construed as an admission of liability for the violation of any Illinois law or regulation.” Because this agreement relates to Illinois law as administered by the Office of the Attorney General, was not a regulatory proceeding issued by the Illinois Commerce Commission and was not to be construed as an admission of violation, it is not substantial or even competent evidence of a “pattern” of misleading practices that could occur in New York State.

#### **IV. The Maryland Matter Pertains to a Novel Interpretation of Maryland Statute, and the Underlying Conduct Would Not Constitute a Violation of the UBP.**

The Denial Recommendation states that Staff now “focuses” upon the elements identified by the Maryland Public Service Commission (“MPSC”), the subsequent “affirmance” on judicial review, and conclusively states (without any evidence or analysis) that such elements would constitute violations of the UBP if they were to occur in New York. Staff states that SmartEnergy’s “failure to provide written contracts to customers”<sup>13</sup> would constitute a violation of the UBP, something that occurred “32,000 times in Maryland.” These statements are patently false, and demonstrate that Staff has not engaged in a meaningful effort to understand SmartEnergy’s alleged misconduct in Maryland.

First, Staff’s suggestion that SmartEnergy’s alleged misconduct in Maryland has been subject to an “affirmance” on judicial review is misleading. While it is true that the Circuit Court of Montgomery County, Maryland affirmed the MPSC Decision finding that SmartEnergy engaged in conduct that had the capacity to be misleading or deceiving customers, this case is currently pending on appeal before the Maryland Court of Special Appeals.<sup>14</sup> It is entirely possible that the Court of Special Appeals will agree with SmartEnergy’s interpretations of

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<sup>13</sup> Staff is incorrect that SmartEnergy failed to provide written contracts to its customers in Maryland.

<sup>14</sup> See, *In the Matter of SMARTENERGY HOLDINGS LLC*, Case No. CSA-REG-1675-2021

Maryland law (see directly below) and find that the company did not engage in deceptive or misleading practices with customers. However, rather than mention this appeal and its importance on SmartEnergy's performance record in Maryland, Staff merely assumes, without substantial evidence in the record, that (i) the disposition of the matter has been "affirmed," and (ii) the conduct would constitute violations of the UBP had it occurred in New York.

Second, the appeal involves a case of first impression regarding a novel interpretation of how the Maryland Telephone Solicitations Act's ("MTSA") definition of "telephone solicitation" should be interpreted for purposes of evaluating SmartEnergy's conduct. The MTSA defines a "telephone solicitation" as "the attempt by a merchant to sell or lease consumer goods . . . that is: (1) [m]ade entirely by phone and [i]nitiating by the merchant." (Maryland Commercial Law § 14-2203(b)). If a company does not engage in "telephone solicitations," the requirement to obtain a customer's written (wet) signature under MTSA § 14-2203(b)(1) does not apply. Rather than engaging in door-to-door marketing or cold-calling customers, SmartEnergy instituted a practice of sending post cards to prospective customers that invited interested customers to call a toll-free number to learn more about SmartEnergy's products and services. If a customer opts to initiate the intentional, affirmative act of calling SmartEnergy in response to the postcard, SmartEnergy sales agents follow a script that was previewed by SmartEnergy's counsel for compliance with all state regulatory rules. Before the Court of Special Appeals, SmartEnergy maintains that MPSC Staff advanced (unexpectedly) a novel legal interpretation of the MTSA to find that SmartEnergy's enrollments required a physically-signed contract.<sup>15</sup> On appeal, SmartEnergy also argues alternatively that even if a "telephone solicitation" occurred, two MTSA exemptions apply: (1) the consumer's purchase of electricity supply services "pursuant to examination of a . . . print advertisement . . . of [SmartEnergy] that contains" the required information regarding the merchant, the goods or services being sold, and any limitations that apply to the offer; and (2) a preexisting business relationship between SmartEnergy and the consumer renders the signed contract requirements inapplicable.

Here, Staff makes the conclusory assertion that the alleged misconduct in Maryland would constitute a violation of the UBP were they to occur in New York. However, in stark contrast to the MTSA, Section 5(B)(1) of the UBP details how ESCOs must obtain a customer agreement to initiate service and enroll a customer, including (a) telephone agreement and authorization, (b) electronic agreement and authorizations, *or* (c) written agreement bearing a customer's signature on a sales agreement. For telephone agreements and authorizations, the UBP requires "a voice-recorded verification" by an "Independent Third Party or an Integrated Voice Response System." (See, UBP, Section 5, Attachment 1, Section A). Thereafter, an ESCO must provide a "Statement and sales agreement to the customer by mail, e-mail or fax within three business days after the telephone agreement and independent third-party verification occurs," which "shall set forth the customer's rights and responsibilities and describe the offer in detail, including the specific prices, terms, and conditions of ESCO service." (*Id.*, at Section B). Notably, **there is no reference to a wet ink signature requirement under the UBP's**

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<sup>15</sup> MPSC staff advanced this new position, despite the Consumer Affairs Division of the MPSC providing SmartEnergy with numerous letters confirming that such customer enrollment practices were lawful under Maryland statutes and regulations, including the MTSA.

**requirements for telephone agreements and authorizations.** (*Cf.*, UBP, Section 5(B)(1)(c)(a) written agreement bearing a customer's signature on a sales agreement is one of three permitted methods, but not a requirement for telephonic agreements and authorizations).

Finally, Staff makes no mention of the fact that only thirty-four (34) customers in Maryland submitted complaints to the MPSC's Consumer Assistance Division about SmartEnergy during the 2017-2019 complaint period. This represents a mere 0.001% of the approximately 32,000 Maryland customers that SmartEnergy enrolled during that period. Thus, aside from the fact that the Maryland matter involves an *entirely* different regulatory regime that is currently subject to judicial review, Staff has not sufficiently demonstrated a "pattern" of misleading or deceptive practices occurred in Maryland.

**V. The Commission Cannot -- and Should Not -- Rely Solely on Extra-Territorial Conduct as a Sufficient Basis to Deny SmartEnergy's Eligibility to Operate as an ESCO.**

As a preliminary matter, SmartEnergy does not contest the Commission's authority to inquire into an ESCO's out-of-state retail electricity and natural gas practices or track record. Despite patent ambiguities as to how certain RAAF questions were worded, and the reality that out-of-state conduct is far from dispositive as to a company's in-state conduct or practices, SmartEnergy is not seeking to invalidate the Commission's authority to *ask* for this information on the RAFF. See, e.g., RAAF Questions 1.D<sup>16</sup> or 7.P.<sup>17</sup>. Rather, SmartEnergy contends that the Commission should not — and is legally precluded from — denying an ESCO's eligibility based purely on out-of-state alleged misconduct and regulatory enforcement orders.

The Commission elucidated its position on this issue in a recent order denying another ESCO's application for eligibility to serve mass-market customers.<sup>18</sup> While SmartEnergy takes no position on the factual background, the petitioner in that matter argued that the Commission committed an error of law when it considered affiliate complaint history outside of New York in denying the ESCO's application.<sup>19</sup> The Commission rebutted that "the Commission specifically retained 'discretion to consider complaint history in other states as a basis for denying or withdrawing ESCO eligibility.'"<sup>20</sup> The Commission cited the 2019 Order as the basis for this authority.

SmartEnergy has carefully reviewed the 2019 Order, and finds it completely devoid of any statutory grant of authority in support of the Commission's position. Nor has the

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<sup>16</sup> Question 1.D asks applicants to furnish "all states that your company has operated in within the last 24 months."

<sup>17</sup> Question 7.P. asks applicants to furnish "[c]omplaint data from each state in which your company has served within the last 24 months."

<sup>18</sup> *In the Matter of Eligibility Criteria for Energy Serv. Companies. Proceeding on Motion of the Comm'n to Assess Certain Aspects of the Residential & Small Non-Residential Retail Energy Markets in New York State. in the Matter of Retail Access Bus. Rules.*, No. 12-M-0476, 2022 WL 2752652, at \*1 (Jun. 21, 2022).

<sup>19</sup> *Id.* at \*10.

<sup>20</sup> *Id.* at \*10, citing Case 15-M-0127, et al., *In the Matter of Eligibility Criteria for Energy Service Companies, et al, Order Adopting Changes to the Retail Access Energy Market and Establishing Further Process* (Dec. 12, 2019).

Commission adopted such a regulation. Rather, it is evident that Section I.C.3 of the 2019 Order (Complaint Data for Other States of Operation) was not the product of any statute or regulation, but the Commission's endorsement of other parties' positions. *See, e.g.*, 2019 Order at 9 (New York State Attorney General ("NYAG") and State Department's Utility Intervention Unit ("UIU") recommending that "the UBPs be modified to enhance eligibility criteria by requiring the disclosure of investigations and complaints in other states that were made against the ESCO and its marketing agents."; "UIU/NYAG believe that eligibility should be denied to any ESCO with a history of 'poor performance.'"); *id.* at 10 (Constellation Energy Gas Choice, LLC urging the Commission to look to the eligibility standards in other states as a guidepost for potential changes to the rules and process in New York for ESCO eligibility).

In other words, the Commission endorsed these positions in permitting Staff to inquire into out-of-state matters, but has not yet evaluated the legality of denying an ESCO's eligibility purely on out-of-state matters. Doing so now would fly in the face of established Commission practice and the weight of legal authority.

In other cases, the Commission explicitly (and rightfully) held that out-of-state matters have no bearing on New York's regulatory regime. For example, *Re Empire Exploration, Inc.*,<sup>21</sup> concerned the transfer of Certificates of Environmental Compatibility and Public Need ("CECPN") from Felmont Natural Gas Storage Company to Empire Exploration Inc. In evaluating the transfer, the Commission became aware that Empire was transporting indigenous natural gas by displacement on the system. Intervener New York State Electric & Gas Company ("NYSEG") argued that, because Empire produced non-indigenous natural gas from over 300 out-of-state wells, the company was not limiting its natural gas activities to those specified in Public Service Law § 66-g(3), unless it is producing, selling or transporting such natural gas only to co-generation or electrical generating facilities. NYSEG claimed that this result is required by the plain language of the statute, which the Commission must enforce; otherwise natural gas producers would improperly be encouraged to come to New York to serve only the most attractive large volume gas customers, thus causing higher rates to other customers of local distribution companies. In contrast, Empire contended that its involvement in production from out-of-state wells (which do not supply gas to its New York customers) has no bearing on its eligibility for a PSL § 66-g(3) exemption "because the *Commission does not have jurisdiction over the company's non-New York operations*." *Id.*; emphasis added.

The Commission agreed with Empire:

"[t]he language of the statute is not plain with respect to the bearing of an entity's out-of-state 'natural gas activities' on its entitlement to an exemption. It is therefore appropriate to look to the legislative history of the provision to ascertain the Legislature's intent. When the Legislature enacted PSL § 66-g(3) in 1984, it provided a statutory exemption to entities that limit their 'activities' as specified therein. In response to a case in which the Commission narrowly construed the exemption, the Legislature added, *inter alia*, the

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<sup>21</sup> No. 91-G-0937, 1993 WL 597480 (Nov. 3, 1993).

words 'natural gas' to describe the type of activities which should be considered in construing the exemption. **In this context, therefore, it appears most proper to interpret 'natural gas activities' to mean 'activities otherwise regulated by the Commission.'** **Therefore, out-of-state activities have no bearing on the exemption."** *Id.*; emphasis added.

The *Empire* decision therefore confirms that the Commission was reluctant to consider out of state conduct for licensure and exemption analyses. Moreover, the *Empire* decision instructs that a statutory analysis is required before the Commission can rely on an ESCO's out-of-state conduct in denying its eligibility.

The Commission has correctly noted that it has broad authority to establish and modify the conditions under which ESCOs may offer electric and gas commodity service to customers, and to impose consequences when ESCOs fail to abide by those conditions.<sup>22</sup> However, that authority is not unbridled. Specifically, the New York Court of Appeals has acknowledged "the PSC's authority to regulate ESCOs' eligibility to access public utilities' infrastructure in General Business Law § 349–d (11), which preserves the PSC's preexisting 'authority ... to limit, suspend or revoke the eligibility of an [ESCO] to sell or offer for sale any energy services for **violation of any provision of law, rule, regulation or policy enforceable by [the PSC].'**" *See, Nat'l Energy Marketers Ass'n v. New York State Pub. Serv. Comm'n*, 33 N.Y.3d 336, 351 (2019); emphasis added.

Under a plain reading of the statute, the broad authority entrusted to the Commission under the General Business Law § 349–d (11) does not include the ability to revoke an ESCO's eligibility for violations of laws, rules, regulations or policies *of another state* – which the Commission cannot, itself, enforce. Those matters are for the regulatory tribunal of those states, who have not only the authority (but the technical experience) to evaluate conduct against their own regulations. Otherwise, the Commission would be *de facto* regulating out-of-state conduct of ESCOs and their affiliates.

The General Business Law § 349–d (11) is highly distinguishable from other New York statutes that *expressly* allow for consideration of out-of-state conduct. *See, e.g.,* N.Y. Educ. Law § 6530(9)(b) (defining professional misconduct for licensed physicians, physicians assistants and other specialists to include "having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency *of another state* where the conduct ... would, *if committed in New York state*, constitute professional misconduct under the laws of New York state); Vehicle and Traffic Law § 1192(8) (prior *out of state convictions* for operating a motor vehicle while under the influence of alcohol or drugs deemed to be a prior conviction of a violation of this section for purposes of determining penalties ... or for purposes of any administrative action required to be taken)." Without a similar or analogous grant of authority, the Commission would be surpassing its statutory authority to regulate ESCOs

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<sup>22</sup> 2022 Remand Order at 6, citing *Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn.*, 33 N.Y.3d 336, 350 (2019); Case 17-M-0415, *In the Matter to Seek Consequences against Flanders Energy LLC for Violations of the Uniform Business Practices*.

based on out-of-state conduct, which is in and of itself outside the regulatory reach of the Commission.

## **VI. Denial of SmartEnergy's Application is a Disproportionate Remedy**

For the reasons set forth above, SmartEnergy maintains that Staff has not identified a sufficient basis for the Commission to deny SmartEnergy's eligibility to serve mass-market customers in New York State as an ESCO. Furthermore, New York case law and prior Commission precedent demonstrate that — should the Commission deny SmartEnergy eligibility based on Staff's inadequate justifications — that will result in an unlawfully disproportionate remedy.

New York courts have held that an administrative penalty falling within the discretion of the reviewing agency "will not be disturbed unless it is so disproportionate to the offense that it shocks one's sense of fairness." *See, e.g., Epelboym v. Bd. of Regents of the State of New York*, 174 A.D.3d 1182, 1183 (2019) (upholding revocation of dentistry license when petitioner defrauded private insurance companies over \$345,000); *Kelly v. Safir*, 96 N.Y.2d 32 (2001) (upholding police officer's employment termination after petitioner issued and sold false firearms training certificates to security guards). Courts have also upheld the Commission's revocation or denial of an ESCO's eligibility as an appropriate remedy, but each of those cases involve substantial violations of the UBP based on conduct that occurred in New York. For example, *Atlantic Power & Gas LLC v. New York State Pub. Serv. Comm'n*, 165 N.Y.S.3d 144 (Mar. 10, 2022), since 2013, Atlantic Power & Gas ("AP&G") was eligible to service New York residential and nonresidential natural gas and electric customers as an ESCO. After a series of complaints, the Commission found that AP&G improperly transferred New York customer accounts from a utility or competitor ESCO to itself without customers' authorization — a practice known as "slamming." *Id.* at 146. After instituting a suspension order against AP&G in March 2017 and later discovering that the company had continued enrolling customers in violation of that order, the Commission revoked AP&G's eligibility to operate as an ESCO. On appeal, the court confirmed that this penalty was proportional to AP&G's "continuous violations [of the UBP and suspension order] in the short period of time that it was operating as an ESCO in New York." *Id.* at 148-149.

In another case — *Marathon Power LLC v. Pub. Serv. Comm'n*, 149 N.Y.S.3d 786 (N.Y. Sup. Ct. 2021) — the Commission revoked Marathon Power, LLC's ESCO's eligibility upon discovering that the company breached its fixed-rate policy in service agreements and also made "false and misleading representations" regarding its rates to New York customers. *Id.* at 790. The record demonstrated that the company "assured customers [that it] would pay fixed rates in regard to the market fluctuations ... but then altered customers['] rates in contravention of those representations." *Id.*, internal citations omitted.

Here, unlike *Atlantic Power & Gas*, Staff has not demonstrated that SmartEnergy has ever violated any requirement of the UBP, let alone continued violations of a suspension order. Nor has staff demonstrated that SmartEnergy failed to adhere to its contract terms, or made

repeated false and misleading representations regarding its rates to New York customers (as was the case in *Marathon Power LLC*). Rather, Staff's recommendation for denial is based purely on the speculation that out-of-state allegations would constitute a UBP violation "were they to occur in New York. (Denial Recommendation at 2).

SmartEnergy does not contend that *Atlantic Power & Gas* and *Marathon Power, LLC* constitute the full universe of UBP violations that would justify revoking or denying an ESCO's eligibility. But these cases illustrate the type of misconduct that courts have upheld the Commission's denial of eligibility as a fair, proportional remedy. The Commission and its Staff cannot seriously contend that an ESCO — with zero record of customer complaints or UBP violations in the state — should be denied eligibility when compared to the factual records in other Commission orders. Even in the Maryland matter discussed in Section III above, the MPSC did not revoke SmartEnergy's retail seller license. The MPSC prohibited SmartEnergy from adding or soliciting new customers in Maryland until the matter was fully adjudicated, and ordered SmartEnergy to post financial security in an amount equal to customer refunds.<sup>23</sup> Put plainly, if the Commission revokes SmartEnergy's eligibility based on alleged conduct occurring in Maryland — where that state's regulatory tribunal refused to go that far — would most surely "shock one's sense of fairness." *Epelboym*, 174 A.D.3d at 1183.

## **VII. Denial of SmartEnergy's Eligibility Would Be Subject to Court Annulment as an Arbitrary and Capricious Determination without a Proper Adjudicatory Hearing.**

Deprivation of due process, failure to follow lawful procedure, or acting in an arbitrary and capricious manner are independent grounds to annul an administrative order under Article 78 of the New York Civil Practice Laws and Rules ("CPLR"). SmartEnergy hereby preserves any and all rights to challenge a Commission order denying SmartEnergy's application as arbitrary and capricious and violative of SmartEnergy's federal and state due process rights. Should the Commission concur with Staff's recommendation and deny SmartEnergy's eligibility to operate as an ESCO, that may be subject to a court-ordered annulment for three independent reasons.

1. Applicants are entitled to an adjudicatory hearing pursuant to the State Administrative Procedure Act ("SAPA") before a license may be revoked by an administrative agency. SAPA broadly defines "license" to include a "permit, certificate, approval, registration, charter, or similar form of permission." SAPA §102(4). As such, the Commission's approval of an ESCO's eligibility falls within the definition of a license. § 301 of SAPA affords parties an "opportunity for hearing within reasonable time," including "an opportunity to present evidence and such argument on issues of fact." SAPA § 301(4). Here the Commission has afforded SmartEnergy the opportunity to present written arguments in support of its positions, but cannot deny SmartEnergy's ESCO authorization without a duly-noticed hearing with sufficient time for oral presentations.

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<sup>23</sup> See, PSCM, Case No. 9613, Ordering Paragraphs 2-3.



2. The factual record before the Commission offers no substantial evidence<sup>24</sup> to support such a denial. Staff has not prepared a diligent investigation to conclude that any of the alleged out-of-state misconduct (in Illinois, Ohio or Maryland) occurred, let alone whether such conduct (if it occurred) would constitute a violation of the UBP. Staff cannot simply rely on settlement agreements lacking an admission of guilt, nor incomplete judicial matters in other states to support a denial.
3. Lastly, the Commission would be acting in an "arbitrary and capricious" manner by deviating from Commission precedent in two meaningful ways: (i) instituting a penalty that is grossly inconsistent with other cases and fact patterns that warrant an ESCO's authorization; and (ii) disregarding a clear precedent of not relying on out-of-state conduct that falls outside the Commission's jurisdiction.<sup>25</sup>

### VIII. Conclusion

For the reasons set forth in this letter, SmartEnergy respectfully requests that the Commission reject Staff's Denial Recommendation, and issue an order granting SmartEnergy's application for eligibility to operate as an ESCO.

Respectfully Submitted,

SMARTENERGY HOLDINGS LLC

By:



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Stephen J. Humes  
Holland & Knight, LLP

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<sup>24</sup> CPLR § 7803(4) (relevant for Article 78 proceedings is "whether a determination made as a result of a hearing held, and *at which evidence was taken*, pursuant to direction by law is, on the entire record, *supported by substantial evidence*).(emphasis added).

<sup>25</sup> CPLR § 7803(3) (relevant for Article 78 proceedings is whether the body or officer proceeded "without or in excess of jurisdiction.")

*In the Matter of SmartEnergy Holdings, LLC*, No. 1675, September Term, 2021. Opinion by Ripken, J.

## **CONSUMER PROTECTION DIVISION – MARYLAND TELEPHONE SOLICITATIONS ACT – ENFORCEMENT**

The MTSA is a subtitle of the Consumer Protection Article. Maryland electricity suppliers are subject to consumer protection laws. The Public Service Commission has jurisdiction to determine whether electricity suppliers violate the MTSA.

## **CONSUMER PROTECTION DIVISION – MARYLAND TELEPHONE SOLICITATIONS ACT – IN GENERAL**

The MTSA defines telephone solicitation in terms of two separate requirements: The attempt by a merchant to sell goods or services to a consumer that is: (1) Made entirely by telephone; and (2) Initiated by the merchant. CL § 14-2201(f). Initiation by the merchant is not limited to telephone communication and could include initiation by mailing postcards to consumers.

## **CONSUMER PROTECTION DIVISION – MARYLAND TELEPHONE SOLICITATIONS ACT – PENALTIES**

The Public Service Commission has jurisdiction to impose civil penalties against a utility company that violates the MTSA.

Circuit Court for Montgomery County  
Case No. 485338V

REPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1675

September Term, 2021

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IN THE MATTER OF SMARTENERGY  
HOLDINGS, LLC

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Zic,  
Ripken,  
Raker, Irma S.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Ripken, J.

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Filed: October 31, 2022

Pursuant to the Maryland Uniform Electronic Legal Materials  
Act (§§ 10-1601 et seq. of the State Government Article) this  
document is authentic.



Gregory Hilton, Clerk

\*Leahy, Andrea, J., did not participate in the  
Court's decision to designate this opinion for  
publication pursuant to Md. Rule 8-605.1.

\*\*Albright, Anne, J., did not participate in the  
Court's decision to designate this opinion for  
publication pursuant to Md. Rule 8-605.1.

Following the receipt of numerous customer complaints by the Public Service Commission (“Commission”), a complaint was filed against SmartEnergy Holdings, LLC (“SmartEnergy”) contending that it systematically violated consumer protection laws. The complaint alleged, among other charges, that SmartEnergy sent misleading and deceptive mailing materials to customers wherein phone calls were solicited, that it utilized a misleading sales script over the phone, that it failed to monitor its agents’ phone calls, and that SmartEnergy enrolled customers without reducing the agreement to a written contract signed by the customer.

Following an evidentiary hearing, a Public Utility Law Judge (“PULJ”) proposed an order to the Commission finding that SmartEnergy engaged in unfair, false, misleading, and deceptive marketing, advertisement, and trade practices. SmartEnergy appealed that proposed order, and the Commission affirmed the PULJ’s findings of violations, in addition to finding that the Maryland Telephone Solicitations Act (“MTSA”) was applicable. The Commission ordered SmartEnergy to refund all of its Maryland retail supply customers, that were enrolled during the violation time period, the difference between the rates charged by SmartEnergy and the applicable utility Standard Offer Service rate. SmartEnergy petitioned for judicial review in the Circuit Court for Montgomery County. That court affirmed the Commission’s findings. SmartEnergy now appeals to this Court. For the reasons that follow, we shall affirm.

## ISSUES PRESENTED

SmartEnergy presents six questions for our review, which we have condensed and rephrased as follows:<sup>1</sup>

- I. Did the Commission have jurisdiction to levy penalties for violations of the MTSA?
- II. Did the Commission err in finding that the MSTTA applied and that SmartEnergy did not otherwise satisfy an exemption?
- III. Was the penalty for those violations of the MTSA arbitrary and capricious?

For the reasons to follow, we hold that the Commission had jurisdiction to levy penalties for MTSA violations, the MTSA applied to SmartEnergy's conduct and there was

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<sup>1</sup> Rephrased from:

1. Does the Commission have jurisdiction to levy penalties arising from alleged violations of the MTSA, Md. Code, Com. Law, § 14-2201 et seq.?
2. Did the Commission err in concluding that the MTSA, Md. Code, Com. Law, § 14-2201 et seq. applies to SmartEnergy's conduct when SmartEnergy's enrollments were not "telephone solicitations" as that term is defined in Md. Code, Com. Law, § 14-2201(f)?
  - a. If the MTSA does apply, did SmartEnergy satisfy the exemption in Md. Code, Com. Law, § 14-2202(a)(5) in which the consumer contracted with SmartEnergy "pursuant to an examination of a . . . print advertisement or a sample, brochure, catalogue, or other mailing material of" SmartEnergy that contained information listed in that Code Section?
  - b. If the MTSA does apply, did SmartEnergy satisfy the exemption in Md. Code, Com. Law, § 14-2202(a)(2) (Comm. Law Art.) in which SmartEnergy "[h]as a preexisting business relationship with the consumer"?
3. Did the Commission act arbitrarily and capriciously in affirming findings of the PULJ regarding SmartEnergy's postcards, sales script, cancellation procedures, training, and monitoring when it affirmed findings unsupported by substantial evidence in the record?
4. Did the Commission act arbitrarily and capriciously, and therefore violate SmartEnergy's due process rights, in fashioning a penalty that requires SmartEnergy to, among other things, pay millions of dollars in "re-rates" to its current and former Maryland customers?

substantial evidence to support the Commission’s findings of violations. Finally, we hold the Commission’s penalty was not arbitrary and capricious

### **FACTUAL AND PROCEDURAL BACKGROUND**

SmartEnergy is a retail supplier selling energy to consumers in Maryland. From February 2017–May 2019, SmartEnergy mailed six million postcards to Marylanders advertising their services. Those postcards informed consumers that they were “eligible” for a “free month of electricity” and a six-month guaranteed rate protection plan. They further indicated that the eligibility for the free month was linked to the customers’ status with their then-current electricity utility: “As a [utility] customer from [city], you are eligible to receive one free month of electricity.” The postcards stated that the offer was “time-sensitive,” so customers should “respond by [date]” to receive the offer. In small print at the bottom of the postcard, customers were informed that to receive the free month of electricity, the customer must “select SmartEnergy,” that SmartEnergy was not affiliated with the then-current utility but is a licensed supplier, and a license number was provided.

During this timeframe, SmartEnergy received approximately 104,000 calls from prospective customers who received the postcards. Each call was recorded by SmartEnergy, and SmartEnergy telephone operators were directed to follow a script. Generally, the phone calls were conducted as follows: First, the representative greeted and informed the customer that the representative was with SmartEnergy and frequently “congratulated” the customer on the free month of energy. The representative stated that, in addition to the free month, the customer also qualified for the price protection plan, wherein the rate would remain the same for six months. The representative further

suggested that the fixed rate provided more security compared to utilities' variable rates, particularly during the high usage months. At that point, the representative requested information from the customer including the electric choice ID that appeared on the utility bill and confirmation of the account holder status. The representative then indicated that the representative had "confirmation questions" that the customer was required to answer in order to receive the free month and price protection. Pursuant to the sales script, those questions were:

Confirmation question #1: [customer], do you understand that by enrolling in SmartEnergy's Price Protection Plan, you'll receive a fixed rate of [rate] for 6 months and then a competitive market based rate that may change from month-to-month, and as mentioned, [Utility] will continue to deliver your electricity, send your bill, and respond to emergencies?

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Confirmation question #2: SmartEnergy will send you a Welcome Kit confirming everything we have discussed today, and [Utility] will send you a letter confirming that you have selected SmartEnergy. When you receive the SmartEnergy Welcome Kit, you'll be able to review all the terms of our agreement and if you change your mind you can cancel and return to [Utility] standard rate at any time. Do you understand your right to cancel?

Of the 104,000 prospective callers from February 2017–May 2019, 32,000 callers enrolled in SmartEnergy's service. SmartEnergy did not provide written contracts or contract summaries to those who enrolled.

In some cases,<sup>2</sup> SmartEnergy sent customers a Welcome Kit. That kit contained a letter, which stated:

Welcome and congratulations for choosing SmartEnergy.

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<sup>2</sup> Of the 34 complaints filed, SmartEnergy produced copies of the Welcome Kits for only 25.

We want to remind you of the key benefits of your plan, and make sure you understand what to expect. At SmartEnergy we will strive to provide you with the lowest possible rate, cleaner electricity, and the same reliable service.

You have selected our 6 month fixed product with a fixed price of 11.20 cents per kilowatt hour. Your electricity rate will appear on the supply portion of your bill. Your agreement and other materials are enclosed.

Here's what to expect:

[Utility] will still deliver your electricity, read your meter and respond to emergencies just like they always have. Your choice of SmartEnergy will be processed by [Utility] within one or two billing cycles.

After that, you will see SmartEnergy listed in the electricity supply portion of your [Utility] bill. You'll continue to receive one bill and make one payment to [Utility] every month. Nothing else will change.

Thereafter, the Commission's Consumer Assistance Division received 34 complaints of service regarding SmartEnergy. The basis of those complaints included that the customers' utility switch was done without their authorization, that SmartEnergy portrayed themselves as being affiliated with the customers' then-current provider, that the bills were excessive, and that the customers were unable to cancel their service.<sup>3</sup>

On May 10, 2019, Office of Staff Counsel of the Commission ("Staff") filed an

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<sup>3</sup> For example, one complaint alleged: "I thought I was speaking to BGE. I wasn't. It was someone from SmartEnergy and not affiliated with BGE." Another indicated: "I was contacted by Smart Energy portraying themselves as subsidiary of BGE[.]" Others stated: "I called [] to cancel this offer. I was put on hold for 11 minutes and instructed to leave a message and my call would be returned asap." "Customer agreed to service but called next day to cancel. However company wouldn't cancel. Customer says company said she didn't have a good reason to cancel." Many customers noted in their complaints that their prior utility company advised them to contact the Consumer Assistance Division because "it sounded as if it was a scam," and to "prevent future misinformation being distributed by SmartEnergy."



initial complaint against SmartEnergy, asserting SmartEnergy violated Maryland law governing retail supplier activities by engaging in deceptive practices. The Commission delegated the complaint to a PULJ to determine whether a pattern or practice of violations of consumer protections existed. Staff filed an amended complaint in July 2019, as well as a second amended complaint in September 2019. The Maryland Office of People's Counsel ("OPC") also filed a third-party complaint against SmartEnergy asserting it violated consumer protection laws in engaging in fraud and deceptive practices.

In January 2020, OPC filed the testimony of Susan Baldwin ("Baldwin") and Harold Muncy ("Muncy"). Baldwin, a specialist in economics, regulation, and public policy of utilities, testified regarding the consumer issues related to SmartEnergy's electric supply. Baldwin reviewed all the filings and supporting exhibits, as well as the relevant Maryland laws and regulations. In reviewing the postcards sent to consumers and audio recordings of the phone calls between SmartEnergy sales representatives and those customers who filed a complaint, Baldwin opined that SmartEnergy used mail materials and telephone contracts that were misleading, deceptive, and filled with incomplete information. Baldwin further opined that SmartEnergy failed to adequately supervise and train its sales representatives, and that those patterns documented in the complaints received likely extended to the other Maryland enrollments.

Muncy testified regarding what utility electric supply rate information would have been available on the dates the consumers who filed complaints had signed up. He specifically testified as to the comparison between the SmartEnergy rates and other utility rates. Based on this analysis, Muncy opined that there was no lack of certainty with utility

rates, and that SmartEnergy's six-month fixed rate program was of no monetary value to any of those customers who filed a complaint.

Staff filed the testimony of Kevin Mosier ("Mosier"). Mosier testified that based on a review of the complaints and associated audio recordings, SmartEnergy engaged in a pattern and practice of systemic violations of Maryland consumer protection laws. Mosier cited the telemarketing calls which contained false implications that customers' rates would not increase, deliberately obscured information that customers would be switching to a competitive supplier, and misled customers into believing that their current supplier rates would increase if they did not switch. He further explained that the deceptions were a "direct result of [SmartEnergy's] 'telephone script' which was required to be used by all sales representatives," and that the script "was crafted to deceive the customer to believe there would be no increase to the existing rate."

SmartEnergy filed the testimony and related exhibits of Daniel Kern ("Kern"), Lloyd Spencer ("Spencer"), Dehan Besnayake ("Besnayake"), and Ann Marie Toss ("Toss"). Besnayake, SmartEnergy's Chief Customer Officer, testified regarding SmartEnergy's quality assurance process and the procedure for addressing cancellation requests. Besnayake stated that the process was robust and done daily, and agents who failed the monitoring process were required to go through a retraining program. He indicated that SmartEnergy transitioned to a "more formalized and standardized approach" in 2019, placing "special emphasis on the quality of communications with consumers." As for cancellation requests, Kern, SmartEnergy's Chief Executive Officer, stated that the agent would ask for the cancellation reason and attempt to retain the customer but go

forward with processing the cancellation if unable to retain the customer. He stated that all cancellation requests cited by the Commission were in fact timely processed.

Toss testified that, in her experience as Chief Compliance Officer, SmartEnergy complied with Maryland consumer protection laws. Toss described the process for handling complaints that originated in the Commission, including launching an investigation to determine whether a violation occurred. Toss further testified that SmartEnergy took steps to ensure compliance with Maryland laws, including, beginning in June 2019, by sending contract summaries, and, prior to June 2019, by sending explanatory letters to enrolled customers explaining that SmartEnergy is an independent supplier.

Spencer testified as the Chief Operating Officer of SmartEnergy. In response to Muncy's testimony, Spencer opined that Muncy was incorrect in stating that SmartEnergy called the consumer, where the calls in fact were inbound. He also cited a portion of Muncy's testimony wherein Muncy noted that SmartEnergy knew published utility rates and misstated their own rate as lower. Spencer pointed out that the customer may also have been aware of published utility rates because they appeared on bills. Finally, Spencer opined that Muncy was incorrect in stating that, because of only small rate adjustment fluctuations, the term "price protection" was misleading. He further indicated that Muncy's testimony that SmartEnergy prices were typically higher than standard utility rates was erroneous. He stated that the two cannot be compared because the standard utility rate fluctuated and did not offer a free month, so "there [were] incentives and value-added components of SmartEnergy's offer that [were] not available" with standard utility companies.

Kern testified that SmartEnergy did not engage in deceptive or misleading sales and marketing practices, and that it complied with Maryland law and regulations governing energy retail suppliers. Kern testified that SmartEnergy did not engage in outbound telephone sales; it “only receive[d] calls from potential customers.” Kern further opined that to require SmartEnergy to have obtained a written contract signed by the customer was not consistent with the language of the Maryland Telephone Solicitations Act and COMAR provisions as enrollments were done in response to customer calls and not through outbound telephone solicitation. Kern also disputed the contention that the postcards were misleading, arguing that all the required information for a general marketing advertisement was included on the postcards, and that there was no rule regarding particular postcard formatting. Additionally, Kern testified that SmartEnergy disclosed all agreements’ material information and has had relatively few complaints. Kern disagreed that SmartEnergy engaged in a “systemic practice” of deception and misrepresentation.

An evidentiary hearing was held before the PULJ on October 28 and 29, 2020. On December 16, 2020, the PULJ issued a proposed order.<sup>4</sup> That order proposed finding that SmartEnergy engaged in systemic violations of PUA § 7-505(b)(7) and associated COMAR provisions by engaging in unfair, false, misleading, and deceptive marketing,

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<sup>4</sup> Pursuant to PUA § 3-104(d)(1), the Commission can delegate to a PULJ “the authority to conduct a proceeding that is within the Commission’s jurisdiction.” Then, the PULJ issues a proposed order and findings of fact. PUA § 3-104(d)(2). Each party has 30 days to note an appeal with the Commission, and one is noted, the Commission shall consider the matter, conduct any further proceedings, and issue a final order. PUA § 3-113(d). If no timely appeal is made to the PULJ’s proposed order, that proposed order becomes the final order of the Commission. PUA § 3-113(d).

advertisement, and trade practices. The PULJ found that the MTSA, which applies to telephone solicitations that are both initiated by the merchant and done entirely by telephone, does not apply to SmartEnergy's contracting with customers because the customers initiated the phone call. However, the PULJ also found that the enrollments were nonetheless invalid because SmartEnergy did not comply with COMAR 20.53.07.08. Based on these violations, the PULJ recommended that the Commission impose a moratorium prohibiting SmartEnergy from adding or soliciting new customers, impose a civil penalty, and require SmartEnergy to notify the current and former customers of the Commission's decision. The PULJ also recommended that SmartEnergy be required to cancel existing customer enrollments, return those customers to utility Standard Offer Service, and issue refunds for the difference in service rates each month. On December 22, 2020, the Commission entered an Order prohibiting SmartEnergy from soliciting new customers. That Order also directed the parties as to how to file exceptions to the PULJ's Proposed Order.

SmartEnergy filed a notice of appeal of the Proposed Order on January 15, 2021, and its memorandum of appeal on January 25, 2021. SmartEnergy argued that multiple findings in the Proposed Order were arbitrary, capricious, and not supported by the evidence. It further argued that the remedy was unconstitutional and unduly penalizing. OPC and Staff also filed exceptions to the Proposed Order on January 25, 2021.<sup>5</sup>

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<sup>5</sup> The Office of the Attorney General of Maryland, Consumer Protection Division, filed an Amicus Memorandum of Law in support of the exceptions of Staff and OPC. In that brief, it argued that the PULJ's holding that MTSA did not apply irreconcilably conflicts with

On March 31, 2021, the Commission entered an Order affirming the PULJ's findings that SmartEnergy violated PUA § 7-507(b)(7) and COMAR Title 20, Subsection 53 provisions. It reversed the PULJ's finding that the MTSA did not apply to calls initiated by prospective customers. The Commission found that the plain language of the MTSA does not differentiate between inbound and outbound calls, and such a distinction "conflates the 'initiation' of the telephone call and the initiation of the attempt by the merchant to sell or lease consumer goods." The customer's phone call was in response to SmartEnergy's sending postcards to customers; therefore, the Commission found, SmartEnergy initiated the attempt to sell an energy supply product. Because the sale was initiated by SmartEnergy and made entirely by telephone, the Commission found the MTSA to apply. It rejected SmartEnergy's contentions that exemptions under MTSA applied, and found that, in failing to provide customers with written contracts, SmartEnergy violated the MTSA.

The Commission also found that SmartEnergy engaged in false and misleading advertising to solicit customer calls. Specifically, SmartEnergy sent over six million postcards that advertised a free month of electricity and a six-month price protection plan, but the customer was not informed until the phone call with the sales representative about 1) the terms and conditions of the service, 2) the rate that would be charged during that six-month price protection period, 3) the requirement that the customer remain on the fixed rate plan for the entire six-month period before becoming eligible for the free month, 4)

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the plain meaning of the statute, and that the MTSA is applicable to sales wherein the customer calls the merchant.

the method for claiming the refund check for the free month, and 5) the customer's right to cancel the service and return to their other utility supplier. The Commission further noted that the postcard's statement that "as a [utility] customer . . . you are eligible to receive one free month of electricity," and sales script phrases such as "yes, I see that as a [utility] customer, you are eligible to receive one free month of electricity" implied that the offer was being made by the customer's then-current utility. Finally, the Commission found that SmartEnergy misled customers in suggesting that the electricity rates in upcoming seasons would likely fluctuate.

The Commission concluded that SmartEnergy: 1) unlawfully enrolled customers; 2) engaged in deceptive trade practices; 3) violated commission regulations; and 4) violated state consumer protection laws. In finding that SmartEnergy failed to comply with MTSA's contracting requirements, in addition to SmartEnergy violating PUA § 7-507(b)(7) and COMAR Title 20, Subsection 53 provisions, the Commission held that the contracts were invalid, and it ordered SmartEnergy to issue partial refunds to all customers enrolled from February 2017–May 2019 and return them to their prior utility service.

SmartEnergy appealed the Commission's findings to the Circuit Court for Montgomery County. It contended that the MTSA did not apply to its actions in sending the postcards and that, alternatively, exemptions to the MTSA applied to its conduct, the Commission's findings were unsupported by substantial evidence, and the penalty levied was arbitrary and capricious. A two-day hearing was held on October 15 and 22, 2021. The circuit court entered an order on December 20, 2021, affirming the Commission's decision. SmartEnergy filed this timely appeal.

## STANDARD OF REVIEW

“The Public Utilities Article ‘sets forth the limited “scope of review” . . . over decisions by the Public Service Commission.’” *Md. Off. of People’s Couns. v. Md. Pub. Serv. Comm’n*, 226 Md. App. 483, 499 (2016) (quoting *Town of Easton v. Pub. Serv. Comm’n*, 379 Md. 21, 30 (2003)). “It states: ‘Every final decision, order, or regulation [of] the Commission is *prima facie correct* and *shall be affirmed* unless *clearly shown* to be: (1) unconstitutional; (2) outside the statutory authority or jurisdiction of the Commission; (3) made on unlawful procedure; (4) arbitrary or capricious; (5) affected by other error of law; or (6) if the subject of review is an order entered in a contested proceeding after a hearing, unsupported by substantial evidence on the record considered as a whole.’” *Id.* at 499–500 (quoting PUA § 3-203 (emphasis added)).

The Commission is vested with a great deal of discretion in discharging its “important and complex duties.” *People’s Couns. v. Pub. Serv. Comm’n*, 52 Md. App. 715, 722 (1982). “Because the Commission is well informed by its own expertise and specialized staff, a court reviewing a factual matter will not substitute its own judgment on review of a fairly debatable matter.” *Commc’ns Workers of Am. v. Pub. Serv. Comm’n*, 424 Md. 418, 433 (2012). In contrast, an agency’s interpretation of a statute that it administers “may be entitled to some deference,” but the weight to be accorded to that interpretation depends upon a number of considerations: whether the agency adopted its view soon after the statute’s passage, whether the interpretation “has been applied consistently and for a long period of time,” “the extent to which the agency engaged in a process of reasoned elaboration in formulating its interpretation,” and “the nature and process through which



the agency arrived at its interpretation.” *Md. Off. of People’s Couns.*, 226 Md. App. at 501 (quotation marks and citations omitted). When the Maryland Public Service Commission has “clearly demonstrated that it has focused its attention on the statutory provisions in question, thoroughly addressed the relevant issues, and reached its interpretations through a sound reasoning process, its interpretation should be accorded the persuasiveness due a well-considered opinion of an expert body.” *Id.* at 505 (quotation marks and citations omitted).

## **DISCUSSION**

Maryland electricity suppliers are subject to consumer protection laws prohibiting unfair and deceptive trade practices, as defined in the Maryland Consumer Protection Act (“CPA”), Comm. Law Art. (“CL”) § 13-301. An unfair or deceptive trade practice includes any “false, falsely disparaging, or misleading oral or written statements, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers.” CPA § 13-301(1). In addition, the Commission sets forth rules and regulations outlined in the Public Utilities Article (“PUA”) § 7-505(b)(7) and the Code of Maryland Regulations (“COMAR”) 20.53.07.07A(2), which similarly prohibit an electricity supplier from engaging in “marketing, advertising, or trade practices that are unfair, false, misleading, or deceptive.”

Within the CPA is Subtitle 22, titled the Maryland Telephone Solicitations Act, CL § 14-2201–14-2205. The MTSA mandates that “[a] contract made pursuant to a telephone solicitation is not valid and enforceable against a consumer” unless the contract is “reduced

to writing and signed by the consumer,” and returned to the seller.<sup>6</sup> CL § 14-2203. A “telephone solicitation” is defined as an “attempt by a merchant to sell or lease consumer goods, services, or realty to a consumer . . . that is: (1) Made entirely by telephone; and (2) Initiated by the merchant.” CL § 14-2201(f). Failure to comply with the MTSA and the CPA constitutes a deceptive practice.

## **I. THE COMMISSION HAS JURISDICTION TO ENFORCE THE MTSA.**

Initially, SmartEnergy argues that the Commission does not have jurisdiction to decide disputes related to the MTSA. It argues that because “violations of regulations relating to ‘telephone solicitations’ are ‘unfair or deceptive trade practices, they are subject to enforcement by the Attorney General’s Office.’” Therefore, according to SmartEnergy, because the Commission is independent of the Attorney General’s Office, the Commission “lacks jurisdiction over the MTSA.” The Commission responds that it has jurisdiction to hear and adjudicate “all supplier-complaint issues, including disputes involving whether the MTSA applies to enrollments solicited by telephone.”

Our analysis “begins with the statutory directive that the Commission’s decision is ‘*prima facie correct* and shall be affirmed unless *clearly shown* to be . . . outside the

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<sup>6</sup> That provision also mandates that the contract “[s]hall comply with all other applicable laws and regulations”; “[s]hall match the description of goods or services as that principally used in the telephone solicitation”; “[s]hall contain the name, address, and telephone number of the seller, the total price of the contract, and a detailed description of the goods or services being sold”; “[s]hall contain, in at least 12 point type, immediately preceding the signature, the following statement: ‘You are not obligated to pay any money unless you sign this contract and return it to the seller.’;” and, “[m]ay not exclude from its terms any oral or written representations made by the merchant to the consumer in connection with the transaction.” CL § 14-2203.

statutory authority or jurisdiction of the Commission[.]” *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Md. Pub. Serv. Comm’n*, 227 Md. App. 265, 293 (2016) (emphasis in original). The Public Utilities Article (“PUA”) dictates: “the Commission has jurisdiction over each public service company that engages in or operates a utility business in the State[.]” § 2-112(a)(1). The PUA further vests the Commission with “the powers specifically conferred by law,” as well as “the implied and incidental powers needed or proper to carry out its functions[.]” PUA § 2-112(b). Those powers “shall be construed liberally.” PUA § 2-112(c).

The Commission also has the power to grant licenses to electricity suppliers. PUA § 7-507(a). The Commission “shall adopt regulations or issue orders” to, among other matters, “protect consumers . . . from anticompetitive and abusive practices” and ensure that customers have “adequate and accurate [] information to enable customers to make informed choices” regarding electricity suppliers. PUA § 7-507(e). Additionally, where there have been violations of consumer protection laws, including “any other applicable consumer protection law of the State,” the Commission has the power to revoke or suspend licenses of competitive retail suppliers, impose a civil penalty, or other remedy. PUA § 7-507(k).

The Commission is expressly charged with fashioning remedies for violations of “any” applicable consumer protection law. It, therefore, has jurisdiction over each electricity supplier engaged in business in Maryland, which includes SmartEnergy, to ensure that those suppliers comply with specific consumer protections laws, under which the MTSA falls. Based on these applicable statutes, we hold the Commission has

jurisdiction to determine whether an electricity supplier violated the MTSA, a subtitle of the Consumer Protection Article.

## **II. THE COMMISSION DID NOT ERR IN FINDING SMARTENERGY VIOLATED THE MTSA.**

SmartEnergy next contends that the Commission erred in finding that SmartEnergy violated Maryland provisions regarding contracting requirements as well as Maryland provisions prohibiting deceptive practices. As to the contracting requirements, SmartEnergy argues that the violations were based on the MTSA, and the MTSA is not applicable to its conduct. Alternatively, SmartEnergy argues that, even if the MTSA is applicable, its actions are nonetheless exempt from MTSA requirements because they fall within two exemptions: preexisting business relationship, and purchase of goods pursuant to examination of mailing material. Finally, SmartEnergy contends the Commission's factual findings were not supported by substantial evidence.

The Commission responds that the MTSA is applicable to SmartEnergy's conduct, and that neither exception to the contracting requirements mandated by the MTSA is applicable. It further argues that substantial evidence in the record supports the conclusions that SmartEnergy engaged in systemic violations of Maryland consumer protection laws.

We begin with an examination of whether the MTSA is applicable to the conduct giving rise to this action. After explaining that SmartEnergy's conduct falls within the MTSA's definition of telephone solicitation, we look to whether it is nonetheless exempt from contracting requirements pursuant to either of the two exceptions. Finally, we examine whether substantial evidence in the record supports the Commission's finding that

SmartEnergy violated Maryland law in its: (1) failure to meet contracting requirements, (2) misleading and deceptive postcards, (3) misleading and deceptive sales scripts, (4) “thwarting” of customer cancellations, and (5) failure to monitor sales calls.

**A. The MTSA is Applicable to SmartEnergy’s Actions.**

SmartEnergy maintains that the MTSA is not applicable because its actions do not constitute “telephone solicitations,” as neither the “entirely by telephone” prong nor the “initiated by merchant” prong of the MTSA’s subtitle 22 are met. According to SmartEnergy, the solicitation began with SmartEnergy mailing postcards to consumers, and therefore the attempt to sell was not “entirely by telephone” as expressly defined in CL § 14-2201. Additionally, because the customer initiated the sales call, SmartEnergy maintains that such inbound calls are not initiated by the merchant as mandated by the statute. The appellees respond that the MTSA does not differentiate between inbound and outbound calls.<sup>7</sup> They argue that the mailing of postcards was an invitation to begin the sales discussion, that prompted the customers to call SmartEnergy, after which the actual sale took place entirely by phone.

“The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual intent of the Legislature.” *Donlon v. Montgomery Cnty. Pub. Schools*, 460 Md. 62, 75 (2018) (quoting *Wash. Suburban Sanitary Comm’n v. Phillips*, 413 Md. 606, 618–

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<sup>7</sup> The Maryland Office of the Attorney General’s Consumer Protection Division, the division tasked with enforcing and administering the Consumer Protection Act, filed an amicus curie brief. It argued that the MTSA includes all merchant-initiated telephonic sales attempts, including where consumers call a merchant in response to a merchant’s marketing through other means.

19 (2010)). Our primary goal is to “discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by the statutory provision under scrutiny.” *Id.* at 75–76. “When interpreting a provision of the Public Utilities Article, as with any other statute, we first examine the ordinary meaning of the enacted language[.]” *Md. Off. of People’s Couns.*, 226 Md. App. at 505. “If the language of the statute is unambiguous and clearly consistent with the statute’s apparent purpose, our inquiry as to legislative intent ends ordinarily and we apply the statute as written[.]” *Donlon*, 460 Md. at 76.

However, we do not read the statutory language in a vacuum, “nor do we confine strictly our interpretation of a statute’s plain language to the isolated section alone.” *Id.* Rather, we look “to the larger context, including other surrounding provisions and the apparent purpose of the enactment.” *Md. Off. of People’s Couns.*, 226 Md. App. at 509. Put differently, “the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute.” *Donlon*, 460 Md. at 76. To the extent possible, we read statutes “so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.” *Id.* at 77 (quoting *Bd. of Ed. of Garrett Cnty. v. Lendo*, 295 Md. 55, 63 (1982)).

The General Assembly expressed concerns with consumer protection, specifically the “increase of deceptive practices in connection with sales[.]” CL § 13-102(a). The express purpose of the General Assembly in enacting the Consumer Protection Act was to “set certain minimum statewide standards for the protection of consumers across the State” and “take strong protective and preventative steps to investigate unlawful consumer

practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland.” CL § 13-102(b).

In 1988, in response to requests from the Montgomery County Office of Consumer Affairs, the Office of the Attorney General, and various business groups within the state, the General Assembly recognized that telephone solicitations are particularly susceptible to deceptive practices because they are not reduced to writing. Subsequently, House Bill 1019—the Maryland Telephone Solicitation Act—was introduced into the General Assembly. The Purpose Paragraph of the Act states:

FOR the purpose of requiring that certain contracts solicited by telephone be reduced to writing in order to be enforceable; prohibiting certain actions by merchants regarding telephone solicitation; requiring that a contract made pursuant to a telephone solicitation meet certain conditions; providing that a violation of this Act shall be an unfair and deceptive trade practice; providing for the applicability of this Act; defining certain terms; and generally relating to telephone solicitation sales.<sup>8</sup> H.B. 1019.

In summarizing the reasons for enacting the MTSA, the House Economic Matters Committee Floor Report<sup>9</sup> explained:

Telephone solicitations are, by nature, subject to certain problems. The goods are not available for inspection and the identity of the seller is often unclear. Even a faithful description of the contract terms is difficult when done entirely by phone. As a consequence, there have been continuous problems associated with telephone solicitations in this State. Frequently, the product

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<sup>8</sup> Senate Bill 409, “Telephone Solicitation Sales,” which is identical to House Bill 1019, was also introduced in the 1988 legislative session of the Maryland General Assembly.

<sup>9</sup> In analyzing a statute, Floor Reports often serve as “key legislative history documents.” *Hayden v. Md. Dep’t of Nat. Res.*, 242 Md. App. 505, 530 (2019) (quoting *Blackstone v. Sharma*, 461 Md. 87 (2018); see also Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 Md. L. Rev. 432 (1995) (identifying floor reports and fiscal notes as potentially valuable sources of legislative purpose).

or service that the consumer actually receives differs greatly from the solicitor's description of the product or service.  
Floor Report, H.B. 1019 at 2.

The legislative history indicates that the MTSA's drafters recognized the need to address the prevailing problems consumers were experiencing with telephone solicitors using deceptive and misleading sales pitches, as well as the lack of verification of contract terms. The General Assembly sought to address these problems specifically through the introduction of the MTSA, which requires a written contract for every seller-initiated phone sale. The MTSA directly furthers the CPA's purpose in consumer protection.

Keeping these concepts in mind, we turn to the plain language of the MTSA. It provides that a telephone solicitation is an attempt by a merchant to sell goods or services to a consumer that is "(1) Made entirely by telephone; *and* (2) Initiated by the merchant." CL § 14-2201(f) (emphasis added). The statute is comprised of two separate requirements; the sale must be made entirely by telephone, and it must have been initiated, in some manner, by the merchant. Had the legislature intended for the MTSA to apply only to sales the merchant initiates by telephone, it could have expressly indicated as much without writing the statute as conjunctive. Instead, the statute, by its plain language, requires two distinct elements to have taken place, only one of which specifies the requirement that it be by telephone. That language indicates that the initiation by the merchant is not limited to telephone.

Such an interpretation is consistent with the entire statutory scheme of the MTSA. To be sure, the MTSA regulates general telephone solicitations which are defined by § 14- 2021 and dictates specific telephone solicitations that are exempt from contracting



requirements by § 14-2022. Those specific requirements contemplate situations in which the customer may call the merchant and a sale made pursuant to that call would be a “telephone solicitation,” unless certain criteria were present that mitigated the potential for deception. Section 14-2022(a)(5) excludes from the MTSA consumer purchases made “pursuant to” marketing materials containing: “(i) The name, address, and telephone number of the merchant; (ii) A description of the goods or services being sold; and (iii) Any limitations or restrictions that apply to the offer.” Additionally, §14-2022(b)(1) also exempts telemarketing offers for credit services where “the customer is required to call a telephone number,” again contemplating that there are instances in which a sale is made through an inbound call.

The Commission gave deference to the CPD’s interpretation of the MTSA. It stated that the clear intent of the MTSA, as argued by the CPD, is “to protect consumers who are subject to deceptive telemarketing tactics from being stuck with products or services that they ultimately do not want, or pursuant to terms that they did not understand or agree to.” The plain language of the MTSA does not make an inbound/outbound distinction, and any such distinction “conflates the ‘initiation’ of the telephone call and the initiation of the attempt by the merchant to sell or lease consumer goods.” It concluded that the MTSA was applicable to in-bound calls “instigated” by the merchant, and “especially those instigated by deceptive, false and misleading advertising.” Given the legislative intent in conjunction with the plain language of the statute, it is reasonable to conclude the General Assembly intended the MTSA to include calls from consumers to merchants that were instigated by marketing brochures, such as SmartEnergy’s post cards.

We conclude that, as the Commission found, SmartEnergy’s conduct was a “telephone solicitation” as defined by the MTSA. SmartEnergy mailed out nearly six million postcards offering a “free month of electricity” and a six-month price protection plan if customers used the “eligibility code” provided. Those postcards also depicted language such as “Important Notice,” “Redeem Before Date,” “Time Sensitive,” and “Act Now.” The mailing of those postcards constituted initiation by SmartEnergy to solicit phone calls from prospective customers. It was only during those phone calls that the actual sale was made wherein the sales representative explained the terms and conditions of the service and other relevant information regarding the option to enroll in SmartEnergy’s services. Therefore, the telephone call was initiated by SmartEnergy in mailing the postcards and soliciting a phone call, during which the entirety of the sale took place as defined by the MTSA. Accordingly, we conclude that the MTSA applies and next turn to whether SmartEnergy was exempt from the written contract requirement.

#### **B. SmartEnergy’s Conduct Is Not Exempt from the MTSA’s Requirements.**

Although telephone sales are required to be reduced to writing signed by the customer and returned to the seller, CL § 14-2202 delineates certain transactions that are exempt. Relevant here, the contracting requirements do not apply to transactions where “the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, catalogue, or other mailing material of the merchant that contains: (i) the name, address, and telephone number of the merchant; (ii) a description of the goods or services being sold; and (iii) any limitations or restrictions that apply to the offer,” or transactions in which the person making the solicitation “has a

preexisting business relationship with the consumer.” CL § 14-2202(a)(2), (5). SmartEnergy argues its conduct is exempt from the MTSA’s requirements because the consumer goods were purchased pursuant to a mailing material and there was thus a preexisting business relationship.

We reject SmartEnergy’s contention that the Commission erred in finding both exemptions did not apply. As to the exemption wherein a consumer purchases goods pursuant to a mailing material, although the consumers called SmartEnergy in response to an examination of postcards that were sent by SmartEnergy, the contents of those postcards did not contain the requisite information to be exempt from the MTSA. Although the postcards listed the name, address, and telephone number of SmartEnergy, they failed to contain an accurate description of the services being offered. Nowhere did the postcards inform customers of the price of the fixed rate, the conversion to a variable rate after the six-month period, the qualifications for the offer, the limitations or restrictions that apply, or the information that their current utility service would be cancelled. Of note, the postcards did not indicate that anything was being sold. The postcards emphasized that the customers were “eligible” to receive the free month of service and a six-month price protection plan, obscuring that SmartEnergy was seeking to enroll customers in its retail electric supply. Thus, SmartEnergy is not exempt from the contracting requirements of the MTSA pursuant to this exemption as the information provided on the postcards was insufficient to satisfy § 14-202(a)(5).

SmartEnergy’s contention that its conduct falls within the preexisting business relationship exemption is similarly without merit. It argues that, by sending the postcards

detailing the offer information, customers had an opportunity to review the advertisement, perform their own research, and decide to call SmartEnergy. That exchange, according to SmartEnergy, created a prior business relationship before the phone sale occurred. SmartEnergy's assertion that customers had an opportunity to research before making the decision to call is unsubstantiated and irrelevant, as prior opportunity to research does not create a business relationship and they posit no other means by which a preexisting business relationship would have existed. We hold the Commission did not err in declining to apply either exemption.

**C. Substantial Evidence Existed for the Board to Conclude SmartEnergy Engaged in Systemic Violations of Maryland Law.**

Finally, SmartEnergy argues that the Commission's findings that it engaged in systemic practice of deceptive, misleading, and false trade practices are not supported by substantial evidence. In addition to its contention that it was not subject to the contracting requirement, SmartEnergy also maintains that the Board's findings as to four violations were in error: the postcards, the sales script, the processing of customer cancellations, and the monitoring and supervision of its agents' conduct. We examine each.

*1. Failure to comply with contracting requirements*

We first hold that substantial evidence existed to support the Commission's finding that SmartEnergy violated the MTSA and COMAR 20.53.07 in failing to comply with the contracting requirements. As we have stated, in circumstances where a consumer received a sales pitch over the telephone, a contract, reduced to writing and signed by the consumer, is required. MTSA § 14-2203. This requirement is also reflected in the Commission's rules

and regulations, which set forth the material terms and conditions that must be contained in a retail contract, including that “[i]f the contract is completed through telephone solicitation, the supplier shall send the Contract Summary to the customer along with the contract that must be signed by the customer and returned as required by the [MTSA].” COMAR 20.53.07.08(B). Additionally, retail suppliers must also provide customers with a completed contract summary, when the contract is completed, “on the form provided by the Commission.” COMAR 20.53.07.08(B). That form includes: electricity supplier information, price structure, supply price, statement regarding savings, incentives, contract start date, contract term/length, cancellation/early termination fees, and renewal terms.

As we have explained, SmartEnergy’s conduct constituted telephone solicitations that were not exempt from the MTSA requirements. SmartEnergy neither sent its customers a written contract to sign and return, nor provided the customers with a contract summary on the form provided by the Commission. Such failures constitute violations of MTSA and COMAR regulations.

SmartEnergy contends that it substantially complied with the contract summaries required by COMAR in sending its Welcome Kit, and that its good faith efforts should be considered. However, as COMAR 20.53.07.08 explicitly states, the supplier must also comply with the contracting requirements outlined in MTSA, which SmartEnergy did not do. Moreover, it is not clear that every customer received a Welcome Kit, and those Welcome Kits that were received did not contain the items listed in the standard form pursuant to COMAR 20.53.07.08B. Though the kit contained the price structure and supply price during the six-month period, the welcome letter did not provide information on the

price structure after that six-month period ended, nor did it include the contract start dates and length, cancellation information, or renewal options. Though SmartEnergy contends that its Welcome Kits contained the required items after SmartEnergy was alerted to its violation in May 2019, any remedial measures taken were not sufficient and thus do not diminish SmartEnergy's failure to send contracts.

## *2. Misleading and deceptive postcards*

We next hold that substantial evidence existed to support the finding that the postcards constituted a violation of the CPA, PUA § 7-505, and COMAR 20.53.07.07 prohibiting deceptive or misleading trade practices. PUA § 7-505(b)(7) and COMAR 20.53.07.07 mandate that an electricity supplier may not engage in marketing, advertising, or trade practices that are “unfair, false, misleading, or deceptive.” Similarly, CPA §§ 13-301 and 13-303 prohibit false and misleading practices that have the capacity, tendency, or effect of deceiving or misleading consumers.

The postcards contained large print advertising “Free Month of Electricity on your [Utility] Bill.” The customers’ then-current utility was listed many times on the postcard, including language such as: “SmartEnergy for [Utility] Customers.” It was only at the bottom of the postcard in smaller print that customers were informed that “SmartEnergy is a licensed supplier and not affiliated with [Utility.]” The postcards did not list information about price, and customers were not informed that the free month was contingent on six months of service after switching to SmartEnergy. Nor were customers informed that the free month was in the form of a reimbursement, rather than a credit. Additionally, the frequency with which the customers’ utility name was mentioned, more frequently than

SmartEnergy and in some cases coupled with SmartEnergy, could, and often did, lead consumers to believe that the offer came from their current utility provider.<sup>10</sup> In fact, one customer's complaint filed with the Commission indicated that the postcard he received stated: "Dear [Customer] Congratulations! As a [town] resident, and a valued [Utility] Customer, you are eligible to receive the following: One Month of FREE Electricity. It's our way of saying Thank You. Please call now to claim this benefit." We hold substantial evidence in the record supports the Commission's finding that SmartEnergy's postcards constitute a misleading and deceptive practice in violation of consumer protection laws.

### *3. Misleading and Deceptive Sales Script*

We similarly reject SmartEnergy's argument that there was not substantial evidence to find the sales script to be misleading or deceptive. As it did before the Commission, SmartEnergy argues that there were ten errors in the findings regarding the sales scripts: 1) statements misleading customers to believing they were dealing with current utility company, 2) the use of "SmartEnergy" implied to customers that they were using BGE's Smart Energy Program, 3) deflecting or not answering customer questions, 4) the failure to disclose all material terms over the telephone, 5) statements leading customers to believe that all their utility services would remain the same, 6) the reference to a six-month price

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<sup>10</sup> SmartEnergy argues that the fact that the utility providers such as BGE, offer "Smart Energy Rewards" should not be held against it because the company name predates these programs. However, SmartEnergy could have clarified this distinction, particularly where the customers expressed confusion about whether SmartEnergy was affiliated with their utility provider, but SmartEnergy did not do so. Regardless of any timing of the programs' creation does not obviate SmartEnergy's deliberate obscuring of the distinction.

protection plan but not informing of rate after that six-month period, 7) script verifying the account number reinforced the deception that the price currently being paid would not increase, 8) statements implying the current rate would increase during high usage periods, 9) the statement that the call may be recorded for training and quality purposes was misleading, and 10) confirmation questions presenting new information.

Retail energy suppliers are responsible for the actions of their agents. COMAR 20.59.10.02(B). Where the agent is performing marketing and sales activities, the supplier is required to confirm that the agent has been properly trained. COMAR 20.59.10.04(A).

The Commission reviewed numerous recorded calls and was provided with extensive testimony and rebuttal testimony concerning those sales scripts and their representation of all calls by sales representatives. The transcripts before the Commission demonstrated that, during the sales calls, the representatives did not inform customers that SmartEnergy was not affiliated with their then-current utility provider. In fact, many customers expressed confusion about the relation between SmartEnergy and their utility provider. In response, SmartEnergy representatives did not provide any distinction, but instead dodged the questions. The representatives frequently used language such as “I do see here now that as a [utility] customer you are eligible,” “congratulations on your free month for being a [utility] valued customer,” all of which perpetuates the confusion regarding SmartEnergy’s connection or lack thereof with other utilities. In one instance, a customer asked: “Is this one of the off companies because I don’t want it if it’s, if it’s not a legitimate BGE company that I’m using right now,” and the sales representative responded: “You will always continue to be a BGE customer.” That same customer later



stated “I’m not changing companies ... So if that’s what’s up there, we need to stop,” and the representative responded: “Like I said just continue making your payment to BGE as you always have.” In another scenario, in discerning whether the offer was a “legitimate” offer from the utility provider, a customer repeatedly stated that she was a part of the “smart energy BGE” program, the representative responded “perfect” and did not clarify any distinction.

The sales representatives also failed to give all the material information over the phone. In addition to obscuring the lack of affiliation between SmartEnergy and the customers’ current utility provider, SmartEnergy failed to affirmatively disclose that the customer would be required to leave the current utility. In addition, the customer was not informed of the actual fixed rate during the six-month period, or the fact that the rate would fluctuate after that period ended. In fact, it was not until the “confirmation questions” at the end of the phone call, that the agent represented to the customers for the first time that there was a fixed rate.

Nor did the representatives disclose the restrictions to qualify for the free month of electricity, specifically that the free month was only after six months of SmartEnergy’s service. In one case, a representative told a customer “the only requirement is for you to stay with [utility].” In some instances, “only after repeated questioning by the caller” does the sales representative inform the customer that the free month of electricity is provided in the form of a check following the customer mailing in copies of three months of utility bills. The Commission found “[t]he audio recordings produced in this case are indicative of a pattern and practice by SmartEnergy’s sales agents engaging in false and misleading

behavior by neglecting to fully explain the restriction applicable to customer's eligibility" for a free month of electricity, and such pattern and practices constitute violations of CL §§ 13-301 and 13-303.

The sales script also indicated that the sales representatives misled customers with the suggestion that, by opting into the six months of price protection, the price would not increase from their current rate. Additionally, if customers did not switch, the sales representatives implied that their rate would actually increase during high usage periods through statements such as "You will also get 6 months of price protection so that means the price you pay for the electricity will be protected and is not going to increase. This can give you peace of mind, especially during the high usage period like the winter/summertime, knowing that your rate won't go up." The sales representatives also often characterized the future energy period as "crazy high," whereas SmartEnergy's six-month rate was fixed. Notably, the sales representatives did not disclose that the price would fluctuate after that six-month period had ended. In fact, Baldwin testified that SmartEnergy created the impression that its offer would save the consumers money, but "at the time of the sales call the published utility rate was clearly known and *always lower* than the rate SmartEnergy offered." Therefore, "the sale of 'price-protection' was based on a knowingly false representation that *such service was needed* by the consumer."

Additionally, at the beginning of each monitored sales call, the sales representative stated that the call was being recorded for quality and training purposes. However, representatives would often restate immediately before the confirmation questions: "now I'm going to place this call on a recorded line." Baldwin opined that these calls were in fact

being recorded as a means of verifying the contract that SmartEnergy was seeking to confirm in its later confirmation questions. Of note, one customer filed a complaint with the Commission alleging that SmartEnergy enrolled her elderly mother without her mother's permission, and when she requested a copy of the phone recording, SmartEnergy "indicated they would call me in 48 hours with the recording. They did not." Another customer indicated that she had not enrolled in SmartEnergy, but when she called after receiving a bill, SmartEnergy informed her via the phone records that she enrolled on January 08, 2019 at 3:03p.m. The Commission found "this portion of the written sales script had the capacity or tendency to mislead customers into believing that the purpose of the recording was solely for quality and training purposes, rather than for purposes of verifying the caller's 'yes or no' response to the Supplier's two-question confirmation questionnaire." The Commission's findings that SmartEnergy's sales script was misleading and deceptive are supported by substantial evidence in the record.

#### *4. "Thwarting" of cancellations*

SmartEnergy next argues that the Commission's finding that it had "thwarted" customers' efforts to cancel their service was erroneous. Transcripts from call recordings demonstrated SmartEnergy sales representatives frequently made it difficult for customers to cancel. For example, one customer called SmartEnergy attempting to cancel because "[a]ll the agreement terms are too confusing," to which the representative's response was "You are cancelling without a reason." A different customer called and explained that she had previously tried to call to cancel and another representative would not let her cancel because she too did not have a good enough reason. Many of the complaints filed by the

customers cited failure to cancel their services. For instance, one customer called one week after enrollment to cancel, was placed on hold for 11 minutes, was instructed to leave a message and receive a call back, and was advised by his initial utility provider to call the Public Service Commission.

The transcripts from the call recordings contradict SmartEnergy's "confirmation question" informing customers of their right to cancel "at any time." Sales representatives told customers that their reasons for cancelling were insufficient, customers often had to go through numerous sales representatives to process cancellations, and many expressed confusion throughout the cancellation process. We hold substantial evidence exists to support the Commission's findings that SmartEnergy thwarted customers' cancellation attempts.

#### *5. Failure to monitor sales calls*

Finally, SmartEnergy argues that the Commission erred in finding that it failed to properly train its sales representatives and monitor those calls. Pursuant to COMAR 20.53.10.04A(1)–(9), a retail supplier must train its agents on applicable consumer protection laws and regulations, information pertaining to the supplier's services, customers' right to cancellation, the need to adhere to a script, and the supplier's contract summary. The supplier shall monitor those marketing and sales calls to "(1) Evaluate the supplier's training program; and (2) Ensure that agents are providing accurate and complete information, complying with applicable rules and regulations, and providing courteous service to customers." COMAR 20.53.10.04(F).

In response to consumer complaints, SmartEnergy prepared quality assurance sheets

evaluating the sales representatives' performance. Baldwin testified that, in comparing those assessments with her assessment of the misrepresentations for certain calls, SmartEnergy graded its representatives "quite leniently," and a representative who made material omissions and misstatements could still get passing marks on all criteria. She also stated that representatives frequently failed to follow a script directing certain text be read "verbatim," and that, had the calls been consistently reviewed, "those responsible for quality assurance would have noticed this regularly occurring omission and taken steps to correct it." The Commission concluded that the audio recordings "demonstrate a variety of 'off-script' messages" by sales agents, and the entirety of the record demonstrated that SmartEnergy failed to monitor its sales calls as required.

We hold that reasoning minds could reach the factual conclusion that SmartEnergy failed to monitor its agents' sales calls. Because substantial evidence in the record supports each of the Commission's findings regarding misleading and deceptive sales practices and failure to conform with Maryland consumer protection laws, we hold the Commission did not err in those determinations.

### **III. THE PENALTY WAS NOT ARBITRARY OR CAPRICIOUS.**

SmartEnergy finally asserts that the penalty issued was arbitrary and capricious. To this end, SmartEnergy argues that it was improperly penalized for "relying on the Commission's own guidance and prior decisions." It further contends that, citing to several Commission decisions wherein a penalty was levied against a retail supplier in an amount less than that which was imposed here, the penalty was "wildly inconsistent with Commission precedent involving significantly more egregious conduct." Next,

SmartEnergy argues that the Commission improperly dismissed its selection bias argument, and the conclusions are therefore based on improperly extrapolated alleged wrongdoings. Last, SmartEnergy argues the Commission failed to consider any remedial measures taken by SmartEnergy.

Pursuant to COMAR 20.51.03.06, the Commission has the power to revoke or suspend a license if a company engages in deceptive practices. Similarly, PUA § 7-507(k)(1) dictates that the Commission “may revoke or suspend the license of an electricity supplier, impose a civil penalty or other remedy, order a refund or credit to a customer, or impose a moratorium on adding or soliciting additional customers by the electricity supplier.” In determining an amount of the civil penalty, the Commission shall consider the number of previous violations, the gravity of current violations, and good faith effort of the electricity supplier. PUA § 7-507(l)(3). A reviewing court will not vacate “absent some showing of fraud or egregious behavior,” or a finding that the sanction was “so extreme and egregious that the reviewing court can properly deem the decision to be ‘arbitrary or capricious[.]’” *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 531, 533 (2004).

SmartEnergy notes that there are three prior Commission decisions in which the Commission held that signed contracts were not required, and that the Commission’s website indicates that customers may call an electricity supplier, who will then record the call and execute the “telephone contract, followed by sending a confirmation and copy of the contract.” SmartEnergy asserts that the website does not reference a signature requirement. Prior Commission decisions and language located on the Commission’s

website do not obviate the statutorily required conditions for an electric utility provider.

As to its selection bias argument, SmartEnergy argues that, in coming to its conclusion, the Commission listened to only a handful of the sales call recordings, and those calls are not representative of the 110,000 calls received and 34,000 enrollments. However, Baldwin testified that the representatives on the sales calls Baldwin reviewed “comprised a substantial portion of SmartEnergy’s sales force (at least two-fifths and most likely more) during the period when the consumer-complainants were enrolled.” In addition, the calls were not confined to a short timeframe, but rather occurred over a period of 18 months. She stated that it is “highly likely that these practices were not limited to the consumers who later filed complaints;” rather, they “appear to have been part of a pattern that would likely extend to all or most of the consumers with whom [SmartEnergy] had contacted and eventually enrolled.”

Per the Commission, SmartEnergy failed to present testimony on the issue of selection bias and therefore the PULJ was not obliged to consider the argument. However, the Commission also indicated that it reviewed the audio files submitted, as well as the “hundreds of pages [from the record] documenting SmartEnergy’s training program and mandatory agent standards.” It also stated: “SmartEnergy—which was in possession of all 34,000+ audio recordings from which [the Commission] and Staff’s ‘sample’ was taken—had the ability, if it wished, to present an opposing sample” but did not do so. *See Md. Comm’n of Lab. & Indus. v. Bethlehem Steel Corp.*, 106 Md. App. 243, 263 (1994) (holding “the burden of proof is generally on the party asserting the affirmative of an issue before an administrative body.”). Despite SmartEnergy’s criticisms, the Commission had an

adequate factual basis to conclude that the sales calls to which it listened were representative of all of the calls. The Commission was not required to conclude the evidence was affected by selection bias. We discern no error with the Commission's conclusion.

The Commission found that SmartEnergy enrolled customers without a written contract or contract summary in violation of COMAR 20.53.07.08 and MTSA on thousands of occasions. The Commission further found that SmartEnergy engaged in marketing and trade practices that were unfair, false, misleading, or deceptive. It rejected SmartEnergy's argument that it took remedial measures. The fact that there may be other decisions by the Commission wherein a lesser penalty was levied for, what in SmartEnergy's view constituted "significantly more egregious" conduct, neither renders the remedy invalid, nor makes the remedy a violation of SmartEnergy's due process rights. The Commission's remedy was within its discretion, and we do not perceive the disgorgement of invalid customer enrollments to be extreme and egregious.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANT.**



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**Summary: In the Matter of the Application of SmartEnergy Holdings LLC**