

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105**

**Mayer Krain vs.
Choice Energy, LLC**

**Public Meeting: October 25, 2018
OSA-2581006
Docket No. C-2016-2581006**

MOTION OF VICE CHAIRMAN ANDREW G. PLACE

Before us today are the Exceptions and Reply Exceptions to the Initial Decision of Administrative Law Judge (ALJ) Guhl in the above captioned case. In December 2016, Mr. Krain filed a Complaint against Choice Energy, LLC (Choice Energy or the Company) alleging that after at least three requests asking them to stop calling, Choice Energy continued multiple marketing calls per day over a period of two months. In addition to the repeated calls, the Complainant alleges that Choice Energy staff failed to identify themselves in the phone calls or explain the purposes of the multiple calls. Choice Energy finally ceased calling the Complainant when his Complaint was served on the Company. The ALJ determined that the Company violated the Commission's regulations as well as the federal Telemarketing and Consumer Fraud and Abuse Prevention Act and imposed a civil penalty of \$1,000 on the Company.

Historically, the Commission has not hesitated to enforce its regulations regarding marketing and sales practices. The Commission has imposed civil penalties on EGSs that violate the Commission's regulations as well as the federal Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§6101-6108, and 16 CFR Part 310.¹ The penalties are determined upon evaluation of certain factors in litigated and settled cases to determine if a fine is appropriate.² Those factors include, but are not limited to, whether the violation was intentional or negligent, the compliance history of the regulated entity which committed the violation, the amount necessary to deter future violations, and past Commission decisions in similar situations. In addition, the Commission issued further guidance and reminders to all EGSs because of an escalation of specific marketing practices that were not in compliance with the Commission's regulations.³

In accordance with the Commission's Policy Statement at 52 Pa. Code §69.1201, the Commission has imposed civil penalties on EGSs that engage in marketing practices that violate

¹ *HIKO v. Pa. Pub. Util. Comm'n*, 163 A.3d 1079 (Pa. Cmwlth. 2017), *appeal granted*, 176 A.3d 235 (Pa. 2017) The Commonwealth Court affirmed the Commission's adoption of the ALJs' Initial Decision ordering HIKO to pay a civil penalty of approximately \$1.8 million for various violations of the Commission's regulations and because HIKO's conduct was, inter alia, intentional, which resulted in a higher penalty. *Id.* at 31.

² See 52 Pa. Code §§69.1201, *et seq.*

³ *Secretarial Letter Re: Guidance on Chapter 111 Residential Supplier Marketing Regulations*, Docket No. L-2010-2208332, issued December 8, 2017. As indicated by the Commission in December 2017, suppliers, and their agents are expected to comply with certain standards and practices as required by regulation when engaged in any sales and marketing activities involving residential customers including immediately identifying himself by name, identify the supplier the agent represents and the reason for the telephone call. In addition, the Commission advised suppliers to respect state and federal "Do Not Call" lists and to honor individual requests by potential customers to not be contacted again by a supplier or its agent.

its regulations including failure to promptly place consumers on a do not call list. In *I&E v. Great American Power, LLC*, the Company was fined \$18,000 in a settlement agreement which acknowledged that, on seventeen occasions, the Company determined that its outside vendor's telemarketing sales representatives exhibited unacceptable or questionable marketing practices on behalf of Great American. The Settlement also acknowledged the corrective action of the Company and the implementation of revised operating procedures.⁴

In this case, the ALJ noted, pursuant to Section 3301 of the Public Utility Code, 66 Pa. C.S. §3301, that the Commission may impose a maximum civil penalty of \$1,000 per day per violation of the Code, its Regulations or its Orders. The ALJ evaluated the facts in this proceeding under the Commission's Policy Statement at 52 Pa. Code §69.1201(c) which sets forth ten factors that the Commission may consider in evaluating whether a civil penalty for violating a Commission order, regulation or statute is appropriate. The ALJ determined that a total civil penalty of \$1,000 against Choice Energy, which is comprised of two \$500 penalties for the months of November and December 2016, was appropriate in this case. Based on the record evidence in this case, I disagree.

The Complainant indicates that he received dozens of calls over a two-month period receiving at times multiple calls per day from Choice Energy.⁵ He indicated that on at least three occasions he spoke with a supervisor and asked to be put on the Company's do not call list.⁶ This is in addition to his many requests to be removed from the telemarketing list where he did not request to speak to a supervisor. He was assured this had been completed. The calls however continued. At one point one of the supervisors threatened that they were going to "call him repeatedly, all night long."⁷ The Complainant also indicated that he blocked the number from which Choice Energy was calling in an attempt to stop the calls. However, the Complainant indicated that calls began coming from different numbers, all identified as Choice Energy LLC, by his Caller ID and later confirmed as such by representatives of the Company. The Complainant further explained that callers did not identify themselves and led him to believe they worked for PECO which he would have believed had it not been for the Caller ID indicating that the caller was Choice Energy LLC.⁸

Based upon my review of the record, we agree with the Complainant that Choice Energy did not honor his original request to be placed on their do not call list before the Complainant filed his Complaint with the Commission. The record evidence shows that Choice Energy did not properly identify itself during at least the initial phone call which is a violation of the Commission's regulations at 52 Pa. Code §111.10(b). In addition, the record evidence demonstrates that Choice Energy continued this violation by placing numerous calls to the Complainant during the months of November and December 2016 in which they did not properly identify the Company and its relationship to the electric distribution company clearly in violation of the Commission's regulations. The record clearly demonstrates that Choice Energy engaged in

⁴ *PAPUC, I&E v. Great American Power, LLC*, Docket No. M-2016-2536806, Order entered September 15, 2016, p. 7.

⁵ Transcript at p.14-16.

⁶ Transcript at p.13.

⁷ Transcript at p.16.


⁸ Complainant Exhibit 1.

abusive telemarketing and intentional misconduct by misrepresenting itself to the Complainant on numerous occasions over a period of two months which warrants a higher penalty in this case. A conservative reading of the record makes it clear that there were dozens of phone calls each with multiple violations and clear abusive telemarketing behavior. Therefore, in order to deter future misconduct by this EGS, I move that the civil penalty in this proceeding be increased to the amount of \$5,000. The civil penalty of \$5,000 is warranted in this case and is in accordance with Section 3301 of Title 66 and the Commission's Policy Statement at 52 Pa. Code §69.1201.

Therefore, I move that:

1. The Exceptions of the Complainant are granted consistent with this Motion.
2. The Reply Exceptions of Choice Energy, LLC are denied consistent with this Motion.
3. The Initial Decision of Administrative Law Judge Marta Guhl issued on December 26, 2017, is modified consistent with this Motion.
4. Choice Energy, LLC is directed to remit a civil penalty of \$5,000 consistent with this Motion.
5. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

DATE: October 25, 2018



Andrew G. Place, Vice Chairman