**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held September 26, 2013 |
| Commissioners Present:  Robert F. Powelson, Chairman  John F. Coleman, Jr., Vice Chairman  Wayne E. Gardner  James H. Cawley  Pamela A. Witmer |  |
| William Towne | C-2012-2307991 |
| v. |  |
| Great American Power, LLC |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions (Exceptions) of William Towne (Complainant) filed on April 9, 2013, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Mary D. Long, which was issued on March 20, 2013, in the above-captioned proceedings. Replies to Exceptions were filed by Great American Power, LLC (Great American Power or GAP) on April 19, 2013. For the reasons stated below, we will, *inter alia,* deny, in part, and grant, in part, the Complainant’s Exceptions and modify the Initial Decision as set forth herein.

**History of the Proceeding**

The Complainant filed a formal Complaint on May 29, 2012, generally complaining about aggressive telemarketing practices of electric suppliers, and specifically complaining about the tactics employed by Great American Power. The Complaint was served on GAP by the Commission on June 5, 2012. Great American Power filed an Answer on June 25, 2012, denying that it engaged in any deceptive or aggressive marketing practices.

An evidentiary hearing was scheduled for October 11, 2012. The Complainant appeared *pro se* and testified on his own behalf. He offered 12 exhibits which were admitted into evidence. Great American Power appeared and was represented by counsel. Great American Power offered the testimony of one witness and offered three exhibits which were admitted into evidence. The hearing generated a transcript of 156 pages. By order dated December 21, 2012, the record was closed.

On March 20, 2013, the ALJ’s Initial Decision was issued. The ALJ sustained the Complaint, in part, and assessed a civil penalty in the amount of $5,000.[[1]](#footnote-1) On April 9, 2013, the Complainant filed Exceptions to the Initial Decision. On April 19, 2013, Great American Power filed Replies to Exceptions.

**Discussion**

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to the respondent. If the evidence presented by the respondent is of co-equal value or “weight,” the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the respondent. [*Burleson v. Pa. PUC,* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d,* 501 Pa. 433, 461 A.2d 1234 (1983).](http://www.lexis.com/research/buttonTFLink?_m=0d7e78528297490763e78babd487bc42&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2006%20Pa.%20PUC%20LEXIS%20102%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b66%20Pa.%20Commw.%20282%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=44d0f4cf51bc1159652e85695542a09d)

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001).

ALJ Long made forty-two Findings of Fact and reached three Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**ALJ’s Decision**

In her Initial Decision, the ALJ observed that the Commission has “emphasized the importance of fair and honest sales and marketing practices in safeguarding consumers and preserving the integrity of the electric generation market.” I.D. at 8, *citing* *Pa. PUC v. MXenergy Electric, Inc.*, Docket No. M-2012-2201861 (Order entered May 3, 2012). The ALJ noted that Section 54.43 of the Commission’s Regulations, 52 Pa. Code § 54.43, sets forth a code of conduct for electric generation suppliers (EGSs). That section provides specific direction to EGSs regarding the manner in which they are to interact with customers in the Commonwealth, including the provision of accurate information, the treatment of customer information, and, notably, that EGSs “are responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employes, agents or representatives.” 52 Pa. Code § 54.43(f).

In addition to the foregoing, the ALJ commented that Section 54.42(a)(8) of the Commission’s Regulations, 52 Pa. Code § 54.42(a)(8), provides that EGSs must conform their practices to Pennsylvania consumer protection law. The ALJ determined that the reference to Pennsylvania consumer protection law would include the Pennsylvania Unfair Trade Practices and Consumer Protection Law (CPL), 73 P.S. §§ 201-1-201-9.3, as well as federal and state telemarketing regulations. I.D. at 11. The ALJ also expressly stated that an EGS is responsible for the actions of third parties retained for marketing to consumers. *Id*.

The ALJ then moved to the Parties’ arguments in light of the foregoing authority. Initially, the ALJ disposed of Great American Power’s argument that the Complainant lacked standing to bring an action under the CPL. Great American Power argued that the Complainant did not suffer any loss of money or property, a necessary element for a private action under Section 201-9.2 of the CPL. The ALJ dismissed Great American Power’s claim stating that the Complainant’s action was brought under Section 701 of the Code, not the CPL. As noted by the ALJ, Section 701 of the Code does not require a pecuniary loss before an action can be filed before the Commission. The ALJ also determined that Great American Power had waived its standing argument by failing to raise it in its Answer or in preliminary objections. I.D. at 11.

The ALJ then moved to a determination of the Complainant’s substantive claims. The ALJ first addressed the Complainant’s allegations that Great American Power had violated the consumer protection laws. The ALJ’s introduction of her discussion on this issue is instructive and we will quote it in full:

As described in the Findings of Fact, the complaints made by [Complainant] arise from GAP’s conduct of what can only be described as a telemarketing blitzkrieg in the spring of 2012. The record shows that GAP contacted the Complainant by telephone 14 times within a period of 26 days. GAP engaged the services of two third-party call centers and charged them with the objective of enrolling as many customers as possible in the Duquesne Light service territory within a relatively short period of time. The call centers were not paid based on the number of hours spent contacting customers or the number of telemarketers they employed. Rather, they were paid based upon the number of customers who were enrolled in GAP’s electricity supply program. The result of the structure of the campaign chosen by GAP was that the Complainant, and no doubt other consumers in the Duquesne Light service territory, were subjected to numerous phone calls by aggressive sales representatives using potentially misleading statements that at the very least created a substantial risk that the consumer would not understand who was calling and that they were enrolling in an electric supply agreement that they would later have to opt-out of rather than affirmatively consenting to choose GAP as their independent electricity supplier. While not all of GAP’s actions rise to the level of violations of consumer protection laws, GAP’s conduct and design of the marketing campaign at the very least raise serious concerns that may merit closer attention by the Commission in the future.

I.D. at 11-12.

The ALJ then discussed the specific allegations of the Complainant. The Complainant had first argued that GAP improperly acquired his account information from Duquesne Light Company. The Complainant explained that he had previously requested that Duquesne Light Company not provide his account information or telephone number to third parties. The ALJ held that the record evidence revealed that Duquesne Light Company had released the Complainant’s information to GAP through the Eligible Customer List (ECL); that GAP had no reason to believe the ECL was not updated to reflect the Complainant’s request to be removed and that the Complainant admitted that his telephone number had not been registered with any Do Not Call List. On this basis, the ALJ found that the Complainant had failed to prove a violation of the consumer protection laws or the Commission’s Regulations on the basis that GAP had obtained his telephone number and account information. I.D. at 12-13.

The Complainant’s next allegation argued that GAP violated consumer protection laws by deliberately misrepresenting its relationship with Duquesne Light Company. GAP responded that its agents clearly identified themselves as calling from GAP and not Duquesne Light. The ALJ agreed that, although the GAP representatives identified themselves as calling from GAP, “their statements had a high potential to lead customers to believe that GAP had a special association or relationship with Duquesne Light and did not state that they are an independent supplier not endorsed or approved by Duquesne Light.” I.D. at 13.

The ALJ found that, taken as a whole, the statements by GAP’s representatives “clearly created the likelihood of customer confusion by suggesting that they were ‘authorized’ by Duquesne Light to offer a ‘savings program’ rather than stating that they were an independent supplier selling electricity generation.” I.D. at 14. The ALJ stated:

At no time did any of the GAP representatives explain to the Complainant that they were “not working for and [were] independent of the local distribution company.” Rather, armed with a customer’s Duquesne Light account information, they led the potential customer to believe that GAP was acting on behalf of Duquesne Light to offer a savings program to qualified customers and that GAP was merely facilitating the process. At no point was the Complainant informed that GAP was independent of Duquesne Light and that GAP was selling a service.

I.D. at 15, footnotes omitted.

The ALJ noted that the CPL prohibits practices which would cause a likelihood of confusion regarding the “source, sponsorship, approval or certification of goods or services” or create a “misunderstanding as to affiliation, connection or association with, or certification by, another.” I.D. at 14, quoting the CPL at 73 P.S. §§ 201-2(4)(ii) and 201-2(4)(iii). The ALJ also observed that the Commission’s *Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 5, 2010) (2010 *Interim Guidelines*),[[2]](#footnote-2) require an EGS’s agents to clearly identify themselves as working for the EGS and to expressly clarify that they are independent of the local distribution company (here, Duquesne Light Company). *Id*. at Section G.1.

Based upon the foregoing, the ALJ found that GAP’s statements regarding its affiliation with Duquesne Light Company constituted an unfair trade practice as defined by the CPL and violated the 2010 *Interim Guidelines*. I.D. at 15.

The ALJ then discussed the Complainant’s allegation that GAP had violated Do Not Call provisions. Even though the Complainant had failed to register his telephone number on the federal or state “Do Not Call” lists, the record indicated that GAP repeatedly called the Complainant after he had requested GAP to stop calling him. The ALJ noted that Section I of the 2010 *Interim Guidelines* provided that EGSs must comply with the Telemarketer Registration Act, 73 P.S. §§ 2241-2249. That Act provides, *inter alia*, that it is unlawful for a marketer to continue to call a person after that person has stated that he does not want to receive any more calls from that marketer. I.D. at 16, 73 P.S. § 2245. That Act further provides that a marketer will not be in violation if it has established and implemented procedures to comply with the Act; has trained its personnel in the procedures; has maintained and recorded lists of persons who may not be contacted; and any subsequent call is the result of an error. *Id*.

The ALJ thoroughly reviewed GAP’s evidence regarding its procedures for compliance with the Telemarketer Registration Act. I.D. 17-18. She determined that GAP produced very little evidence concerning its do-not-call policy. To the extent that any internal policy existed, the ALJ found that GAP failed to follow it. *Id*. at 17. The ALJ concluded as follows:

In sum, GAP designed a very intensive short-term telemarketing campaign executed by agents calling from multiple locations who were employed by multiple call centers. Accordingly, GAP should have known that this design required a do-not-call protocol which would make provisions for these factors which would mitigate the risk of calling consumers who did not want to be contacted. Yet it failed to do so. Not only did GAP representatives continue to contact the Complainant after he asked them not to, but the same representative called him with the same pitch even after the Complainant told him that he was not interested in GAP’s product. This is clearly the type of sales behavior that Section 2245 of the Telemarketer Registration Act was designed to prevent and constitutes a violation of the Commission’s 2010 Interim Guidelines which incorporate the requirements of that statute.

I.D. at 18.

The next allegation asserted by the Complainant was that GAP engaged in abusive telemarketing by failing to transmit a telephone number on “Caller ID” that could be called during normal business hours in order to request that the calls stop. I.D. at 18. The Complainant testified that he was able to record and identify the telephone numbers associated with GAP’s telemarketing calls. When he attempted to contact those numbers, he either received a message that the number was disconnected or that he had reached a business not affiliated with GAP. The ALJ found that GAP failed to offer any admissible evidence to refute the Complainant’s testimony. *Id*. at 18-19.

After discussing the Complainant’s testimony on this issue, the ALJ found that the Telemarketer Registration Act prohibits a telemarketer from blocking caller identification. 73 P.S. § 2245.1. The ALJ also determined that the 2010 *Interim Guidelines*, at Section H.2, require adherence to the federal Telemarketing Sales Rule found at 16 C.F.R. § 310.4(8). The federal Rule similarly requires a telemarketer to provide a telephone number via Caller ID which can be called during normal business hours. I.D. at 19-20. Based on the foregoing, the ALJ found that GAP had violated the Telemarketer Registration Act, the federal Telemarketer Sales Rule and, therefore, the Commission’s 2010 *Interim Guidelines*.

The Complainant’s next allegation asserted that GAP had switched a consumer’s energy supplier without informed consent and provided misleading or false information about GAP’s rates. GAP responded that the Complainant’s service was never switched, the enrollment process was clearly explained and the information provided relating to GAP’s rates was correct. I.D. at 20.

With regard to the Complainant’s allegation about switching, the ALJ found that she “was constrained to agree with GAP, . . . because the Complainant was not actually switched.” I.D. at 21. However, after reviewing the transcripts of the sales calls, the ALJ expressed substantial concern that given the entirety of the customer contact by GAP representatives, a customer less informed than the Complainant could have been sufficiently confused to enroll in GAP’s service without realizing what happened. I.D. at 21-23. However, based on the record before her, the ALJ found that this Complainant was not confused and was able to decline enrollment in GAP’s supply program. *Id*. at 22-23.

The Complainant next alleged that GAP violated consumer protection laws by abandoning calls. The Complainant submitted evidence which indicated that several recorded incoming calls failed to establish that a connection actually occurred. I.D. at 23. The ALJ found that the federal Telemarketing Sales Rule prohibits abandoning outbound calls. However the ALJ also found that the definition of an abandoned call provides that a call is deemed abandoned if a person answers it and the telemarketer does not connect the call within two (2) seconds of the person’s completed greeting. 16 C.F.R.   
§ 310.4(b)(1)(iv). Based upon the record before her, the ALJ determined that the Complainant failed to produce evidence that he ever answered calls that do not indicate any handling time. Accordingly, the Complainant failed to show that those calls were “abandoned.” *Id*.

The Complainant also alleged that GAP failed to maintain records as required by the federal Telemarketer Sales Rule at 16 C.F.R. § 310.5. The ALJ found that GAP’s testimony on this issue supported a finding that the records described by the Complainant were maintained by GAP’s contracted call centers, a practice permitted by the Telemarketer Sales Rule at 16 C.F.R. § 310.5(c). The Complainant never pursued his allegation and failed to put any additional evidence on record. Accordingly, the ALJ found that the Complainant failed to satisfy his burden of proof on this issue. I.D. at 24-26.

The Complainant’s final allegation was that GAP failed to prove that its telemarketing subcontractor was properly registered as a telemarketer as required by the Telemarketer Registration Act. The ALJ found that, like the record-keeping claim, the Complainant failed to develop his argument through evidence introduced at the hearing. As with the record-keeping allegation, the mere allegation is insufficient to shift the burden of going forward to GAP. The Complainant had the burden of proof and failed to meet it. Accordingly, the ALJ denied this allegation.

The ALJ next discussed the penalty to be assessed against GAP. The Complainant had requested that a civil penalty be assessed and that GAP’s EGS license be revoked. The Complainant also requested that GAP and all partners, contractors, and employees be permanently barred from operating as an EGS in the Commonwealth. I.D. at 26. The ALJ noted that Section 3301 of the Code provides the Commission with the authority to impose a civil penalty for violations of up to $1,000 per day of violation. In addition, the ALJ referred to the Commission’s Policy Statement at 52 Pa. Code § 69.1201(*Policy Statement*) which sets forth specific factors and standards to be considered when determining whether to assess a civil penalty for a violation. I.D. at 26‑28.

The ALJ found that:

GAP violated the 2010 *Interim Guidelines* and several Pennsylvania and federal consumer protection laws by failing to clearly represent itself as a supplier independent from Duquesne Light, by failing to expeditiously place the Complainant’s contact information on its internal do-not-call list and by failing to provide an accurate call-back telephone number on its caller ID.

I.D. at 28.

The ALJ then discussed each of the three violations described above and her basis for finding that the violations occurred. I.D. at 28-29. She then explained that the Commission “emphasized the importance of favorable customer opinion of interactions with participants in the market.” *Id*. at 29. The ALJ quoted this Commission’s substantial concern that “customer opinion is key to the success of any retail market. . . .” *Id*., *citing, Interim Guidelines Regarding Standards for Changing a Customer’s Electricity Generation Supplier*, Docket No. M-2011-2270442 (Order entered October 25, 2012), at 3. The ALJ stated that given the foregoing, the type of behavior described by the Complainant negatively impacts other market participants and the retail market as a whole in addition to the Complainant. On that basis, she found that the nature and consequences of the violations at issue merit a higher penalty. I.D. at 29, 52 Pa. Code § 69.1201(c)(1) and (c)(2).

The ALJ also determined that GAP’s conduct was at least negligent. She determined that GAP failed to properly monitor its call centers and designed a telemarketing campaign “that virtually guaranteed that customers who do not wish to be contacted would be contacted on multiple occasions even after requests to be placed on the do-not-call list and after declining GAP’s offer of services.” I.D. at 29. The ALJ also found this merited a higher penalty. *Id*., 52 Pa. Code § 69.1201(c)(3).

The ALJ explained that the fourth factor to be considered under the Policy Statement is the efforts of the regulated entity to modify its internal practices and the involvement of top-level management in correcting the conduct. 52 Pa. Code § 69.1201(c)(4). Here, the ALJ found that GAP’s CEO failed to acknowledge that GAP representatives misstated their relationship with Duquesne Light Company, failed to have an effective process to protect the Complainant’s contact information within 48 hours of his request, and failed to provide any evidence regarding training for call center personnel. The ALJ found that this factor also merits a higher penalty “inasmuch as any efforts made by GAP were not significant.” I.D. at 30.

The fifth factor involves the number of customers affected by the conduct at issue. 52 Pa. Code § 69.1201(c)(5). The ALJ noted that only a single customer could be found to have been impacted on this record. However, she found that while the course of the violation occurred over a relatively short period of time for this customer, the Complainant was contacted numerous times and often on the same day. On that basis, she determined that this factor merited a higher penalty. I.D. at 30

In the ALJ’s view, deterrence was perhaps the most important factor for her consideration in this proceeding. In this regard, the ALJ stated:

Clearly, GAP did not take its obligation to comply with the Commission’s regulations and codes of conduct seriously in its design of this campaign and supervision of its telemarketing subcontractor. Moreover, the penalty in this case may also serve as a reminder to other suppliers who are designing intensive telemarketing campaigns. Therefore, a substantial civil penalty is necessary in order to emphasize the importance of being educated and aware of the requirements of Commission guidelines and regulations to deter not only this supplier, but other suppliers as well.

I.D. at 30, *citing* 52 Pa. Code § 69.1201(c)(8).

The ALJ noted that the *Policy Statement* also provided that “other relevant factors” could be considered in determining the civil penalty to be assessed. 52 Pa. Code § 69.1201(c)(10). Here, the ALJ found that compliance with the Commission’s Regulations, guidelines and code of conduct for EGSs in the retail energy market is extraordinarily important. I.D. at 31.

Based on the foregoing, the ALJ determined that a civil penalty of $5,000 was appropriate. She stated that the size of the penalty was sufficient to emphasize the importance of compliance with the Commission’s Regulations and would serve as a deterrent to GAP and other EGSs engaged in telemarketing in the retail energy market. I.D. at 31. She found that suspension or revocation of GAP’s EGS license was not warranted at this point, but that GAP was placed on notice that further conduct of this nature could result in suspension or revocation in the future. *Id*.

**Exceptions, Replies and Disposition**

The Complainant filed twenty-one Exceptions to the Initial Decision. Several of them address the same issue, but make different arguments. For the sake of organization, we will group those Exceptions which address the same issue together. Some of the Exceptions express agreement with the Initial Decision. While we will identify those Exceptions, no disposition is needed as the Complainant is not actually claiming error.

The Complainant’s first Exception expresses agreement with the ALJ’s Finding of Fact No. 24 relating to the Complainant’s conversation with an account manager for GAP finding that the Complainant agreed to answer yes/no questions regarding his account information. Exc. at 1. The Complainant suggests that some clarification is needed, however, our review of the Finding of Fact at issue indicates that it is a simple, one sentence Finding. No clarification is warranted.

The Complainant’s second Exception argues that Finding of Fact No. 29 incorrectly found that the taped verification call asked the Complainant to say “yes” if he understood the terms of enrollment. The Complainant argues that the taped verification call actually asked if the Complainant understood GAP’s rates and that a welcome packet would be mailed to him. The Complainant argues that he believed he had to answer the question incorrectly in order to avoid switching his power supplier “and hereby clarifies that response.” Exc. at 1.

GAP responds to the second Exception and asks that it be stricken. GAP argues that the Complainant is seeking to submit additional evidence through this Exception. According to GAP, Finding of Fact No. 29 accurately reflects the record evidence as set forth in the transcript of this proceeding. GAP asserts that, if any clarification was necessary, the Complainant should have provided that at the hearing or upon review of the transcript. R.Exc. at 1-2.

Based upon our review of the record, we agree with the ALJ and GAP. Finding of Fact No. 29 accurately reflects the record in this proceeding. We also find that the “clarification” sought by the Complainant through this Exception is immaterial to the outcome of this proceeding. This Exception is denied.

The Complainant’s third Exception relates to Finding of Fact No. 32 which simply states that the Complainant filed his Complaint with the Commission and the Complaint was served on GAP on June 5, 2012. The Complainant does not claim error in this Finding; in fact the Complainant states that it is “accurate.” Exc. at 1. But the Complainant then seeks to present additional argument without citing any error by the ALJ on this point. Finding no error on the part of the ALJ relating to Finding of Fact No. 32, this Exception is denied.

The Complainant’s Exception No. 4 simply states agreement with the ALJ’s comment on Page 12 of the Initial Decision that GAP’s conduct may merit closer attention by the Commission. Since this Exception does not claim any error on the part of the ALJ, no disposition is necessary.

The Complainant’s fifth Exception claims that the ALJ erred when she stated that GAP had no reason to believe that the ECL provided by Duquesne Light Company which contained the Complainant’s information was not fresh. *See*, I.D. at 13. The Complainant argues that it was unreasonable for GAP to assume that an ECL provided in March was still accurate for a telemarketing campaign in May and June. Exc. at 2.

GAP responds that the Complainant ignores the fact that his telephone numbers were not on any do-not-call lists and that any “scrubbing” of the ECL would have restricted GAP’s access to the Complainant’s telephone numbers. Since the Complainant failed to register with any do-not-call list, GAP asserts that the ALJ correctly found that GAP did not violate any consumer protection laws on this issue.

We agree with the ALJ on this point. As she stated in her Initial Decision, GAP had no reason to believe that the ECL provided by Duquesne Light Company was not current. In addition, GAP is correct that, since the Complainant failed to register with a do-not-call list, they could lawfully contact the Complainant regardless of the state of the ECL. On that basis, the ALJ correctly found that GAP did not violate any consumer protection laws with regard to this issue. Accordingly, we will deny this Exception.

The Complainant’s Exception No. 6 expressly states that no exception is taken to various rulings in the Initial Decision. Exc. at 2-3. Accordingly, no disposition is necessary.

In the Complainant’s Exception No. 7, the Complainant states that the ALJ found that there is no binding authority regarding the amount of time a telemarketer has to place a request on its internal do-not-call list (as distinguished from the federal and state do-not-call registries). It does not appear that the Complainant is claiming that the ALJ erred; however, the Complainant appears to argue that a standard should be implemented to provide that such requests should become effective immediately. Exc. at 3.

GAP responds that it correctly argued, and the ALJ correctly found, that there is no binding authority on the amount time a telemarketer has to place a request on its internal do-not-call list. GAP stated that it expressed the opinion that a thirty-one day grace period, such as that provided by FCC guidance, is appropriate. However, in this proceeding, GAP asserts that the ALJ found that GAP failed to follow its own internal policy and therefore violated Section 2245 of the Telemarketer Registration Act, 73 P.S. § 2245, and the Commission’s 2010 *Interim Guidelines*. Accordingly, GAP argues that the Complainant’s Exception is moot. R.Exc. at 2-3.

As we noted above, it does not appear that the Complainant claims that the ALJ erred in her statement regarding binding authority for timelines to process requests on internal do-not-call lists, nor do we find any error in that statement. We also agree with GAP that, since the ALJ did find a violation for GAP’s failure to follow its own internal guidelines, we are hard pressed to find any error in the ALJ’s handling of this issue. We will deny this Exception.

The Complainant’s eighth Exception references the ALJ’s determination that the Complainant was not “slammed,” i.e., transferred to GAP’s service without his consent, but appears to argue that GAP’s communication was so confusing that the Complainant could have been slammed had he been less alert. Exc. at 4. Similarly, the Complainant’s Exception No. 9 argues that the communication with GAP’s account representative was so confusing that the Complainant believed he had provided incorrect answers to questions to avoid getting slammed. *Id*. In the Complainant’s tenth Exception, he argues that GAP provided misleading statements regarding discounts that would be applied if the Complainant had switched to GAP’s service. *Id*.

GAP asserts that the record established that the Complainant was not slammed and the ALJ correctly ruled that no violation occurred. R.Exc. at 3.

We have carefully reviewed the record and the Initial Decision in this proceeding. The ALJ correctly found that the Complainant was not slammed. The ALJ went to some lengths to express her concern over the confusing messages provided by GAP’s representatives. *See*, I.D. at 14-15, 20-23. However, with regard to this Complainant and based on the record before her, the ALJ determined that the Complainant was able to make an informed decision. She stated, “on this record it appears that this Complainant was not confused and was able to decline enrollment in the supply program.” I.D. at 22-23. We agree with those determinations and deny these three Exceptions.

The Complainant’s eleventh Exception claims that the ALJ erred when she found that the Complainant failed to prove that GAP had abandoned calls within the meaning of the federal Telemarketer Sales Rule. Exc. at 4-5. The Complainant explains at length his efforts at obtaining telephone records to establish his claim and explains why he did not do so. *Id*. at 5.

GAP asserts in reply that the Complainant was provided every opportunity to establish his claim on the record, but failed to do so. GAP also requests that this Exception be stricken as an improper effort to introduce new evidence through an exception. R.Exc. at 3-4.

We agree with GAP on this issue. The ALJ based her determination regarding abandoned calls on the record before her. Regardless of the Complainant’s efforts to obtain telephone records, he failed to produce the necessary evidence at hearing. GAP is correct that a litigant cannot introduce new evidence at the exception stage of a proceeding. *Pa. PUC v. Philadelphia Gas and Water Company Water Division*, 1988 Pa. PUC LEXIS 511. Accordingly, we will deny this Exception.

The Complainant’s Exceptions Nos. 12 through 17 claim that the ALJ erred in finding that the Complainant failed to show that GAP did not maintain records required by various consumer protection laws. Throughout these Exceptions, the Complainant makes two basic arguments. First, once the Complainant alleged that GAP failed to maintain the required records, GAP had the burden of showing that it did maintain them. *See*, Exc. at 5-6. Second, the Complainant argues that GAP failed to cooperate during the discovery phase of this proceeding, therefore hindering the Complainant’s efforts at hearing. *Id*. at 6.

GAP asserts that the Complainant had the burden of proof on this issue and the ALJ correctly held that he failed to meet it. With regard to discovery, GAP argues that it fully cooperated with all of the Complainant’s discovery requests upon receiving a pledge from the Complainant to maintain the confidentiality of some of the documents as trade secrets. GAP also argues that, to the extent the Complainant believed there were problems during the discovery phase of the proceeding, he should have raised them at that time and not in the exceptions phase.

Again, we have carefully reviewed the ALJ’s Initial Decision and her thorough discussion of the Complainant’s allegations regarding record-keeping, the applicable authorities and the Complainant’s burden of proof. See, I.D. at 24-26. We find no error in the ALJ’s handling of this issue. We also agree with GAP that the Complainant had every opportunity to bring discovery issues to the attention of the ALJ at the appropriate time but did not do so. We will deny these Exceptions.

In Exceptions Nos. 18 and 19, the Complainant excepts to the ALJ’s finding that the Complainant failed to show that GAP violated the registration requirements for telemarketers in the Commonwealth. Exc. at 6-7. The Complainant argues that Section 2248 of the Telemarketer Registration Act, 73 P.S. § 2248, places the burden of proving an exemption or exception from a definition on the person claiming it. On that basis, the Complainant argues that GAP had the burden of proving that it was properly registered. *Id*. The Complainant then describes efforts he made to obtain the registration information. *Id*. at 7. In his Exception No. 19, the Complainant asserts that this Commission can review its records to determine whether GAP has properly registered with this Commission. *Id*.

GAP responds that the Complainant is again attempting to introduce evidence through his Exceptions. GAP argues that the Complainant agreed that GAP was not required to register as a telemarketer and the ALJ correctly ruled on that point. To the extent that the Complainant describes efforts to determine whether entities were properly registered, GAP argues that the Complainant had every opportunity to introduce evidence into the record but failed to do so. Accordingly, the ALJ properly found that the Complainant failed to meet his burden of proof on this issue. R.Exc. at 5.

Again, based upon our review of the record and the ALJ’s Initial Decision, we find that the ALJ properly found that the Complainant failed to meet his burden of proof on the issue of telemarketer registration. I.D. at 26. The ALJ correctly held that GAP is not required to register as a telemarketer. *See*, 2010 *Interim Guidelines* at Section I. We also agree with the ALJ that the Complainant failed to introduce sufficient evidence on the issue of registration to shift the burden of going forward to GAP. We will deny these Exceptions.

In the Complainant’s Exception No. 20, the Complainant argues that the civil penalty assessed by the ALJ was insufficient given GAP’s conduct, the potential impact that conduct could have on other customers and the fact that the amount will not serve as a deterrent to either GAP or other EGSs in the retail energy market. Exc. at 7-9. The Complainant discusses each of the *Policy Statement* criteria addressed by the ALJ and argues that, in each instance, the criteria indicate that a higher penalty should have been assessed. *Id*.

GAP responds that the Complainant admits in his Exceptions that the threat of the loss of GAP’s license is the largest deterrent in this proceeding. GAP argues that the ALJ has stated that future violations by GAP “will likely lead to GAP losing its license to operate.” R.Exc. at 6. GAP also argues that it is not a large company and the $5,000 civil penalty “was quite significant to its bottom line.” *Id*. Finally, GAP argues that increasing the civil penalty in order to deter actions of other EGSs is “unfair and not appropriate.” *Id*.

We will grant this Exception. Based upon the record before us, the $5,000 civil penalty assessed by the ALJ is insufficient given GAP’s conduct. It is undisputed that GAP contacted the Complainant fourteen times over a twenty-six day period despite repeated requests by the Complainant to stop calling. The ALJ stated that:

. . . the Complainant, and no doubt other customers in the Duquesne Light service territory, were subjected to numerous phone calls by aggressive sales representatives using potentially misleading statements that at the very least created a substantial risk that the consumer would not understand who was calling and that they were enrolling in an electric supply agreement that they would have to opt-out of rather than affirmatively consenting to choose GAP as their independent electric supplier.

I.D. at 12. Therefore, based upon the evidentiary record, we will increase the civil penalty from $5,000 to $10,000.

We also find the conduct by GAP to be potentially detrimental to the ongoing enhancements and the ultimate success of Pennsylvania’s retail electric market. As we have stated in prior cases, we strongly believe the competitive market can provide consumers with a variety of electric supply products and services, and that consumers do bear some responsibility to make choices that are appropriate for their individual circumstances. However, for those market forces to work, this Commission must continue to send a clear message to EGSs that the egregious and deliberate behavior utilized in this case, including the use of potentially misleading statements that could result in slamming, will not be tolerated.

In cases where this Commission finds that EGSs need increased oversight to ensure adequate compliance with our Regulations and the Code, the Commission has imposed conditions on EGS licenses. We find that this is one of those cases where increased oversight is needed. Accordingly, GAP’s ability to offer, render, furnish or supply electric generation supplier services in this Commonwealth will be subject to the conditions set forth below (Conditions). These Conditions will apply for a term of 18 months from the entry date of this Opinion and Order (Term). To the maximum extent possible, these Conditions will be construed in a fashion consistent with our Regulations. In the event of a conflict, these Conditions will control. They are as follows:

1. In its response to the Commission’s Bureau of Consumer Services (BCS) regarding a complaint alleging slamming, improper enrollment or deception, GAP shall provide BCS with copies of the documentation that GAP has supporting its position. The documentation can include written enrollment forms, disclosure statements, audio recordings, third party verification, marketing and sales materials and any other relevant documentation. Failure to provide documentation supporting an enrollment may result in a finding against GAP and possible referral to the Commission’s Bureau of Investigation and Enforcement for appropriate action.

2. GAP will provide a report the first week of each calendar quarter to BCS capturing: (a) the complaints by category received by GAP during the prior quarter; (b) the resolution for each complaint; and, (c) any process improvements/changes, organizational changes, etc., implemented to reduce and/or eliminate similar complaints going forward.

3. GAP will provide a single point of contact for Commission staff for resolution of consumer inquiries and/or complaints received by BCS.

4. GAP shall operate in accordance with BCS requirements for complaint management and handling. Notwithstanding the above:

a. GAP will send a written response, either via electronic mail, regular mail or by facsimile, to the BCS investigator assigned to mediate complaints against GAP within ten days of receipt of the complaint;

b. GAP will send a written response to the consumer who filed the complaint, within ten days of receipt of the complaint;

c. GAP will respond to supplemental or new information referred by BCS, within ten days of receipt of such information; and,

d. GAP will provide final resolution in writing to BCS and provide the affected consumer with the same resolution.

5. Not less than sixty days before the end of the Term of these Conditions, GAP shall file a status report with the Commission describing its compliance with the Code, Commission Orders and Regulations, and the Conditions set forth herein. A copy of this report shall be provided to the Commission’s Bureau of Technical Utility Services (TUS) and BCS.

TUS, with the assistance of BCS and the Commission’s Law Bureau, shall monitor GAP’s compliance with the Conditions set forth in this Opinion and Order. Upon receipt of the status report directed to be filed not less than sixty days before the end of the Term of the Conditions, TUS, with the assistance of BCS and the Law Bureau, shall prepare a staff recommendation regarding appropriate license conditions after the expiration of the Term of the Conditions set forth in this Opinion and Order. The Commission shall consider the staff recommendation at a subsequent Public Meeting.

The Complainant’s Exception No. 21 refers to Footnote 52 at Page 26 of the Initial Decision, in which the ALJ noted the Complainant’s decision to appear *pro se*. The ALJ wrote the footnote in the context of her ruling that the Complainant had failed to meet his burden of proof on the record keeping issue. She stated that the Complainant “very ably represented himself,” but in doing so, he took some risk that his lack of expertise would hurt his chances for success. The Complainant explains the reasons for his decision to appear *pro se*, but, other than complaining that the penalty was not sufficient, he does not refer to any claimed error by the ALJ. Exc. at 9.

We have addressed the matter of the amount of the civil penalty above. Our review of the remainder of this Exception fails to reveal what, if any, error was committed by the ALJ which the Complainant wishes to bring to our attention. Accordingly, this Exception needs no disposition.

We have noted above that the ALJ discussed GAP’s marketing tactics and suggested that they “raise serious concerns that may merit closer attention by the Commission in the future.” I.D. at 12. We believe that serious concerns exist now. Accordingly, we will also refer this proceeding to the Bureau of Investigation and Enforcement for such further action as may be deemed appropriate.

**Conclusion**

Based upon the foregoing discussion, we shall deny, in part, and grant, in part, the Complainant’s Exceptions; modify the Initial Decision, consistent with the foregoing discussion; increase the civil penalty assessed in this proceeding to $10,000; impose certain conditions as set forth above on GAP’s EGS license; and refer this matter to the Bureau of Investigation and Enforcement for such further action as may be deemed appropriate; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of William Towne are denied, in part, and granted in part, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Mary D. Long is modified, consistent with this Opinion and Order.

3. That the Complaint of William Towne against Great American Power, LLC at Docket No. C-2012-2307991 is sustained as to the violations pertaining to Great American Power, LLC’s failure to properly identify itself as an independent energy supplier, failure to promptly place Mr. Towne on a do-not-call list and failure to provide a caller ID which permitted Mr. Towne to request placement on a do-not-call list.

4. That the complaint of William Towne against Great American Power, LLC at Docket No. C-2012-2307991 is dismissed in all other respects.

5. That Great American Power, LLC shall pay a civil penalty as set forth in the amount of $10,000 for the violations of the Public Utility Code and the Commission’s Regulations described in Ordering Paragraph No. 4. This Commission’s records reflect that GAP paid $5,000 with regard to this matter on or about March 27, 2013. Accordingly, the balance of $5,000 shall be paid by certified check or money order, made payable to “Commonwealth of Pennsylvania,” and sent within twenty (20) days after the entry date of the Commission’s Order to:

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

6. That, for a Term of eighteen months following the entry date of this Opinion and Order, the following Conditions shall be attached to the Electric Generation Supplier License granted to Great American Power, LLC:

a. In its response to the Commission’s Bureau of Consumer Services regarding a complaint alleging slamming, improper enrollment or deception, GAP shall provide the Bureau of Consumer Services with copies of the documentation that GAP has supporting its position. The documentation can include written enrollment forms, disclosure statements, audio recordings, third party verification, marketing and sales materials and any other relevant documentation. Failure to provide documentation supporting an enrollment may result in a finding against GAP and possible referral to the Commission’s Bureau of Investigation and Enforcement for appropriate action.

b. GAP will provide a report the first week of each calendar quarter to the Bureau of Consumer Services capturing: (i) the complaints by category received by GAP during the prior quarter; (ii) the resolution for each complaint; and, (iii) any process improvements/changes, organizational changes, etc., implemented to reduce and/or eliminate similar complaints going forward.

c. GAP will provide a single point of contact for Commission staff for resolution of consumer inquiries and/or complaints received by the Bureau of Consumer Services.

d. GAP shall operate in accordance with the Bureau of Consumer Services’ requirements for complaint management and handling. Notwithstanding the above:

i. GAP will send a written response, either via electronic mail, regular mail or by facsimile, to the Bureau of Consumer Services’ investigator assigned to mediate complaints against GAP within ten days of receipt of the complaint;

ii. GAP will send a written response to the consumer who filed the complaint, within ten days of receipt of the complaint;

iii. GAP will respond to supplemental or new information referred by the Bureau of Consumer Services, within ten days of receipt of such information; and,

iv. GAP will provide final resolution in writing to the Bureau of Consumer Services and provide the affected consumer with the same resolution.

e. Not less than sixty days before the end of the Term of these Conditions, GAP shall file a status report with the Commission describing its compliance with the Code, Commission Orders and Regulations, and the Conditions set forth herein. A copy of this report shall be provided to the Commission’s Bureau of Technical Utility Services and the Bureau of Consumer Services.

7. That the Bureau of Technical Utility Services, with the assistance of the Bureau of Consumer Services and the Commission’s Law Bureau, shall monitor GAP’s compliance with the Conditions set forth in this Opinion and Order. Upon receipt of the status report directed to be filed not less than sixty days before the end of the Term of the Conditions, the Bureau of Technical Utility Services, with the assistance of the Bureau of Consumer Services and the Law Bureau, shall prepare a staff recommendation for the Commission regarding appropriate license conditions after the expiration of the Term of the Conditions set forth in this Opinion and Order.

8. That a copy of this Opinion and Order shall be placed in the Commission’s document file for Great American Power’s EGS License at Docket No. A‑2010-2205475.

9. That copies of this Opinion and Order shall be served on the Commission’s Bureau of Consumer Services, the Commission’s Bureau of Technical Utility Services and the Commission’s Law Bureau.

10. That Great American Power, LLC shall cease and desist from further violations of the Public Utility Commission’s Regulations.

11. That this matter shall be referred to the Commission’s Bureau of Investigation and Enforcement for such further action as is deemed appropriate.



**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 26, 2013

ORDER ENTERED: October 18, 2013

1. We note that this Commission’s records reflect that GAP satisfied the $5,000 penalty on or about March 27, 2013. [↑](#footnote-ref-1)
2. We note that the 2010 Interim Guidelines have been superseded by the Commission’s Regulations at 52 Pa. Code §§ 111.1-111.14, relating to Marketing and Sales Practices for the Retail Residential Energy Market, effective June 29, 2013. [↑](#footnote-ref-2)