

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William Towne

v.

Great American Power, LLC
(referred to as "GAP")

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C-2012-2307991

Main Brief

Respectfully filed by William Towne

December 5, 2012

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Summary

This brief describes aggressive, deceptive, and illegal telemarketing practices used by Great American Power as a primary source of obtaining new customers. It cites the specific regulations that were violated and describes how they were violated, and requests enforcement actions by the PUC. Ten specific areas are cited, each with a summarizing title.

Primary Authorities

The primary authorities cited include:

- 15 USC Chapter 87 Telemarketing and Consumer Fraud and Abuse Prevention Act
- 16 CFR Part 310 Telemarketing Sales Rule (TSR)
- PA Title 73 P.S. Chapter 4 § 201 Unfair Trade Practices and Consumer Protection Law
- PA Title 73 P.S. Chapter 40 Telemarketer Registration Act
- PA Code Title 52 Public Utilities [various selections]
- PA PUC Office of Competitive Market Oversight orders and regulations, especially dockets:
 - M-2009-2082042
 - M-2010-2185981 (incorporating the federal authorities noted above in Guideline H2)
 - L-2010-2208332

Where these authorities are directly quoted, the quotes are in italics. Some quotes have been shortened for readability purposes, e. g. removing “or donor” from the phrase “customer or donor” common in telemarketing regulations. Where bold emphasis is present, it has generally been added to improve readability. Text in [brackets] within quotes indicates context-implied meaning; text in [brackets] before or after a quote or assertion indicates source(s). I have generally adopted familiar scientific style standards placing closing punctuation after source citations.

In many places, the regulations are presented through the interpretation of the agency which authored them even though it is the original regulations that are authoritative, to provide guidance from the authors and interpreters on how the regulations should be applied and interpreted.

PUC Regulatory Background

In Docket M-2009-2082042, the PUC issued a Secretarial Letter¹ in response to customer concerns about the use of independent marketing contractors for electric generation. The letter clarified that Electric Generation Suppliers (EGSs) must be licensed by the PUC and may not engage in marketing prior to being licensed. Third party marketing service providers working directly for a particular EGS under contract are not required to be licensed separately. However, the letter notes that:

EGSs are reminded of their responsibility for any fraudulent, deceptive or other unlawful marketing or billing acts performed by their employees, agents or representatives. See 52 Pa. Code §54.43. For instance, if an independent marketing services provider under contract with the EGS misrepresents an offer to a consumer or uses deceptive practices to attract the customer to the EGS, the Commission will hold the EGS responsible. Such actions of the third party marketing services provider could result in the imposition of civil penalties on EGSs, including fines, license suspension or license revocation.

In Docket M-2010-2185981, the PUC followed up on this secretarial letter, issuing Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, with a final order on November 4, 2010. These guidelines were developed in response to consumer concerns about unfamiliar and direct marketing strategies and sales techniques, after in-depth consultation with representatives from industry groups and consumer advocates. The guidelines were drafted to apply “to EGSs and to any person or entity that would be conducting marketing or sales activities, or both, on a supplier’s behalf” (final order, p. 4). Annex A of the Final Order² details the guidelines.

Guideline A notes the following:

Everyone should use good judgment to avoid any practices that may appear to be overly intimidating or aggressive, and suppliers should have policies in place to prevent such practices.

....Section 54.43(f) of the EGS licensing requirements states that the supplier is responsible for “any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives.” See 52 Pa. Code § 54.43(f) (standards of conduct for licensees). Section 62.102 of the NGS licensing regulations has similar language. See 52 Pa. Code § 62.102 (d) & (e) (scope of licensure) and § 62.114(e) (standards of conduct for licensees).

Guideline C requires that:

Suppliers shall ensure, and maintain appropriate documentation indicating, that the training of their marketing agents or sales agents includes:

- a. Knowledge and awareness of applicable Pennsylvania laws and regulations governing marketing, consumer protection and door-to-door sales.*
- b. Knowledge and understanding of responsible and ethical sales practices.*

¹ <http://www.puc.state.pa.us/pcdocs/1062483.docx>; quoted paragraph is on p. 2.

² <http://www.puc.state.pa.us/pcdocs/1101235.docx>

- c. Knowledge of the supplier's products and services.
- d. Knowledge of supplier's rates, rate structures and payment options.
- g. Knowledge of and adherence to supplier-developed scripts.
- h. Knowledge on the proper completion of contract and enrollment documents.
- i. Knowledge of the supplier's disclosure statement.
- j. Knowledge of relevant terms and definitions.
- k. Knowledge of how customers may contact the supplier to obtain information about billing, disputes, and complaints.

Guideline E notes:

When developing internal agent discipline policies, all parties should be aware of the Commission's long-standing "zero-tolerance" policy concerning "slamming" and related customer-enrollment issues. The Commission has penalized companies that engage in inappropriate practices and has made it clear that such practices will not be tolerated. For example, in Pennsylvania Public Utility Commission v. Total Gas & Electric Inc., Order entered September 26, 2001 at Docket No. M-00011529 at page 5, the Commission declared that: [t]he Commission does not trivialize allegations of unauthorized enrollment of customers, or "slamming", and seeks to deter such conduct by instituting firm retaliatory measures for violations of the Commission's regulations with respect to enrollment of customers. Section 3301 of the Public Utility Code provides for penalties of \$ 1000.00 per violation per day for any infraction of the rules and regulations of the Commission. See 66 Pa.C.S. § 3301 (relating to civil penalties for violations). All parties should also be aware of the Commission's Policy Statement on Factors and Standards for Evaluating Litigated and Settled Proceedings at 52 Pa. Code § 69.1202. This policy statement explains how the Commission will calculate and apply penalties, taking into account mitigating and aggravating factors, to address violations of the Public Utility Code, and Commission regulations, directives and orders. Suppliers should also be aware that, consistent with due process, the Commission can suspend or revoke a supplier's license for violations of applicable provisions of the Public Utility Code and other consumer protection law, applicable Commission regulations, and orders pursuant to 52 Pa. Code § 54.42 and § 62.113 (relating to license suspension; license revocation).

Descriptive text on page 6 of the order highlighted the intention of these guidelines "to prevent, and failing that, help document the unauthorized transfer of a customer's account, i.e., slamming. Sections 2206 (b) and 2807(d)(1) of the Public Utility Code, 66 Pa. C.S. § 2206(b) & § 2807(d)(1), specifically prohibit this activity."

Guideline F-5 and G on misrepresentation:

A supplier shall not use bills, company name, marketing materials or consumer education materials of another supplier, distribution company, or government agency in any way that implies a relationship that does not exist [emphasis original].

G. MISREPRESENTATION

1. ... *The agent shall also make clear that he or she is not working for, and is in fact independent of the local distribution company or another supplier. ...*
2. *Agents of a supplier that is an affiliate of a distribution company shall comply with the rules regarding affiliate marketing at 52 Pa. Code § 54.122 (relating to the code of conduct) and at 52 Pa. Code § 62.142 (relating to the standards of conduct). ...*
4. *A supplier is responsible for any fraudulent deceptive or other unlawful marketing or sales performed by its employees, contractors, agents or representatives. See 52 Pa. Code § 54.43(f) and § 62.114 (e) (relating to standards of conduct and disclosure for licensees).*

Guideline H “FEDERAL LAW/CONSUMER PROTECTION” and guideline M-2(a) specifically incorporate federal consumer protection laws, specifically citing the Telemarketing and Consumer Fraud and Abuse Prevention Act and Telemarketing Sales Rule. Also relevant here are 16 CFR § 310.7 and 15 USC § 6103 which grant enforcement authority over these rules to “*officers of a State who are authorized by the State to bring actions on behalf of its residents.*” (See also Exhibit 8 p. 89 regarding enforcement of the Telemarketing Sales Rule and http://transition.fcc.gov/eb/News_Releases/DOC-239488A1.html). The PUC can and should assert these regulations on behalf of PA residents.

Guideline I, “STATE LAWS / OAG / CONSUMER PROTECTION,” and guideline M-2(a) specifically incorporate state consumer protection law. Part 2 specifically affirms that “*An agent, representative, independent contractor or vendor shall follow all provisions of the Telemarketer Registration Act, including being registered as a telemarketer.*” According to Guideline K, the Commission and local suppliers shall also be notified of marketing activities before they take place. Guideline M-3 specifically incorporates sections of PA Code Title 52.

Guideline M-2 states that

Suppliers shall:

- a. Not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order;*
- b. Not make false or misleading representations including misrepresenting rates or savings offered by the supplier;*
- c. Provide the customer with written information about the products and services being offered, upon request, or with contact information (phone number, website address, etc.) at which information can be obtained.*
- d. Provide accurate and timely information about services and products being offered. Such information shall include information about the rates being offered, contract terms, early termination fees and right of cancellation and rescission.*

Guideline P describes a process by which suppliers are supposed to respond to consumer complaints with an effective internal system. It also notes that

Suppliers ... shall cooperate with the relevant agencies regarding complaints about marketing or sales practices prohibited by the Commonwealth and with local law enforcement officials in investigations concerning deceptive marketing or sales practices.

A proposed rulemaking order based on these guidelines was published Feb. 10, 2011³ in docket L-2010-2208332. After comments were received and considered, the rules were finalized on October 24, 2012⁴. The order (p. 8, echoed on page 18) notes that

The Commission is confident that it can effectively act upon information received through a variety of channels and enforce these regulations. All market participants are put on notice that the Commission will use these resources to aggressively enforce these regulations in the public interest - to safeguard public safety and ensure fairness for all. We also take this opportunity to remind suppliers of their obligation to respect all federal, state and local laws related to sales and marketing and to note that nothing in these regulations is intended to vacate or supersede any other existing federal, state or local requirement.

Page 19 of the order notes:

The Public Utility Code at 66 Pa.C.S. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code...66 Pa.C.S. § 3301 authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation subject to the Commission's authority for violations of the Code or Commission regulations or both. Section 3301 further allows for the imposition of a separate fine for each violation and each day's continuance of such violation(s).

52 Pa. Code §54.43(g) requires that “a licensee shall comply with relevant Commission regulations, orders and directives that may be adopted.” The Commission has issued directives regarding telemarketing practices in a competitive supply market. These directives specifically incorporate state and federal laws. Though they have changed in status between the start of this case and the briefing order, GAP’s telemarketing campaigns took place continuing both before and after key landmarks in guideline revision and formalization.

It is a key part of the PUC’s stated mission to “to protect the public interest and enable consumers to make independent and informed utility choices.” This brief requests that the Commission take such appropriate enforcement action.

³ <http://www.puc.pa.gov/pcdocs/1121422.doc>

⁴ <http://www.puc.pa.gov/pcdocs/1196732.docx>

Summary of Case-Specific Background Details

William Towne is a residential customer of Duquesne Light who has chosen to remain with Duquesne Light for the supply portion of his electric bill, while realizing that other choices are available.

On March 10, 2012, Mr. Towne received a letter from Duquesne Light [*Exhibit 3*] with information about a new option (“You now have the right to withhold...”) that would restrict Duquesne Light from sharing customer information including name, billing and service addresses, account number, and usage data with competitive suppliers. The letter noted that “customer telephone numbers will never be released by Duquesne Light.” Withholding the information required completing and returning an enclosed form, which was done immediately. Duquesne Light confirms that they received the form (“request to restrict your contact information from alternate Electric Generation Suppliers”) on March 14, 2012 [*Exhibit 4*].

More than three full months later, Great American Power[’s telemarketing representatives] began repeatedly calling Mr. Towne to make sales solicitations. These continued at a rate of up to four per day and did not stop after repeated requests to not be called any more. Many of the calls were abandoned after a few rings, producing “your caller just hung up” errors in the Google Voice call system where Mr. Towne’s account phone number is registered.

When the calls did connect, sales representatives used illegal and deceptive telemarketing tactics described in greater detail below. For example, they misrepresented their affiliation with Duquesne Light. They failed to obtain express informed consent before telling customers they had been switched to using GAP as their electricity supplier (after which point a customer would need to take special opt-out action to not be a GAP customer), failing to meet the legal requirements of informed consent and failing to meet the legal requirements of express consent (or even the basic ethical requirement of asking a customer if they wanted to switch). They omitted or in some cases misrepresented materially important information.

As GAP CEO Ginger Lucas testified to at hearing, GAP’s telemarketing campaigns continue, at about half the rate they were going during the period when the presented calls were placed, with the same tactics.

William Towne is a customer of Google Voice, a telephony service that provides a local (e. g. Pittsburgh) number that can be forwarded to other devices; Mr. Towne’s uses the Google Voice number routed to or from his cell phone as a primary telephone. Google Voice also has a recording feature for incoming calls that includes an automated verbal announcement for legal compliance purposes, announcing “This call is now being recorded” at the beginning of each recording. Google Voice also stores a record of calls that an account owner can search through and view over a Web interface.

GAP is a LLC headquartered in Kennesaw, GA, led by CEO Ginger Lucas, who testified that the primary business activities started in Spring 2011.

Primary Issues

This section describes the primary issues of the complaint, in the order they were presented at hearing. Uses of the first person refer to William Towne.

Issue 1: Getting the phone number and account information without permission

Background for this issue begins above with the letter [*Exhibit 3*] from Duquesne Light offering to withhold customer information including name, billing and service addresses, account number, and usage data from competitive suppliers. The letter also notes that "whatever you decide...customer telephone numbers will never be released by Duquesne Light." The withholding request was completed and returned immediately upon receipt, and received by Duquesne Light on March 14, 2012 [*Exhibit 4*].

GAP has presented exhibit R-3 containing my information, which they claim to have obtained on March 28 and not refreshed. Just as the state and federal do-not-call lists require companies to periodically get new copies of the list to reflect updated privacy preferences, a greater-than-90-day window seems inappropriately long for electric customer data privacy preferences to take effect. From a customer perspective, this is an explicit request to not share this information with suppliers, followed more than three months later by sales calls from a supplier like GAP citing that specific information, which it apparently (from a customer perspective) should not have legally obtained.

52 Pa. Code §54.43(d) states that "A licensee shall maintain the confidentiality of a consumer's personal information including the name, address and telephone number, and historic payment information;" this confidentiality especially when explicitly requested in writing is a consumer's reasonable expectation. GAP should not have received my account number, address, usage information, etc. and they also should have not received my phone number. Duquesne Light asserts in the letter [*Exhibit 3*] and in a press release [*Exhibit 5*] that they do not release customer phone numbers, and they report general compliance with PA code.

The recording presented from June 13, which followed eService and so began the discovery process, includes a recording of call center supervisor Garrett claiming that GAP got my phone number from Duquesne Light. The customer perspective here includes Duquesne asserting that they do not release customer phone numbers multiple times, juxtaposed with GAP telling me they got the phone number from Duquesne, apparently illegally. There are laws prohibiting access to restricted information (*e. g. see FTC guide/Exhibit 8 p. 80*) which may apply here. GAP has also refused to clearly state where they obtained where they got my phone number, beyond the assertion of the call center supervisor that they obtained it from Duquesne Light. Atty. Julius' made a conflicting assertion at hearing that the recorded call center manager was wrong, and that other call center managers purchase number listings from undisclosed "lead brokers."

Issue 2: Continuing to call after I've requested they don't

GAP telemarketing representatives continued to call, several times, after they had been asked to stop. Phone records presented at hearing [*Exhibit 6*] show fourteen calls, the first at 5/18/12 4:08pm and the last at 6/13/12 2:50pm. These are at a rate of up to three or four per day, some pairs of calls spaced by

less than two hours. In each of the calls that connected, I asked not to be called back, or (in a later call) made it explicitly clear that I did not wish to change my power provider. Under the law, requests to cease sales calls should be effective immediately, across all call centers for the same or closely related business, though GAP's behavior and testimony revealed that it believes and holds policy otherwise. The early short calls are visible in the record [*Exhibit 6*], for example, on 5/18 and 5/22. GAP has repeatedly refused to disclose the list of outgoing numbers used in GAP telemarketing, objecting, "for their own purposes." Therefore, this call record may be incomplete.

Calls continued, most of them abandoned (Issue 3 below). On 5/24 there were four calls in one day, two of them abandoned. In both of the calls that connected when I answered, I made it clear that I did NOT want to change my power supplier and did not wish to be contacted anymore. After I received the third and fourth calls, only a few hours after I had just told them that I was not interested, I wrote up my complaint, and sent it the next day [*Evidence: Date on filing*].

Time passed. On June 5 I received the eServe notice that a formal complaint had been served in this proceeding about GAP's telemarketing practices [*Evidence on eFiling server and e-mail*]. **More than a week after that**, on June 13, I received another sales call, from **the same representative** who was on an earlier recording when I said I was definitely not interested, which was followed mere hours later by another sales call in which I made it painfully clear that I did not want to be called. It is obvious that GAP was **not** respecting my wish to be left in peace.

The PUC's policy strongly supports starting the discovery process as soon as possible. I began the discovery process in that sales call, and also restated some of the issues that are part of my complaint, communicating the message directly to the call center representatives who I spoke with.

From a customer perspective, I perceive repeated calls after I've said I don't want them, as well as multiple abandoned calls, to be harassment, under the legal definition of harassment in the state of NH where I grew up, although PA's laws create a narrower definition and are not specifically alleged here.

With regards to telemarketing, the analogous federal regulatory body is the FCC, and the FCC's rules apply to both interstate and intrastate calling [*Exhibit 8, p. 11*]. The FCC refers consumers to their state counterparts (including the PA PUC) through the National Association of Regulatory Utility Commissioners, especially for any issues that may have state-specific considerations such as marketing practices around electric deregulation. The FCC has also specifically delegated authority to take action under its regulations to State officers who are authorized to act on behalf of the State's residents [15 USC § 6103; CFR T16 § 310.7]. The FTC has done the same with their Telemarketing Sales Rule (TSR) [*Exhibit 8 p. 89*].

The FCC has prepared a concise sheet summarizing rules regarding unwanted telemarketing calls [*Exhibit 7*], and the FTC has prepared a guide to businesses for complying with the law [*Exhibit 8*]. Provisions of the Telemarketing Sales Rule "require disclosures of specific information, prohibit misrepresentations, require transmission of Caller ID information, prohibit abandoned outbound calls," have certain provisions regarding consent, and "prohibit calling a person who has asked not to get telemarketing calls from a particular company." among others. Exhibit 8 spells out that "It is a Rule

*violation to call any consumer who has asked not to be called again (the “entity-specific Do Not Call” provision). A telemarketer may not call a consumer who previously has asked not to receive any more calls from or on behalf of a particular seller. It also is a Rule violation for a seller who has been asked by a consumer not to call again to cause a telemarketer to call that consumer. Calling a consumer who has asked not to be called potentially exposes a seller and telemarketer to a civil penalty of \$16,000 **per violation**” [Exhibit 8 p. 50-51; see also 62, 90].*

“It is a Rule violation to deny or interfere with someone’s right to be placed on the National Do Not Call Registry or on any entity-specific Do Not Call list. This provision prohibits a telemarketer from refusing to accept a consumer’s entity-specific Do Not Call request, whether by hanging up the telephone when the consumer asserts the request... or simply failing to diligently capture information about a consumer’s Do Not Call request and add it to the appropriate entity-specific Do Not Call list” [Exhibit 8 p. 66].

*“The original rules also ... **require telemarketers to comply with any do-not-call request** you make directly to the caller during a solicitation call. ... Whether or not your home phone number or numbers are registered on the national Do-Not-Call list, the FCC requires a person or entity placing voice telephone solicitations to your home to maintain a record of your direct request to that caller not to receive future telephone solicitations from that person or entity. The calling company must honor your do-not-call request for five years... **Your request should also stop calls from affiliated entities** if you would reasonably expect them to be included, given the identification of the caller and the product being advertised [Exhibit 7 p. 1-2]. GAP fails to comply with do-not-call requests made directly to the caller during a solicitation call. With regard to the latter bolded segment, GAP asserts that the two numbers tied to it in this case belong to different telemarketing contractors. One would reasonably expect all of GAP’s telemarketing contractors to be included in a do not call request. GAP could easily meet the affiliated entities requirement without adding communication overhead between call centers by dividing its call list into mutually exclusive sets of customers sent to each call center, but it has chosen not to do so, just as it chose to ignore customer wishes to not be called back after an unsuccessful sale, or called at all in the first place.*

The specific rule CFR T16 § 310.4 (b) (1) states that “It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, **or for a seller to cause a telemarketer to engage in**, the following conduct: [CFR T16 § 310.4 (b) (1) (iii)] Initiating any outbound telephone call to a person when [CFR T16 § 310.4 (b) (1) (iii) (A)] **That person previously has stated that he or she does not wish to receive an outbound telephone call** made by or on behalf of the seller whose goods or services are being offered.

GAP has violated these rules and called me repeatedly even after requesting no further contact. Evidence of this includes phone records and recordings, and GAP’s own admission.

Issue 3: Abandoned calls

GAP regularly abandoned calls, where as soon as I pick up I am informed that the caller has just hung up, or receive a dead line [Exhibit 6]. The law prohibits this. As GAP testified to in the hearing, it does not even keep sufficient records or required practices (like playing a recorded message appropriately

indicating source of the call) to fall into the safe harbor provisions, nor are their abandonment rates low enough for this exclusion even if it did apply.

The FCC fact sheet [Exhibit 7] states that *“Telemarketers must ensure that dialers abandon no more than three percent of all calls placed and answered by a person. A call will be considered “abandoned” if it is not transferred to a live sales agent within two seconds of the recipient’s greeting.”* Exhibit 8 p. 67 (by the FTC) concurs. The specific rules referred to there include CFR T16 § 310.4 (b) (1), which states that *“It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct: [CFR T16 § 310.4 (b) (1) (iv)] **Abandoning any outbound telephone call.** An outbound telephone call is “abandoned” under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.”*

CFR T16 § 310.4 (b) (4) provides the slight exception, which even GAP does not fall into, because it only applies if less than 3% of calls answered by a person are abandoned, if for each call the seller allows the phone to ring at least 15 seconds or 4 rings before disconnection, **and** a recording stating the name and phone number plays if a salesperson isn’t available, **and** records are kept about this. *“That recorded message must not contain a sales pitch and the number must be one to which a consumer can call to place an entity specific Do Not Call request”* [-FTC guide/Exhibit 8 p. 68].

Well over 3% of GAP’s calls are abandoned – Exhibit 6 shows it to be well over 50% in my case, for example. The dialers don’t wait long enough, they don’t have a message telling you who is calling, and they don’t keep records of this, as admitted in Exhibit 1 (II)(3) and (IV)(7c), stating that the information “has not been tracked.” GAP has violated the rules about abandoned calls.

Issue 4: Bad Caller ID

GAP failed to transmit valid information on the caller ID which one could call back to know the identity of the caller and request that calls stop. Telemarketers also do not provide GAP’s phone number during the call, as required, and as evidenced by recordings.

“It is a violation of the Telemarketing Sales Rule to fail to transmit or cause to be transmitted the telephone number, and, when available by the telemarketer’s telephone company, the name of the telemarketer to any consumer’s caller identification service” [-FTC guide/Exhibit 8 p. 79].

*The Federal Communications Commission (FCC) adopted rules that require anyone making a telephone solicitation call to your home to provide his or her name, the name of the person or entity on whose behalf the call is being made, **and a telephone number or address at which that person or entity can be contacted*** [-FCC/Exhibit 7 p.1]. GAP’s telemarketers do not provide this information about how to contact GAP.

*If you have caller ID, a telemarketer is required to transmit or display its phone number and, if available, its name or the name and phone number of the company for which it is selling products. **The display must include a phone number that you can call during regular business hours** to ask that the company no longer call you. This rule applies even if you have an EBR [Established Business Relationship] with the*

company, and even if you have not registered your home phone number(s) on the national Do-Not-Call list. Before these rules took effect, the words “private,” “out of area” or “unavailable” might have appeared on the Caller ID display [-FCC/Exhibit 7 p. 3].

“Some states permit you to file law suits in state court against persons or entities violating the do-not-call rules. You may be awarded \$500 in damages or actual monetary loss, whichever is greater. **The amount may be tripled if you are able to show that the caller violated the rules willfully and knowingly.** ...States [AG/PUC] also can bring a civil law suit against any person or entity that engages in a pattern or practice of violating the TCPA or FCC (or FTC) rules” [-FCC/Exhibit 7; FTC/Exhibit 8 p. 89]. The FCC tells consumers to contact the regulators to encourage such suits; this action does so.

One specific rule described above is CFR T16 § 310.4 (a) which reads as follows: “Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct: [CFR T16 § 310.4 (a) (8)] **Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call.**” In these telemarketing calls, GAP failed to transmit a valid phone number that could be called during normal business hours to reach GAP and ask that the company no longer call. When I tried returning the calls, I reached messages informing me that the number had been disconnected or that I had reached another kind of business completely, such as HBW Leads, which offers comparison quotes on auto insurance.

This is a widespread issue. Exhibit 9 is a “Chairman letter” downloaded from the FCC’s website, on US Senate letterhead, again asserting that, “*this practice is illegal under current law – callers must accurately identify themselves [through Caller ID].*”

A large number of additional complaints (about just the two numbers known to be tied to GAP in this case), many of them predating GAP’s calls to me, identifying the same telemarketing issues as this complaint, are available but were not admitted as evidence, as a layperson complainant had not independently verified each one to the PUC’s standards of evidence.

Issue 5: GAP Representing themselves as Duquesne Light

GAP’s telemarketers deliberately misrepresented their association with, endorsement by, and contract with Duquesne Light. The callers inform residents that they’ve been contracted to call customers directly to give them a better rate, and are an external party simply because Duquesne does not have sufficient staff to make the calls directly.

GAP’s representatives introduce themselves as calling “on behalf of Duquesne Light” or “because Duquesne Light has authorized us to enroll you in a special cost-savings program.” They then proceed to ask for verification that they are talking to the right person who handles the electric bill, and verify customer information.

Customers have at least an understood obligation to keep their contact information current with utility providers if they wish to have reliable service and accurate billing, and it is understood that utility

companies have subsidiaries and other partners that operate on the utility company's behalf, so even if the supplier introduces themselves by some name other than Duquesne Light, they still claim the association and claim to be calling on behalf of Duquesne Light or calling under contract from Duquesne Light in order to perform business that Duquesne Light might reasonably do, so customers may understand a duty to comply with the questions. GAP's representatives further their misrepresentation by reading off sensitive account information that a reasonable consumer might think only Duquesne Light has, especially a consumer who has taken advantage of options to restrict sharing of that information, months earlier.

It is also generally understood that when somebody calls to verify your address & other information by reading the information to you and asking you to read it back, that the only new information communicated there is that the address/other information is still current, not that one wishes to change one's electric supplier. Much of what is actually a sales call feels like a call where the consumer is obligated to verify the currency of information, for the utility's purposes.

Representing oneself as Duquesne Light is against telemarketing and false advertising laws, as well as PUC directives (e. g. see F-5 and G on p. 5 of this brief).

The Telemarketing Sales Rule *"prohibits sellers and telemarketers from making false or misleading statements to induce anyone to pay for goods or services. For example, you cannot falsely claim that you need a consumer's account number only for identification purposes, when, in fact, you will use the number as payment for the goods or services offered. ...The Rule also prohibits both express and implied misrepresentations. Sellers and telemarketers cannot circumvent the Rule by creating a false impression in a consumer's mind through the artful use of half-truths or misleading or incomplete information. ... The Rule prohibits sellers and telemarketers from misrepresenting affiliations with — or endorsements or sponsorships by — any person, organization, or government entity...In addition, **sellers and telemarketers cannot falsely claim or create the impression in a consumer's mind that they are related to or affiliated with a company with which the consumer usually does business.**"* [Exhibit 8 p. 32-33].

CFR T16 § 310.4 (d) reads as follows: *"Required oral disclosures in the sale of goods or services. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:*

- [CFR T16 § 310.4 (d) (1)] *The identity of the seller;*
- [CFR T16 § 310.4 (d) (2)] *That the purpose of the call is to sell goods or services; and*
- [CFR T16 § 310.4 (d) (3)] *The nature of the goods or services."*

"'Promptly' means before any sales pitch is given" [- FTC/Exhibit 8 p. 29].

GAP does not disclose these things, esp. (2) and (3). Recordings were only presented from those who at least mentioned Great American Power for (1) even with a misleading association to Duquesne Light; there may have been GAP callers from other numbers insufficiently identified as GAP to be included in this brief, and GAP has repeatedly refused to provide a list of other numbers that it uses.

PA Title 73 PS, Ch. 4, § 201-2 (4) states that “Unfair methods of competition” and “unfair or deceptive acts or practices” are illegal and mean any one or more of the following:

- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (i)] Passing off goods or services as those of another;*
- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (ii)] Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;*
- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (iii)] Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;*
- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (iv)] Using deceptive representations or designations of geographic origin in connection with goods or services;*
- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (v)] Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have;*
- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (xi)] Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;*
- *[PA Title 73 PS, Ch. 4, § 201-2 (4) (xvii)] Making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:*
 - *[PA Title 73 PS, Ch. 4, § 201-2 (4) (xvii) (A)] the identity of the seller;*
 - *[PA Title 73 PS, Ch. 4, § 201-2 (4) (xvii) (B)] that the purpose of the call is to sell goods or services; and*
 - *[PA Title 73 PS, Ch. 4, § 201-2 (4) (xvii) (C)] the nature of the goods or services.*
 - (This statute, like others, somewhat echoes federal regulations).

PA Title 73 PS, Ch. 4, § 201-4 states that where there is “*reason to believe that any person is using or is about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceedings would be in the public interest, [an appropriate law enforcement officer] may bring an action in the name of the Commonwealth against such person to restrain by temporary or permanent injunction the use of such method, act or practice. Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.*”

PA Title 73 PS, Ch. 4, § 201-8 (b) further states that “*In any action brought under section 4 of this act, if the court finds that a person, firm or corporation is willfully using or has willfully used a method, act or practice declared unlawful by section 3 of this act, the Attorney General or the appropriate District Attorney, acting in the name of the Commonwealth of Pennsylvania, may recover, on behalf of the Commonwealth of Pennsylvania, a civil penalty of not exceeding one thousand dollars (\$1,000) per violation, which civil penalty shall be in addition to other relief which may be granted under sections 4*”

and 4.1 of this act. Where the victim of the willful use of a method, act or practice declared unlawful by section 3 of this act is sixty years of age or older, the civil penalty shall not exceed three thousand dollars (\$3,000) per violation, which penalty shall be in addition to other relief which may be granted under sections 2 and 4.1 of this act.”

The recordings illustrate practices creating confusion about who the call is on behalf of. In these particular recordings, the agents identify themselves as calling from Great American Power; that is how I was able to associate those phone numbers with GAP. GAP’s own monitoring records reveal that sales agents did not always clearly identify who they are calling from, for example using the three-letter acronym “G-A-P” which is a clothing store to most customers. An example is found in Exhibit 1 Attachment E 5/22/12 6:02 e-mail monitoring the PA call center. In Exhibit 1 (IV)(7d) I asked about enforcement actions around agents that violated various policies. No consequences are apparent, even when GAP did know about issues. GAP asserted that agents occasionally receive a bit of re-training if they’re not selling well, as call centers are paid per new customer.

As an example, even the call center supervisor in the third recording breaks this rule multiple times. He shares that “You would actually receive a confirmation letter **from Duquesne Light**, verifying the fact that you are in the savings program...With [Duquesne Light] being such a big company, they’re unable to call their customers directly and let them know about the different savings that are available for them....they don’t have, you know, the resources to have a bunch of people call all their customers and let them know that this savings is available for them. So **that’s basically what our job is**, is to let you know that you have an opportunity to save some money on your bill. ...They’ve contracted out just a third party supplier...It is correct that we’re under contract from Duquesne.”

Suppliers like GAP representing themselves as Duquesne Light and misrepresenting their affiliation is also quite a rampant problem. Duquesne Light reports they’ve had a lot of problems with customers calling them and reporting this, and that they’re also working with the PUC and aware of many other cases. This is enough of an issue that Duquesne Light thinks it important enough to put a notice on the homepage of their website.

GAP **does not clearly identify that the purpose of the call is to sell goods or services**, instead saying that they are calling to enroll customers in a savings program offered by the customer’s utility company. They **create a strong likelihood of confusion or of misunderstanding** as to the source, sponsorship, approval or certification of goods or services as well as their association with that local utility. They create false statements about the reasons for price reductions, **describing it as a savings program of the EDC**, rather than a competitive market price driven by legislative and PUC “deregulation.” They are doing this willfully, in a way that violates the law and subjects them to civil penalties of thousands of dollars [*up to \$16K by TSR*] **per violation**.

Issue 6: Switching individuals' energy supplier without providing sufficient information to make informed consent, and
Issue 7: Telling people false information about the rates

GAP switches individuals' energy supplier without providing sufficient information to meet even a minimum legal definition of informed consent. Even without noting that environmental impact aspects of power generation are material (under the FTC's definition) to many consumers' supplier choices or that switching power providers restricts generating customers' options for interconnection agreements, GAP fails to disclose all the elements required by law for telemarketing in general.

Additionally, GAP provides false information about rates, rate promotions, and guarantees of savings compared to Duquesne Light's rates, leading people to believe they will pay a net amount that may be significantly less than what GAP will actually bill.

The laws described above apply to these issues, as do a few others. For example, the Telemarketing Sales Rule *"requires sellers and telemarketers to provide certain material information before the consumer pays for the goods or services that are the subject of the sales offer. **Material information** is information that **would likely affect a person's choice of goods or services**. More simply, it is information a consumer needs to make an **informed decision** about whether to purchase goods or services. ... **Failure to provide any of the required information truthfully and in a "clear and conspicuous" manner, before the consumer pays for the goods or services offered, is a deceptive telemarketing act or practice that violates the Rule and subjects a seller or telemarketer to a civil penalty of \$16,000 for each violation**" [Exhibit 8 p. 21].*

*"Sellers and telemarketers also must provide the required information before asking for any credit card, bank account, or other information that they will or could use to obtain payment. When sellers and telemarketers have **pre-acquired account information**, they must provide the required disclosures before the customer provides express informed consent. Pre-acquired account information is any information that enables you to cause a charge against a consumer's account without obtaining the account number directly from the consumer during the transaction for which the consumer will be charged" [Exhibit 8 p. 22]. Clearly, GAP is using pre-acquired account information, as described in Issue 1.*

"Clear and conspicuous means that information is presented in a way that a consumer will notice and understand. The goal is that disclosures be communicated as effectively as the sales message" [Exhibit 8 p. 22]. That applies verbally and in writing.

"The Telemarketing Sales Rule also prohibits sellers and telemarketers from misrepresenting specific categories of information about a telemarketing transaction that are likely to affect a consumer's decision to purchase the goods or services offered. The Rule prohibits both express and implied misrepresentations." This includes information about cost and quantity: "For example, you may not tell consumers that they may purchase a magazine subscription for three years at \$1.50 a month, when the subscription is available at that price for one year only" [Exhibit 8 p. 32]. GAP can't tell people that they'll get 15% off Duquesne Light's rate when that discount is for the first month only.

CFR T16 § 310.3 (a) states that: *“It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:*

- *[CFR T16 § 310.3 (a) (1)] Before a customer consents to pay for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:*
 - *[CFR T16 § 310.3 (a) (1) (i)] The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer*
 - *[CFR T16 § 310.3 (a) (1) (ii)] All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;*
 - *...and the refund or cancellation policy.*
- *[CFR T16 § 310.3 (a) (2)] Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:*
 - *[CFR T16 § 310.3 (a) (2) (i)] The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;*
 - *[CFR T16 § 310.3 (a) (2) (ii)] Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;*
 - *[CFR T16 § 310.3 (a) (2) (iii)] Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;*
 - *[CFR T16 § 310.3 (a) (2) (iv)] Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies.*

GAP has violated these laws. They don't provide sufficient information to give informed consent under the law, and they misrepresent information that they do provide. The misrepresentation of rates is further in violation of PUC directive M-2 (b) quoted on page 6 of this brief.

Some GAP representatives tell customers that what they pay for electricity will be 15% below Duquesne Light's rate, even though the actual billing will only apply that 15% savings to the first month. Even call center supervisor Garrett describes the "15% off your bill in regards to the savings and also the guaranteed savings for the next 11 months" in the third recording. Rep. Nancy Lazowicki says even more strongly in the second, "you're entitled to a 15% savings" with no time limitations or end date. This is materially important information being misrepresented to make the offer more attractive, if less true. GAP's records [*Exhibit 1 Attachment E*] show that this is common especially at their PA call center, for agents to give customers bad information about the actual price they will pay.

Telemarketing agents also tell customers that [example from the second recording] "if you stay with us for a full 12 months, we will send you a 15% loyalty bonus check which would be 15% of the highest portion of your bill for that year." An educated consumer might assume that the highest portion of his/her bill is the generation cost, and understand two compounded 15% discounts for prices that are 28% off Duquesne Light's rates. In fact, their policy is that after payment is received for the 12th consecutive monthly bill, there is a rebate check for 15% of only the supplier charge for only one of the previous twelve months, the highest, and that the pre-bill 15% discount applies to the first month only.

GAP sends all new customers a welcome packet [*Exhibit 1 Attachment A*], which they may believe makes up for the false information disclosed by telemarketers. However, it only makes the violations worse. For example, they list a "Savings Rate" which is actually the per-kilowatt hour PRICE that will be CHARGED, rather than a "savings rate" fixed amount below the Provider Of Last Resort's pricing. The packet also does not disclose, as required, that this rate is artificially lowered for just the first month as a signup promotion. Finally, it hides a lot of details in fine print. "*When written, clear and conspicuous information generally is printed in a type size that a consumer can readily see and understand; that has the same emphasis and degree of contrast with the background as the sales offer; and that is not buried on the back or bottom*" [-FTC guide/*Exhibit 8 p. 22*]. GAP's welcome packet fails to meet this standard for clear and conspicuous, and by the time it is sent, no action means that the customer is signed up.

Each of these pieces of misinformation (e. g. about rates, rebates, and affiliations) are deliberate misrepresentations designed to increase sales, which GAP knew about and did not correct. Even if these were accurate, they are still missing material information that is important for an informed decision, which must all be disclosed under the law. (See checklists above, and FTC guide/*Exhibit 8 p. 40-41* or CFR T16 § 310.3 (a) (3) (ii) below for specific items that must be disclosed before a sale can be authorized.)

Issue 8: Switching individuals' energy suppliers without asking for their consent

Issue 8 caused me to believe that the electric **choice** program may have included loopholes that allow "slamming" in telemarketing.

In the recordings with GAP "account manager" Kip Goldsberry, particularly the Third Party Verification (TPV) stage, the customer is told "Thank you for enrolling" as one phrasing and also "You have now selected Great American Power as your supplier of generation and transmission service..." BEFORE s/he as the customer is ever asked if s/he wants to do that. In fact, the customer is never asked if s/he wants to switch his/her power supplier – GAP representatives simply assume that s/he does and make that happen. This is evidenced in the recordings. This being standard practice is supported further by the degree to which Kip consistently follows some script, even though that script was not among those kept by GAP as required by law. Those scripts [*Exhibit 1 Attachments B and C*], though not used in the call recordings presented at hearing, also do not have any especially obvious question obtaining express consent to the changing of electric supplier.

In the TPV portion of the call, the customer is asked to state his/her name, the name appearing on his/her electricity bill, that s/he is authorized to make changes on the account, that s/he is over 18, that his/her account number is correct (which is a little silly when the customer is not expected to have any electric bills at hand), his/her service and billing addresses and phone number, and to confirm that s/he understands that s/he will receive a welcome packet in the mail. At no time is the customer asked if s/he wishes to change providers, but the customer is told "You have now selected Great American Power as your supplier of generation and transmission service..." **before any such consent** or choice question is asked.

The title of the welcome packet [Exhibit 1 Attachment A] tells customers “You’ve made a great choice.” It describes the enrollment as a past event, and if no action is taken, GAP will begin providing and billing for services. Again, the consumer was **never asked if they wanted to switch**. That seems to be an inappropriate component of a program that’s supposed to be all about customer choice, especially when changing suppliers is supposed to be opt-in, rather than opt-out. What we have here is a negative option requiring customers’ action to reject the offer or they will be charged [see *FTC packet p. 27, 35*] rather than a process of affirmative consent, as is required by current law. GAP allows you to reject the terms of their packet and cancel service at any time, but they don’t ask if you want to sign up, and if you tell them you don’t want to, they keep calling back – they are not taking no for an answer.

In addition to PUC rules prohibiting “slamming” with severe penalties as noted in the PUC Regulatory Background section of this brief, the Telemarketing Sales Rule “requires express verifiable authorization when the payment is made by a method other than a credit card or a debit card” [Exhibit 8 p. 38].

*“It is a violation of the Telemarketing Sales Rule to cause billing information to be submitted for payment— directly or indirectly — without the **express informed consent** of the customer. Under the Rule, consent is express if it is affirmatively and unambiguously articulated by the consumer. Silence is not express consent, nor is an ambivalent response like, “Well, maybe . . .,” or a noncommittal “uh-huh.” For consent to be informed, a consumer, prior to giving consent, **must receive all the disclosures required by the Rule. Consent is an affirmative statement that the consumer agrees to purchase the goods or services**” [Exhibit 8 p. 45-46].* The bar is much higher when sellers are using pre-acquired account information.

CFR T16 § 310.3 (a) states that: “It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

- [CFR T16 § 310.3 (a) (3)] Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services, directly or indirectly, without the customer’s express verifiable authorization. Such authorization shall be deemed verifiable if any of the following means is employed:
 - [CFR T16 § 310.3 (a) (3) (i)] Express written authorization by the customer, **which includes the customer’s signature** (GAP does not obtain that.)
 - [CFR T16 § 310.3 (a) (3) (ii)] Express oral authorization which is audio-recorded and made available upon request to the customer, and the customer’s bank or other billing entity, and which evidences clearly both the customer’s authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer’s or donor’s receipt of **all** of the following information:
 - [CFR T16 § 310.3 (a) (3) (ii) (A)] The number of debits, charges, or payments (if more than one);
 - [CFR T16 § 310.3 (a) (3) (ii) (B)] The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;
 - [CFR T16 § 310.3 (a) (3) (ii) (C)] The amount(s) of the debit(s), charge(s), or payment(s);
 - [CFR T16 § 310.3 (a) (3) (ii) (D)] The customer’s name;

- [CFR T16 § 310.3 (a) (3) (ii) (E)] The customer's billing information, identified with sufficient specificity such that the customer understands what account will be used to collect payment for the goods or services that are the subject of the telemarketing transaction;
- [CFR T16 § 310.3 (a) (3) (ii) (F)] **A telephone number for customer inquiry that is answered during normal business hours** (which GAP does not give [evidenced in the recordings; see also Issue 4]); **and**
- [CFR T16 § 310.3 (a) (3) (ii) (G)] The **date** of the customer's oral authorization; or
- [CFR T16 § 310.3 (a) (3) (iii)] Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer in the event the confirmation is inaccurate; provided, however, that **this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.**

“In transactions involving pre-acquired account information combined with a free-to-pay conversion, sellers and telemarketers may not use the written confirmation method of obtaining authorization. In these transactions, written confirmation does not constitute “express verifiable authorization” [-in bold in FTC guide/Exhibit 8 p. 42]. In these transactions, *“telemarketers must obtain from the customer at least the last four digits of the account number to be charged, **and obtain the customer’s express, unambiguous agreement** to be charged. **Reading the information to the customer and asking for confirmation of the digits is not complying with the Rule.** Neither is it sufficient to read the digits to the customer, and then ask the customer to recite them back”* [Exhibit 8 p. 47]. The specific regulations referenced here include CFR T16 § 310.4 (a) (7) (i).

[CFR T16 § 310.2 (p)] *Free-to-pay conversion means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.”* Customers will receive power for an initial billing cycle before being asked to pay for it, and they must take affirmative action to cancel before the end of the initial period- even though they have never said they want to sign up; therefore the free-to-pay conversion rules may apply. (See also FTC guide/Exhibit 8 p. 46-47.)

In these transactions, *“telemarketers must [also] make and maintain an audio recording of the **entire telemarketing transaction**”* [-FTC guide/Exhibit 8 p. 47; CFR T16 § 310.4 (a) (7) (i)(C)]. GAP only informs customers that it records the TPV portion. It objects when recording notification is not given in the same voice as a present party, though it has no qualms about recording or monitoring other portions of the calls without notice to consumers. GAP was prepared to present digitally manipulated recordings at

the hearing, but did not do so as I presented full call recordings. It readily admits to call monitoring (e. g. see Exhibit 1 Attachment E for sample reports) without informing potential customers.

If the audio recording is supposed to demonstrate express informed consent, it must demonstrate “*that the consumer received each piece of information below and that, based on this information, the consumer understood and acknowledged each term of the transaction and authorized the transaction*” [Exhibit 8 p. 40]. That is each term listed above, including the seller’s phone number, and the customer does not get all the required information.

Regardless of any free-to-pay conversion element, “*telemarketers **must** obtain the customer or donor’s **express agreement** to be charged for the goods or services and to be charged using the account number the seller or telemarketer has identified. To comply with this requirement, you must elicit an **affirmative and unambiguous statement** from the consumer that demonstrates his intention to agree to be charged, and to be charged on a specific account. Silence is not a substitute for such a statement, nor are ambivalent or noncommittal responses like, “Well, maybe . . .” or “uh-huh”*” [Exhibit 8 p. 49].

The FTC guide is describing CFR T16 § 310.4 (a) (7) (ii): “*In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(7)(i) of this section, the seller or telemarketer must: (A) At a minimum, identify the account to be charged with sufficient specificity for the customer to understand what account will be charged; and (B) Obtain from the customer **his or her express agreement to be charged** for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(7)(ii)(A) of this section.*”

Further, CFR T16 § 310.4 (a) states that: “*Abusive conduct generally. It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct: [CFR T16 § 310.4 (a) (7)] Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer. **In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer** to be charged for the goods or services and to be charged using the identified account. In any telemarketing transaction involving **preacquired account information**, the requirements in paragraphs (a)(7)(i) through (ii) of this section must be met to evidence express informed consent.*”

GAP does not obtain express informed consent as required by these regulations. They do not ask for the customer’s affirmative consent to sign up. They do not provide enough information to allow consumers to make an informed decision, and the information that they do provide is often misleading, misrepresenting, or flat-out wrong (see issues 6 and 7 and recording 3 conversation with Garrett). GAP does not comply with telemarketing rules such as those around abandoned calls, accurate caller ID, or customer requests to stop calling. They even obtain detailed account information against consumer wishes.

However, GAP denies any wrongdoing. Even after a complaint was well underway [see also GAP’s original response, items 4-5], an e-mail dated 10/5/12 6:24 pm states that “we do not believe that GAP’s practices to be inappropriate or illegal...It is our position that there should be no penalty because GAP did not do anything not permitted by the PUC.” GAP’s closing arguments at the hearing assert that

consumers have a choice – but when? It is clear in multiple recordings that consent is not asked for before the third party verification would begin, which informs customers multiple times that they have been switched; special affirmative action is required to opt out. GAP does not meet the legal standards for express informed consent and does not obtain any account number information directly from the customer.

Issue 9: Recordkeeping

CFR T16 § 310.5 (a) states the following: *Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:*

CFR T16 § 310.5 (a) (1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials. Clearly some scripts are missing, such as the one Kip is using in the first and third recordings. The scripts provided in Exhibit 1 Attachments B-D are substantially different from what is heard in the recordings.

CFR T16 § 310.5 (a) (4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations... Great American Power does not even know how many employees were involved in telephone sales [Exhibit 1 (II)(8)], let alone their names.

CFR T16 § 310.5 (a) (5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule. Since express informed consent as required under this Rule is not received, as described especially in issues 6-8, records of it are not kept. (See also Exhibit 8 p. 88.)

CFR T16 § 310.5 (b) Failure to keep all records required by §310.5(a) shall be a violation of this Rule. Therefore, this issue demonstrates a violation of the Telemarketing Sales Rule.

Additionally, recordkeeping around calls is demonstrably inaccurate, as shown in the difference between GAP's call log (Exhibit R-4?) and the phone records of Exhibit 6. GAP's admission to not keeping records around abandoned calls is discussed in Issue 3 above [+ Exhibit 1 (II)(3) and Exhibit 1 (IV)(7c)]. They also fail to keep documentation as required by the PUC in Guideline C quoted on p. 4 of this brief.

Issue 10: Failure to Register

73 P.S. Chapter 40, PA's Telemarketer Registration Act, echoes many of the federal telemarketing laws quoted here. It is specifically incorporated in directives quoted on p. 6 of this brief, where additional notification of telemarketing activities is required.

As part of this Act, 73 P.S. §2243 defines a misdemeanor of the second degree: *"In addition to any other requirements imposed by law, a telemarketer or the telemarketing business which employs the telemarketer is required to register with the Office of Attorney General at least 30 days prior to offering for sale consumer goods or services through any medium. ... It shall be unlawful for any telemarketer to initiate a telephone call to or receive a telephone call from a consumer in connection with the purchase*

of consumer goods or services unless the telemarketer or the telemarketing business which employs the telemarketer is registered with the Office of Attorney General.” While GAP itself is not required to register, as a PUC-licensed utility company, the telemarketing companies providing services to GAP are required to register. The business relationship between GAP and its telemarketing agents as separate firms was not fully clear until the hearing. The last page of the Guide for Telemarketers from the PA Office of Attorney General⁵ specifically addresses telemarketing companies acting on behalf of utilities, requiring registration unless they have been under the same ownership and control for at least five years and meet one of the exemption criteria listed in the law. GAP has refused to provide sufficient information about its telemarketing partners and information it has provided in discovery and at hearing do not match against any telemarketer registered with the Office of Attorney General.

Responsibility of Great American Power for its Telemarketing Contractors

Telemarketers represented themselves as Great American Power, as evidenced by recordings and as instructed by GAP [*GAP’s Original response item 12 and Exhibit 1 (IV) (6.2)*]. If they were not calling from GAP, they should not have claimed this identity. Because they did and because GAP instructed them to, GAP should bear full responsibility for the telemarketing practices they used.

The Telemarketing Sales Rule states that a party can’t avoid liability by not asking questions about whether verifiable authorization procedures comply with the Rule [*see Exhibit 8 p. 39, 43*].

The public utilities code 52 Pa. Code §54.43(f) references the PA consumer protection law and states: “*A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employees, agents or representatives. Licensee shall inform consumers of state consumer protection laws that govern the cancellation or rescission of electric generation supply contracts.*” The documents referenced in “PUC Regulatory Background” at the beginning of this brief specifically remind companies of these obligations; some relevant quotes are provided in that section.

⁵ Available at http://www.attorneygeneral.gov/uploadedFiles/Guide_for_Telemarketers.pdf or from Towne on request

Determination of Penalty Amount

PA Title 73 PS, Ch. 4, § 201-4 states that *“Whenever any court issues a permanent injunction to restrain and prevent violations of this act as authorized in section 4 above, the court may in its discretion direct that the defendant or defendants restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act, under terms and conditions to be established by the court.”* It is the people of PA whose property was acquired by means of violation of that and other acts, by an out-of-state company. The PUC, authorized by the state [gov’t] to act on behalf of its residents, can act to get this property back, at least to the Commonwealth.

Two methods are presented for determining the appropriate amount of a penalty here, based on the Deterrent and Flat Rate principles respectively.

Deterrent Principle

The Deterrent Principle states that fines should be set so that the expected value of breaking the law is less than the expected value of adhering to it. The expected value of breaking the law is the revenue gained by doing so minus the costs (e. g. a fine), each first multiplied by its probability.

Suppose for a moment that a person named Joe robs a convenience store, and gets \$1,000. Suppose he knows that, six months later, there’s a 1% chance that he’s going to have to pay it back, and a 99% chance that he’ll be able to keep his ill-gotten gains, and even keep his freedom to go on doing all of his daily business, either way. Will he be back at it? Of course! His incentive is even stronger if there’s only a tiny chance that he’ll have to pay back only a tiny fraction of his ill-gotten gains – if, in the unlikely event that he gets caught, he only has to pay back \$10 and can keep the rest, that is a great business to be in. Even if the penalty were larger than the \$1,000 he got, there’s still only a small chance that he’ll get caught and have to pay it, so in that incentive structure it’s better for him to ignore or break the law. The penalty would have to be greater than the ill-gotten gain multiplied up by the probability of having to pay it before it would be an effective deterrent, under standard economic theory.

“As of 8/31/12, there [were] 5,578 customers enrolled in GAP service from the Duquesne territory” [Exhibit 1 (II)(4)]. From Ginger Lucas’s testimony at hearing, many of these customers were obtained during a campaign in late March and early April 2012, targeting to enroll 50-75 customers per day in the Duquesne territory. After the conclusion of that campaign, telemarketing continues with a target rate of 20-50 new customers per day, according to Ginger Lucas’s testimony. There are 122 days between September 1 and Dec. 31; 86 are weekdays. If GAP’s weekday telemarketing on average reaches the middle of that target range (35/day), GAP will have approximately 8,600 customers in the Duquesne Light territory at the end of 2012. Based on the service map on GAP’s website, the Duquesne territory is geographically tiny compared to the PECO and PPL territories where they also operate. Even if GAP’s three other territories (PEPCO as well) each had the same amount of GAP customers (rather than more, as may seem a reasonable assumption), GAP would have approximately $4 \times 8600 = 34,400$ customers by the end of 2012, still prior to the likely date of a PUC decision in this case. (GAP has tried to keep their

testimony about numbers limited to Duquesne Light, though the PA PUC's scope is broader than just this territory, and there is no reason to believe GAP singled me out for targeting use of the cited practices).

The average customer based on usage in the Duquesne territory generates an estimated \$576-\$756/year in revenue for GAP [*Exhibit 1 (II)(5)*]. If the average customer retains electric service for the same 30-year period that they hold mortgages and warranties on durable home purchases (e. g. flooring, roofing) and no longer, the average customer will bring GAP \$17,280 to \$22,680 in 2012 dollars, before any inflation adjustments. The average of these two numbers is about \$20K in revenue per customer. If GAP does not increase its customer pool in future years, the customer pool at the end of 2012 represents 34,400*\$20K, or **\$688 million in projected revenue** (in 2012 dollars). As GAP gains customers primarily through telemarketing (and the few customers gained through other means are excluded from these calculations based on telemarketing targets), this is a reasonable estimate of the gains that GAP enjoys by using these aggressive, deceptive, and illegal telemarketing practices, as of the end of 2012.

GAP asserts that this is the first time it has been caught using these practices, in a PUC or other legal proceeding. This is not exceptionally surprising, as the investment required to file a complaint is somewhat intense. I do not believe that I was singled out by GAP, but received GAP's standard treatment that they apply to all applicable PA (and MD) residents. I just happened to be a random individual who happened to know about some of the relevant laws and get annoyed enough to overcome the requirements, prepare filings and evidence to PUC standards, and take action.

GAP does not share or track the number of calls made on its behalf, only its number of new customers. Even if its success rate were as high as 10%, that leaves GAP's odds of getting caught between one in 86,000 and one in 344,000 depending on if a calculator examines only Duquesne Light calls or not. Multiplying these odds of having to pay a fine by the benefits enjoyed by breaking the law, as the deterrent principle recommends, gives a fine amount of tens to hundreds of trillions of dollars. Changing the odds or the specific numbers used in this estimate does not change the conclusion, that the minimum fine by the deterrent principle far exceeds the total value of the company. This is not surprising, given that all or nearly all of the company's revenue derives from illegal practices.

The deterrent principle would also put Joe's convenient-store-robbing 'business,' Bernie Madoff's funds, companies that prey on elders, or anybody else who's built a business on practices violating the law, out of business with a requirement that they return all their ill-gotten gains or more, as a part of whatever penalty was established as a deterrent to observers considering or already using the same practices. "When you build a business on breaking the law, you might lose it all."

In the case of Georgia-based GAP, a self-described "small player" in the business, the market would be less disrupted than if a much larger company were affected where far more customers would see their suppliers switch. A high fine amount would send a strong signal to the market about the PUC's willingness to enforce the laws and the importance of following them. It would also make room in the market for more ethical competitors who can't compete with these current practices, and incentivize

current competitors who are also adopting these tactics to change their practices. I encourage the PUC to take that action.

Flat Rate Principle

In Issue 5, under PA title 73, the consumer protection law provides for a penalty of \$1,000 to \$3,000 *per violation* of these rules. Penalties under Issue 4 for bad caller ID provides for a penalty of up to \$1,500 per call recipient. The Telemarketing Sales Rule provides for \$16,000 civil penalty per violation, noting that *“Each call may be considered a separate violation.”* [Exhibit 8 p. 59]. These are just a couple of the laws broken here; for example the PUC may also apply rules related to “slamming” based on GAP not obtaining customers’ express informed consent to change suppliers as required by law.

Estimation based on the flat rate principle still requires an estimation of the number of calls made, using these practices. The 10% success rate (customers signed on / calls made) figured above seems to be a very high estimate, based on telemarketing industry figures and the experience observed here of 14 calls and no new customer. Call center supervisor Garrett is heard in the third recording stating they make “thousands” of calls per day, during a time when GAP was apparently targeting 20-50 new customers per day. Still, using that 10% number (for Duquesne only or the estimate of all 4 territories), and only the FTC’s \$16,000/call violation with no penalties from other rule violations, yields a computed fine well into the billions of dollars. Changing the numbers used in the assumed calculations does not change the comparison between the fine amount and likely company value, only the strength of the signal sent to market competitors.

The amount requested in the outcomes section below corresponds approximately to GAP returning only the amount of expected revenue as estimated in the first part of the “deterrent principle” subsection. From a mathematical perspective, this appears too low to effectively deter competitors from continuing to adopt these and worse practices, comparable to the robber who had only a small probability of having to return the money obtained. Competitors will be watching the outcome of this case as a signal from the PUC to guide their profit-maximizing decisions. The outcome of this case will also be taken back to entrepreneurship and business classes that include strong exhortations to consult with lawyers and make sure that all one’s business activities are strictly within the bounds of the law, under threat of stiff penalties and business shutdowns otherwise. I trust the PUC to apply its judgment in upholding legal principles that make energy choice an ethical process where energy consumers can make informed decisions about their energy sources.

Requested Outcomes

I request the following outcomes:

Great American Power and all partners, contractors, and employees be ordered to permanently cease and desist from all telemarketing operations, and forbidden from reorganizing with a similar set of investors, management, and/or assets to circumvent this order.

Great American Power's license as an electric supplier be revoked.

Great American Power be ordered to pay a financial penalty of \$700M or more.

That the PUC, if finding any violations it does not believe it has the jurisdiction to enforce, seek out and/or partner with the appropriate venues and agencies to address the violations.

Conclusion

This is an example of a company that made profit-maximizing decisions that were not ethical, and that broke existing laws on many points. Presented with a new opportunity, Great American Power (and its competitors) made profit-maximizing decisions that were less than fully ethical. GAP claims [through Exhibit 2 and hearing testimony] to be a small company built completely on these unethical telemarketing practices, while denying that the unethical and clearly illegal aspects are illegal or unethical.

GAP knew they had a full legal obligation to follow the laws, but even those legal requirements are insufficient to stop GAP from profiting by breaking them. This observation demonstrates that written assurance that the company will begin following the laws is obviously an insufficient resolution. A permanent injunction to stop these practices is necessary but not sufficient. They continue these practices as their primary source of sales, though at approximately half the rate of a "major campaign." This is true even after a complaint has been filed and GAP has been made fully aware of the rules that they knowingly and willfully continue to violate. Even after knowing all of the law and evidence presented at the hearing, GAP believes this behavior is fine, that their telemarketing agents were doing "a good job" [e. g. in the calls presented during the hearing], and that their "process did exactly what it was supposed to do."

Even from sparse monitoring, GAP knew about some of these issues (e. g. #7) and failed to take sufficient corrective action.

The PUC has power and discretion to take the actions requested in this brief as well as actions that are beyond or different than what I have requested here. With the PUC's work on electric choice, we are a major step closer to enabling consumer to make informed decisions about where their energy comes from. Please rule in favor of allowing consumers to make affirmative, informed choices about their electric supplier in an ethical marketplace, and free them from the aggressive, deceptive telemarketing practices demonstrated here. Thank you!