



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

IN REPLY PLEASE
REFER TO OUR FILE

June 6, 2019

Via Hand Delivery

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. Liberty Power Holdings, LLC
Docket No. M-2019-2568471
Joint Petition for Approval of Settlement

Dear Secretary Chiavetta:

Enclosed for paper filing is the Joint Petition for Approval of Settlement in the above-referenced proceeding as well as the following Appendices: (1) Appendix A - Proposed Ordering Paragraphs; (2) Appendix B - the Bureau of Investigation and Enforcement's Statement in Support; and (3) Appendix C - the Statement in Support of Liberty Power Holdings, LLC.

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,

Stephanie M. Wimer
Senior Prosecutor
PA Attorney ID No. 207522

Enclosure

cc: Kathryn G. Sophy, Director, OSA
Michael L. Swindler, Deputy Chief Prosecutor, I&E
As per Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JUN - 6 2019

PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND ENFORCEMENT,
Complainant

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

v.

DOCKET NO. M-2019-2568471

LIBERTY POWER HOLDINGS, LLC,
Respondent

JOINT PETITION FOR APPROVAL OF SETTLEMENT

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to 52 Pa. Code §§ 5.41, 5.232 and 3.113(b)(3), the Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") and Liberty Power Holdings, LLC ("Liberty Power" or "Company") hereby submit this Joint Petition for Approval of Settlement ("Settlement" or "Settlement Agreement") to resolve all issues related to an informal investigation initiated by I&E. I&E's investigation was initiated based on information provided by the Commission's Bureau of Consumer Services ("BCS"), which had received informal complaints from residential consumers alleging that Liberty Power enrolled their electricity accounts to receive the Company's electric generation supply without authorization. During this same time, Liberty Power had initiated its own internal investigations of the enrollments from its independent, third-party marketing vendor which ultimately lead to the termination of this vendor's contract as well as a self-reporting of the issue to the Commission's Office of Competitive Market Oversight ("OCMO"). Upon a review of the informal complaints, BCS also became concerned with pricing information presented to customers in Liberty Power's disclosure statements and other marketing materials.

As part of this Settlement Agreement, I&E and Liberty Power (hereinafter referred to collectively as the “Parties”) respectfully request that the Commission enter a Final Opinion and Order approving the Settlement, without modification. Proposed Ordering Paragraphs are attached as Appendix A. Statements in Support of the Settlement expressing the individual views of I&E and Liberty Power are attached hereto as Appendix B and Appendix C, respectively.

I. INTRODUCTION

1. The Parties to this Settlement Agreement are the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement, by its prosecuting attorneys, P.O. Box 3265, Harrisburg, PA 17105-3265, and Liberty Power Holdings, LLC with a principal place of business at 2100 West Cypress Creek Road, Fort Lauderdale, FL 33309.

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

3. I&E is the entity established to prosecute complaints against public utilities and other entities subject to the Commission’s jurisdiction pursuant to 66 Pa.C.S. § 308.2(a)(11); *See also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011) (delegating authority to initiate proceedings that are prosecutory in nature to I&E).

4. 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.

5. Section 701 of the Code, 66 Pa.C.S. § 701, authorizes the Commission, *inter alia*, to hear and determine complaints alleging a violation of any law, regulation or order that the Commission has jurisdiction to administer.

6. 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, the Commission's regulations and orders. Section 3301 allows for the imposition of a fine for each violation and each day's continuance of such violation(s).

7. Liberty Power is a licensed electric generation supplier ("EGS") as defined by 66 Pa.C.S. § 2803. On April 11, 2008, at Docket No. A-110175, Liberty Power was granted Commission approval to begin to offer, render, furnish or supply electricity or electric generation services as a generator and supplier of electric power to the public within the Commonwealth of Pennsylvania.

8. Liberty Power, as a licensed provider of electric generation supply service, is subject to the power and authority of the Commission pursuant to Sections 501 and 2809 of the Code, 66 Pa.C.S. §§ 501, 2809.

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

10. This matter involves the (actual and attempted) enrollments of residential accounts by one of Liberty Power's prior independent, third-party vendors whose contract with Liberty Power was terminated shortly after Liberty Power initiated its own internal investigation of the submitted enrollments. A review of the resulting informal consumer complaints to BCS led to an informal investigation initiated by I&E prosecutory staff based on information referred

to I&E by BCS. BCS received allegations from residential consumers alleging that their electricity accounts had been switched to receive electric generation supply provided by Liberty Power without the customers' authorizations. Such complaints caused BCS to review the Company's disclosure statements and marketing materials, in which BCS became concerned that Liberty Power was not marketing an all-inclusive price on a consistent basis. Based on this, a further investigation was conducted to examine whether the actions of Liberty Power violated Commission regulations and orders.

11. As a result of negotiations between I&E and Liberty Power, the parties have reached an agreement on an appropriate outcome to the investigation as encouraged by the Commission's policy to promote settlements. *See* 52 Pa. Code § 5.231. The duly authorized parties executing this Settlement Agreement agree to the settlement terms set forth herein and urge the Commission to approve the Settlement as submitted as being in the public interest.

II. BACKGROUND

12. Between May and June 2016, BCS received approximately six (6) informal complaints submitted by residential customers alleging that their electricity accounts had been switched to receive electric generation service supplied by Liberty Power without their authorization.

13. During this same time period, Liberty Power conducted an internal investigation of all the enrollments submitted by its independent, third-party marketing vendor Made in America Business Group ("MIB"). As a result of this internal investigation, Liberty Power terminated MIB's contract with Liberty Power, voluntarily reported the incident and Liberty Power's action plan to OCMO on July 18, 2016.

14. The informal complaints prompted BCS to review Liberty Power's disclosure statements and other marketing materials, such as Liberty Power's Door-to-Door Solicitation

Disclosures. BCS became concerned that Liberty Power was not consistently representing an all-inclusive price to residential consumers in its marketing materials. At times, Liberty Power marketed an “Energy Only Rate” on Door-to-Door Solicitation Disclosures, which did not include utility distribution and delivery charges, applicable federal, state and local taxes and charges, or the Pennsylvania gross receipts tax (“GRT”), and was lower than the Liberty Power “Price to Compare” rate, which was all-inclusive. However, both the “Energy Only Rate” and “Price to Compare” rate appeared on Liberty Power’s residential disclosure statements.

15. Based on the information averred in the informal complaints as well as BCS’s own review of Liberty Power’s marketing materials, BCS referred the matter to I&E.

16. By letter dated January 27, 2017, I&E notified Liberty Power that it had initiated an informal investigation of the Company consistent with Sections 331(a) and 506 of the Code, 66 Pa.C.S. §§ 331(a) and 506, and Section 3.113 of the Commission’s regulations, 52 Pa. Code § 3.113. I&E advised Liberty Power that its investigation would focus on Liberty Power’s compliance with Commission regulations that govern changing a customer’s EGS, and marketing and sales practices for the retail residential energy market.

17. I&E served Liberty Power with two (2) sets of data requests on May 18, 2017, and March 2, 2018, respectively.

18. Liberty Power responded to I&E’s two (2) sets of data requests on June 7, 2017, and March 29, 2018, respectively.

19. The results of I&E’s investigation, which included a review of the Company’s responses to I&E’s data requests, formed the basis for the instant Settlement Agreement.

A. Unauthorized Switching Allegations¹

20. In its responses to I&E's data requests, Liberty Power indicated that it contracted with an independent, third-party marketing company named the Made in America Business Group ("MIB") between February 2, 2016 and June 14, 2016 to solicit new customers in Pennsylvania. MIB was an exclusive sales agent for Liberty Power and does not have a license to broker electric generation supply issued by the Commission.

21. During this time period, MIB contacted 921 potential residential Pennsylvania customers and 533 of the contacted customers were enrolled by Liberty Power to receive electric generation supply provided by Liberty Power.

22. Liberty Power first became aware of a potential issue with customer enrollments submitted by MIB on June 10, 2016 following receipt of a consumer complaint, which prompted Liberty Power to conduct an internal investigation of the issue. The Company's investigation consisted of making 176 "welcome" phone calls to customers enrolled by MIB to ensure all customers were contracted accurately and that there were no miscommunications during the sales process. Out of the 176 attempted phone calls, Liberty Power was only able to successfully speak to five (5) customers, all of whom requested to cancel receiving electric generation service provided by Liberty Power.

23. On June 14, 2016, Liberty Power verbally terminated its contract with MIB, which was accompanied by the suspension of MIB's customer contracting abilities on behalf of Liberty Power. On July 26, 2016, Liberty Power issued a formal termination letter to MIB, confirming the Company's decision to finally and permanently sever its relationship with MIB.

¹ Portions of Liberty Power's responses to I&E's data requests were marked "confidential." As such, the investigative materials described herein are designed to present an overview of the material items reviewed by I&E without divulging any confidential information.

24. On July 18, 2016, Liberty Power self-reported to OCMO the incidents leading to its internal investigation of MIB as well as the corrective measures taken (and planned to be taken) by Liberty Power.

25. After the results of the “welcome” call process revealed that Liberty Power likely did not have accurate telephone contact information for the customers enrolled by MIB, Liberty Power mailed letters on August 26, 2016, to all then-currently active accounts enrolled by MIB as of that date, which totaled 270 accounts. Liberty Power’s letter explained the concern with the customers’ enrollments and urged the customers to contact Liberty Power to review their account details.

26. Following Liberty Power’s efforts to make “welcome” calls and contact customers by letter, eighty-five (85) customers requested to be dropped as customers of Liberty Power and/or complained of being “slammed.”²

27. Of these eighty-five (85) customers, fifty-six (56) customers had been enrolled with Liberty Power to receive the Company’s electric generation supply service. The accounts of the other twenty-nine (29) customers were in the process of being switched to Liberty Power, but Liberty Power terminated the order to switch prior to the time that electric generation supply from the Company would have flowed to the customers.

28. The impacted residential customers were located in the Metropolitan Edison Company, PPL Electric Utilities and PECO Energy Company service territories.

29. Following its internal investigation, Liberty Power refunded a total of \$27.64 to customers who filed Formal Complaints at the Commission. The refunds were based on a

² “Slamming” is an unauthorized change to a customer’s supply service. *EDC Customer Account Number Access Mechanism for EGSSs*, Docket No. M-2013-2355751 (Order entered April 18, 2013).

comparison of the Liberty Power electric generation supply charge versus the applicable electric distribution company's ("EDC") price-to-compare ("PTC").

30. Upon review of data requests responses provided by Liberty Power to I&E, I&E concluded that it appeared that approximately seven (7) MIB agents were involved in a scheme to enroll customers with electric generation supply provided by Liberty Power without proper customer authorizations.

31. I&E determined that MIB sales representatives fabricated documents and audio verifications to conceal that the customers, in fact, did not consent to switch to Liberty Power. Customers were often unaware that their electric generation service was in the process of being switched until receiving a confirmation letter from the customer's local EDC.

32. Liberty Power's policies, *inter alia*, prohibit slamming and require sales agents to act lawfully and in accordance with Liberty Power's Code of Conduct. MIB defied Liberty Power's policies by fraudulently obtaining "sales" that were not authorized by the customer.

33. Liberty Power has a quality assurance program where third-party verifications are reviewed and field visits are performed. During the course of Liberty Power's internal quality control program, the operations of MIB appeared to be consistent with Liberty Power's requirements. In essence, MIB's fraudulent and unlawful conduct circumvented Liberty Power's policies and procedures.

34. Although MIB and not Liberty Power caused the unauthorized enrollments, Liberty Power bears responsibility for fraudulent, deceptive or other unlawful marketing acts performed by its agent pursuant to 52 Pa. Code §§ 54.43(f) and 111.3(b).

B. Allegations Regarding Disclosure Statements and Marketing Materials

35. Prior to February 10, 2017, Liberty Power's residential disclosure statements presented two (2) prices to Pennsylvania consumers: (1) a Liberty Power "Energy Only Rate,"

which did not include utility distribution and delivery charges, applicable federal, state and local taxes and charges, or the Pennsylvania GRT; and (2) a Liberty Power PTC, which consisted of the Liberty Power “Energy Only Rate” plus the Pennsylvania GRT. The Liberty Power PTC was the rate that the Company billed to customers.

36. Neither price presentation includes the charges to be included on the customer bill by the EDC for the EDC’s non-generation related items. The only difference between the two pricing comparisons is the inclusion of the Pennsylvania GRT.

37. I&E’s investigation uncovered several instances where Liberty Power sales representatives, including agents working on behalf of the Company, only wrote or typed the “Energy Only Rate” on marketing materials that were distributed to consumers, such as the “Pennsylvania Residential Energy Door to Door Solicitation Disclosures” and the “Prospective Product Content Label.” The “Energy Only Rate” was the lower rate as it did not include an amount for the Pennsylvania GRT.

38. It is unknown to I&E how many occasions agents acting on behalf of Liberty Power advertised the lower “Energy Only Rate,” in lieu of the Liberty Power PTC, or how many residential customers received Liberty Power’s disclosure statements that contained both an “Energy Only Rate” and a Liberty Power PTC.

39. Though the number of instances in which the “Energy Only Rate” was marketed to customers is unknown, I&E avers that such conduct took place from October 2014 until February 10, 2017, when inclusion of the “Energy Only Rate” in Liberty Power’s pricing information was eliminated ensuring that Liberty Power’s enrollment and disclosure documents set forth only one price which includes all relevant components of the commodity price charged by Liberty Power to include GRT. Liberty Power also revised its documents to consistently refer to a “fixed rate,” rather than using the terms “energy only rate” and a “price to compare.”

Liberty Power made these changes upon review of the concerns stated by I&E in its January 27, 2017 letter to the Company that initiated the instant informal investigation.

40. No consumers complained to BCS regarding the inclusion of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials.

III. ALLEGED VIOLATIONS

41. Had this matter been fully litigated, I&E would have proffered evidence and legal arguments to demonstrate that Liberty Power committed the following violations:

- A. The action of Liberty Power’s agent initiated the process of switching the electric generation supplier on at least eighty-five (85) customer accounts and resulted in physically switching the electric generation supplier on fifty-six (56) of those accounts without the authorization of the customers.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code §§ 54.42(a)(9), and the Standards for Changing a Customer’s Electricity Generation Supplier at 52 Pa. Code §§ 57.171-180 (multiple counts).

- B. The presentation of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials, which is a rate that did not include the GRT and, therefore, did not represent an all-inclusive price that consumers were able to compare to the PTC that is used for default service.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code § 54.43(1) and the Commission’s Order regarding *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013) (multiple counts).

- C. The presentation of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials, which is a rate that did not include the GRT, did not reflect the prices billed for Liberty Power’s electric generation supply.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code §§ 54.4(a), 54.5(a) and 54.7(a).

42. Had this matter been litigated, Liberty Power would have denied each of the alleged violations of the Commission’s regulations, the Code or Commission’s Orders, raised defenses to each of these allegations, and defended against the same at hearing.

IV. SETTLEMENT TERMS

43. Pursuant to the Commission's policy of encouraging settlements that are reasonable and in the public interest,³ the Parties held a series of discussions that culminated in this Settlement. I&E and Liberty Power desire to: (i) terminate I&E's informal investigation; and (ii) settle this matter completely without litigation. Although Liberty Power disputes or disagrees with the allegations described above and takes the view that it proactively and reasonably took actions prior to the initiation of this investigation, it fully acknowledges the seriousness of the allegations and recognizes the need to prevent a future reoccurrences. Moreover, the Parties recognize that this is a disputed claim, and given the inherent unpredictability of the outcome of a contested proceeding, the Parties further recognize the benefits of amicably resolving the disputed issues. The terms and conditions of the Settlement, for which the Parties seek Commission approval, are set forth below.

44. I&E and Liberty Power, intending to be legally bound and for consideration given, desire to fully and finally conclude this litigation and agree that a Commission Order approving the Settlement without modification shall create the following rights and obligations:

- A. Liberty Power will pay a civil penalty in the amount of Eighty-Two Thousand Eight-Hundred Dollars (\$82,800), pursuant to 66 Pa.C.S. § 3301, to resolve all allegations of slamming and unlawful marketing, and to fully and finally settle all possible liability and claims of alleged violations of the Commission's regulations and Orders arising from, or related to, the conduct investigated herein. The civil penalty represents the following: Fifty-Six Thousand Dollars (\$56,000) for the fifty-six (56) customer accounts that were physically switched to and received electric generation supply from Liberty Power; Five Thousand Eight Hundred Dollars (\$5,800) for the twenty-nine (29) customer accounts where the process of switching to Liberty Power had been initiated but not completed; One Thousand Dollars (\$1,000) for the non-quantifiable and unknown number of customers who may have been potentially affected by the unauthorized switching conducted by Liberty Power's agent; and Twenty Thousand Dollars (\$20,000) for Liberty Power's inclusion of an "Energy Only Rate" on Liberty Power's disclosure statements and

³ See 52 Pa. Code § 5.231(a).

marketing materials. Said payment shall be made within sixty (60) days of the date of the Commission's Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the "Commonwealth of Pennsylvania" and sent to:

Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

- B. Liberty Power will provide to each of the customers, who had one or more of the fifty-six (56) accounts physically switched to Liberty Power, a refund for the entire electric generation supply portion on the customers' bills for the first two (2) billing periods that the customers were switched to Liberty Power, pursuant to 52 Pa. Code § 57.177(b). Liberty Power will issue the customer refunds within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement. Pursuant to 52 Pa. Code § 5.591, following payment of the refunds, Liberty Power will file with the Commission a verification acknowledging that all refund payments have been disbursed, satisfying this settlement provision.

45. Upon Commission approval of the Settlement in its entirety without modification and in consideration of Liberty Power's payment of a monetary civil penalty and disbursement of customer refunds, I&E agrees that its informal investigation relating to Liberty Power's conduct as described in this Settlement Agreement shall be terminated and marked closed.

46. Upon Commission approval of the Settlement in its entirety without modification, I&E will not file any complaints or initiate other action against the Company at the Commission with respect to allegations of unauthorized enrollments committed by MIB and deceptive and/or unlawful marketing practices during the time period in question. 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 subject of the allegations of I&E's informal investigation.

47. I&E and Liberty Power jointly acknowledge that approval of this Settlement Agreement is in the public interest and fully consistent with the Commission's Policy Statement for Litigated and Settled Proceedings Involving Violations of the Code and Commission Regulations, 52 Pa. Code § 69.1201. The Parties submit that the Settlement Agreement is in the public interest because it effectively addresses I&E's allegations while recognizing Liberty Power's proactive actions initiated prior to this investigation. The Settlement Agreement avoids the time and expense of litigation, which entails hearings, travel for the Company's out-of-state witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals. Attached as Appendices B and C are Statements in Support submitted by I&E and Liberty Power, respectively, setting forth the bases upon which they believe the Settlement Agreement is in the public interest.

V. CONDITIONS OF SETTLEMENT

48. 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. This Settlement Agreement shall be construed and interpreted under Pennsylvania law.

49. The Settlement is conditioned upon the Commission's approval of the terms and conditions contained in this Joint Petition for Approval of Settlement without modification. If the Commission modifies this Settlement Agreement, any party may elect to withdraw from the Settlement and may proceed with litigation and, in such event, this Settlement Agreement shall be void and of no effect. Such election to withdraw must be made in writing, filed with the Secretary of the Commission and served upon all parties within twenty (20) days after entry of an Order modifying the Settlement.

50. The Parties agree that the underlying allegations were not the subject of any hearing and that there has been no order, findings of fact or conclusions of law rendered in this proceeding. It is further understood that, by entering into this Settlement Agreement, Liberty Power has made no concession or admission of fact or law and may dispute all issues of fact and law for all purposes in all proceedings that may arise as a result of the circumstances described in the Settlement.

51. The Parties acknowledge that this Settlement Agreement reflects a compromise of competing positions and does not necessarily reflect any party's position with respect to any issues raised in this proceeding.

52. If either party should file any pleading, including comments, in response to a tentative or final order of the Commission, the other party shall have the right to file a reply.

53. This Settlement Agreement is being presented only in the context of this proceeding in an effort to resolve the proceeding in a manner that is fair and reasonable. This Settlement is presented without prejudice to any position that any of the Parties may have advanced and without prejudice to the position any of the Parties may advance in the future on the merits of the issues in future proceedings, except to the extent necessary to effectuate the terms and conditions of this Settlement Agreement. This Settlement does not preclude the Parties from taking other positions in any other proceeding.

54. The Parties arrived at the Settlement after conducting informal discovery and engaging in discussions over several months. The terms and conditions of this Settlement Agreement constitute a carefully crafted package representing reasonably negotiated compromises on the issues addressed herein. Thus, the Settlement Agreement is consistent with the Commission's rules and practices encouraging negotiated settlements set forth in 52 Pa. Code §§ 5.231 and 69.1201.

WHEREFORE, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement and Liberty Power respectfully request that the Commission enter an Order approving the terms of the Joint Petition for Approval of Settlement in their entirety as being in the public interest.

IN WITNESS WHEREOF, we have hereunto set our hands and seals on this the 6th day of June 2019.

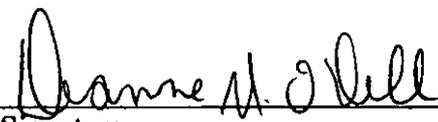
FOR THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, BUREAU OF INVESTIGATION AND ENFORCEMENT:


Signature

Senior Prosecutor
Title

June 6, 2019
Date

FOR LIBERTY POWER HOLDINGS, LLC:


Signature

Counsel for Liberty Power Holdings, Inc
Title

June 6, 2019
Date

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RECEIVED

PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND ENFORCEMENT,
Complainant

JUN - 6 2019

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

v.

DOCKET NO. M-2019-2568471

LIBERTY POWER HOLDINGS, LLC,
Respondent

PROPOSED ORDERING PARAGRAPHS

1. That the Joint Settlement Petition filed on June 6, 2019 between the Commission's Bureau of Investigation and Enforcement and Liberty Power Holdings, LLC is approved in its entirety without modification.

2. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa.C.S. § 3301, within sixty (60) days of the date this Order becomes final, Liberty Power Holdings, LLC shall pay Eighty-Two Thousand Eight-Hundred Dollars (\$82,800), which consists of the entirety of the civil penalty amount. Said payments shall be made by certified check or money order payable to "Commonwealth of Pennsylvania" and shall be sent to:

Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

3. Within thirty (30) days of the date this Order becomes final, Liberty Power Holdings, LLC shall provide to each of the customers who had one or more of the fifty-six (56) accounts physically switched to Liberty Power, a refund for the entire electric generation supply portion on the customers' bills for the first two (2) billing periods that the customers were switched to Liberty Power, pursuant to 52 Pa. Code § 57.177(b). Following payment of the

refunds, Liberty Power shall file with the Commission a verification acknowledging that all refund payments have been disbursed.

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

5. That the above-captioned matter shall be marked closed upon receipt of the civil penalty and verification indicating that all customer refunds have been disbursed.

52 Pa. Code § 3.113(a). I&E advised Liberty Power that its investigation would focus on Liberty Power's compliance with Commission regulations that govern changing a customer's electric generation supplier ("EGS"), and marketing and sales practices related to the retail residential energy market.

I&E initiated the investigation based on approximately six (6) informal complaints received by the Commission's Bureau of Consumer Services ("BCS") from residential customers who alleged that their electricity accounts had been switched to receive electric generation service supplied by Liberty Power without their authorization. The receipt of such informal complaints prompted BCS to review Liberty Power's disclosure statements and other marketing materials, such as Liberty Power's Door-to-Door Solicitation Disclosures. BCS became concerned that Liberty Power was not consistently representing an all-inclusive price to residential consumers in its marketing materials. At times, Liberty Power marketed an "Energy Only Rate" on Door-to-Door Solicitation Disclosures, which did not include the Pennsylvania gross receipts tax ("GRT"), and was lower than the all-inclusive Liberty Power "Price to Compare" rate. Both the "Energy Only Rate" and "Price to Compare" rate appeared on Liberty Power's residential disclosure documents.

I&E's investigation primarily consisted of service and review of two (2) sets of data requests to Liberty Power. With respect to the allegations of unauthorized switching, I&E's investigation determined that an independent, third-party marketing company named the Made in America Business Group ("MIB"), with whom Liberty Power contracted, enrolled or attempted to enroll residential consumers without their authorization to receive Liberty Power's electric

generation supply service.² Liberty Power contracted with MIB³ between February 2, 2016 and June 14, 2016 to solicit new customers in Pennsylvania. During this time period, MIB contacted 921 potential residential Pennsylvania customers and 533 of the contacted customers were enrolled by Liberty Power to receive electric generation supply provided by the Company.

Liberty Power first became aware of an issue with customer enrollments submitted by MIB on June 10, 2016, following receipt of a consumer complaint that prompted an internal investigation. The Company's investigation consisted of making 176 "welcome" phone calls to customers enrolled by MIB to ensure that all customers were contracted accurately and that there were no miscommunications during the sales process. Out of the 176 attempted phone calls, Liberty Power was only able to successfully speak to five (5) customers, all of whom requested to cancel receiving electric generation service provided by Liberty Power.

As the results of the "welcome" call process demonstrated that Liberty Power likely did not have accurate telephone contact information for the customers enrolled by MIB, the Company mailed letters on August 26, 2016, to all then-currently active accounts enrolled by MIB as of that date, which totaled 270 accounts. The letter explained Liberty Power's concern with the customers' enrollments and urged the customers to contact the Company to review their account details.

Following Liberty Power's efforts to make "welcome" calls and contact customers by letter, eighty-five (85) customers requested to be dropped as customers of Liberty Power and/or

² Pursuant to 52 Pa. Code § 111.3(b), a supplier is responsible for fraudulent, deceptive or other unlawful marketing acts performed by its agent.

³ MIB worked as an exclusive sales agent for Liberty Power and does not have a license to broker electric generation supply issued by the Commission.

complained of being “slammed.”⁴ Of these eighty-five (85) customers, fifty-six (56) customers had been enrolled with Liberty Power to receive the Company’s electric generation supply service. The accounts of the other twenty-nine (29) customers were in the process of being switched to Liberty Power, but the Company terminated the order to switch prior to the time that electric generation supply from Liberty Power would have flowed to the customers. The impacted residential customers were located in the Metropolitan Edison Company, PPL Electric Utilities and PECO Energy Company service territories.

Liberty Power took proactive efforts to address MIB’s slamming. On June 14, 2016, Liberty Power verbally terminated its contract with MIB, which was accompanied by the suspension of MIB’s customer contracting abilities on behalf of Liberty Power. On July 26, 2016, Liberty Power issued a formal termination letter to MIB, confirming the Company’s decision to finally and permanently sever its relationship with MIB. Liberty Power self-reported the slamming incidents to the Commission’s Office of Competitive Market Oversight (“OCMO”) on July 18, 2016. Further, Liberty Power issued refunds, albeit a nominal amount, to affected customers.

The slamming allegations led I&E to review BCS’s concerns with regard to Liberty Power’s disclosure statements and marketing materials. Prior to February 10, 2017, Liberty Power’s residential disclosure statements presented two (2) prices to Pennsylvania consumers: (1) a Liberty Power “Energy Only Rate,” which did not the Pennsylvania GRT; and (2) a Liberty Power price-to-compare (“PTC”), which consisted of the Liberty Power “Energy Only

⁴ “Slamming” is an unauthorized change to a customer’s supply service. *EDC Customer Account Number Access Mechanism for EGSSs*, Docket No. M-2013-2355751 (Order entered April 18, 2013).

Rate” plus the Pennsylvania GRT. The Liberty Power PTC was the rate that the Company billed to customers.

Additionally, I&E’s investigation uncovered several instances where Liberty Power sales representatives, including agents working on behalf of the Company, only wrote or typed the “Energy Only Rate” on marketing materials that were distributed to consumers, such as the “Pennsylvania Residential Energy Door to Door Solicitation Disclosures” and the “Prospective Product Content Label.” The “Energy Only Rate” was the lower rate as it did not consist of an all-inclusive price like the PTC.

I&E alleges that such conduct violates 52 Pa. Code §§ 54.4(a), 54.5(a) and 54.7(a) (requiring the prices billed to reflect the prices set forth in the disclosure statement), the Commission’s Order regarding *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered November 14, 2013) (providing that EGS prices should be bundled to facilitate an apples-to-apples comparison of the PTC) and 52 Pa. Code § 54.43(1) (requiring EGSs to provide information in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service).

It is unknown to I&E on how many occasions Liberty Power or agents acting on behalf of Liberty Power advertised on marketing materials the lower “Energy Only Rate,” in lieu of the Liberty Power PTC, or how many residential customers received Liberty Power’s disclosure statements that contained both an “Energy Only Rate” and a Liberty Power PTC. While the number of affected customers is unknown, I&E avers that such conduct took place from October 2014 until February 10, 2017, when inclusion of the “Energy Only Rate” in Liberty Power’s pricing information was eliminated. Liberty Power ceased marketing an “Energy Only

Rate” upon reviewing the concerns stated by I&E in its January 27, 2017 letter to the Company that initiated the instant informal investigation.

No consumers complained to BCS regarding the inclusion of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials.

On June 6, 2019, the Parties filed a Joint Settlement Petition resolving all issues between I&E and Liberty Power in the instant matter. This Statement in Support is submitted in conjunction with the Settlement Agreement.

II. THE PUBLIC INTEREST

Pursuant to the Commission’s policy of encouraging settlements that are reasonable and in the public interest, the Parties held a series of settlement discussions. These discussions culminated in this Settlement Agreement, which, once approved, will resolve all issues related to I&E’s informal investigation involving allegations that Liberty Power, or its agents, switched customers to receive electric generation service without their authorization and distributed misleading sales and marketing materials. Notably, Liberty Power promptly took actions to address the slamming allegations prior to the initiation of I&E’s investigation and the Company has since ceased marketing an “Energy Only Rate,” which was not an all-inclusive rate.

I&E intended to prove the factual allegations set forth in its investigation at hearing, to which the Company would have disputed. This Settlement Agreement results from the compromises of the Parties. Although I&E and Liberty Power may disagree with respect to I&E’s factual allegations, Liberty Power recognizes the seriousness of the allegations and commits to fully complying with the Commission’s regulations in the future.

Further, I&E recognizes that, given the inherent unpredictability of the outcome of a contested proceeding, the benefits to amicably resolving the disputed issues through settlement

outweigh the risks and expenditures of litigation. I&E submits that the Settlement constitutes a reasonable compromise of the issues presented and is in the public interest. As such, I&E respectfully requests that the Commission approve the Settlement without modification.

III. TERMS OF SETTLEMENT

Under the terms of the Settlement, I&E and Liberty Power have agreed as follows:

A. Liberty Power will pay a civil penalty in the amount of Eighty-Two Thousand Eight-Hundred Dollars (\$82,800), pursuant to 66 Pa.C.S. § 3301, to resolve all *allegations of slamming and unlawful marketing, and to fully and finally settle all possible liability and claims of alleged violations of the Commission's regulations and Orders arising from, or related to, the conduct investigated herein.* The civil penalty represents the following: Fifty-Six Thousand Dollars (\$56,000) for the fifty-six (56) customer accounts that were physically switched to and received electric generation supply from Liberty Power; Five Thousand Eight Hundred Dollars (\$5,800) for the twenty-nine (29) customer accounts where the process of switching to Liberty Power had been initiated but not completed; One Thousand Dollars (\$1,000) for the non-quantifiable and unknown number of customers who may have been potentially affected by the unauthorized switching conducted by Liberty Power's agent; and Twenty Thousand Dollars (\$20,000) for Liberty Power's inclusion of an "Energy Only Rate" on Liberty Power's disclosure statements and marketing materials. Said payment shall be made within sixty (60) days of the date of the Commission's Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the "Commonwealth of Pennsylvania" and sent to:

Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

B. Liberty Power will provide to each of the customers, who had one or more of the fifty-six (56) accounts physically switched to Liberty Power, a refund for the entire electric generation supply portion on the customers' bills for the first two (2) billing periods that the customers were switched to Liberty Power, pursuant to 52 Pa. Code § 57.177(b). Liberty Power will issue the customer refunds within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement. Pursuant to 52 Pa. Code § 5.591, following payment of the refunds, Liberty Power will file with the Commission a verification acknowledging that all refund payments have been disbursed, satisfying this settlement provision.

In consideration of Liberty Power's payment of a monetary civil penalty, I&E agrees that its informal investigation relating to Liberty Power's conduct as described in the Settlement Agreement referenced herein shall be terminated and marked closed upon approval by the Commission of the Settlement Agreement in its entirety.

Upon Commission approval of the Settlement in its entirety without modification, I&E will not file any complaints or initiate other action against Liberty Power at the Commission with respect to the unauthorized switching allegations and misleading marketing practices that are the subject of I&E's instant investigation.

IV. LEGAL STANDARD FOR SETTLEMENT AGREEMENTS

Commission policy promotes settlements. *See* 52 Pa. Code § 5.231. Settlements lessen the time and expense that the parties must expend litigating a case and, at the same time, conserve precious administrative resources. Settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. "The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a 'burden of proof' standard, as is utilized for contested matters." *Pa. Pub. Util. Comm'n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Order entered July 14, 2011) at p. 11. Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004).

I&E submits that approval of the Settlement Agreement in the above-captioned matter is consistent with the Commission's Policy Statement regarding *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* ("Policy Statement"), 52 Pa. Code § 69.1201; *See also* Joseph A. Rosi

v. Bell-Atlantic-Pennsylvania, Inc., Docket No. C-00992409 (Order entered March 16, 2000).

The Commission's Policy Statement sets forth ten factors that the Commission may consider in evaluating whether a civil penalty for violating a Commission order, regulation, or statute is appropriate, as well as whether a proposed settlement for a violation is reasonable and in the public interest. 52 Pa. Code § 69.1201.

The Commission will not apply the factors as strictly in settled cases as in litigated cases. 52 Pa. Code § 69.1201(b). While many of the same factors may still be considered, in settled cases, the parties "will be afforded flexibility in reaching amicable resolutions to complaints and other matters as long as the settlement is in the public interest." *Id.*

The first factor considers whether the conduct at issue was of a serious nature, such as willful fraud or misrepresentation, or if the conduct was less egregious, such as an administrative or technical error. Conduct of a more serious nature may warrant a higher penalty. 52 Pa. Code § 69.1201(c)(1). I&E alleges that the conduct in this matter involves the following two actions:

(1) Slamming. An independent contractor/agent of Liberty Power fabricated documents and audio verifications to create the illusion that residential customers consented to receive Liberty Power's electric generation service when, in fact, no such authorization to enroll with Liberty Power was given. The agent switched at least fifty-six (56) customer accounts, which received electric generation provided by Liberty Power, and attempted to enroll an additional twenty-nine (29) customer accounts before Liberty Power terminated the enrollment requests. It is possible that more customers may have been affected by the unauthorized switching conducted by Liberty Power's agent, but the number of additional affected customers is unknown as they did not respond to the Company's multiple efforts to contact them or file informal complaints at BCS. When Liberty Power received customer complaints about the slamming, Liberty Power

took swift action to terminate the contract with its agent, self-reported the matter to the Commission's Office of Competitive Market Oversight and conducted an internal investigation that was designed, in part, to learn the identity of the affected customers and offer them a refund.

(2) Misleading pricing information. Liberty Power presented two prices in its residential disclosure statements – a Liberty Power PTC and a Liberty Power “Energy Only Rate,” which did not include the GRT. I&E's investigation also uncovered instances where Liberty Power sales agents wrote the lower rate, the “Energy Only Rate,” on marketing materials. The Energy Only Rate is not the rate that Liberty Power billed to customers. When I&E apprised the Company of its concern that the presentation of the “Energy Only Rate” could mislead customers, Liberty Power ceased marketing the “Energy Only Rate” in all of its materials, including disclosure statements.

I&E submits that the violations averred in its investigation are of a serious nature in that they involve changing a customer's electric generation supplier without consent as well as ambiguous pricing information. Consequently, the seriousness of these violations was considered in arriving at the civil penalty in the Settlement.

The second factor considered is whether the resulting consequences of Liberty Power's alleged conduct were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty. 52 Pa. Code § 69.1201(c)(2). I&E submits that no personal injury or property damage occurred as a result of the alleged violations. Nevertheless, the consequences of the alleged violations may have resulted in customers, who received electricity from Liberty Power, being charged a more expensive rate than the local electric distribution company's PTC or the rate of another generation supplier. Liberty Power sent a limited number of refund checks to customers who

were adversely financially impacted and has agreed to fully reimburse affected customers generation charges for two (2) billing cycles as part of the Settlement. Accordingly, I&E avers that customers experienced financial consequences as a result of the actions of Liberty Power's agent and such consequences should be deemed serious.

The third factor to be considered under the Policy Statement is whether the alleged conduct was intentional or negligent. 52 Pa. Code § 69.1201(c)(3). "This factor may only be considered in evaluating litigated cases." *Id.* Whether Liberty Power's alleged conduct was intentional or negligent does not apply since this matter is being resolved by settlement of the Parties.

The fourth factor to be considered is whether the Company has made efforts to change its practices and procedures to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). In light of Liberty Power's experience with MIB, Liberty Power now audits ten percent (10%) of all contracts submitted through door-to-door third party agents to confirm that the customer telephone number being provided to Liberty Power is legitimate and connected to the name submitted for enrollment from the agent. If either of these checks indicate a problem, then the prospective customer is not submitted by Liberty Power for enrollment. Furthermore, if a trend is discovered, then Liberty Power initiates an in-depth investigation concerning the proposed enrollments. The objective of this new process is to identify fraudulent proposed enrollments and address any potential issues with agents as soon as possible.

With respect to the allegations that Liberty Power advertised misleading or confusing pricing information in its disclosure statements and other marketing materials, Liberty Power revised its enrollment and disclosure documents, effective February 10, 2017, to set forth only

one price that includes all relevant components of the generation price charged by the Company and includes the GRT.

The fifth factor to be considered relates to the number of customers affected by the Company's actions and the duration of the violations. 52 Pa. Code § 69.1201(c)(5). With regard to the slamming allegations, I&E's investigation revealed that the accounts of fifty-six (56) customers were switched to receive electric generation service provided by Liberty Power without the customers' authorization and the accounts of twenty-nine (29) customers were in the process of being switched to Liberty Power before the Company terminated the transactions. Additionally, a non-quantifiable and unknown number of customers who were not discovered by Liberty Power's internal investigation of the incident may have been potentially affected by the unauthorized switching, however, I&E is uncertain as to whether this number is significant as BCS only received six (6) informal complaints complaining of slamming. The agent responsible for the unauthorized switching, MIB, was engaged by Liberty Power between February 2, 2016 and June 14, 2016. With regard to the allegations concerning misleading or confusing pricing information, Liberty Power marketed the "Energy Only Rate" from October 2014 until February 10, 2017. The number of instances in which the "Energy Only Rate" was presented to customers is unknown and BCS received no informal complaints from consumers regarding the inclusion of the "Energy Only Rate" on Liberty Power's disclosure statements and marketing materials.

The sixth factor to be considered relates to the compliance history of Liberty Power. 52 Pa. Code § 69.1201(c)(6). An isolated incident from an otherwise compliant company may result in a lower penalty, whereas frequent, recurrent violations by a company may result in a higher penalty. *Id.* Numerous formal complaints have been filed by consumers against Liberty Power, all of which were either withdrawn, dismissed or resulted in the filing of Certificates of

Satisfaction pursuant to 52 Pa. Code § 5.24. Accordingly, no formal complaints have been sustained against the Company. Additionally, the instant matter is the first case involving an enforcement action brought against Liberty Power and is the first instance in which Liberty Power would pay a civil penalty imposed by the Commission.

The seventh factor to be considered relates to whether the Company cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). I&E submits that Liberty Power cooperated in the investigation in this matter, including cooperating in both informal discovery as well as settlement discussions.

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). I&E submits that a civil penalty amount of \$82,800, which is not tax deductible, in combination with the issuance of customer refunds, is substantial and sufficient to deter Liberty Power from committing future violations.

The ninth factor to be considered relates to past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). The Settlement Agreement between I&E and Liberty Power provides a civil penalty of \$1,000 for each of the fifty-six (56) customer accounts that were physically switched to and received electric generation supply service from Liberty Power. This per account civil penalty is identical to the \$1,000 per account penalty imposed by the Commission in previous slamming matters where a customer's account was switched and received electric generation supply service from a company without the customer's authorization. *See Pa. Pub. Util. Comm'n, Law Bureau Prosecutory Staff v. MXenergy Electric, Inc.*, Docket No. M-2012-2201861 (Order entered August 29, 2013); and *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pa. Gas &*

Electric and U.S. Gas & Electric, Inc. d/b/a Pa. Gas & Electric, Docket No. M-2013-2325122 (Order entered October 2, 2014) (hereinafter referred to as the *PaG&E Order*).

The Settlement also provides for a \$200 per account penalty for the twenty-nine (29) customers whose accounts were in the process of being switched to Liberty Power. This per account civil penalty is identical to the \$200 per account penalty imposed by the Commission in the *PaG&E Order* where the switching process had been initiated but not completed.

Moreover, I&E asserts that the agreed-upon civil penalty of \$20,000 regarding Liberty Power's marketing of an "Energy Only Rate" on the Company's disclosure statement and marketing materials is largely comparable to civil penalties imposed by the Commission in settled matters where it was alleged that deceptive marketing occurred. *See Commonwealth of Pa., et al., v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Orders entered March 9, 2016 and March 18, 2016) (Approving a settlement agreement with a civil penalty of \$25,000 to resolve allegations of misleading and deceptive representations, slamming, failing to handle complaints in good faith, failing to comply with the telemarketer registration act, failing to provide accurate pricing information and charging prices that did not conform to the disclosure statement); *Commonwealth of Pa., et al., v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Orders entered June 30, 2016 and July 8, 2016) (Approving a settlement agreement with a civil penalty of \$25,000 to resolve allegations of misleading and deceptive representations, slamming, failing to handle customer complaints in good faith, failing to provide accurate pricing information, charging prices that did not conform to the disclosure statement and failing to comply with the telemarketer registration act); *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. American Power & Gas of Pa.*, Docket No. M-2017-2508002 (Order entered June 14, 2018) (Approving a settlement agreement with a civil penalty

of \$30,000 to resolve allegations that the company used misleading sales scripts and instructions to sales agents that impeded the presentation of clear and adequate information to customers).

I&E submits that the instant Settlement Agreement should be viewed on its own merits as there are no past Commission decisions that are directly responsive to an identical situation. For example, I&E was unable to determine whether consumers experienced confusion by the inclusion of Liberty Power's "Energy Only Rate" in addition to the Company's PTC rate on disclosure statements and marketing materials as no consumers complained to BCS regarding this issue. However, in looking at the relevant factors that are comparable to other matters involving allegations of ambiguous or misleading marketing that are subject to the Commission's jurisdiction, and comparing the allegations to the relief provided in the Settlement - specifically, a civil penalty - this Settlement is consistent with past Commission actions and presents a fair and reasonable outcome.

The tenth factor considers "other relevant factors." 52 Pa. Code § 69.1201(c)(10). I&E submits that an additional relevant factor – whether the case was settled or litigated – is of pivotal importance to this Settlement Agreement. A settlement avoids the necessity for the governmental agency to prove elements of each allegation. In return, the opposing party in a settlement agrees to a lesser fine or penalty, or other remedial action. Both parties negotiate from their initial litigation positions. The fines and penalties, and other remedial actions resulting from a fully litigated proceeding are difficult to predict and can differ from those that result from a settlement. Reasonable settlement terms can represent economic and programmatic compromise while allowing the parties to move forward and to focus on implementing the agreed upon remedial actions.

In conclusion, I&E fully supports the terms and conditions of the Settlement Agreement. The terms of the Settlement Agreement reflect a carefully balanced compromise of the interests of the Parties in this proceeding. The Parties believe that approval of this Settlement Agreement is in the public interest. Acceptance of this Settlement Agreement avoids the necessity of further administrative and potential appellate proceedings at what would have been a substantial cost to the Parties.

WHEREFORE, I&E supports the Settlement Agreement as being in the public interest and respectfully requests that the Commission approve the Settlement in its entirety without modification.

Respectfully submitted,



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Dated: June 6, 2019

relates to Commission Staff's review of Liberty Power's sales and marketing materials during its review of customer complaints regarding MIB. The facts are not in dispute.

Liberty Power instituted an internal investigation after receiving four complaints from customers who were submitted for enrollment to Liberty Power through its former third-party telemarketing agent, MIB. Liberty Power's then existing quality control procedures immediately raised red flags related to these submitted enrollments causing Liberty Power to undertake further investigation of MIB. Within two months, Liberty Power terminated its relationship with MIB, reached out to all known customers enrolled through MIB, and self-reported the incident to the OCMO Staff.

Regarding the allegation of unlawful marketing, Liberty Power first became informed of Commission Staff's concerns regarding its pricing presentation on January 27, 2017. Neither Liberty Power nor the Commission received complaints from customers regarding this issue. Upon review of the January 27, 2017 letter from I&E, Liberty Power revised its disclosure statements and marketing materials consistent with the concerns identified by Staff. These revised materials became effective on February 16, 2017.

Liberty Power responded to the data requests received from I&E and engaged in good faith negotiations with I&E to amicably resolve this matter.

II. APPLICATION OF POLICY STATEMENT FACTORS

An application of the factors and standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201 shows that approval of the Settlement Petition is in the public interest.¹ These factors and standards are utilized by the Commission in determining if a proposed civil penalty is appropriate, as well as if an overall proposed settlement is reasonable

¹ The Policy Statement, which sets forth various factors and standards that are used in evaluating settled cases, is a codification of the Commission's decision in *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-00092409 (Order entered February 10, 2000).

and its approval is in the public interest.² Although the same criteria are used in the evaluation of both litigated and settled cases, they are not applied in as strict of a fashion to settled cases, and the parties in settled cases are afforded flexibility in reaching amicable resolutions to complaints as long as the settlement is in the public interest.³ An evaluation of the factors in the Policy Statement shows that the Settlement Petition is in the public interest and that it should be approved without modification. Not only does the Settlement Petition sufficiently address the issues raised in this proceeding, it avoids the uncertainty and attendant costs of litigation and permits Liberty Power to focus on its business operations to develop and offer competitive generation services to consumers in the Commonwealth.

A. Nature of Conduct

The first factor that is considered under the Policy Statement is whether the allegations were of a serious nature, such as willful fraud or misrepresentation, as opposed to administrative or technical errors.⁴ Although allegations of unauthorized switching and unlawful sales and marketing are of a serious nature, the facts present here do not evidence either willful fraud or misrepresentation on the part of Liberty Power. Rather, Liberty Power's internal processes quickly revealed a problem with an independent agent leading Liberty Power to swiftly engage in an investigation of the agent, termination of the contract with the agent, remedial action with the impacted customers and a voluntary decision to self-report the incident to OCMO staff. All of these factors support the agreed-to civil penalty.

All the consumer complaints forming the basis of this informal investigation can be traced back to the actions of Liberty Power's former third-party telemarketing sales agent who

² 52 Pa. Code § 69.1201(a).

³ 52 Pa. Code § 69.1201(b).

⁴ 52 Pa. Code § 69.1201(c)(1).

circumvented Liberty Power's policies and procedures. Settlement Petition at ¶¶30-33. For its part, Liberty Power quickly identified an issue with the requests for enrollments submitted by MIB and took proactive measures. These measures included initiating telephone calls to a portion of the enrolled customers. Settlement Petition at ¶ 22. When able to speak to only five of the 176 customers contacted, Liberty Power terminated its contract with MIB, self-reported the issues to OCMO, and mailed letters to all then-currently active accounts submitted by MIB. Settlement Petition at ¶¶ 23-26. As a result of these efforts, Liberty Power worked with eighty-five (85) customers who responded to Liberty Power's outreach to ensure that their concerns were satisfactorily addressed. Settlement Petition at ¶¶ 26-29. Because of Liberty Power's timely actions, most of the impacted customers received only one bill with Liberty Power charges. The majority of the proposed settlement (\$62,800) is intended to address the unauthorized switching allegations. Settlement Petition at ¶44. Liberty Power submits that this is a reasonable amount upon which to settle this allegation balancing the seriousness of the allegations with the lack of willful fraud or misrepresentation on the part of Liberty Power as evidenced by the swift remedial actions it took and the self-reporting to OCMO Staff.

Regarding the allegation of unlawful sales and marketing actions, no customers raised any complaints with Staff regarding a misunderstanding of Liberty Power's charges. Settlement Petition at ¶ 40. Despite this, Liberty Power changed its enrollment and disclosure documents effective February 10, 2017 – twenty days after being first informed about I&E's concerns. Settlement Petition at ¶ 39. Since that time, Liberty Power's documents set forth only one price which includes all relevant components of the commodity price charged to include GRT. Liberty Power also revised its documents to consistently refer to a "fixed rate" and is agreeing to pay \$20,000 to address the concerns raised by I&E related to this allegation. Liberty Power

submits this is a reasonable amount upon which to settle this allegation which does not involve any willful fraud or misrepresentation on the part of Liberty Power nor have any consumers raised complaints consistent with the concerns identified by I&E.

B. Nature of Consequences

The second factor that is evaluated under the Policy Statement is whether the resulting consequences of the alleged actions were of a serious nature, such as whether personal injury or property damage was involved.⁵ No allegations have been raised about personal injury or damage. As to the financial impact on customers, most of the impacted customers received only one bill for Liberty Power charges and Liberty Power is agreeing to provide a full refund for the entire electric generation supply portion on the customer's bill for the first two billing periods billed for Liberty Power charges. Although Liberty Power recognizes the seriousness of unauthorized switching, it is important to point out that Liberty Power acted swiftly to correct the actions of its former third-party telemarketing agents which minimized the financial impact.

Regarding the presentation of Liberty Power's pricing, no consumers raised complaints about Liberty Power's prior presentation; and, therefore, this mitigating factor supports the negotiated civil penalty.

C. Intentional or Negligent Conduct

The third factor identified by the Policy Statement is whether the conduct at issue was deemed intentional or negligent.⁶ While this is only considered in evaluating litigated cases, it is worth reiterating that the unauthorized switching allegations of this complaint all resulted from the actions of Liberty Power's former third-party telemarketing agent who was promptly

⁵ 52 Pa. Code § 69.1201(c)(2).

⁶ 52 Pa. Code § 69.1201(c)(3).

terminated once Liberty Power became aware of the situation. There is also no allegation that Liberty Power acted intentionally or negligently.

D. Modification of Internal Practices and Procedures

The fourth factor that is considered under the Policy Statement is whether Liberty Power has made efforts to modify its internal practices and procedures to address the allegations at issue and prevent similar conduct in the future. These modifications may include improving company techniques.⁷ As explained previously, Liberty Power's internal processes and procedures identified the unauthorized switching issue related to its former third party telemarketing agent (MIB) which led to that agent's swift termination by Liberty Power. In direct response to MIB's actions, LP instituted a new check after MIB was terminated as a sales channel. The check involves auditing 10% of the contracts submitted to confirm that the customer telephone number being provided to Liberty Power is legitimate and to confirm that the telephone number is connected to the name submitted for enrollment from the sales channel. If either of these checks indicate a problem, then the prospective customer is not submitted by Liberty Power for enrollment. If, as a result of this audit, a trend is discovered, then Liberty Power begins an in depth investigation into why it is receiving bad proposed enrollments. By adding this process improvement in light of the MIB experience, Liberty Power's objective is to spot any fraudulent proposed enrollments and address any problems with its sales partners as soon as possible.

While Liberty Power's then-existing internal processes did quickly identify a potential problem with this particular third-party vendor, the modifications made in light of the experience are intended to further improve Liberty Power's processes and, therefore, are a reasonable modification of internal processes and procedures to support the Settlement Agreement.

⁷ 52 Pa. Code § 69.1201(c) (4).

As noted above, Liberty Power addressed Commission Staff's concerns regarding its pricing presentation as soon as it was informed by I&E that the concerns existed.

E. Number of Affected Customers

The fifth factor that is evaluated under the Policy Statement is the number of customers who were affected and the duration of the alleged violations.⁸ As set forth in the Settlement Petition, MIB contacted 921 potential residential customers in Pennsylvania and, of these, 533 contacted consumers were submitted to Liberty Power to receive electric generation supply. Settlement Petition at ¶ 21. Within two months of these submissions, only 270 accounts were still actively enrolled with Liberty Power. Settlement Petition at ¶ 25. After reaching out to these accounts, Liberty Power was contacted by eighty-five (85) customers. Settlement Petition at ¶ 26. Of these 85 customers, fifty-six (56) of them had been enrolled with Liberty Power at that time. The enrollments were in process for the other twenty-nine (29) consumers but were successfully canceled so that no electric generation supply from Liberty Power was ever billed to these consumers. Settlement Petition at ¶ 27. When the affected customers are compared to the total number of residential customers in Pennsylvania,⁹ or to the total number of residential customers shopping for electricity in Pennsylvania,¹⁰ the number of affected customers is a fraction of either number.

Regarding the concerns about Liberty Power's pricing presentation, no complaints were received from consumers expressing confusion or a misunderstanding. Settlement Petition at ¶ 40. As such, while the number of potentially affected customers is unknown, the fact that no

⁸ 52 Pa. Code § 69.1201(c) (5).

⁹ As of April 2019, Pennsylvania has 5,134,732 total residential electric customers. <http://www.papowerswitch.com/sites/default/files/PAPowerSwitch-Stats.pdf>

¹⁰ As of April 2019, 1,553,245 of Pennsylvania residential electric customers are purchasing supply from EGSSs. <http://www.papowerswitch.com/sites/default/files/PAPowerSwitch-Stats.pdf>

complaints have been received supports a view that no significant number of consumers were negatively impacted.

Liberty Power submits that this factor, especially when viewed in conjunction with other factors including Liberty Power's proactive actions and the fact that the complaints all stem from the behavior of one of Liberty Power's former third-party marketing agents supports the negotiated civil penalty.

F. Compliance History

The sixth factor is the compliance history of Liberty Power.¹¹ Liberty Power has been a licensed EGS for ten years and takes its responsibilities to customers and the Commission seriously. This is evidenced by Liberty Power's swift action to identify the issue with its third-party agent, to take proactive measures and to voluntarily self-report the incident to OCMO Staff. Further support for Liberty Power's serious commitment to regulatory compliance is the fact that within twenty days of being notified by I&E about concerns related to Liberty Power's pricing presentations, Liberty Power revised its documents and practices. Liberty Power was also fully cooperative with I&E during the course of this informal investigation and negotiated in good faith the amicable resolution that is set forth in the Settlement Petition. Liberty Power's compliance record and actions in this investigation weigh in favor adopting the Settlement Petition without modification.

G. Cooperation with Investigation

The seventh factor that is considered under the Policy Statement is whether Liberty Power cooperated with the Commission's informal investigation.¹² As noted in the Settlement Petition, Liberty Power cooperated with I&E during the investigation. Settlement Petition at

¹¹ 52 Pa. Code § 69.1201(c) (6).

¹² 52 Pa. Code § 69.1201(c) (7).

¶¶17 and 18. This cooperation included immediately revising Liberty Power's pricing presentation to consumers, engaging in the informal discovery process and negotiating an amicable resolution of the investigation in good faith.

H. Amount of Civil Penalty

The eighth factor that is evaluated under the Policy Statement is the amount of civil penalty that is necessary to deter future violations.¹³ Liberty Power submits that the civil penalty of \$82,800 reasonably recognizes the seriousness of the unauthorized switching allegations while offering an appropriate deterrence for future violations. Also, Liberty Power proactively and voluntarily took action to investigate its former third-party telemarketing agent, to reach out to customers and to self-report the incident to OCMO. Liberty Power also immediately revised its pricing presentations to customers upon initial notification from I&E that Staff was concerned about its then-existing documents. Liberty Power did not wait for the Commission to order modifications to its business practices before promptly changing its internal procedures to avoid a recurrence of the situation that lead to the unauthorized switching in this proceeding. There is no particular reason based on the facts in this case to increase the agreed-to civil penalty to deter future violations. On the contrary, given Liberty Power's self-reporting to OCMO, increasing the agreed-to civil penalty could have the negative effect of discouraging other EGSs from self-reporting similar incidents in the future.

I. Past Commission Decisions in Similar Situations

The ninth factor is consideration of Commission decisions in similar situations.¹⁴ Recently approved settlement agreements regarding informal investigations initiated by I&E support adoption of the Settlement Petition. For example, the Commission recently increased the

¹³ 52 Pa. Code § 69.1201(c) (8).

¹⁴ 52 Pa. Code § 69.1201(c) (9).

proposed civil penalty negotiated between Vista Energy Marketing, L.P. (“Vista”) and I&E, in part, on the basis that Vista made the business decision to temporarily authorize personnel to market door-to-door without fully completing criminal background reviews.¹⁵ According to the Commission, the proposed civil penalty of \$37,500 was not sufficient to deter future violations and did not send a proper signal to the Commonwealth’s marketplace about the importance of the Commission’s background check regulations.¹⁶ Based on this, the Commission increased the civil penalty to \$52,700 which represents a per violation fine amount of \$425 applied to each of the 124 violations.¹⁷

Here, Liberty Power did not act with intent to engage in unauthorized switching. On the contrary, Liberty Power immediately addressed the situation with its third-party vendor as soon as possible and voluntarily self-reported the incident to Commission Staff. Moreover, the proposed civil penalty equates to \$1,000 per violation for each of the customer accounts physically switched to electric generation service from Liberty Power in addition to another \$7,800 to cover accounts that were not switched. Settlement Petition at ¶44(A).

In another recent case involving allegations of unauthorized switching, the Commission recognized that although multiple violations were associated with the actions of an EGS’s rogue door-to-door agent (to include a fraudulent third-party verification recording), the mitigating actions of the EGS to promptly identify the agent, to sever business relations with him, and to issue a refund to the customer supported a civil penalty of \$6,000.¹⁸

¹⁵ *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Vista Energy Marketing, L.P.* Docket No. M-2018-2624484, Opinion and Order entered March 14, 2019 at 12.

¹⁶ *Id.* at 16

¹⁷ *Id.*

¹⁸ *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Residents Energy, LLC*, Docket No. M-2017-2551372, Opinion and Order entered July 12, 2018 at 11.

Here, Liberty Power similarly took swift, proactive measures to identify the issues related to MIB, mitigate customer impact and self-report the incident to OCMO Staff. Also important to note is that MIB only enrolled customers via telemarketing. As such the issues in this case do not involve door-to-door marketing. This, in combination with the fact that the civil penalty proposes a fine of \$1,000 for each known unauthorized switch where service did flow, supports adoption of the proposed civil penalty as set forth in the Settlement Agreement.

J. Other Relevant Factors

The tenth factor invites evaluation of “other relevant factors.”¹⁹ As discussed more fully in previous sections, a unique fact in this case which supports approval of the negotiated civil penalty is Liberty Power’s voluntary decision to self-report the incident involving its independent third-party telemarketing agent to Commission Staff in a timely manner. Liberty Power initiated the discussion with OCMO, provided Staff with full information about what it was uncovering in its internal investigation and discussed its going-forward plan to remediate the situation. While the Commission has considered the cooperation of suppliers in other complaint actions, none of those cases to date appear to involve the voluntary self-reporting to OCMO by the supplier. Liberty Power urges the Commission to give this fact significant weight so as to positively incent future EGSs to self-report incidents.

Coupled with the decision to self-report the incident is Liberty Power’s decision to immediately revise its customer facing documents when it was first informed by I&E that Staff had concerns about the presentation of Liberty Power’s pricing to consumers. While Liberty Power presented two rates to consumers – one that factored in an estimate for GRT and one that

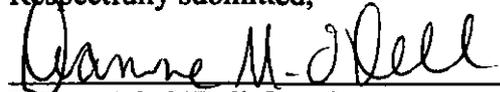
¹⁹ 52 Pa. Code § 69.1201(c) (10).

did not – Liberty Power acknowledged the potential confusion two pricing presentations could cause and immediately revised its written material to display only the Liberty Power fixed rate.

III. CONCLUSION

The agreement of Liberty Power pursuant to the Settlement Petition to pay Eighty-Two Thousand Eight-Hundred Dollars (\$82,800) and issue customer refunds sufficiently addresses the issues raised in this proceeding and recognizes the proactive measures taken by Liberty Power both before and after initiation of I&E's informal investigation. As such Liberty Power respectfully requests that the Commission approve the Settlement Petition without modification.

Respectfully submitted,



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Dated: June 6, 2019

Counsel for Liberty Power Holdings, LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY
COMMISSION, BUREAU OF
INVESTIGATION AND ENFORCEMENT,
Complainant

v.

LIBERTY POWER HOLDINGS, LLC,
Respondent

DOCKET NO. M-2019-2568471

CERTIFICATE OF SERVICE

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

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PA PUBLIC UTILITY COMMISSION
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