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Supreme Court I.D. No.209496
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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

WILLIAM TOWNE,	:	
Complainant	:	
	:	Complaint Docket
v.	:	No: C-2012-2307991
	:	
GREAT AMERICAN POWER, LLC,	:	
Respondent	:	

GREAT AMERICAN POWER’S MEMORANDUM OF LAW

AND NOW COMES, Great American Power, LLC, by and through its attorneys, Jacobson, Julius & McPartland, who hereby submits this Memorandum of Law, and in support thereof, states:

I. FACTS.

Great American Power, LLC (hereinafter “GAP”), is a small, family-owned business with five (5) employees. GAP is approved and licensed by the Pennsylvania Public Utilities Commission and the Maryland Public Service Commission (Pa License No.: A-2010-2205475). GAP provides electric service in PPL, PECO, Duquesne, and PEPCO utility territories. (N.T. at 120). GAP's mission is to help customers save on their electricity while supporting local and national communities through employment opportunities, partnerships, specialized discounts and giving programs. (N.T. at 23). Telemarketing is among the means by which electricity providers such as GAP may seek to discharge their obligation under the Competition Act and regulations to inform customers of choices regarding the purchase of electricity. One of the potential customers that GAP attempted to sell power to was Complainant, William Towne.

Duquesne Power and Light provided GAP an eligible Duquesne customer list which included information such as Mr. Towne's name, address, usage, and peak load contribution. (N.T. at 124- 125). The eligible customer list was then matched to lead lists of contact information that was purchased from lead brokers. *Id.* The lead lists included telephone numbers that were not on the National and Pennsylvania Do-Not-Call lists. (N.T. at 121-122). Mr. Towne's number did not appear on said lists at the time of the calls. (N.T. at 27-28 and 122-123). GAP then contracted with third party telemarketing firms to conduct the telemarketing campaign (N.T. at 129). During this particular telemarketing campaign, GAP used two separate call centers to place telemarketing calls. (N.T. at 127).

From May 18, 2012 through and including June 13, 2012, GAP and/or its agents placed fourteen calls to Mr. Towne. (N.T. at 29). Of the fourteen calls made, six of the calls actually connected to Mr. Towne. (N.T. at 30). The remaining calls (8) show no handling time indicating that those calls were not answered by Mr. Towne. At the hearing in this matter, the Chief Executive Officer of GAP, Ginger Lucas, testified that on May 24, 2012, one of the contracted call centers processed a do-not-call request from Mr. Towne. (N.T. at 127). This call is the first of the calls that was recorded and played for this honorable court at the hearing. (N.T. at 71-95). Mr. Towne's request to be put on the do-not-call list was processed and distributed to all centers on the campaign. The goal is for this to be done as soon as possible. Unfortunately, in Mr. Towne's case it took longer than usual and he received two more calls, another call later on May 24, 2012 and again on June 13, 2012. (N.T. at 127).

During the calls to Mr. Towne, GAP's telemarketing agents identified themselves as calling from GAP. For example, the May 24, 2012 call begins with "[M]y name is Kip, and I'm an account manager calling from Great American Power...Duquesne Light authorized us to

provide you with an immediate savings program.” (N.T. at 71 and 81). In the second call, the account manager informed Mr. Towne that “I’m calling from Great American Power... .” (N.T. at 78). The third call that takes place on June 13, 2012 and is no different than the other calls. The agent again stated, “I’m an account manager calling from Great American Power. We are an approved supplier of Duquesne’s energy choice program. ...Duquesne Light authorized us to provide you with an immediate savings program... .” (N.T. at 82-95).

During the June 13, 2012 telephone call, Mr. Towne had a conversation with a supervisor named Garrett. Garrett clearly explained to Mr. Towne GAP’s switch process. “Before [the actual switch] even happens, we actually send you the information which you receive in the next three to four days, which lets you look over the whole program and make a decision based on it. So, the actual switch doesn’t take effect to the next – between the next 14 and 45 days, but you will actually have the terms and conditions of the program before that even happens, sir.” (N.T. at 92). During call number 2 made to Mr. Towne he is informed that GAP offered savings “15 percent off your rate for the first billing cycle, and after that, [he could] take advantage of guaranteed savings on your bill at a new low variable rate for the following 11 months.” (N.T. at 72).

Despite GAP’s telemarketing, Mr. Towne never purchased electric services from GAP. (N.T. at 111). Mr. Towne was never billed as a customer of Great American Power. *Id.* In fact during the May 24, 2012 telephone call, Mr. Towne is asked to confirm whether he wished GAP to be his electric supplier. (N.T. at 76). Apparently recognizing that he might be switched to GAP after being prompted by the recording, Mr. Towne said “No”. *Id.* Mr. Towne further stated to GAP that “he did not want to change his power supplier.” *Id.* Per his request, GAP never enrolled Mr. Towne as a customer.

Ms. Lucas confirmed via her testimony that Mr. Towne was never obtained as a customer of GAP. (N.T. at 121). Mr. Towne never received a welcome packet directly from GAP to indicate that he had been enrolled in any service provided by GAP. (N.T. at 111). In fact, Mr. Towne only received the welcome packet from GAP when he requested it and received it through the discovery process of this case. *Id.*

On or about June 5, 2012, Mr. Towne filed a formal complaint with this honorable court arising out of GAP's telemarketing campaign. GAP filed its answer to the complaint on or about June 25, 2012. After a brief discovery period, a hearing was held on October 11, 2012. At the hearing, Mr. Towne alleged numerous violations of federal law and the Pennsylvania Unfair Trade Practices Act Consumer Protection Law. In his case in chief, Mr. Towne failed to produce any evidence to prove that he had suffered any damage arising out of the campaign. Mr. Towne's only testimony was that the calls placed by GAP were "inconvenient" and "annoying". (N.T. at 112-113).

II. SUMMARY OF ARGUMENT.

Mr. Towne alleges that GAP violated the UTPCPL and other miscellaneous federal regulations to which GAP strictly denies. While GAP sympathizes and apologizes to Mr. Towne for not being able to process his do-not-call request more quickly, GAP should not be held accountable to Mr. Towne when he failed to prove any violation of the law nor suffered any damage as a result of the calls. Despite a lack of damages, Mr. Towne continues to allege several violations against GAP such that GAP should be sanctioned severely including, but not limited to, the permanent suspension of its license to operate. This brief is filed in support of GAP's position that no sanctions are appropriate in this case.

III. ARGUMENT.

- I. THE COURT SHOULD DENY ANY RELIEF REQUESTED AS MR. TOWNE LACKS STANDING TO PURSUE VIOLATIONS OF THE PENNSYLVANIA CONSUMER PROTECTION LAW BECAUSE HE HAS NOT SUFFERED AN ASCERTAINABLE LOSS OF MONEY OR PROPERTY.¹

The Pennsylvania Unfair Trade Practices Act Consumer Protection Law (hereinafter “UTPCPL”) makes “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” unlawful. 73 P.S. § 201-3. The definition section of the UTPCPL sets forth 21 practices that constitute “unfair methods of competition and unfair or deceptive acts or practices.” 73 P.S. § 201-2(4).

Although not clear from the complaint, Mr. Towne appears to allege a laundry list of violations including: passing off goods or services as those of another § 201-2(4)(i); causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services; § 201-2(4)(ii); causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another § 201-2(4)(iii); 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 § 201-2(4)(v); advertising goods or services with intent not to sell them as advertised § 201-2(4)(ix); making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions § 201-2(4)(xi); making solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:(a) the identity of the seller; (b) that the purpose of the call is to sell goods or services; (c) the nature of the goods or services § 201-2(4)(xviii); and

¹ This honorable court has authority to suspend or revoke or fine Great American Power’s license if violations of the consumer protection law are proven. 52 Pa. Code. § 54.42(a)(8).

fraud § 201-2(4)(xxi).

In addition to actions by the Pennsylvania Attorney General, the UTPCPL creates a private right of action for violations of the UTPCPL. “Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars, whichever is greater. ...” 73 P.S. §201-9.2 (emphasis added). The UTPCPL's “underlying foundation is fraud prevention.” *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812, 816 (1974). The act is to be liberally construed in order to effect its purpose.” *Keller v. Volkswagen of Am., Inc.*, 733 A.2d 642, 646 (Pa.Super.Ct.1999) (internal citations omitted).

The Pennsylvania Supreme Court has stated when analyzing the UTPCPL that “[t]here is no authority which would permit a private plaintiff to pursue a defendant because an advertisement might deceive members of the audience and might influence a purchasing decision when the plaintiff himself was neither deceived nor influenced. There is certainly nothing in the statute which suggests such a private right.” *Weinberg v. Sun Company, Inc.*, 77 A.2d 442 (Pa. 2001) (emphasis added). Further, claims for emotional distress and punitive damages are not recognized under the UTPCPL. *Mccauslin v. Reliance Finance Company*, 751 A.2d 683 (Pa.Super.Ct. 2000). Finally, there is no court in Pennsylvania that has recognized a claim under the UTPCPL for mere annoying or inconvenient conduct on the part of a defendant.

The testimony at the hearing on this matter makes it clear that Mr. Towne does not have standing to bring any claim under the UTPCPL because he did not suffer an ascertainable loss of money or property. Mr. Towne never purchased electric services from Great American Power.

(N.T. at 111). Mr. Towne was never billed as a customer of Great American Power. *Id.* GAP's CEO, Ginger Lucas testified at the hearing that Mr. Towne was never obtained as a customer of Great American Power. (N.T. at 121). Mr. Towne never received a welcome packet directly from GAP to indicate that he had been in enrolled in any service provided by GAP. (N.T. at 111). In fact, Mr. Towne only received the welcome packet from GAP when he requested it and received it through the discovery process of this case. *Id.*

The recordings of the telemarketing calls also make clear that Mr. Towne did not want to be and was not switched to become a customer of GAP. (N.T. at 71-95). During the May 24, 2012 telephone call, Mr. Towne is asked to confirm whether he wanted GAP as his supplier of electric. (N.T. at 76). Apparently recognizing that he might be switched to GAP after being prompted by the recording, Mr. Towne said "No". *Id.* Mr. Towne further stated to GAP that "he did not want to change his power supplier." *Id.*

The only evidence provided by Mr. Towne to prove any kind of damage in this case was his testimony that the calls received from GAP were "inconvenient" and "annoying". (N.T. at 112-113). There is no authority in Pennsylvania that has ever held that inconvenient or annoying conduct of a defendant rises to the level of an actual loss of money or property. As such, Mr. Towne lacks standing to allege a violation of the UTPCPL as he did not suffer an ascertainable loss of money or property. Therefore, GAP did not violate the UTPCPL or any other law cited by Mr. Towne such that its license should be suspended or sanctioned by this honorable court.

GAP appreciates that Mr. Towne is a motivated young man who seeks certain laws to be enacted to govern deregulation. Unfortunately, litigation through this case is simply not the appropriate forum to bring about the changes that Mr. Towne desires. GAP believes the fact that Mr. Towne failed to prove any damages resolves this case in its entirety. Nevertheless, Mr.

Towne has made numerous allegations to which GAP feels a duty to the Public Utility Commission to respond.

1. GAP appropriately obtained Mr. Towne's account information from Duquesne Power and Light.

Mr. Towne has alleged that GAP illegally obtained his contact information from Duquesne Power and Light. GAP obtained Mr. Towne's information from two sources. The first was from an eligible Duquesne electric customer list which was provided directly from Duquesne Power and Light. (N.T. at 124-125). Said customer list included information such as Mr. Towne's name, address, usage, and peak load contribution. (N.T. at 125). The second came from a search of telephone numbers by lead brokers and GAP that were not on either the National or Pennsylvania Do-Not-Call lists. (N.T. at 121-122). Mr. Towne's number did not appear on said list at the time of calls. (N.T. at 122-123). Based on this information, GAP began to make telemarketing calls to Mr. Towne. Mr. Towne admitted that his number was not on any Do-Not-Call lists. (N.T. at 27-28).

Mr. Towne's only testimony at the hearing was that he sent requests to Duquesne Power and Light stating his customer information should not be shared. (N.T. at 24-29). Specifically, Mr. Towne testified that he received confirmation from Duquesne that they received his request on March 14, 2012 which he was able to later confirm online on May 24, 2012 (N.T. at 25). GAP can offer little explanation as to why Mr. Towne's information was provided by Duquesne despite his request. While GAP sympathizes with Mr. Towne, Mr. Towne's complaint in this matter is chiefly against Duquesne Power and Light. GAP should not be held accountable for any error committed by Duquesne regarding the release of Mr. Towne's information. (N.T. at 125-126). Therefore, GAP did not inappropriately obtain Mr. Towne's contact information.

2. GAP's calls to Mr. Towne did not misrepresent their association with Duquesne Power and Light nor did GAP fail to disclose all the elements required by the UTPCPL or the Code of Federal Regulations.

Mr. Towne alleges that GAP's telemarketing agents failed to follow the telemarketing law and violated § 201-2(4)(xviii) of the Pennsylvania UTPCPL². Section 201-2(4)(xviii) makes it illegal to make solicitations for sales of goods or services over the telephone without first clearly, affirmatively and expressly stating:(a) the identity of the seller; (b) that the purpose of the call is to sell goods or services; (c) the nature of the goods or services, and (d) that no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment entry method for the prize promotion; provided, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction. § 201-2(4)(xviii).

While GAP stands behind its recorded calls presented to this honorable court by Mr. Towne, there are a few areas that should be clarified. First, in all calls the account managers clearly identified themselves as calling from GAP. For example, in calls one and three the calls began as follows: “[M]y name is Kip, and I’m an account manager calling from Great American Power...Duquesne Light authorized us to provide you with an immediate savings program.” (N.T. at 71 and 81). In the second call, the account manager informed Mr. Towne that “I’m calling from Great American Power...” (N.T. at 78). The account manager continues call

² Towne alleges violations of 16 CFR 310.4 *et. seq.* For purposes of this section the elements of the violation are the same as under the Pennsylvania UTPCPL.

number two by explaining the program, making clear distinctions between GAP and Duquesne by comparing the rates between the two companies. (N.T. at 78). The third call is no different. The agent again stated, “I’m an account manager calling from Great American Power. We are an approved supplier of Duquesne’s energy choice program. ...Duquesne Light authorized us to provide you with an immediate savings program... .” (N.T. at 81). Therefore, GAP did not violate the Code of Federal Regulations nor the UTPCPL.

3. GAP does not switch consumer’s electricity before receiving affirmative consent nor does GAP provide false information about its rates.³

One needs only to listen to the recordings of the telephone calls between Mr. Towne and GAP to understand that Mr. Towne’s averments are simply false. During Mr. Towne’s first telephone call on May 24, 2012, Mr. Towne is asked to confirm that he wanted GAP as his electric supplier. (N.T. at 76). Mr. Towne stated a resounding “No”. *Id.* Mr. Towne further stated to GAP that “he did not want to change his power supplier.” *Id.*

In addition, during the telephone call on June 13, 2012, Mr. Towne had a conversation with the supervisor, Garrett, who explained GAP’s switch process. “Before [the actual switch] even happens, we actually send you the information which you receive in the next three to four days, which lets you look over the whole program and make a decision based on it. So, the actual switch doesn’t take effect to the next – between the next 14 and 45 days, but you will actually have the terms and conditions of the program before that even happens, sir.” (N.T. at 92). Mr. Towne was never enrolled in GAP’s energy program, and never, as a consumer, received the “welcome packet” and was never billed by Great American Power. (N.T. at 111). GAP clearly does not switch customers’ electricity service before receiving a customer’s affirmative consent.

³ This honorable court also has the authority to suspend or revoke or fine Great American Power’s license if they transfer a customer’s electrical supplier without the customer’s consent. 52 Pa. Code. § 54.42(a)(9).

With regard to the rates, in his testimony, Mr. Towne states that “GAP can’t tell people that they’ll get 15 percent off Duquesne Light’s rate when that discount is for the first month only.” (N.T. at 53). However, in the first recording the agent clearly states, “We are giving you 15 percent off your rate for the first billing cycle, and after that, you get to take advantage of guaranteed savings on your bill at a new low variable rate for the following 11 months.” (N.T. at 72). Although not received by Mr. Towne in this case, the welcome packet sent to new clients and introduced by Mr. Towne as part of his case in chief clearly specifies the rate structure. (N.T. at 20 and 114). GAP clearly does not provide false information about its rates.

4. GAP exercised reasonable diligence when adding Mr. Towne to its internal do-not-call list after being requested by Mr. Towne to not call him again.⁴

Although there is no binding Pennsylvania authority regarding the time a company has to place a consumer on its internal do-not-call list, the FCC provided persuasive guidance as to this issue in 2003. “We conclude that telemarketers must honor a company-specific do-not-call request within a reasonable time of such request. Taking into consideration both the large databases of such requests maintained by some entities and the limitations on certain small businesses, we conclude that a reasonable time to honor such requests must not exceed thirty days from the date of such a request.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*. Federal Communications Commission Report and Order dated June 26, 2003. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf

Mr. Towne produced telephone records via google voice, indicating a total of 14 calls starting from May 18, 2012 through and including June 13, 2012. (N.T. at 29). Of the fourteen

⁴ As Mr. Towne has withdrawn his claims for violations of the National and State Do-Not-Call list, GAP does not cite the Safe Harbor to the Telemarketing Sales Rule in support of its defense to any claim by Mr. Towne. 16 CFR 310 *et. seq.*

calls made, six of the calls actually connected to Mr. Towne as shown by the time entry for each call. (N.T. at 30). Ms. Lucas testified that on May 24, 2012, one of the contracted call centers processed a do-not-call request from Mr. Towne. (N.T. at 127). This call is the first of the calls that was recorded and played for this honorable court by Mr. Towne. (N.T. at 71-95).

Typically, GAP and its agents target to process internal do-not-call requests in approximately 48 hours (N.T. at 127). After the internal do-not-call request was received on May 24, 2012, unfortunately, Mr. Towne was called again May 24, 2012 and again on June 13, 2012. (N.T. at 82-95). Ms. Lucas testified that GAP adheres to Federal do-not-call standards as a more formal guideline for GAP's internal do-not-call list (N.T. at 128).

GAP contracts telemarketing firms, which are permitted to subcontract with other call centers. (N.T. at 129). Managing and distributing the do-not-call lists are the responsibilities of the project managers, who are the employees of the specific call centers, not direct employees of GAP. (N.T. at 129-130). GAP takes full responsibility for any unlawful conduct that may be committed by those call centers when acting on behalf of GAP. Prior to the complaint raised by Mr. Towne, the internal do-not-call master lists were distributed every few days. GAP has changed its internal policy to require daily updates in an effort to increase the speed at which an internal do-not-call request is processed by all its contracted call centers. (N.T. at 130).

It should be noted that even though GAP disputes that Mr. Towne requested that he be placed on GAP's internal do-not-call list as early as May 18, 2012, the last call received by Mr. Towne based on his own testimony was June 13, 2012. (Complainant's Exhibit 6). Said calls were all made within 30 days of his alleged initial request. Therefore, GAP exercised reasonable diligence in placing Mr. Towne on its internal do-not-call list.

5. GAP did not abandon over three percent of the calls made to Mr. Towne and provided its telephone number as part of the call such that no violation of the Telemarketing Sales Rule occurred.

Pursuant to the Telemarketing Sales Rule an outbound telephone call is “abandoned” if a person answers it and the telemarketer does not connect the call to a sales representative within two seconds of the person’s completed greeting. Telemarketing Sales Rule, 16 CFR Section 310, *et seq.*

Mr. Towne alleges that GAP’s contracted telemarketing firms have an abandoned call rate of over three percent in violation of the aforementioned regulations. However the evidence presented by Mr. Towne does not support such a claim. Of the fourteen calls to Mr. Towne, only six calls actually connected to Mr. Towne as evidenced by the time stamp on Complainant Exhibit 6. (Complainant’s Exhibit 6). The remaining calls (8) show no handling time indicating that those calls were not answered by Mr. Towne and therefore not falling within the definition of an abandoned call. *Id.* Six of the calls from GAP to Mr. Towne connected and it was his testimony that during those calls he had enough time to ask to be placed on the internal do-not-call list. (N.T. at 104-105). Based on his testimony and the evidence submitted at trial, one can deduce from the record that GAP did not in fact abandon any calls made to Mr. Towne.

Finally, this honorable court can take judicial notice that when dialing 412-542-5932 listed on Complaint Exhibit 6, the caller will still receive a recorded message from GAP asking the caller to leave a message with the company. At the time of the telemarketing campaign that is the subject of this complaint, GAP could also be reached at 234-542-5932. (N.T. at 103-104). All calls to this number today will connect to a company called HBW leads. It is believed that the number has been changed by the third party call center to reflect a new calling campaign. Based on the above, GAP did not abandon calls to Mr. Towne nor did GAP provide

inappropriate call identification information to customers in violation of the Telemarketing Sales Rule.

IV. CONCLUSION.

For the foregoing reasons, Respondent, Great American Power, LLC requests that this honorable court deny the relief requested in the Complaint, and for any other relief deemed just and appropriate.

Respectfully submitted,

JACOBSON, JULIUS & MCPARTLAND

Dated: December 5, 2012

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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

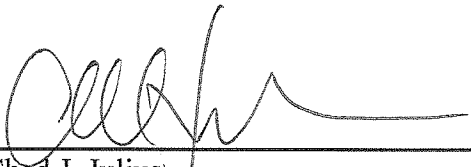
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Respondent	:	

CERTIFICATE OF SERVICE

I, Chad J. Julius, Jacobson, Julius & McPartland, do hereby certify that on this day I served the within Brief upon the following persons via the ECF/CM system and/or by depositing a true and correct copy of the same in the United States Mail:

William B. Towne
4243 Glen Lytie Road
Pittsburgh, Pa 15217

DATED: December 5, 2012



Chad J. Julius