



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

March 28, 2016

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation  
and Enforcement v. Great American Power, LLC  
Docket No. M-2016- 2536806

Dear Secretary Chiavetta:

Enclosed please find the Settlement Agreement and attached Statements in Support of Settlement Agreement of both the Bureau of Investigation and Enforcement and Great American Power, LLC in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Michael L. Swindler  
Deputy Chief Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney ID No. 43319

Enclosure  
cc: As per certificate of service

RECEIVED  
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RECEIVED  
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PA PUC  
SECRETARY'S BUREAU

Pennsylvania Public Utility :  
Commission, Bureau of :  
Investigation and Enforcement :

v. :

Docket No. M-2016-2536806

Great American Power, LLC :

**SETTLEMENT AGREEMENT**

**I. Introduction**

1. The parties to this Settlement Agreement (“Settlement” or “Settlement Agreement”) are the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (“I&E”), by its prosecuting attorneys, P.O. Box 3265, Harrisburg, PA 17105-3265, and Great American Power, LLC, a Pennsylvania limited liability company (“Great American” or “Company”), with a principal address of 2959 Cherokee Street, Suite 202, Kennesaw, GA 30144.

2. The Pennsylvania Public Utility Commission (“Commission”) is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate public utilities within this Commonwealth pursuant to the Public Utility Code (“Code”), 66 Pa.C.S. §§ 101, *et seq.*

3. Section 501(a) of the Code, 66 Pa.C.S. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code.

4. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities.

*Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities,*

Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa.C.S. § 308.2(a)(11).

5. Great American is a jurisdictional electric generation supplier (“EGS”) certificated by the Commission to operate within the service territories of PPL, PECO, Met-Ed and Duquesne. Great American is a public utility as defined by 66 Pa.C.S. § 102, and is engaged in, *inter alia*, the provision of public utility service for compensation as an electric generation supplier.<sup>1</sup>

6. Great American, as a provider of electric generation service for compensation, is subject to the power and authority of the Commission pursuant to Section 501(c) of the Code.

7. Pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of Great American in its capacity as an EGS serving customers in Pennsylvania.

8. Section 3301 of the Code, 66 Pa.C.S. § 3301, authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation subject to the Commission’s authority for violations of the Code or Commission regulations or both. Section 3301 further allows for the imposition of a separate fine for each violation

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<sup>1</sup> 66 Pa.C.S. § 102 states that electric generation suppliers are public utilities for the limited purposes of Section 2809 and 2810 of the Public Utility Code. “Electric generation supplier” is defined in Section 2803 of the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801-2812; see also, 52 Pa. Code § 57.171.

and each day's continuance of such violation(s). Specifically with regard to standards for changing a customer's electric generation supplier, the Commission is empowered to assess fines under the aforementioned 66 Pa.C.S. Chapter 33, pursuant to 52 Pa. Code § 57.177(e).

9. By letter dated October 29, 2013, ("October 29 Letter") I&E advised Great American that it had initiated an informal investigation of the Company consistent with Sections 331(a) and 506 of the Public Utility Code, 66 Pa.C.S. §§ 331(a) and 506; and 52 Pa. Code § 3.113.

10. Great American was advised that I&E's investigation would focus on the Company's marketing practices as an electric generation supplier within Pennsylvania and, specifically, as a follow-up to the Commission's Opinion and Order in *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Order entered October 18, 2013) ("*Towne Order*").<sup>2</sup> In the *Towne Order*, the Commission directed I&E to examine the potential that other customers were subjected to similar mistreatment by Great American as that experienced by the customer Complainant in the above-referenced complaint, and to take whatever further action may be deemed warranted.<sup>3</sup>

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<sup>2</sup> In its *Towne Order*, the Commission determined that the allegations raised by the Complainant that he was contacted by Great American 14 times over a 26-day period despite repeated requests by the Complainant to stop calling were "potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania's retail electric market." *Towne Order* at 22.

<sup>3</sup> *Ordering Paragraph 11 of the Towne Order* reads: "That this matter shall be referred to the Commission's Bureau of Investigation and Enforcement for such further action as is deemed appropriate."

## II. Background

11. In its October 29 Letter, I&E posed an initial set of data requests to Great American regarding its EGS marketing procedures.

12. In its data request responses dated December 6, 2013, Great American indicated that its primary marketing channels for EGS services in Pennsylvania were telemarketing, the PAPowerswitch website, and Great American's own website.

13. Great American further indicated that its outbound telemarketing services were conducted by a single outside vendor that provided outbound sales calls within the guidelines provided by Great American.

14. In its responses to I&E's data requests, Great American provided, *inter alia*, a confidential internal customer log listing Pennsylvania customer complaints received by the Company in the 12 months preceding the data request, December 2012 to November 2013. This log contained a total of 37 marketing-related complaints lodged by Pennsylvania consumers and received by Great American for that period. Each of the 37 individual log entries consist of a log number, date, brief description of the customer's complaint, research conducted by the Company and the Company's findings and any action taken. Upon review of these log entries, I&E found that in 17 instances, Great American concluded that either unacceptable or, at minimum, questionable marketing practices were exhibited by the outside vendor's sales representatives ("TSR") telemarketing on behalf of Great American.

15. In its responses to I&E's data requests, Great American noted that in the 17 instances cited above, the Company's review of each complaint resulted in the

cancellation of the customer's enrollment or enrollment request and/or the retraining or removal of the particular TSR.

16. Upon review of customer disputes received and investigated by the Commission's Bureau of Consumer Services, I&E found that in 3 additional instances, the Company determined that its outside telemarketing efforts resulted in unacceptable third-party verification calls or that the Company had failed to maintain the proper documentation.

17. Great American assessed each of the 20 instances as they occurred and determined that 4 warranted refunds, which have been provided, and 16 did not warrant any refund or credit.<sup>4</sup>

18. Great American notes that it has subsequently employed the following quality control measures in order to review the actions of its third-party marketing representatives:

- a. Great American requires outbound sales calls to be recorded;
- b. Great American conducts live monitoring of outbound sales calls for a total of 10 to 20 hours per month;
- c. Outbound sales call enrollments are validated by a third-party verification company;

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<sup>4</sup> In 13 of the 16 instances, the customer's enrollment was cancelled or never processed such that the customer was not invoiced any charges by Great American, thus warranting no credit or refund. 2 of the 3 remaining instances comprised a clerical error and a misunderstanding between the agent and a returning customer (who elected to remain enrolled with the Great American). In the last remaining instance, although the customer's billed charges from Great American for one billing cycle were actually *less* than what the customer would have otherwise paid, Great American nevertheless made a recent, good faith effort to refund the charges billed by Great American on that single invoice. However, nearly three years having passed since the incident, Great American was unable to ascertain a forwarding address for the then 95-year-old resident.

- d. Great American provides federal and state Do-Not-Call (“DNC”) lists and requires the vendor to scrub DNC list numbers from the sales lead lists;
- e. Great American also maintains an internal DNC list generated from contacts made directly to Great American and also requires the vendor to scrub these numbers from the sales lead lists twice per week; and
- f. Great American sends a welcome package to every customer that enrolls.

19. Great American requires its outside contractors to follow all federal, state and local rules and regulations while acting on behalf of the Company, but acknowledged that there may be some instances where agents do not adhere to these standards.

20. When a violation is reported, Great American immediately conducts its own investigation of the incident.

21. Great American takes full responsibility for any and all actions performed by its outside sales agents related to the 20 instances noted above.

22. While Great American understands that in connection with providing retail electric supply service in Pennsylvania, it is required, among other things, to take full responsibility for any and all actions performed by its outside sales agents, including those actions taken by such sales agents in connection with the 20 instances noted above, it believes that in at least 9 of those 20 instances, while Great American’s sales agents did not provide prompt courteous customer service, such action reflected in the recording of the respective third-party verifications did not violate the Commission’s administrative rules and regulations. However, in the interests of resolving all matters related to this

investigation, and recognizing that Great American has since implemented significant enhanced training and compliance protocols that were not in place during the period of this investigation, Great American is willing to enter into this Settlement Agreement in accordance with the terms set forth herein.

23. By letter dated October 6, 2015, I&E communicated to Great American that I&E's informal investigation had concluded that sufficient data had been gathered to substantiate allegations of one or more violations of the Code and/or other applicable statutes and regulations and warranted further formal action.

### **III. Alleged Violations**

24. I&E concluded from its investigation that outside sales agents acting in the capacity of telemarketing representatives on behalf of Great American engaged in marketing conduct and sales practices that failed to meet the established standards and practices for marketing and sales activities for EGSs and their agents to ensure the fairness and integrity of the competitive residential energy market, pursuant to relevant chapters of the Code.

25. As a result of the incidents as described herein, I&E concluded that Great American, as a licensed EGS in Pennsylvania, violated provisions of Chapters 54 and 111 of the Pennsylvania Code concerning "Standards for Changing a Customer's Electricity Generation Supplier", among other statutes and regulations, with regard to the



telemarketing activity conducted by outside sales agents acting on behalf of Great American.<sup>5</sup>

26. Based on information obtained through its investigation as described above and a review of the Commission's regulations and relevant statutes, I&E was prepared to contend by the filing of a formal complaint that Great American violated certain provisions of Title 52 of the Pennsylvania Code including:

a. The action of the Company or of an agent or agents of the Company or the Company's third-party vendor failed to comply with the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code §§ 54.1, *et seq.*, in that the Company or an agent or agents of the Company or Company's third-party vendor engaged in fraudulent, deceptive or otherwise unlawful acts in the process of marketing electric generation supplier services of the Company to Pennsylvania consumers.

If proven, this would be a violation of 52 Pa. Code § 54.43(f) (20 counts).

b. The action of the Company or of an agent or agents of the Company or the Company's third-party vendor failed to comply with the Marketing and Sales Practices for the Retail Residential Energy Market, 52 Pa. Code §§ 111.1-14, in that the Company or an agent or agents of the Company or Company's third-party vendor failed to properly conduct telemarketing sales resulting in fraudulent, deceptive or otherwise unlawful acts in the process of marketing electric generation supplier services of the Company in Pennsylvania.

If proven, this would be a violation of 52 Pa. Code §§ 111.7 and 111.10 (20 counts).

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<sup>5</sup> 52 Pa. Code § 54.43, *Standards of conduct and disclosure for licensees, Subsection (f)*, states: "A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives. Licensee shall inform consumers of state consumer protection laws that govern the cancellation or rescission of electric generation supply contracts." *See also*, Marketing and Sales Practices for the Retail Residential Energy Market, 52 Pa. Code §§ 111.1-14, at Section 111.3(b).

27. As a mitigating factor to the above allegations, I&E acknowledges that Great American acknowledged the shortcomings of its outside sales agents in response to I&E inquiries during its investigation and fully cooperated with I&E's investigation.

28. Throughout the entire investigatory process, Great American and I&E remained active in communications and informal discovery and continued to explore the possibility of resolving this investigation, which ultimately culminated in this Settlement Agreement.

#### **IV. Settlement Terms**

29. Great American and I&E desire to: (i) terminate I&E's informal investigation and (ii) settle this matter in its entirety without litigation. There has been no evidentiary hearing before any tribunal and no sworn testimony taken related to I&E's above-docketed investigation, but for that litigation related to the prior proceeding as set forth at Paragraph 10, herein.

30. Great American acknowledges that the Commission has a long-standing "zero-tolerance" policy concerning slamming and related unauthorized customer marketing and enrollment issues, that the Commission has penalized companies that engage in or are alleged to have engaged in inappropriate supplier marketing practices, and that the Commission has made it clear that such practices will not be tolerated.

31. Great American fully acknowledges the seriousness of unauthorized EGS marketing practices and recognizes the need to prevent the reoccurrence of such matters.

32. The Parties recognize that their positions and claims are disputed and, given the inherent unpredictability of the outcome of a contested proceeding, the Parties further recognize the benefits of amicably resolving the disputed issues through settlement.

33. Great American and I&E, intending to be legally bound and for consideration given, desire to fully and finally conclude this informal investigation and agree to stipulate as to the following terms solely for the purposes of this Settlement Agreement:

a. Great American will pay a civil penalty of eighteen thousand dollars (\$18,000.00) to resolve the allegation of unauthorized marketing practices of its outside sales agents in order to fully and finally settle all possible liability and claims of alleged violations of the Code and/or the Pennsylvania Code arising from, or related to, the unauthorized marketing practices investigated herein. Said payment shall be made by check to "Commonwealth of Pennsylvania" and presented to the Secretary's Bureau of the Commission within thirty (30) days after the Commission has entered a final order approving the Settlement Agreement, as follows:

Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

No portion of this payment shall be recovered from Pennsylvania consumers by any future proceeding, device or manner whatsoever and Great American shall not seek a tax deduction in the amount of the civil penalty stated above pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f);

b. Great American will take or has taken corrective action and implemented revisions to its operating procedures which will act as safeguards against future unauthorized EGS marketing practices of employees or agents of Great American or the Company's third-party vendors. The pertinent portions of Great American's modified procedures are briefly described as follows:

- *Hiring Inhouse Counsel and additional Compliance personnel.*
- *Actively engaging outside counsel for compliance matters.*
- *Instituting a revised Internal Compliance policy.*
- *Terminating relationship with the third-party marketer involved in the violations.*
- *Contracting with new compliant third-party marketer.*
- *Improving upon training materials for third-party marketers.*

c. Great American shall confirm its single point of contact for BCS staff for resolution of customer inquiries and/or complaints received by the Commission;

d. In exchange for the action taken by Great American as described above, I&E agrees not to institute any formal proceeding, including the filing of a formal complaint, relating to the unauthorized marketing practice that is the subject of this Settlement Agreement; and

e. The terms and conditions in this Settlement Agreement cannot be used and will not be admissible in any future proceeding, including, but not limited to, the Commission, the Pennsylvania court system or the federal court system, relating to this or any other matter as proof of unlawful and/or improper behavior, or as an admission of unlawful and/or improper behavior by Great American.

34. In consideration of the Company's payment of a monetary civil penalty and its compliance with the non-monetary terms of this settlement, as specified herein, I&E agrees to forgo the institution of any formal complaint that relates to the Company's conduct as described in the Settlement Agreement. Nothing contained in this Settlement Agreement shall adversely affect the Commission's authority to receive and resolve any informal or formal complaints filed by any affected party with respect to the incident, except that no penalties beyond the civil settlement amount agreed to herein may be imposed by the Commission for any actions identified herein.

## **V. Conditions of Settlement**

35. The Parties submit that a settlement avoids the necessity for the prosecuting agency to prove elements of each violation. In return, the opposing party in a settlement agrees to pay a monetary settlement amount to, in part, avoid the possibility of a larger fine or penalty resulting from litigation and the substantial expenses associated with litigation. This settlement represents a compromise by both Great American and I&E of their respective litigation positions. Any fines and penalties resulting from a litigated proceeding, typically are different from payments resulting from a settlement.

36. The Settlement Agreement meets the standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201. The Parties submit that the Settlement Agreement is in the public interest because it effectively addresses the single unauthorized marketing issue that was the subject of I&E's investigation, avoids the time and expense of litigation, which entails hearings, travel for the company's out-of-state witnesses and counsel, and the preparation and filing of briefs, exceptions, reply exceptions, and possible appeals.

37. With the Commission's approval that the terms and conditions in this Settlement Agreement are in the public interest, Great American agrees, along with the non-monetary terms set forth above, to pay a civil penalty of \$18,000 within thirty (30) days of the date of the Order approving this Settlement Agreement to resolve completely the allegations raised by I&E's investigation. Moreover, Great American agrees not to seek recovery of any portion of this civil penalty from its Pennsylvania customers or to

seek a tax deduction in the amount of the civil penalty stated above pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

38. This Settlement Agreement is a full and final resolution of the Commission's investigation related in any way to the matters described in this Settlement Agreement.

39. Great American and I&E have agreed to this settlement in the interests of avoiding formal litigation and moving forward in the conduct of business in Pennsylvania.

40. Great American and I&E have entered into and seek the Commission's approval of the Settlement Agreement pursuant to 52 Pa. Code § 3.113. This Settlement Agreement is subject to all applicable administrative and common law treatments of settlements, settlement offers and/or negotiations. The validity of this Settlement Agreement is expressly conditioned upon the Commission's approval under applicable public interest standards without modification, addition, or deletion of any term or condition herein. Accordingly, this Settlement Agreement is made without any admission against or prejudice to any position which any Party might adopt during litigation of this case if this settlement is rejected by the Commission or withdrawn by any of the parties as provided below. This Settlement Agreement is, therefore, a compromise and is conditioned upon the Commission's approval of the terms and conditions contained herein without modification or amendment.

41. This document represents the Settlement Agreement in its entirety. No changes to obligations set forth herein may be made unless they are in writing and are

expressly accepted by the Parties involved. This Settlement Agreement shall be construed and interpreted under Pennsylvania law.

42. None of the provisions of the Settlement Agreement or statements herein shall be considered an admission of any fact or culpability. I&E acknowledges that this Settlement Agreement is entered into with the express purpose of settling the asserted, disputed claims regarding the specific alleged violations of the Commission's regulations and the Code.

43. If either Party should file exceptions to the tentative or final order of the Commission, the other Party shall have the right to file a reply to exceptions.

44. If the Commission fails to approve by tentative and final order this Settlement Agreement, including any of the terms or conditions set forth herein, without modification, addition, or deletion, then either Party may elect to withdraw from this Settlement Agreement by filing a withdrawal in response to the tentative or final order within 20 days of the date the tentative or final order is entered. None of the provisions of this Settlement Agreement shall be considered an admission of fact or law or be binding upon the Parties if one of them files a withdrawal.

**WHEREFORE**, Great American Power, LLC and the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement respectfully request that the Commission adopt an order approving the terms and conditions of this Settlement Agreement in their entirety as being in the public interest.

Respectfully Submitted,

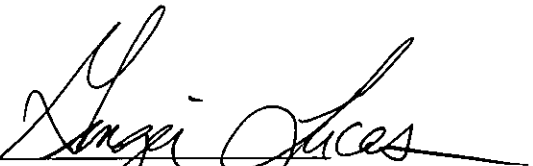
Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement

By: 

Michael L. Swindler  
Deputy Chief Prosecutor  
Bureau of Investigation and Enforcement  
P.O. Box 3265  
Harrisburg, PA 17105  
717.783.6369  
[mwindler@pa.gov](mailto:mwindler@pa.gov)

Date: 28 MAR 16

Great American Power, LLC

By: 

Ginger Lucas  
Chief Executive Officer  
Great American Power, LLC  
2959 Cherokee Street  
Suite 202  
Kennesaw, GA 30144  
281.631.5512  
[glucas@greatamericanpower.com](mailto:glucas@greatamericanpower.com)

Date: 3/11/16



## PROPOSED ORDERING PARAGRAPHS

### IT IS ORDERED:

1. That the Settlement Agreement filed on \_\_\_\_\_, 2016, between the Commission's Bureau of Investigation and Enforcement and Great American Power, LLC, is approved in its entirety. or [,as modified, subject to the condition(s) set forth in Ordering Paragraph No. 2.]

[2. That, within twenty days of the entry of this Opinion and Order, any Party may file with the Secretary of the Commission at this docket number a notice that it is withdrawing from the Settlement Agreement entered into between the Commission's Bureau of Investigation and Enforcement and Great American Power, LLC, and filed with this Commission on \_\_\_\_\_, 2016. If any Party withdraws from the Settlement Agreement, the Agreement shall be disapproved without further action by this Commission and this matter shall be referred to the Bureau of Investigation and Enforcement for such further action as may be warranted.]

3. That, if no Party withdraws from the Settlement Agreement pursuant to Ordering Paragraph No. 2, this Opinion and Order shall become final without further Commission action, and it is further ordered:

a. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa.C.S. § 3301, within thirty (30) days of the date this Order becomes final, Great American Power, LLC shall pay a civil penalty in the amount of \$18,000. Said payment shall be made by check or money order payable to "Commonwealth of Pennsylvania" and shall be sent to:

Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

b. A copy of this Opinion and Order shall be served upon the  
Financial and Assessment Chief, Office of Administrative Services.

4. That this matter be marked closed.

**BY THE COMMISSION,**

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED:

ORDER ENTERED:

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility	:	
Commission, Bureau of	:	
Investigation and Enforcement	:	
	:	
	:	
v.	:	Docket No. M-2016-_____
	:	
	:	
Great American Power, LLC	:	

**STATEMENT IN SUPPORT OF SETTLEMENT AGREEMENT  
OF PENNSYLVANIA PUBLIC UTILITY COMMISSION  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

The Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement (“I&E”) submits this Statement In Support Of Settlement Agreement at the above docket. The specific terms of the settlement are found at Paragraphs 29 through 34 of the Settlement Agreement. I&E submits that the settlement as memorialized by the Settlement Agreement was amicably reached by I&E and Great American Power LLC (“Great American”) (hereinafter collectively referred to as “Parties”) and balances the duty of the Pennsylvania Public Utility Commission (“Commission”) to protect the public interest with the interests of the Company, the Company’s customers, and all electric consumers in Pennsylvania.

This matter involves Great American, a jurisdictional electric generation supplier (“EGS”) licensed by the Commission to operate within the electric distribution company

(EDC) service territories of PPL, PECO, Met-Ed and Duquesne. I&E's investigation focused on the Company's billing and marketing practices as an electric generation supplier within Pennsylvania specifically regarding marketing practices exhibited by an outside vendor's sales representatives ("TSR") telemarketing on behalf of Great American.

An informal investigation into Great American's marketing practices as an EGS in Pennsylvania was initiated by I&E. In Great American's responses to I&E data requests, the Company provided to I&E an internal customer log, marked confidential, listing Pennsylvania customer complaints and containing a total of 37 marketing-related complaints lodged by Pennsylvania consumers and received by Great American for the period of December 2012 to November 2013. The listed complaints included 17 instances where Great American concluded that either unacceptable or, at minimum, questionable marketing practices were exhibited by the outside vendor's TSRs. In three additional instances originating as informal complaints lodged with the Commission's Bureau of Consumer Services ("BCS"), the Company provided refunds to the customers based on the Company's own determination that its outside telemarketing efforts resulted in unacceptable third-party verification calls or that the Company had failed to maintain the proper documentation. It was alleged that the Company, as a result of these marketing actions, may have violated provisions of Chapters 54 and 111 of the Pennsylvania Code concerning the marketing standards and sales practices of an electricity generation supplier. I&E's informal investigation concluded that sufficient data had been gathered to substantiate allegations of violations of the Public Utility Code

and/or other applicable statutes and regulations in connection with the marketing practices exhibited by the outside vendor's sales representatives telemarketing on behalf of Great American.

In making a determination that the instant settlement was appropriate, I&E weighed the Commission's clear "zero tolerance" mandate that it would "not tolerate unlawful activity that threatens to harm Pennsylvania consumers and thereby the burgeoning retail electricity market in Pennsylvania"<sup>1</sup> against various mitigating circumstances present here. Importantly, I&E acknowledges that Great American fully cooperated with I&E's investigation. The Company promptly responded to I&E's requests for information and provided I&E with records, correspondence, and other documents relevant to the investigation. Moreover, throughout the entire investigatory process, Great American and I&E remained active in communications and informal discovery and continued to explore the possibility of resolving this investigation, which ultimately culminated in the Settlement Agreement reached here.

The Settlement Agreement addresses the allegations raised in I&E's informal investigation while avoiding the time and expense of litigation, including but not limited to, discovery, preparation of witness testimony, hearings, briefs, exceptions, and appeals. The Settlement Agreement, as proposed, is in the public interest and should be approved by the Commission. The Settlement Agreement sets forth the following terms:

- a. Great American will pay a civil penalty of eighteen thousand dollars (\$18,000.00) to resolve the allegation of unauthorized marketing practices of its outside sales agents in order to fully and finally settle all possible

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<sup>1</sup> See, *Pennsylvania Public Utility Commission, Law Bureau Prosecutory Staff v. MXenergy Electric Inc.*, M-2012-2201861 (Opinion and Order entered May 3, 2012) ("*MXenergy*").

liability and claims of alleged violations of the Code and/or the Pennsylvania Code arising from, or related to, the unauthorized marketing practices investigated herein. Said payment shall be made by check to "Commonwealth of Pennsylvania" and presented to the Secretary's Bureau of the Commission within thirty (30) days after the Commission has entered a final order approving the Settlement Agreement, as follows:

Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

No portion of this payment shall be recovered from Pennsylvania consumers by any future proceeding, device or manner whatsoever and Great American shall not seek a tax deduction in the amount of the civil penalty stated above pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f);

b. Great American will take or has taken corrective action and implemented revisions to its operating procedures which will act as safeguards against future unauthorized EGS marketing practices of employees or agents of Great American or the Company's third-party vendors. The pertinent portions of Great American's modified procedures are briefly described as follows:

- Hiring In-house Counsel and additional Compliance personnel;
- Actively engaging outside counsel for compliance matters;
- Instituting a revised Internal Compliance policy;
- Terminating relationship with the third-party marketer involved in the violations;
- Contracting with new compliant third-party marketer; and
- Improving upon training materials for third-party marketers.

c. Great American shall confirm its single point of contact for BCS staff for resolution of customer inquiries and/or complaints received by the Commission;

d. In exchange for the action taken by Great American as described above, I&E agrees not to institute any formal proceeding, including the filing of a formal complaint, relating to the unauthorized marketing practice that is the subject of this Settlement Agreement; and

e. The terms and conditions in this Settlement Agreement cannot be used and will not be admissible in any future proceeding, including, but not limited to, the Commission, the Pennsylvania court system or the federal court system, relating to this or any other matter as proof of unlawful and/or improper behavior, or as an admission of unlawful and/or improper behavior by Great American.

Great American has, as stated above, agreed to pay a fair and equitable civil penalty totaling \$18,000.00, and has taken appropriate corrective action to its telemarketing procedures. These monetary and non-monetary settlement terms are in accord and satisfaction of disputed claims and not an admission of liability of any sort by Great American. This settlement was reached after taking into consideration past settlements regarding similar incidents that were approved by this Commission which acted as a foundation from which the Parties could determine reasonable settlement terms in this case.<sup>2</sup>

All necessary factors were considered in reaching a settlement amount that would be deemed by this Commission as an appropriate balance of all mitigating factors while adequately reflecting the seriousness of the allegations and promoting ongoing regulatory compliance and compliance with Commission policy. It is the position of I&E that the settlement reached, including a civil settlement amount to be paid by Great American of \$18,000.00, in addition to the non-monetary operational improvements implemented by the Company, is reasonable and should be found by this Commission to be in the public interest.

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<sup>2</sup> A recent example is the *MXenergy* case wherein this Commission stated, “[W]e simply do not believe that a \$500-per-customer penalty, even when combined with the corrective actions, is enough to remedy this situation or to deter potential future violations of the Code or our Regulations by an EGS.”

The agreement of the Parties to settle this case is made without any admission or prejudice to any position that the Parties might adopt during subsequent litigation, including but not limited to, in the event that this settlement is rejected by the Commission or otherwise properly withdrawn by any of the Parties. Had this matter proceeded to hearing, I&E would have alleged that the Company committed numerous violations of the Public Utility Code. Specifically, I&E would have alleged in its case-in-chief as follows:

a. The action of the Company or of an agent or agents of the Company or the Company's third-party vendor failed to comply with the Electricity Generation Customer Choice and Competition Act, 52 Pa. Code §§ 54.1, *et seq.*, in that the Company or an agent or agents of the Company or Company's third-party vendor engaged in fraudulent, deceptive or otherwise unlawful acts in the process of marketing electric generation supplier services of the Company to Pennsylvania consumers.

If proven, this would be a violation of 52 Pa. Code § 54.43(f) (20 counts).

b. The action of the Company or of an agent or agents of the Company or the Company's third-party vendor failed to comply with the Marketing and Sales Practices for the Retail Residential Energy Market, 52 Pa. Code §§ 111.1-14, in that the Company or an agent or agents of the Company or Company's third-party vendor failed to properly conduct telemarketing sales resulting in fraudulent, deceptive or otherwise unlawful acts in the process of marketing electric generation supplier services of the Company in Pennsylvania.

If proven, this would be a violation of 52 Pa. Code §§ 111.7 and 111.10 (20 counts).

In *Rosi v. Bell Atlantic Pennsylvania Inc., et al.*, 94 PA PUC 103, Docket No. C-00992409 (Order entered March 16, 2000), as set forth in *Pennsylvania Public Utility Commission v. NCIC Operator Services*, Docket No. M-00001440 (December 20, 2000),



the Commission adopted and utilized standards for determining whether a particular enforcement outcome is in the public interest. The standards set forth in *Rosi* were reviewed by I&E. I&E submits that this Settlement Agreement complies with the requirements for settlements found in *Rosi* and that the terms of the Settlement Agreement are in the public interest.

I&E further asserts that approval of this Settlement Agreement is consistent with the Commission's Policy Statement, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations – statement of policy*, at 52 Pa. Code § 69.1201 ("Policy Statement"). Under the Policy Statement, while many of the *Rosi* standards may still be applied, the Commission specifically recognized that in settled cases the parties "will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest." 52 Pa. Code § 69.1201(b).

The Commission's Policy Statement provides for ten (10) factors and standards to be considered by the Commission. The first standard addresses whether the conduct at issue was of a serious nature. 52 Pa. Code § 69.1201(c)(1). While there was no evidence that such activity was indicative of the Company's overall marketing practices for its EGS services in Pennsylvania, the conduct at issue was in fact of a serious nature, and impacted a number of customers.

The second standard addresses whether the resulting consequence of the conduct in question was of a serious nature. 52 Pa. Code § 69.1201(c)(2). The I&E investigation determined that these errant marketing incidents resulted in numerous revisions and

improvements to the EGS's marketing procedure and that changes were implemented to help avoid similar incidents occurring in the future. Nevertheless, I&E avers that any inappropriate EGS marketing or billing practices are recognized by the Commission as a serious consequence.<sup>3</sup> Accordingly, I&E avers that the resulting consequence of the actions of Great American or a vendor representative acting on behalf of Great American, whether intentional or unintentional, was of a serious nature, that resulted in positive modifications to the Company's marketing or billing procedure and internal oversight of its procedure.

The third standard addresses whether the conduct was intentional or unintentional. 52 Pa. Code § 69.1201(c)(3). Since this standard may apply to litigated proceedings and this matter has resulted in an amicable Settlement Agreement, it is not applicable here.

The fourth standard addresses whether the Company made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). As previously stated, the Company has taken corrective action and implemented revisions to its operating procedures, as described in Paragraph 18 of the Settlement Agreement, which will act as safeguards against errant marketing activity in order to prevent this type of violation from reoccurring. As such, the Company is taking appropriate action to address concerns and decrease the likelihood of similar incidents in the future.

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<sup>3</sup> As stated, *infra*, the Commission maintains a "zero tolerance" regarding slamming and made clear in the *MXenergy* case, among others, that it "will not tolerate unlawful activity that threatens to harm Pennsylvania's consumers and thereby the burgeoning retail electricity market in Pennsylvania." Order at 5.

In the process of negotiating this Settlement Agreement, the remaining factors in the Policy Statement were also considered. Specifically, the Parties reviewed the number of customers affected, the compliance history of the Company, the Company's cooperation with the Commission, and the monetary penalty necessary not only to deter future violations but to recognize alleged violations in the past. The Settlement Agreement was amicably negotiated and recognizes the Company's good faith efforts to comply with the Commission's regulations.

Finally, a settlement avoids the necessity for the prosecuting agency to prove elements of each violation. In return, the opposing party in a settlement avoids the possibility of a greater fine or penalty. Both parties negotiate from their initial litigation positions. The fines and penalties in a litigated proceeding, such as *Rosi*, have always been different from those that result from a settlement. I&E submits that this is the reason that *Rosi* listed whether penalties arise from a settlement or a litigated proceeding as one of its tests.

The Settlement Agreement is in the public interest because it effectively addresses the allegations identified by the informal investigation, avoids the time and expense of litigation which entails hearings, filings of briefs, exceptions, reply exceptions, and possible appeals. The Company has also agreed to pay a fair and equitable civil settlement amount and has improved its procedural safeguards regarding conducting criminal background checks to avoid such matters in the future. Moreover, the Settlement Agreement is consistent with the Commission's Policy Statement at 52 Pa. Code § 69.1201, *Factors and standards for evaluating litigated and settled proceedings*

*involving violations of the Public Utility Code and Commission regulations – statement of policy.*

Commission Rules and Regulations encourage the settlement of proceedings and, consequently, Great American and I&E convened a number of discussions during the course of this investigation. These discussions ultimately resulted in the foregoing Settlement Agreement which is a full and final resolution of I&E's investigation.

In addition to the foregoing reasons, based upon I&E's analysis of these matters, *acceptance of this proposed settlement is in the public interest because resolution of this case by settlement rather than litigation will avoid the substantial time and expense involved in continuing to formally pursue all allegations in this proceeding. Moreover, acceptance of the Settlement Agreement at this time will ensure that the Company will immediately implement the changes in their policies enumerated in the Settlement Agreement instead of at the end of what could be protracted litigation.*

**WHEREFORE**, I&E represents that it supports the settlement of this matter as memorialized by the Settlement Agreement as being in the public interest and respectfully requests that the Commission approve the foregoing Settlement Agreement, including all terms and conditions contained therein in its entirety.

Respectfully submitted,



Michael L. Swindler  
Deputy Chief Prosecutor  
PA Attorney ID No. 43319

Pennsylvania Public Utility Commission  
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Dated: March 28, 2016

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Pennsylvania Public Utility :  
Commission, Bureau of :  
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v. : Docket No. M-2016-\_\_\_\_\_  
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Great American Power, LLC :

**STATEMENT IN SUPPORT OF SETTLEMENT AGREEMENT  
OF PENNSYLVANIA PUBLIC UTILITY COMMISSION  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Great American Power, LLC, a Pennsylvania limited liability company (“Great American”), jointly and in cooperation with the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission’s (“Commission”), hereby submits the enclosed Settlement Agreement (“Settlement Agreement”), which is proposed to fully resolve all issues in the above-referenced docket and ongoing regulatory investigation being conducted by I&E. This Settlement Agreement is submitted on behalf of: Great American and I&E (collectively, “Settling Parties”).

As you are aware, the Commission ordered I&E to conduct further investigations of Great American’s marketing and/or billing practices as an electric generation supplier (“EGS”) within the Commonwealth of Pennsylvania as set forth in the Commission’s Opinion and Order in *William Towne v. Great American Power, LLC*, Docket No. C-201202307991 (Order entered October 18, 2013). I&E, acting under its delegated authority, conducted a prosecutor investigation regarding Great American’s EGS retail marketing and billing practices in Pennsylvania. This investigation concluded that sufficient data was gathered to evidence allegations of potential violations of the Pennsylvania Public Utility Code (the “Code”) and/or other applicable statutes and regulations for the period of December 2012 through July 2014. This conclusion was based on data and call log entries submitted to I&E by Great American, in full cooperation with the investigation, evidencing instances of marketing practices exhibited by third-party vendor sales agents engaged in telemarketing on behalf of Great American that fell below Great American’s expectations. While certain of the call log entries giving rise to the number of potential Code violations were admittedly improper or unacceptable, Great American several call log entries identified in the Settlement Agreement did not rise to actual misconduct, but were the result of poor customer service or similar general complaints that were unlikely to constitute Code violations.

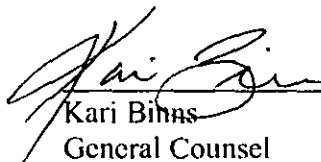
Nevertheless, to avoid further action and a formal complaint as a result of the potential violations, the Settling Parties engaged in settlement discussions in an attempt to reach an amicable resolution of the

investigation as set forth in the terms and conditions of the Settlement Agreement. Further, as a result of (i) Great American's full cooperation with the investigation, (ii) Great American's acknowledgment that a finite group of customers experienced inappropriate telemarketing practices, (iii) Great American's design and implementation of remedial and quality control measures designed to prevent any further unauthorized marketing and billing activity, and (iv) the uncertain culpability of Great American with respect to several alleged Code violations, I&E has agreed to all of the terms and conditions of the Settlement Agreement, including without limitation, the monetary penalty amount, and fully supports the Commission's final adoption of the Settlement Agreement in order to dispense with and finally resolve the above-captioned matter.

For the reasons set forth herein and in the accompanying documents, the Settling Parties respectfully request that the Commission accept and approve the Settlement Agreement and adopt an order approving the terms and conditions thereof in their entirety as being in the public interest.

We thank the Commission for its consideration of this filing. If you should have any questions, please contact the undersigned counsel.

Respectfully submitted,



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*Attorney for Great American Power, LLC*

March 22, 2016

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing documents upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

### Service by Electronic Mail and First Class Mail:

Kari Binns, Esquire  
General Counsel  
Great American Power, LLC  
722 Pin Oak Road, Suite 202  
Katy, TX 77494

Ginger Lucas, CEO  
Great American Power, LLC  
2959 Cherokee Street, Suite 202  
Kennesaw, GA 30144



Michael L. Swindler  
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Dated: March 28, 2016

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