**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held April 20, 2017

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

John F. Coleman, Jr.

Robert F. Powelson

David W. Sweet, Statement

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| Pennsylvania Public Utility Commission,  Bureau of Investigation and Enforcement  v.  Great American Power, LLC |  | M-2016-2536806 |

**Opinion and Order**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a proposed Settlement Agreement (Settlement) filed on March 28, 2016, by the Commission’s Bureau of Investigation and Enforcement (I&E) and Great American Power, LLC (Great American or Company) (collectively, the Parties), with respect to an Informal investigation conducted by I&E. Both Parties submitted a Statement in Support of the Settlement Agreement. I&E submits that the proposed Settlement is in the public interest and 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*. I&E Statement in Support at 7-10. On October 17, 2016, the Parties filed a Joint Supplemental Statement in Support of the Settlement (Supplemental Statement). For the reasons set forth herein, we find that the Settlement should be adopted, consistent with this Opinion and Order.

**History of the Proceeding**

This matter concerns an informal investigation initiated by I&E regarding Great American’s marketing practices as an electric generation supplier (EGS) in Pennsylvania. By letter dated October 29, 2013 (Investigation Letter), I&E instituted an investigation of the Company in follow-up to the Commission’s Order in *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991 (Order entered October 18, 2013) (*Towne*).[[1]](#footnote-1) In *Towne* we noted that customers may have been subjected to aggressive marketing tactics similar to that experienced by the complainant in that proceeding and found the conduct of Great American “to be potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania’s retail electric market.” *Towne* at 22. Thus, we determined that the Company’s actions may merit closer attention by the Commission and referred the matter to I&E for such further action as deemed appropriate. *Id.* at 25, 28.

The Investigation Letter requested documents and information from Great American regarding its EGS marketing procedures. I&E sent further data requests on March 7, 2014. By letter dated October 6, 2015, I&E informed the Company of the conclusion of the informal investigation and indicated the gathering of sufficient data to substantiate allegations of one or more violations of the Public Utility Code (Code) and/or other applicable statutes and regulations which warranted formal action by the Commission. Thereafter, the Parties entered into negotiations and agreed to resolve the matter in accordance with the Commission’s policy to promote settlements at 52 Pa. Code § 5.231. The Parties filed the instant Settlement on March 28, 2016.

On September 15, 2016, we issued an Opinion and Order (*September 2016 Order*)indicating that there did not appear to be sufficient information to evaluate whether the civil penalty and corrective actions in the Settlement were sufficient to address the alleged violations. Accordingly, we directed the Parties to file supplemental statements to provide additional information in order for us to determine whether the Settlement is in the public interest. As noted above, the Parties filed their Supplemental Statement on October 17, 2016. By Order entered December 8, 2016 (*December 2016 Order*), the Commission provided interested parties with the opportunity to file comments. In order to be considered timely, comments were due within twenty days of the date of entry of the *December 2016 Order*. No comments were filed.

**Background**

Great American is a jurisdictional EGS licensed by the Commission to operate within the service territories of PPL Electric Utilities Corporation, PECO Energy Company, Metropolitan Edison Company and Duquesne Light Company. In response to I&E’s data requests, Great American explained that its primary marketing vehicles for EGS services in Pennsylvania were telemarketing, the Commission’s PAPowerSwitch website, and the Company’s own website. Regarding the telemarketing services, Great American asserted that it utilized a single outside vendor to provide outbound sales calls within the guidelines provided by the Company. Settlement at 2, 4.

In further response to I&E’s inquiries, Great American provided a confidential internal customer log listing Pennsylvania customer complaints received by the Company from December 2012 to November 2013. According to the Settlement, the log contained thirty-seven marketing related complaints initiated by Pennsylvania consumers and received by the Company for that period. Each of the individual log entries contained a log number, date, brief description of the customer’s complaint, research conducted by Great American and any findings and actions taken by the Company. On seventeen occasions the Company determined that its outside vendor’s telemarketing sales representatives (TSRs) exhibited unacceptable or questionable marketing practices on behalf of Great American. Of these seventeen instances, the Company noted that its review of each complaint resulted in cancellation of the customer’s enrollment or enrollment request and/or the retraining of the particular TSR. *Id.* at 4-5.

I&E also reviewed customer disputes received and investigated by the Commission’s Bureau of Consumer Services (BCS). In three additional instances involving BCS, Great American determined that its outside telemarketing efforts resulted in unacceptable third-party verification calls or that the Company had failed to maintain the proper documentation. *Id.* at 5.[[2]](#footnote-2)

Regarding these twenty incidences – the seventeen received by the Company and the three received and investigated by BCS – Great American assessed each as it occurred and determined that four merited refunds, which the Company has already provided. However, the Company determined that sixteen did not warrant any refund or credit. The Parties explained that in thirteen of the sixteen incidents, the customer’s enrollment was cancelled or never processed and the customer was not invoiced by the Company for any charges. Thus, in those instances, no credit or refund was warranted. Further, two of the three remaining instances involved a clerical error and a misunderstanding between the agent and a returning customer who elected to remain enrolled with the Company. As to the last remaining incident, the customer was billed for one billing cycle but the billed charges were actually less than what the customer would have otherwise paid. Nevertheless, Great American attempted to refund the charges on that single invoice. However, according to the Settlement, Great American was unable to locate a forwarding address for the customer, who was ninety-five years old at the time, and three years have passed since the occurrence. *Id*. at 5.

In response to the I&E inquiries, the Company indicated that it has subsequently implemented the following quality control measures for reviewing the actions of its third-party representatives:

* requiring outbound sales calls to be monitored;
* conducting live monitoring of outbound sales calls for a total of ten to twenty hours per month;
* validating outbound sales call enrollments by a third-party verification company;
* providing federal and state Do-Not-Call (DNC) lists to its vendor and requiring the vendor to scrub DNC list numbers from its sales lead lists;
* maintaining an internal DNC list generated from contacts made directly to Great American and requiring its vendor to scrub these numbers from the sales lead list twice per week; and
* sending a welcome package to every enrolling customer.

*Id.* at 5-6.

Additionally, Great American asserted that it requires all of its outside contractors to follow all federal, state and local rules and regulations but recognized that there may be occasions in which agents do not adhere to these standards. In those instances, the Company stated that it immediately conducts its own investigation. Furthermore, Great American proffered that it takes full responsibility for the actions of its outside sales agents related to the twenty incidences at issue in this proceeding. *Id.* at 6.[[3]](#footnote-3)

After its investigation, I&E concluded that outside sales agents acting 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 market pursuant to Commission Regulations. Specifically, I&E concluded that the Company violated provisions of Chapters 54 and 111 of our Regulations concerning “Standards for Changing a Customer’s Electricity Generation Supplier” and other Statutes and Regulations regarding telemarketing activity by the outside agents. Settlement at 7-8.

I&E was prepared to allege in a formal complaint proceeding that Great American failed to comply with Chapter 54 of our Regulations, 52 Pa. Code §§ 54.1 *et seq.*, in that the Company, its agents, or its third-party vendor engaged in fraudulent, deceptive or otherwise unlawful acts in the process of marketing the Company’s services to Pennsylvania consumers. According to I&E, if proven, these actions would have violated 52 Pa. Code § 54.43(f) on twenty counts.[[4]](#footnote-4) Settlement at 8.

Additionally, I&E was prepared to allege in a formal complaint that Great American, its agents or its third-party vendor failed to comply with Chapter 111 of our Regulations, 52 Pa. Code §§ 111.1 *et seq.* I&E would have averred that Great American, its agents or its third-party vendor failed to properly conduct telemarketing sales resulting in fraudulent, deceptive or otherwise unlawful acts in the process of marketing EGS service in Pennsylvania. I&E contends that, if proven, these allegations would have violated 52 Pa. Code § 111.7, pertaining to customer authorization to transfer account, transaction, verification and documentation, and 52 Pa. Code § 111.10, pertaining to telemarketing, on twenty counts. Settlement at 8.

However, I&E acknowledged that Great American recognized the shortcomings of its outside sales agents in response to I&E’s inquiries and fully cooperated with the investigation. I&E considered the Company’s cooperation to be a mitigating factor to the allegations. As noted above, the Parties have agreed to resolve the matter by settlement in order to avoid the necessity for I&E to prove the elements of each violation. Settlement at 9, 12.

The proposed Settlement has been filed by the Parties in order to resolve allegations of EGS marketing violations. The Parties urge the Commission to approve the Settlement as being in the public interest. Settlement at 15.

**Terms of the Settlement[[5]](#footnote-5)**

Pursuant to the proposed Settlement, Great American will pay a civil penalty of $18,000, of which no portion shall be recovered from Pennsylvania consumers by any future proceeding, device or manner whatsoever. Settlement at 12-13.

The Settlement also acknowledges the corrective actions of the Company and the implementation of revised operating procedures that will act as safeguards against future unauthorized EGS marketing practices of employees or agents of Great American. The Settlement recites a portion of the Company’s modified procedures as follows:

* hiring in-house counsel and additional compliance personnel;
* actively engaging outside counsel for compliance matters;
* instituting a revised internal compliance policy;
* terminating its relationship with the third-party marketer involved in the violations;
* contracting with a new compliant third-party marketer; and
* improving upon training materials for third-party marketers.

Settlement at 11.

The Settlement also requires Great American to confirm its single point of contact for BCS staff for resolution of customer inquiries and/or complaints received by the Commission. *Id.*

In response, I&E agrees to forbear from initiating a formal complaint relative to the allegations that are the subject of the proposed Settlement. The proposed Settlement will not, however, affect the Commission’s authority to receive and resolve any formal or informal complaints filed by any affected party, except that no further penalties beyond the agreed civil penalty may be imposed by the Commission for any actions identified in the Settlement. *Id.*

The proposed Settlement is conditioned on the Commission’s approval without modification of any of its terms or conditions. If the Commission does not approve the proposed Settlement, or makes any change or modification to the proposed Settlement, either Party may elect to withdraw from the Settlement. *Id.* at 13-14.

In the *September 2016 Order*, we explained that neither the Settlement nor the statements in support contain sufficiently clear information about the referenced twenty incidences – the seventeen received by the Company and the three received and investigated by BCS. Thus, we sought further information related to the dates, descriptions of the complaints, the research conducted by the Company, and the findings and actions taken by the Company or by BCS.

In their Supplemental Statement, the Parties provide the following information pertaining to the dates and number of informal complaints received by BCS:

Period No. of informal complaints received

Calendar Year 2012 23

Calendar Year 2013 7

January 2014 2

February 2014 78

Supplemental Statement at 3.

Additionally, the Parties note that BCS received approximately 200 informal complaints regarding Great American for all of 2014. Although acknowledging that total may seem high, the Parties indicate that BCS conducted initial investigations of each and uncovered concerns with only four of the 200 complaints against Great American. According to the Parties, BCS concluded that the vast majority of the informal complaints in 2014 were sparked by spikes in variable rates related to legitimate variable rate plan changes. Furthermore, the Parties contend, BCS indicated that the quantity of inquiries related to Great American was consistent with the number of similar inquiries regarding all other energy suppliers occurring during the “polar vortex.” *Id.* at 3-4.

The Parties also explain that the four informal complaints were referred to I&E for further investigation which resulted in I&E’s determination that three of the four matters warranted inclusion in the proposed formal complaint against Great American. Accordingly, the Parties explain that the total of twenty incidences referenced in the Settlement – seventeen from Great American’s internal customer log and three from the BCS informal complaints – were for the period of 2012 through 2014. *Id.* at 4.

Regarding the request for descriptions of complaints, research conducted and actions taken by the Company, the Parties contend that the information is contained in an internal customer log which Great American had previously designated as confidential. Nonetheless, in order to comply with the *September 2016 Order*, the Company reevaluated the contents of its internal customer log and agrees to withdraw its confidential designation for the purpose of supplying the requested information. As such, the Parties attached a chart containing information pertaining to the seventeen complaints received by the Company. Supplemental Statement, Appendix A.[[6]](#footnote-6)

In their Supplemental Statement, the Parties also provide a chart detailing the three informal complaints investigated by BCS. Supplemental Statement, Appendix B.[[7]](#footnote-7)

**Discussion**

Initially, we note that any issue or argument that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally*, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements. The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004). After a review of the terms of the Settlement, we find that it is in the public interest.

The Commission has promulgated a Policy Statement at 52 Pa. Code   
§ 69.1201 that sets forth ten factors that we may consider in evaluating whether a civil penalty for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest. The Policy Statement sets forth the guidelines we use when determining whether, and to what extent, a civil penalty is warranted. In this case, application of these guidelines supports approval of the Settlement.

The first factor we may consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.” *Id*. The allegations against Great American relate to its marketing practices for EGS services in Pennsylvania. According to I&E’s investigation, the Company’s outside sales agents 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. Indeed, upon review of the supplemental investigation data, Great American described incidents in which its agents were on occasion rude or misleading or provided inaccurate information, which resulted in the cancelation of multiple customer enrollments. Supplemental Statement, Appendix A.

We have made clear that unlawful activity that threatens to harm Pennsylvania’s consumers and the burgeoning retail electricity market in Pennsylvania will not be tolerated. *Pa. PUC v. MXenergy Electric Inc.*, M-2012-2201861 (Order entered May 3, 2012) at 5. Despite the various corrective measures taken by the Company, we believe the acts alleged in the Settlement threatened harm to consumers and the EGS market in Pennsylvania and, thereby, constituted conduct of a serious nature warranting a higher penalty.

The second factor is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* There is no indication that the alleged violations resulted in personal injuries or property damage. In addition, the customers impacted by the actions of the Company’s agents do not appear to have suffered any financial harm. Accordingly, this factor does not warrant a higher penalty.

The third factor pertains to litigated cases only. 52 Pa. Code   
§ 69.1201(c)(3). Because this proceeding was settled, this factor is not applicable to this Settlement.

The fourth factor is whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered. 52 Pa. Code § 69.1201(c)(4). As outlined in the Settlement, Great American has taken numerous steps to revise its operating procedures to help prevent future unauthorized EGS marketing practices by its employees and agents. The operational improvements include various quality control measures for reviewing the actions of its third-party representatives. Settlement at 5-6. Additionally, the Company has modified its procedures as follows: hiring in-house counsel and additional compliance personnel; actively engaging outside counsel for compliance matters; instituting a revised internal compliance policy; terminating its relationship with the third-party marketer involved in the violations; contracting with a new compliant third-party marketer; and improving upon training materials for third-party marketers. *Id.* at 11. Although it is not entirely clear from the Settlement how long it took for Great American to act after receiving the complaints, we consider the Company’s corrective measures to be a significant improvement over its prior procedures. Thus, this factor supports a lower penalty.

The fifth factor is the number of customers affected and the duration of the violations. 52 Pa. Code § 69.1201(c)(5). According to the Settlement, there were twenty alleged incidents involving improper or unauthorized EGS marketing standards. Although the duration of the alleged violations occurred over an approximate two year period from 2012 to 2014, we consider the number of customers potentially impacted by the incidents to be relatively low. Accordingly, we consider this factor as supportive of a lower penalty.

We may also consider the compliance history of the regulated entity. 52 Pa. Code § 69.1201(c)(6). “An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.” *Id.*  As noted above, the genesis of I&E’s investigation was our referral in *Towne*. Other than the *Towne* proceeding, there have been no proceedings in which the Commission has made findings of violations against Great American. We determine that the Company’s compliance history has been satisfactory and poses no barrier to approval of the Settlement between the Parties.

Another factor we may consider is whether the regulated entity cooperated with the Commission’s investigation. 52 Pa. Code § 69.1201(c)(7). According to I&E, the Company fully cooperated with I&E’s investigatory process and promptly complied with requests for information and documentation associated with the customer complaints. I&E Statement in Support of Settlement at 3.

In addition, we may consider the amount of the civil penalty necessary to deter future violations as well as past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(8) and (c)(9). According to the Parties, the civil penalty of $18,000 addresses the alleged past violations while also deterring future violations. The Parties also assert that the Settlement is a fair and equitable resolution of this matter and is consistent with prior settlement agreements of a similar nature that were recently approved by the Commission.[[8]](#footnote-8) Here, the Parties explain that the monetary fine equals a payment of $900 for each of the twenty alleged violations. Supplemental Statement at 8. We find that this amount will be sufficient to deter future violations and is consistent with our prior decisions as well as the Code.

The tenth factor to consider is other “relevant factors.” 52 Pa. Code   
§ 69.1201(c)(10). We believe that it is in the public interest to settle this matter so as to avoid the expense of litigation.

For the reasons set forth above, after reviewing the terms of the Settlement, we find that approval of the Settlement is in the public interest and is consistent with the terms of our Policy Statement and our past decisions.

**Conclusion**

It is the Commission’s policy to promote settlements. 52 Pa. Code § 5.231. The Parties herein have provided the Commission with sufficient information upon which to thoroughly consider the terms of the proposed Settlement. Based on our review of the record in this case, we find that the proposed Settlement between I&E and Great American is in the public interest and merits approval. We will therefore approve the Settlement consistent with this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That the Settlement Agreement filed on March 28, 2016, between the Commission’s Bureau of Investigation and Enforcement and Great American Power, LLC is approved.

2. That, within thirty (30) days of entry of this Order, Great American Power, LLC shall pay a civil penalty in the amount of $18,000. Said payment shall be made by certified check or money order payable to “Commonwealth of Pennsylvania” and shall be sent to:

Secretary

Pennsylvania Public Utility Commission

Commonwealth Keystone Building

400 North Street

Harrisburg, PA 17120

3. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

4. That, after Great American Power, LLC remits the civil penalty as set forth in Ordering Paragraph No. 2, the Secretary’s Bureau shall mark this proceeding closed.

**** **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 20, 2017

ORDER ENTERED: April 20, 2017

1. In *Towne* we determined that the Company contacted the complainant fourteen times over a twenty-six day period despite repeated requests by the complainant to stop calling. We sustained the complaint as to the following violations: Great American’s failure to properly identify itself as an independent energy supplier, to promptly place the complainant on a do-not-call list and to provide a caller ID. We imposed a civil penalty of $10,000 and placed certain conditions on the Company’s EGS license. *Id.* at 25. [↑](#footnote-ref-1)
2. The Settlement does not provide the total number of customer disputes against the Company received and investigated by BCS. However, as discussed below, the Supplemental Statement provides additional information pertaining to the number of BCS investigations. [↑](#footnote-ref-2)
3. Great American believed that in nine of the twenty instances the sales agents did not provide prompt and courteous customer service. However, according to the Company, such actions as reflected in the recordings of the third-party verifications did not violate the Commission’s Regulations or requirements. Nonetheless, in the interest of resolving all of the matters and recognizing that it has implemented training and compliance protocols that were not in place during the investigation, the Company stated that it is willing to enter into the Settlement. *Id.* at 6-7. [↑](#footnote-ref-3)
4. The standards of conduct for EGSs provide, in part, that a “licensee is responsible for any fraudulent, deceptive or other unlawful marketing or billing acts performed by the licensee, its employes, agents or representatives.” 52 Pa. Code

   § 54.43(f). [↑](#footnote-ref-4)
5. The terms are set forth in greater detail in the Settlement at pages 9-14. [↑](#footnote-ref-5)
6. The chart contains a summary related to the date and description of each complaint and the research, results and actions taken. Additionally, the chart indicates whether in each complaint an “enroll resulted.” Supplemental Statement, Appendix A. [↑](#footnote-ref-6)
7. The chart contains detail about BCS Case Nos. 3190796 (dated February 20, 2014), 3193816 (dated February 25, 2014), and 3261079 (dated July 9, 2014). It provides a description of each case, the BCS research conducted, and the actions taken. Supplemental Statement, Appendix B. [↑](#footnote-ref-7)
8. The Parties cite to *Pa. PUC v. AP Gas & Electric (PA), LLC, d/b/a APG&E,* Docket No. M-2013-2311811 (Order entered October 17, 2013) ($43,200 for fifty-four violations); *Pa. PUC v. IDT Energy, Inc.*, Docket No. M-2013-2314312 (Order entered October 17, 2013) ($39,000 for thirty-nine violations); and *Pa. PUC v. MXenergy Electric Inc.*, M-2012-2201861 (Order entered December 5, 2013)($22,000 for twenty-two instances of slamming). Supplemental Statement at 8. [↑](#footnote-ref-8)