**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held June 14, 2018

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

Norman J. Kennard

David W. Sweet

John F. Coleman, Jr.

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| Pennsylvania Public Utility Commission,  Bureau of Investigation and Enforcement  v.  American Power & Gas of Pennsylvania, LLC |  | M-2017-2508002 |

**Opinion and Order**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a proposed Joint Settlement Petition (Settlement) filed on April 6, 2017, by the Commission’s Bureau of Investigation and Enforcement (I&E) and American Power & Gas of Pennsylvania, LLC (AP&G or Company) (collectively, the Parties), with respect to an Informal Investigation conducted by I&E. Both Parties submitted Statements in Support of the Settlement. The Parties submit that the proposed Settlement is in the public interest and is consistent with the Commission’s Policy Statement at 52 Pa. Code § 69.1201, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy*. Settlement at 17. For the reasons set forth herein, we find that the Settlement should be adopted, consistent with this Opinion and Order.

**History of the Proceeding**

This matter concerns an informal investigation initiated by I&E regarding AP&G’s marketing practices as an electric generation supplier (EGS) in Pennsylvania. By letter dated February 17, 2016 (Investigation Letter), I&E instituted an investigation of AP&G, after receiving information provided by the Commission’s Bureau of Consumer Services (BCS) and the Office of Competitive Market Oversight (OCMO) about allegations that AP&G engaged in deceptive marketing practices by misrepresenting the Company’s status as an EGS and its purpose, speaking to individuals who lacked authority to enroll accounts, and engaging in questionable marketing practices in 2015.

On February 17, 2016, April 6, 2016, and July 25, 2016, I&E served three sets of data requests on the Company. AP&G provided responses to each set of data requests on March 16, 2016, April 27, 2016, and August 22, 2016, respectively.[[1]](#footnote-1) Thereafter, the Parties entered into negotiations and agreed to resolve the matter in accordance with the Commission’s policy to promote settlements at 52 Pa. Code § 5.231. The Parties filed the instant Settlement on April 6, 2017. By Order entered March 1, 2018 (*March 2018 Order*), the Commission provided interested parties with the opportunity to file comments. In order to be considered timely, comments were due within twenty days of the date of entry of the *March 2018 Order*. No comments were filed.

**Background**

I&E initiated the informal investigation of AP&G[[2]](#footnote-2) after being notified about allegations of deceptive marketing practices that were received from a variety of sources, including customers, an EGS broker, and an electric distribution company (EDC). One of the allegations forwarded by OCMO involved a phone call on August 25, 2015, between a sales agent acting on behalf of AP&G and a government distribution service customer of PECO. The sales agent allegedly failed to identify himself as being associated with AP&G and misled an administrative assistant of a government entity into verifying various account numbers, service addresses and rates that appeared on utility bills. The administrative assistant also asserted in part that she told the sales agent about her inability to make any decisions regarding the electricity accounts but nonetheless completed the third-party verification (TPV) process. Settlement at 5.

During the enrollment process related to this incident, an AP&G customer service manager contacted the governmental customer to verify the enrollment as part of the routine quality control measure. Through this communication, AP&G learned that the administrative assistant lacked the authority to make account-related decisions and the governmental customer was able to cancel the enrollment with AP&G prior to receiving electric generation supply service from the Company. Thereafter, on September 2, 2015, the governmental customer filed an informal complaint with BCS about the incident and alleged that numerous accounts were fraudulently switched by AP&G. In its informal complaint, the governmental customer averred that the administrative assistant lacked authority to change EGSs and that the TPV inappropriately used responses to certain questions to create a verbal contract to switch service. *Id.* at 5-6.[[3]](#footnote-3)

On September 23, 2015, AP&G responded to the informal complaint by averring that the administrative assistant affirmed her authority to enroll the electricity accounts of the governmental customer. In support, AP&G provided an audio recording of the TPV completed by the administrative assistant and asserted that it uses an independent vendor not affiliated with the Company for TPV services.

In addition to the governmental customer incident, OCMO received similar allegations about AP&G from an EGS broker/marketer in August 2015. The EGS broker/marketer contended that four to five of his large governmental and commercial clients claimed that AP&G changed their electric generation service based on conversations between the Company’s sales agents and individuals not authorized by their employers to switch electric service. The clients of the EGS broker/marketer alleged that AP&G deceived individuals into discussing their employer’s electric service. Furthermore, BCS received at least four additional informal complaints from a mixture of residential, small commercial and governmental customers in 2015 alleging that the Company accepted authorizations from persons who were not customers of record. Settlement at 6-7.

In its investigation, I&E concluded that AP&G’s sales agents asked appropriate questions during the TPV process to obtain authorizations from or on behalf of the customer of record. According to I&E, there was no evidence that TPVs were falsified or doctored or that the Company enrolled customer accounts based on inadequate or questionable authorizations. I&E Statement in Support at 3.

In contrast, I&E determined that AP&G’s sales scripts, instructions to sales agents and audio recordings of the sales presentations were misleading. For example, I&E found that sales agents were directed not to identify AP&G upon first contact with a potential customer but were instructed to indicate that the call was about the utility account. I&E concluded that the Company’s sales agents were not told to inform residential customers that AP&G is independent of the customer’s EDC, as required under 52 Pa. Code § 111.8(b). Moreover, I&E found that some sales agents informed customers that they were entitled to a rate reduction as part of the state’s energy program and other agents failed to indicate that the Company’s rate was variable when first discussing prices. I&E also determined that AP&G directed sales agents to tell customers, near the beginning of phone calls, that they would receive a new low rate starting with the next billing cycle. I&E considered such communication aggressive because it may lead some customers to believe they did not have options. I&E Statement in Support at 3.

As a result of its informal investigation, I&E concluded that it had gathered sufficient data to substantiate allegations of violations of our Regulations. Specifically, I&E was prepared to allege in a formal complaint that AP&G’s conduct violated 52 Pa. Code §§ 54.43(f), 54.122(3), and 111.8 (multiple counts). Settlement at 12. I&E provided its findings to the Company, which agreed to promptly revise its sales scripts, policies, and procedures pertaining to marketing its EGS service to potential customers in Pennsylvania. I&E Statement in Support at 4.

The proposed Settlement has been filed by the Parties in order to resolve allegations of EGS marketing violations. The Parties urge the Commission to approve the Settlement as being in the public interest. Settlement at 17.

**Terms of the Settlement**

Pursuant to the proposed Settlement, AP&G will pay a civil penalty of $30,000. Settlement at 14. The Settlement acknowledges that the Company has since revised its marketing practices, including modifying sales materials, policies, and procedures related to marketing its EGS service to potential customers.[[4]](#footnote-4) Additionally, the Company commits to complying with 52 Pa. Code § 57.175 (relating to persons authorized to act on behalf of a customer), and will not enter into a sales agreement or change the commodity provider for any consumer that is not personally accepted by the EDC customer of record. The Settlement also requires the Company’s TPV to continue to require affirmative representation by the person consenting to the change that the person is either the EDC customer of record or has been authorized by the customer of record to act on behalf of the customer. In the absence of such a confirmation, the Settlement continues, AP&G shall not proceed with enrollment. Settlement at 14.

Moreover, AP&G will ensure that its training programs for internal and external sales representatives reflects the remedies described in the Settlement. As verification, AP&G will, within sixty days of entry of the final Commission Order approving the Settlement, provide to I&E a detailed description of the training that the Company will implement including specific revisions to its policy and script. *Id.*

In response, I&E agrees to forbear from initiating a formal complaint relative to the allegations that are the subject of the proposed Settlement. The Settlement will not, however, affect the Commission’s authority to receive and resolve any formal or informal complaints filed by any affected party regarding the subject of the allegations of I&E’s informal investigation. *Id.* at 14-15.

The proposed Settlement is conditioned on the Commission’s approval without modification of any of its terms or conditions. If the Commission does not approve the proposed Settlement or makes any change or modification to the proposed Settlement, either Party may elect to withdraw from the Settlement. *Id.* at 16.

**Discussion**

Initially, we note that any issue or argument that we do not specifically address 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); *also see, generally*, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Pursuant to our Regulations at 52 Pa. Code § 5.231, it is the Commission’s policy to promote settlements. The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004). After a review of the terms of the Settlement, we find that it is in the public interest.

The Commission has promulgated a Policy Statement at 52 Pa. Code § 69.1201 that sets forth ten factors that we may consider in evaluating whether a civil penalty 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. The Policy Statement sets forth the guidelines we use when determining whether, and to what extent, a civil penalty is warranted. In this case, application of these guidelines supports approval of the Settlement.

The first factor we may consider is whether the conduct at issue is of a serious nature. 52 Pa. Code § 69.1201(c)(1). “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.” *Id*. The allegations against AP&G relate to deceptive marketing practices for its EGS services in Pennsylvania. According to I&E’s investigation, the Company’s outside sales agents engaged in marketing conduct and sales call practices that failed to meet the established standards and practices for marketing and sales activities for EGSs and their agents. The Company’s alleged acts included misleading sales scripts and instructions to sales agents that impeded the presentation of clear and adequate information to customers.

We have made clear that unlawful activity that threatens to harm Pennsylvania’s consumers and the burgeoning retail electricity market in Pennsylvania will not be tolerated. *Pa. PUC v. MXenergy Electric Inc.*, M-2012-2201861 (Order entered May 3, 2012) at 5. Despite the various corrective measures taken by the Company, we believe the acts alleged in the Settlement are of a serious nature which appear to have threatened harm to consumers and the EGS market in Pennsylvania. Thus, we find that this factor supports a higher penalty.

The second factor is whether the resulting consequences of the conduct are of a serious nature. 52 Pa. Code § 69.1201(c)(2). “When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.” *Id.* There is no indication that the alleged violations resulted in personal injuries or property damage. In addition, the customers impacted by the actions of the Company’s agents do not appear to have suffered any financial harm. Accordingly, this factor does not warrant a higher penalty.

The third factor pertains to litigated cases only. 52 Pa. Code § 69.1201(c)(3). Because this proceeding was settled, this factor is not applicable to this Settlement.

The fourth factor is 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. 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. 52 Pa. Code § 69.1201(c)(4). As outlined in the Settlement, AP&G has taken numerous steps to revise its marketing practices, including the prompt revision of its sales scripts and policies and procedures related to marketing its EGS service to potential customers. I&E confirms that the Company’s made the revisions prior to the filing of this Settlement. Additionally, AP&G will be initiating a retraining program for agents having contact with customers. Thus, we find that this factor supports a lower penalty.

The fifth factor is the number of customers affected and the duration of the violations. 52 Pa. Code § 69.1201(c)(5). I&E indicates that it reviewed eighteen informal complaints against the company by consumers between October 2014 and September 2015 alleging enrollment based on improper authorizations. But I&E notes that AP&G received appropriate authorizations for each of the consumers who filed the informal complaints. Regarding the alleged deceptive marketing calls, I&E was able to review ten audio recordings of sales presentations to customers and found two of them to be misleading. I&E asserts, however, that there was no practical means to quantify the total number of sales contacts made by the Company’s sales agents that may have been deceiving because audio recordings of sales presentations were not archived. I&E Statement in Support at 9. Under the circumstances, we can only speculate about the number of customers who may have been affected by the Company’s actions and, as such, decline to give any weight to this factor.

We may also consider the compliance history of the regulated entity. 52 Pa. Code § 69.1201(c)(6). “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.” *Id.*  Here, there have been no proceedings in which the Commission has made findings of violations against AP&G. We determine that the Company’s compliance history has been satisfactory and poses no barrier to approval of the Settlement between the Parties.

Another factor we may consider is whether the regulated entity cooperated with the Commission’s investigation. 52 Pa. Code § 69.1201(c)(7). According to I&E, the Company fully cooperated with I&E’s investigatory process including cooperating in both informal discovery and settlement discussions. I&E Statement in Support at 10.

In addition, we may consider the amount of the civil penalty necessary to deter future violations as well as past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(8) and (c)(9). According to the Parties, the civil penalty of $30,000 and the corrective measures taken by the Company are substantial and sufficient to deter future violations. AP&G also highlights that its retraining program for agents will cost approximately $65,000. AP&G Statement in Support at 2.

Regarding past Commission decisions in similar situations, I&E contends that the civil penalty is comparable to other cases involving allegations of deceptive EGS marketing practices.[[5]](#footnote-5) I&E also contends that this Settlement should be considered on its own merits because there are no past Commission decisions directly responsive to this situation. I&E submits that, although it cannot substantiate the number of slamming allegations as in other Commission decisions, the allegations of deceptive marketing practices and the resulting civil penalty are consistent with prior Commission actions. I&E Statement in Support at 11-12. We agree and find that the proposed civil penalty will help deter future violations and presents a fair and reasonable outcome.

The tenth factor to consider is other “relevant factors.” 52 Pa. Code § 69.1201(c)(10). We believe that it is in the public interest to settle this matter so as to avoid the expense of litigation.

For the reasons set forth above, after reviewing the terms of the Settlement, we find that approval of the Settlement is in the public interest and is consistent with the terms of our Policy Statement and our past decisions.

**Conclusion**

It is the Commission’s policy to promote settlements. 52 Pa. Code § 5.231. The Parties herein have provided the Commission with sufficient information upon which to thoroughly consider the terms of the proposed Settlement. Based on our review of the record in this case, we find that the proposed Settlement between I&E and AP&G is in the public interest and merits approval. We will therefore approve the Settlement consistent with this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That the Joint Settlement Petition filed on April 6, 2017, between the Commission’s Bureau of Investigation and Enforcement and American Power & Gas of Pennsylvania, LLC, is approved.

2. That, within thirty (30) days of entry of this Order, American Power & Gas of Pennsylvania, LLC, shall pay a civil penalty in the amount of $30,000. Said payment shall be made by certified check or money order payable to “Commonwealth of Pennsylvania” and shall be sent to:

Rosemary Chiavetta, Secretary

Pennsylvania Public Utility Commission

Commonwealth Keystone Building

400 North Street

Harrisburg, PA 17120

3. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

4. That, within sixty (60) days of the entry date of this Opinion and Order, American Power & Gas of Pennsylvania, LLC, shall provide to the Commission’s Bureau of Investigation and Enforcement a detailed description of the training program for internal and external sales representatives that American Power & Gas of Pennsylvania, LLC, will implement reflecting the remedies described in the Joint Settlement Petition.

5. That, after American Power & Gas of Pennsylvania, LLC remits the civil penalty as set forth in Ordering Paragraph No. 2, the Secretary’s Bureau shall mark this proceeding closed.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: June 14, 2018

ORDER ENTERED: June 14, 2018

1. AP&G marked the second and third set of data request responses as confidential. According to the Parties, the Settlement describes the investigative materials as an overview without divulging any confidential information. Settlement at 8. [↑](#footnote-ref-1)
2. AP&G is an EGS licensed by the Commission to operate within several service territories including PECO Energy Company (PECO). [↑](#footnote-ref-2)
3. Additionally, the governmental customer reported the incident as a scam to the Office of the Bucks County District Attorney. According to the Parties, the District Attorney’s office referred its investigation materials about the incident to OCMO. Settlement at 6. [↑](#footnote-ref-3)
4. AP&G acknowledges specific modifications to its policy and script described in Paragraphs 40 to 42 of the Settlement. [↑](#footnote-ref-4)
5. I&E Statement in Support at 10-11 (citing, in part, *Pa. PUC v. ResCom Energy LLC,* Docket No. M-2013-2320112 (Order entered November 13, 2014) (Commission approval of settlement imposing a civil penalty of $59,000 to resolve allegations of slamming, unauthorized marketing practices and “Do Not Call” violations); *Pa. PUC v. AP Gas & Electric (PA), LLC, d/b/a APG&E,* Docket No. M-2013-2311811 (Order entered October 17, 2013) (Commission approval of settlement with a $43,200 civil penalty to resolve allegations of slamming, unauthorized marketing practices and “Do Not Call” violations); and *Pa. PUC v. IDT Energy, Inc.*, Docket No. M-2013-2314312 (Order entered October 17, 2013) (Commission approval of settlement with a $39,000 civil penalty to resolve allegations of slamming and fraudulent, deceptive or unlawful sales and marketing practices and “Do Not Call” violations)). [↑](#footnote-ref-5)