

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Mayer Krain	:	
	:	
v.	:	C-2016-2581006
	:	
Choice Energy LLC	:	

**INITIAL DECISION**

Before  
Marta Guhl  
Administrative Law Judge

**INTRODUCTION**

This initial decision grants the Complainant’s Formal Complaint because the Complainant met his burden of proof to establish that Choice Energy LLC violated the Commission’s regulations under 52 Pa.Code § 111.10, and should be subject to civil penalties for telephone calls to the Complainant’s home telephone number.

**HISTORY OF THE PROCEEDING**

On December 15, 2016, Mayer Krain (Mr. Krain or Complainant) filed a formal Complaint (Complaint) against Choice Energy LLC (the Respondent, the Company or Choice) with the Pennsylvania Public Utility Commission (Commission) alleging that Choice had been calling his home telephone at least once daily for an extended period of time after requests to remove him from their call list. As relief, Complainant requests that the telephone calls cease.

On January 11, 2017, Respondent filed an Answer.<sup>1</sup> The Respondent denied the main averments of the Complaint. The Respondent asserted that the Complainant's telephone number was not on any state or federal do not call list and that as soon as the Complaint was filed, the Complainant's telephone number was removed from the Company's call list.

A Hearing Notice dated April 14, 2017, notified the parties that an in-person initial hearing was scheduled for Thursday, May 25, 2017, at 10:00 a.m. and the matter was assigned to me.

A Prehearing Order was issued on April 19, 2017, advising the parties of the date and time of the scheduled hearing, and also informing them of the procedures applicable to this proceeding.<sup>2</sup>

On April 20, 2017, Gabrielle A. Figueroa<sup>3</sup>, Esq., counsel for Choice, sent correspondence requesting that they be allowed to participate in the hearing telephonically. The correspondence did not provide any reason or need for this accommodation. On April 21, 2017, the Complainant sent correspondence to the office in response to the Company's request. Mr. Krain indicated that he felt the matter should be in person in order for the presiding officer to make credibility determinations. By Order dated May 18, 2017, I denied Choice's request and indicated that the hearing would proceed as scheduled on May 25, 2017.

The hearing convened as scheduled on May 25, 2017. Mayer Krain appeared *pro se* and testified on behalf of the Complaint. He presented four exhibits which were admitted into the record at the hearing. Ms. Figueroa was present on behalf of the Respondent and brought one witness, but was not allowed to participate in the proceedings because she failed to complete

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<sup>1</sup> The Answer was filed by Murray E. Bevan, Esquire on behalf of the Respondent. Mr. Bevan is not licensed to practice law in Pennsylvania.

<sup>2</sup> The prehearing order also indicated that a limited liability company, such as the Respondent, must have an attorney that is licensed to practice law in Pennsylvania or admitted *Pro Hac Vice*, to represent them in the proceedings. *See* 52 Pa.Code §§ 1.21 & 1.22; 52 Pa.Code § 1.24(b).

<sup>3</sup> Ms. Figueroa has not filed a notice of appearance on behalf of the Respondent in this matter and is also not licensed to practice law in Pennsylvania.

her request to participate *Pro Hac Vice* and no attorney had entered their appearance on behalf of the Respondent that was licensed to practice law in Pennsylvania.

The hearing resulted in a transcript of 30 pages. The record closed on June 19, 2017, when I received my copy of the transcript.<sup>4</sup>

### FINDINGS OF FACT

1. The Complainant is Mayer Krain, who resides at 3650 Salina Road, Philadelphia, Pennsylvania 19154 (Service Address). Tr. 12.
2. The Respondent is Choice Energy LLC, a licensed electric generation supplier in Pennsylvania.
3. In November and December 2016, the Complainant received numerous telephone calls from the Respondent. Tr. 12-13, 16; Complainant Exh. 1.
4. The telephone calls came from several telephone numbers, including 908-428-4714, 610-628-9792, 732-807-5614, and 201-603-2805, which were identified as “Choice Energy” on the caller ID on the Complainant’s telephone. Tr. 14, 17; Complainant Exh. 1.
5. The Complainant requested that he stop receiving telephone calls, and his home telephone number be removed from the Respondent’s call list. Tr. 13, 19, 20.
6. The Complainant requested to speak to a supervisor on at least three occasions to resolve the issue. Tr. 16.

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<sup>4</sup> After the record closed in this matter, on June 21, 2017, Michael A. Gruin, Esquire, entered his appearance on behalf of the Respondent. On the same date, the Respondent filed two Motions for Admission *Pro Hac Vice* for Mr. Bevan and Ms. Figueroa. On June 30, 2017, Mr. Krain filed a response to the Motions, essentially asking that the Motions be denied. I granted the Motions via an Order dated December 13, 2017.

7. The Complainant continued to receive telephone calls from Choice after his request. Tr. 13-14.

8. In the phone calls, the Respondent's telemarketer did not properly identify themselves or the purpose of the call. Tr. 20.

9. The phone calls ended after December 28, 2016, after the Complainant filed his Formal Complaint with the Commission. Tr. 14, 21; Complainant Exh. 1.

10. According to internet searches, there are complaints against Choice in other state and federal jurisdictions. Tr. 22-23, 24, 25-26, 27; Complainant Exh. 2, 3, 4.

11. The Complainant is not on the national do not call registry. Tr. 28.

#### DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, the complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, the complainant must show that the respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa.PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa.PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub.*

*Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dep't of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlt. 1984).

Upon the presentation by the 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 complainant shifts to the respondent. If the evidence presented by the respondent is of co-equal weight, the complainant has not satisfied her burden of proof. The complainant would be required to provide additional evidence to rebut the evidence of the respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlt. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion 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. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlt. 2001).

### Telemarketing Practices

The Complainant contends that Choice violated the Commission's regulations regarding telemarketing practices. Specifically, Mr. Krain indicates that Choice failed to properly identify itself in telephone calls and the purpose of the calls. Mr. Krain also asserts that Choice called him on numerous occasions and failed to respond to his requests to remove his telephone number from their call list.

Under Section 111.10 of the Commission's regulations, a supplier and its agents shall comply with regulations that govern marketing, consumer protection and telemarketing sales including consumer protection regulations. 52 Pa.Code § 111.10(a). Further, a supplier and its agents shall comply with the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C.A. § § 6101—6108) and 16 CFR Part 310 (relating to telemarketing sales rule). 52 Pa.Code § 111.10(a)(3).

Under the Commission's regulations, an agent who contacts customers by telephone shall, after greeting the customer, immediately identify himself by name, identify the supplier the agent represents and the reason for the telephone call. The agent shall state that he is not working for and is independent of the local distribution company or another supplier. *See* 52 Pa.Code § 111.10(b).

The Federal regulations related to the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act) indicate that excessive telephone calls are considered an abusive telemarketing practice. 16 C.F.R. § 310.4(b). Specifically, it is a violation of the Telemarketing Act to repeatedly call a person with the intent to abuse, annoy or harass the person at the telephone number called. 16 C.F.R. § 310.4(b)(1)(i). Further, it is also a violation of the Telemarketing Act to deny or interfere with a person's right to be placed on a do not call list for the company. 16 C.F.R. § 310.4(b)(1)(ii).

In support of his claim, Mr. Krain testified that in November and December 2016, he received numerous telephone calls from the Respondent at his home telephone number. Tr. 12-13, 16; Complainant Exh. 1. He testified that the telephone calls came from several telephone numbers, including 908-428-4714, 610-628-9792, 732-807-5614, and 201-603-2805, which were identified as "Choice Energy" on the caller ID on his telephone. Tr. 14, 17; Complainant Exh. 1. Mr. Krain indicated that he requested telephone calls stop, and his home telephone number be removed from the Respondent's call list. Tr. 13, 19, 20. The Complainant also requested to speak to a supervisor on at least three occasions to resolve the issue. Tr. 16. Mr. Krain testified that he continued to receive telephone calls from Choice after his request. Tr. 13-14. Mr. Krain also noted that in the phone calls, the Respondent's telemarketer did not properly identify themselves or the purpose of the call. Tr. 20. Lastly, Mr. Krain testified that the phone calls ended after December 28, 2016, after he filed his Formal Complaint with the Commission. Tr. 14, 21; Complainant Exh. 1.

Based on the above, the Complainant has met his burden of proof to establish that Choice violated the Commission's regulations regarding telemarketing practices. The Complainant was annoyed by the pattern of call from the Respondent so he filed a Formal

Complaint regarding the issue. *See* 52 Pa.Code § 111.10(a)(3); 16 C.F.R. § 310.4(b)(1)(i). He also credibly testified that he requested his telephone number be removed from the Respondent's call list but that it was not done until he filed his Complaint. This is also a violation of the Commission's regulations and the Telemarketing Act regulations, which indicate that the company cannot deny or interfere with a customer's right to be placed on a do not call list. *See* 52 Pa.Code § 111.10(a)(3); 16 C.F.R. § 310.4(b)(1)(ii). Further, based on Mr. Krain's credible testimony, the Respondent failed to properly identify themselves in the telephone calls or properly explain the purpose of the call, which is again a violation of the Commission's regulations. *See* 52 Pa.Code § 111.10(b). The Respondent did not present any evidence to rebut the Complainant's credible testimony. As such, the Complainant's Formal Complaint is granted.

### Civil Penalties

At the hearing and in a subsequent amendment to his Formal Complaint, the Complainant requested that the Commission assess civil penalties against Choice for its telemarketing practices. As noted above, the telemarketing practices of Choice violate the Commission's regulations regarding the use of telemarketing under 52 Pa.Code § 111.10.

Pursuant to Section 3301 of the Code, 66 Pa.C.S. § 3301, the Commission may impose a maximum civil penalty of \$1,000 per day for each violation of the Code, its regulations or its orders. However, certain standards apply when imposing a civil penalty. *Joseph A. Rosi v. Bell Atlantic-Pa., Inc.*, 94 Pa.PUC 103 (February 10, 2000).

The *Rosi* factors are generic in nature and apply to all violations of the Public Utility Code, as well as Commission regulations and orders, regardless of utility type. *Pa. Pub. Util. Comm'n v. NCIC Operator Services*, Docket No. M-00001440 (Order entered December 21, 2000). The factors and standards first articulated by the Commission in *Rosi* were published as Policy Statements and Guidelines. *See* 52 Pa.Code § 69.1201. Section 69.1201 applies to both litigated and settled cases involving the calculation of civil penalties. Section 69.1201 in part, provides as follows:

(a) The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa.C.S. (relating to Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.

(b) Many of the same factors and standards may be considered in the evaluation of both litigated and settled cases. When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding.

(c) The factors and standards that will be considered by the Commission include the following:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa.Code § 69.1201.

In light of Choice's violation of the Commission's regulations, the following determinations are warranted under the *Rosi* factors and standards:

(1) Choice's failure to comply with Mr. Krain's request and immediately stop telemarketing calls to his home telephone and place him on a do not call list is not a serious offense. It appears that it was more of an administrative or technical error, rather than willful fraud or misrepresentation on the part of the Respondent. As such, a lower civil penalty is warranted.

(2) The consequences of Choice's failure to put the Complainant on a do not call list and stop the telemarketing calls are of a less serious nature. The Complainant did not allege any injury or damage to himself or his property due to the Respondent's violations. Therefore, a lower civil penalty is warranted.

(3) This was a litigated case. Choice's failure to act when Mr. Krain requested that the telephone calls stop and his name be placed on a do not call list is deemed intentional.<sup>5</sup> The agent also failed to clearly identify itself and Choice and their relationship to electric distribution company. When an agent acting on behalf of Choice violates a Commission regulation, Choice is responsible. Such conduct is intentional and supports imposing a higher civil penalty.

(4) There is no evidence that Choice has made efforts to modify internal practice and procedures to address the conduct at issue and prevent similar conduct in the future. Therefore, the civil penalties are warranted.

(5) There is no evidence that other customers were affected by Choice's violation of the Code and the Commission's regulations. As to the duration of the violations, the evidence establishes that Choice's failure to act was over a short period of time between November and December of 2016. Therefore, a lower civil penalty is warranted.

(6) With regard to the sixth factor, the compliance history of the regulated entity which committed the violation, this factor will not be considered when determining the appropriate penalty to impose because there is no record evidence regarding Choice's compliance history.

(7) With regard to the seventh factor, whether the regulated entity cooperated with the Commission's investigation, this factor is not relevant to this proceeding and will not be considered when determining an appropriate civil penalty because this proceeding does not involve a Commission investigation.

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<sup>5</sup> If the violation is intentional, the Commission should start with the presumption that the penalty will be in the range of \$500.00 to \$1,000.00 per day. If the violation is negligent, the Commission should start with the presumption that the penalty will be in the range of zero dollars to \$500.00 per day. ... [T]he Commission retains broad discretion in determining a total civil penalty amount that is reasonable on an individual case basis. See *Rosi*, cited above.

(8) With regard to the eighth factor, the amount of the civil penalty necessary to deter future violations, this factor supports imposing a higher penalty. The Commission has emphasized the importance of ensuring the development of a robust market for electric generation service through informative and reliable marketing practices and avoiding conduct that may be potentially detrimental to the development of a successful retail electric market.<sup>6</sup> As a result, a higher civil penalty is appropriate to deter future violations by IDT.

(9) With regard to the ninth factor, past Commission decisions in similar cases, this factor also supports a higher civil penalty. As noted above, the Commission recently determined in *Yaglidereliler, supra*, that oral representations made to consumers at the time of the contact are important. A higher civil penalty in this case will be consistent with past Commission decisions that all disclosures by electric generation suppliers, whether oral or written, must be clear and unequivocal.

(10) With regard to the tenth factor, other relevant factors, this factor also supports a higher civil penalty. There is no evidence in the record that Choice was properly recording the telephone calls to the Complainant. There is nothing in the record to rebut Mr. Krain's assertions. Therefore, this also warrants a higher civil penalty.

When considering each factor in the civil penalty analysis provided by Section 69.1201 of the Commission's regulations, it is appropriate that a civil penalty of \$1,000 be imposed on Choice for violations of the Public Utility Code discussed above. This penalty comprises two \$500 penalties – one for each month of November 2016 and December 2016 where record evidence demonstrates that Mr. Krain received the misleading telephone calls and Choice failed to stop the marketing calls and place Mr. Krain's telephone number on a do not call list.

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<sup>6</sup> *Stephen Kiback, Jr. v. IDT Energy, Inc.*, Docket No. C-2014-2409676 (Opinion and Order entered August 20, 2015) (where the Commission determined that the ALJ rightly assessed penalties for violations of the telemarketing regulations and that they were serious in nature). *See also Yaglidereliler Corporation v. Blue Pilot Energy, LLC*, Docket No. C-2014-2413732, (Opinion and Order entered Jan. 16, 2015); *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991, (Order entered Oct. 18, 2013); *William MacLuckie v. Palmco Energy PA, LLC*, Docket No. C-2014-2402558, (Opinion and Order entered December 4, 2014).

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter of this proceeding. 66 Pa.C.S. § 701.

2. Pursuant to 66 Pa.C.S. § 332(a), the burden of proof in this proceeding is upon the Complainant. 66 Pa.C.S. § 332(a).

3. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704.

4. An electric generation supplier and its agents shall comply with regulations that govern marketing, consumer protection and telemarketing sales including consumer protection regulations. 52 Pa.Code § 111.10(a).

5. An electric generation supplier and its agents shall comply with the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C.A. § § 6101—6108) and 16 CFR Part 310 (relating to telemarketing sales rule). 52 Pa.Code § 111.10(a)(3).

6. An agent who contacts customers by telephone shall, after greeting the customer, immediately identify himself by name, identify the supplier the agent represents and the reason for the telephone call. The agent shall also state that he is not working for and is independent of the local distribution company or another supplier. 52 Pa.Code § 111.10(b).

7. The Federal regulations related to the Telemarketing and Consumer Fraud and Abuse Prevention Act indicate that excessive telephone calls are considered an abusive telemarketing practice. 16 C.F.R. § 310.4(b).

8. It is a violation of the Telemarketing and Consumer Fraud and Abuse Prevention Act to repeatedly call a person with the intent to abuse, annoy or harass the person at the telephone number called. 16 C.F.R. § 310.4(b)(1)(i).

9. It is also a violation of the Telemarketing and Consumer Fraud and Abuse Prevention Act to deny or interfere with a person's right to be placed on a do not call list for the company. 16 C.F.R. § 310.4(b)(1)(ii).

10. The Complainant has met his burden of demonstrating that the Respondent violated the Commission's regulations related to its telemarketing practices. *See* 52 Pa.Code § 111.10(a)(3); 52 Pa.Code § 111.10(b); 16 C.F.R. § 310.4(b)(1)(i); 16 C.F.R. § 310.4(b)(1)(ii).

11. Section 3301(a) of the Public Utility Code grants the Commission the authority to assess civil penalties against any public utility, person or corporation that is subject to the Code and violates any section of the Code, the Commission's regulations or a Commission rule or order. 66 Pa.C.S. § 3301(a).

12. The violations of the Public Utility Code and the Commission's regulations that are of a serious nature warrant a higher penalty. 52 Pa.Code § 69.1201(c)(1).

### ORDER

THEREFORE,

IT IS ORDERED:

1. That the Formal Complaint of Mayer Krain against Choice Energy LLC at Docket No. C-2016-2581006 is granted.

2. That Respondent Choice Energy LLC is hereby assessed a penalty of One Thousand Dollars (\$1,000.00) because Respondent failed to respond to the Complainant's

