**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held April 15, 2021

Commissioners Present:

Gladys Brown Dutrieuille, Chairman

David W. Sweet, Vice Chairman, Statement

John F. Coleman, Jr.

Ralph V. Yanora

Pennsylvania Public Utility Commission, M-2019-2568471

Bureau of Investigation and Enforcement

v.

Liberty Power Holdings, LLC

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are: (1) the Joint Petition for Approval of Settlement (Joint Petition, Settlement, or Settlement Agreement) filed on June 6, 2019, by the Commission’s Bureau of Investigation and Enforcement (I&E) and Liberty Power Holdings, LLC[[1]](#footnote-2) (Liberty Power or Company) (collectively, the Parties or Settling Parties), and (2) the comments filed in response to our Opinion and Order, entered August 8, 2019 at this docket (*August 2019 Order*), in which we sought comments from interested parties regarding the proposed Settlement Agreement between I&E and Liberty Power. The Joint Petition contains terms and conditions representing a comprehensive Settlement, along with Statements in Support of the Settlement, with respect to an informal investigation conducted by I&E regarding allegations of unauthorized switching, and deceptive disclosure and marketing materials by Liberty Power. Both Parties submitted Statements in Support of the Settlement. The Settling Parties request that the Commission approve the proposed Settlement because it 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* (Policy Statement). Settlement ¶ 47 at 13. For the reasons set forth herein, we shall grant the Petition and, thereby, approve the proposed Settlement based on our finding that the Settlement is in the public interest.

**I. History of the Proceeding**

During the period from May 2016 through June 2016, the Commission’s Bureau of Consumer Services (BCS) received approximately six informal complaints from residential customers alleging their electricity accounts had been switched to Liberty Power without their authorization.[[2]](#footnote-3) Settlement ¶ 12 at 4. At that same time, Liberty Power: (1) immediately conducted an internal investigation of all of the enrollments submitted by its independent, third marketing vendor, Made in America Business Group (MIB); (2) subsequently terminated its contract with MIB (verbally on June 14, 2016, and by formal letter on July 26, 2019); and (3) voluntarily reported the slamming incidents along with Liberty Power’s action plan to the Commission’s Office of Competitive Market Oversight (OCMO) on July 18, 2016. Settlement *¶* 13 at 4.

The informal reports prompted the BCS to review Liberty Power’s disclosure statements and other marketing materials. The BCS determined that Liberty Power was not consistently representing an all-inclusive price to residential consumers in its marketing materials and based on this determination and the informal complaints it had received, BCS referred the matter to I&E. Settlement ¶¶ 14-15 at 4-5.

On January 27, 2017, I&E initiated an informal investigation of the Company. Settlement ¶ 16 at 5. I&E informed Liberty Power that the investigation would focus on the Company’s compliance with Commission’s Regulations that govern changing a customer’s EGS, and marketing and sales practices for the retail residential energy market consistent with Sections 331(a) and 506 of the Public Utility Code (Code), 66 Pa. C.S. §§ 331(a) and 506, and Section 3.113 of the Commission’s Regulations, 52 Pa. Code § 3.113. *Id*.

On May 18, 2017, and March 2, 2018, I&E sent data requests to Liberty Power regarding the alleged slamming incidents, and the Company’s marketing materials and disclosure statements. I&E received responses to the aforementioned data requests from Liberty Power on June 7, 2017, and March 29, 2018, respectively. Settlement ¶¶ 17, 18 at 5.

After conducting informal discovery and engaging in discussion and negotiation over several months, the Parties agreed to resolve the matter in accordance with the Commission’s policy to promote settlements at 52 Pa. Code § 5.231. Settlement ¶ 54 at 14.

As a result of their negotiations, the Parties filed the instant Settlement on June 6, 2019, for the Commission’s consideration.

In our *August 2019 Order*, we provided interested parties with the opportunity to file comments. To be considered timely, the Commission directed that comments be filed no later than twenty days from the date of entry of the *August 2019 Order*, or by August 28, 2019.

Comments were filed by one interested party, Mr. Dan Ocko, on August 27, 2019. On October 17, 2019, Liberty Power filed reply comments. These comments and reply comments in conjunction with our analysis and disposition of the proposed Settlement will be discussed in this Opinion and Order, *infra*.

**II. Background**

**A. Allegations of Slamming**

Through its investigation, I&E determined that Liberty Power had contracted with MIB between February 2016 and June 14, 2016, to solicit new customers in Pennsylvania. Settlement ¶ 20 at 6. During this period, MIB contacted 921 potential residential Pennsylvania customers and 533 of these customers were enrolled to receive electric generation supply from Liberty Power. Settlement ¶ 21 at 6. The impacted residential customers were located in service territories served by Metropolitan Edison Company, PPL Electric Utilities Corporation, and PECO Energy Company. Settlement ¶ 28 at 6.

On June 10, 2016, Liberty Power first became aware of a potential issue with customer enrollments submitted by MIB following receipt of a consumer complaint. This prompted Liberty Power to conduct an internal investigation of the issue. In the beginning of its investigation, Liberty Power attempted to make phone calls to 176 of the 533 customers who were enrolled by MIB to: (1) welcome them as new customers to Liberty Power’s electric generation service; (2) ensure that all customers were contracted accurately; and (3) determine that no miscommunications occurred during the sales process. Settlement ¶ 22 at 6. Of the 176 attempted calls, the investigation revealed that Liberty Power was only able to speak successfully to 5 customers, all of whom requested their enrollment with Liberty Power’s electric generation service be cancelled.  *Id.*

On June 14, 2016, Liberty Power verbally terminated its contract with MIB and suspended MIB’s ability to contact customers.

On July 26, 2016, Liberty Power sent a formal letter of termination to MIB in which it confirmed its decision to finally and permanently sever its relationship with MIB. Settlement ¶ 23 at 6.

On July 18, 2016, Liberty Power voluntarily reported the incidents to OCMO as well as its internal actions and the corrective measures it planned to take. Settlement ¶ 24 at 7.

Since the results of the “welcome” call process revealed that Liberty Power likely did not have accurate telephone contact information for the customers enrolled by MIB, Liberty Power mailed letters on August 26, 2016 to all accounts enrolled by MIB as of that date, which totaled 270 accounts, explaining its concerns, and urging customers to contact Liberty Power to review their account details. Settlement ¶ 25 at 7. Following these communications, 85 customers requested to be dropped as customers or complained of being “slammed.” Settlement ¶ 26 at 7. At that time, 56 of those 85 customers had been enrolled with Liberty Power through MIB while the other 29 customers were in the process of being switched to Liberty Power. Liberty Power terminated the orders to switch those 29 customers in time to ensure that no charges from Liberty Power would be assessed to them. Settlement ¶ 27 at 7.

After completing its internal investigation, Liberty Power refunded a total of $27.64 to customers who filed Formal Complaints with the Commission. The refunds were based on a comparison of Liberty Power’s electric generation supply charge and the electric distribution company’s price-to-compare. Settlement ¶ 29 at 7-8.

Upon review of Liberty Power’s data request responses, I&E concluded that it appeared that 7 MIB agents were involved in a scheme to enroll customers with Liberty Power, without proper customer authorization, by fabricating documents and audio verifications to conceal that the customers did not consent to the switch to Liberty Power.[[3]](#footnote-4) I&E also determined that customers were often unaware that their electric generation service was in the process of being switched until they received a confirmation letter from their EDCs. Settlement ¶¶ 30, 31 at 8.

**B. Allegations of Deficient Disclosure Statements and Marketing Materials**

Prior to February 10, 2017, Liberty Power’s residential disclosure statements presented two different prices to customers: (1) an “Energy Only Rate” which did not include utility distribution and delivery charges; applicable federal, state, or local taxes, and charges; or the Pennsylvania Gross Tax Rate (GRT), and (2) a “Price to Compare” (PTC), which consisted of the Energy Only Rate plus the Pennsylvania GRT. The Liberty Power PTC was the rate that the Company billed to customers. Settlement ¶ 35 at 8-9. I&E’s investigation determined that in several instances, Liberty Power sales representatives, including agents working on behalf of the Company, only wrote or typed the “Energy Only Rate” on marketing materials that were distributed to consumers, such as the “Pennsylvania Residential Energy Door to Door Solicitation Disclosures” and the “Prospective Product Content Label.” Settlement ¶ 37 at 9.

Although I&E was not able to determine how many occasions MIB agents advertised the lower Energy Only Rate in lieu of Liberty Power’s PTC, or how many residential customers received Liberty Power’s disclosure statements containing both rates, it was able to establish that marketing its services using the Energy Only Rate took place from October 2014 until February 10, 2017, at which time the Company, in addressing the concerns of I&E, eliminated all references to the Energy Only Rate in their disclosures and advertisements to ensure that Liberty Power’s enrollment and disclosure documents contained only one price, which includes the GRT, in all relevant components of the commodity price it charges. Settlement ¶ 37 at 9-10. In addition, Liberty Power revised its documents to consistently refer to a “fixed rate,” rather than using the terms “energy only rate” and a “price to compare.” Settlement ¶ 37 at 9. As of the date of the Settlement, no consumers have complained to BCS about the inclusion of the Energy Only Rate on Liberty Power’s disclosure statements and marketing materials. Settlement ¶ 37 at 10.

If this matter had been litigated, I&E was prepared to allege, and Liberty Power was prepared to dispute, that Liberty Power committed the following violations of the Commission’s Regulations and Orders:

A. The action of Liberty Power’s agent initiated the process of switching the electric generation supplier on at least eighty-five (85) customer accounts and resulted in physically switching the electric generation supplier on fifty-six (56) of those accounts without the authorization of the customers.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code § 54.42(a)(9) and the Standards for Changing a Customer’s Electricity Generation Supplier at 52 Pa. Code §§ 57.171-180 (multiple counts).

B. The presentation of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials, which is a rate that did not include the GRT and, therefore, did not represent an all-inclusive price that consumers were able to compare to the PTC that is used for default service.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code § 54.43(1) and the Commission’s Order regarding *Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Docket No. M‑2013‑2362961 (Order entered November 14, 2013) (multiple counts).

C. The presentation of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials, which is a rate that did not include the GRT, did not reflect the prices billed for Liberty Power’s electric generation supply.

If proven, I&E alleges that such conduct would have violated 52 Pa. Code §§ 54.4(a), 54.5(a) and 54.7(a).

Settlement ¶ 41 at 10.

There has been no evidentiary hearing before any tribunal and no sworn testimony taken. If there was, Liberty Power would have contended that it did not violate the provisions of the Code or the Commission’s Regulations or Orders. *Id.* While Liberty Power disputes or disagrees with some or all of the alleged violations, the Company recognizes the seriousness of the allegations, the need to prevent future reoccurrences, and the benefits of amicably resolving the investigation.

I&E acknowledges that prior to the start of its investigation on January 27, 2017, Liberty Power had already taken proactive efforts to address MIB’s slamming when it verbally terminated its contract with MIB on June 14, 2016, and formally issued a termination letter on July 26, 2016. Appendix B (I&E Statement in Support of Settlement) at 4. In addition, I&E notes that Liberty Power self-reported the slamming incidents to OCMO on July 18, 2016, and issued refunds, albeit a nominal amount, to affected customers. *Id.* Moreover, in addressing I&E concerns, on February 10, 2017, Liberty Power promptly eliminated the inclusion of the Energy Only Rate on its disclosure statements and marketing materials. *Id.* Nevertheless, inasmuch as Liberty Power is responsible for the actions of its contracted independent third-party agent,[[4]](#footnote-5) I&E submits that the benefits to amicably resolve the disputed issues through settlement outweigh the risks and expenditures of litigation. Appendix B (I&E Statement in Support of Settlement) at 6.

Liberty Power opines that the proposed Settlement sufficiently addresses the issues raised in this proceeding and recognizes the proactive measures it has taken both before and after the initiation of I&E’s informal investigation to correct the damage done by MIB. Appendix C (Liberty Power Statement in Support of Settlement) at 12.

Both I&E and Liberty Power support the approval of the Settlement because they believe it is consistent with the Commission’s policy to promote settlements, reflects a carefully balanced compromise of the interests of the Parties in this proceeding, and is in the public interest because its approval would avoid the necessity of further and costly administrative and potential appellate proceedings.

**III. Terms of the Settlement**

The Parties entered into the Settlement to resolve I&E’s informal investigation and to settle this matter without litigation in a formal proceeding. Pursuant to the proposed Settlement, Liberty Power agreed to the following terms:

A. Liberty Power will pay a civil penalty in the amount of Eighty-Two Thousand Eight-Hundred Dollars ($82,800), pursuant to 66 Pa. C.S. § 3301, to resolve all allegations of slamming and unlawful marketing, and to fully and finally settle all possible liability and claims of alleged violations of the Commission’s Regulations and Orders arising from, or related to, the conduct investigated herein. The civil penalty represents the following: Fifty-Six Thousand Dollars ($56,000) for the fifty-six (56) customer accounts that were physically switched to and received electric generation supply from Liberty Power; Five Thousand Eight Hundred Dollars ($5,800) for the twenty-nine (29) customer accounts where the process of switching to Liberty Power had been initiated but not completed; One Thousand Dollars ($1,000) for the non-quantifiable and unknown number of customers who may have been potentially affected by the unauthorized switching conducted by Liberty Power’s agent; and Twenty Thousand Dollars ($20,000) for Liberty Power’s inclusion of an “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials. Said payment shall be made within sixty (60) days of the date of the Commission’s Final Order approving the Settlement Agreement and shall be made by certified check or money order payable to the “Commonwealth of Pennsylvania” and sent to:

Rosemary Chiavetta, Secretary

Pennsylvania Public Utility Commission

400 North Street

Harrisburg, PA 17120

The civil penalty shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f).

B. Liberty Power will provide to each of the customers, who had one or more of the fifty-six (56) accounts physically switched to Liberty Power, a refund for the entire electric generation supply portion on the customers’ bills for the first two (2) billing periods that the customers were switched to Liberty Power, pursuant to 52 Pa. Code § 57.177(b). Liberty Power will issue the customer refunds within thirty (30) days of the date of the Commission’s Final Order approving the Settlement Agreement. Pursuant to 52 Pa. Code § 5.591, following payment of the refunds, Liberty Power will file with the Commission a verification acknowledging that all refund payments have been disbursed, satisfying this settlement provision.

Settlement ¶ 44 at 11-12.

The Settlement is conditioned upon the Commission’s approval of the Settlement’s terms and conditions in its entirety and without modification. If the Commission modifies the Settlement, any Party may withdraw from the Settlement and proceed with litigation. *Id*. at 13. Upon Commission approval of the Settlement without modification, I&E will not file any complaints or initiate other action against the Company at the Commission concerning unauthorized enrollments by MIB and deceptive and/or unlawful marketing practices during the time period in question. *Id*. at 12. The Settlement does not constitute a concession or an admission of fact or law by Liberty Power. The Settlement is presented without prejudice to any position the Parties have advanced or may advance in the future regarding the merits of the issues in future proceedings, except to the extent necessary to effectuate this Settlement. *Id*. at 14.

**IV. 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). In this regard, 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 ten factors we use when determining whether, and to what extent, a civil penalty is warranted in litigated and non-litigated settled cases. In settled cases, while many of the same factors may still be considered, the settling parties “will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” 52 Pa. Code § 69.1201(b). Based on our review of the Settlement, we find, as discussed in more detail below, that the application of these factors supports approval of the Settlement.

**A. Comments to Settlement, Reply Comments and Disposition**

As noted, we received comments from one party in response to our *August 2019 Order* issuing the proposed Settlement for comment. Those comments were filed by Mr. Dan Ocko on August 27, 2019. In his comments, Mr. Ocko submits that the Settlement does not represent an adequate response to protect retail electric customers in Pennsylvania as authorized by the laws of the Commonwealth of Pennsylvania and the rules of the PA Public Utility Commission.

Mr. Ocko first addresses a situation in which he alleges that while the Settlement in this proceeding was being negotiated or presented to the Commission, he received what he characterized as “multiple illegal and deceptive marketing calls from an electric power company that identified themselves upon questioning first as PPL but finally identified themselves as LP Power.” Mr. Ocko states that there is no retail electric supplier named LP Power registered with the Commission. As a result, Mr. Ocko contacted the Commission but was unable to talk to someone on the phone after multiple extended calls. Therefore, Mr. Ocko filed “a detailed complaint online about LP Power.” He subsequently received an email response from Commission staff stating that they would not investigate this matter because the power company was not identified.

Mr. Ocko next avers that shortly after receiving the rejection email from the Commission, he received additional calls from “LP Power.” In one of those calls, he told “LP Power” that he could not switch to LP Power because he was a customer of “Liberty Power.” Mr. Ocko notes that the caller did not immediately try to switch him to another power company but responded that they were “Liberty Power.” In other calls he received, Mr. Ocko alleges that the callers again identified themselves as “Liberty Power.”

Mr. Ocko points out that he is on a do-not-call list, and that he does not receive calls from other Pennsylvania power companies on the phone number he has registered with his power company. Mr. Ocko also alleges that on multiple occasions, the callers self-identified themselves as representing Liberty Power, but in other instances, the companies from which he received the solicitation calls used “robocallers and fake caller ID,” to make it difficult to identify who they are.

Mr. Ocko also opines that the penalty in the proposed Settlement that was attached to the *August 2019 Order* includes “an incredibly small fine, penalty or compensation and does not suspend Liberty Powers’ ability to market to Pennsylvania customers.” For penalty comparison reasons, Mr. Ocko attached to his comments a newspaper article dated June 11, 2019, from a Connecticut newspaper, *The Middletown Press*,which reported that the Connecticut Public Utilities Regulatory Authority (CT PURA) assessed a $1.5 million fine against Liberty Power with a proposed suspension of Liberty Power’s ability to market activities for violations which Mr. Ocko alleges that are “similar to what is described in this order [*August 2019 Order*] a few years ago and what appears to have occurred to [him] over the summer [of 2019] and continued to just a few days ago.”[[5]](#footnote-6) In addition, Mr. Ocko attached a TV news article reported by NBC Channel 4 in New York City on April 11, 2018, in which the New York State Attorney General reached a $500,000 settlement with Liberty Power Holdings involving violations where Liberty Power Holdings contractors and subcontractors who claimed to represent a consumer’s current utility provider either switched New York City and Westchester County, NY area consumers’ current utility provider without their consent or lured them with false promises of savings, but then charged them early termination fees of $200 or more when those customers tried to get out of their contracts.

Mr. Ocko believes that this docket is the appropriate avenue to ask for and demand immediate additional disclosures from Liberty Power on their telemarketing practices and to determine whether Liberty Power or its agents are continuing to use illegal or deceptive practices described in this docket and to authorize or impose additional investigations, penalties, and suspensions of Liberty Power’s ability to operate in this Commonwealth.

In its reply comments, Liberty Power notes that in August 2019, Commission Staff requested that Liberty Power investigate the allegations proffered by Mr. Ocko in his complaint to the Commission regarding the telephone calls he allegedly received from Liberty Power. Liberty Power states that its investigation pertained to the same issues that Mr. Ocko identified in his comments. Based on its investigation, Liberty Power determined that none of its representatives had ever dialed the telephone number provided by Mr. Ocko. Additionally, the Company confirmed that the telephone number provided by Mr. Ocko was removed from all of Liberty Power call lists and added to Liberty Power’s internal do-not-call list. Liberty Power also offered to review the calls Mr. Ocko received to further investigate his concerns.

Notwithstanding the above actions taken by Liberty Power in response to Mr. Ocko’s concerns, the Company submits that the focus of the investigation here is limited, in relevant part, to the enrollments submitted to Liberty Power in early 2016 from one specific independent, third-party vendor (*i.e.*, MIB) whose contract with Liberty Power has long been terminated. Accordingly, the Company contends that the unsubstantiated allegations raised in Mr. Ocko’s comments do not provide relevant feedback for evaluating the proposed Settlement. Finally, the Company asserts that Mr. Ocko’s opinions about the redress that the Commission should take in response to his claims against Liberty Power are not an appropriate basis upon which to disrupt the carefully crafted Settlement presented here.

We agree with the Company that Mr. Ocko’s comments are not specifically relevant to this proceeding. Although his concerns raise similar matters addressed in this proceeding regarding potential slamming, we agree with Liberty Power that the focus of the investigation and resulting Settlement in this proceeding specifically applies to the solicitation of new customers in Pennsylvania by its third-party marketing company, MIB, and allegations of deficient disclosure statements and marketing materials between February 2016 and June 14, 2016.

Nevertheless, although Mr. Ocko’s comments are not pertinent to this specific proceeding, out of an abundance of caution, we shall serve a copy of this Opinion and Order, along with a copy of the comments filed by Mr. Ocko, on I&E for any such action that they may deem necessary.

Also, we disagree with Mr. Ocko’s unsubstantiated assertion that the proposed penalty negotiated in the Settlement here is inadequate when compared with the penalties that the CT PURA and the New York Attorney General assessed against Liberty Power.[[6]](#footnote-7) Based on our review of the CT PURA’s July 31, 2019 Decision at Docket No. 06-12-07RE07 and the news article addressing the New York Attorney General’s penalty against Liberty Power, the circumstances and the violations in those cases appear to be much more flagrant and egregious than those alleged here, and thus, appear to warrant the higher penalties imposed by the authorities in those cases. In this proceeding, Liberty Power proactively: (1) undertook the appropriate measures to terminate its contract with MIB; (2) self-report to OCMO the violations related to slamming and the deceptive disclosure statements/marketing materials utilized by MIB; (3) promptly performed its own internal investigation of the violations; and (4) eliminated all references to the Energy Only Rate in their disclosures and advertisements and revised its documents to consistently refer to a “fixed rate,” rather than using the terms “energy only rate” and a “price to compare.” In our opinion, these actions by the Company prevented a similar scenario that occurred in Connecticut and New York from happening in Pennsylvania by preventing the violations that were occurring in Pennsylvania to escalate to the blatant level of violations involving slamming and the resulting extreme financial consequences endured by those slammed customers in Connecticut and New York. Thus, we find that the enormity of the penalties assessed on Liberty Power in Connecticut and New York are not relevant here, and furthermore, it would be imprudent for us to base our determination of a civil penalty on the findings in unrelated cases in other states.

**B. Application of Policy Statement Factors**

The Commission’s Policy Statement 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, as well as whether a proposed settlement for a violation is reasonable and in the public interest. 52 Pa. Code § 69.1201.

The Commission will not apply the factors as strictly in settled cases as in litigated cases. 52 Pa. Code § 69.1201(b). While many of the same factors may still be considered, in settled cases, the parties “will be afforded flexibility in reaching amicable resolutions to complaints and other matters as long as the settlement is in the public interest.” *Id.*

The first factor considers whether the conduct at issue was of a serious nature, such as willful fraud or misrepresentation, or if the conduct was less egregious, such as an administrative or technical error. Conduct of a more serious nature may warrant a higher penalty. 52 Pa. Code § 69.1201(c)(1). As noted, the conduct in this matter involves the following two actions: (1) slamming and (2) deceptive marketing and disclosure statements. With regard to slamming, I&E’s investigation determined that MIB fabricated documents and audio verifications to create the illusion that residential customers consented to receive Liberty Power’s electric generation service when, in fact, no such authorization to enroll with Liberty Power was given. Settlement ¶ 31 at 8; Appendix B (I&E Statement in Support) at 9. MIB switched at least 56 customer accounts to Liberty and attempted to enroll an additional 29 customer accounts before Liberty Power terminated the enrollment requests. Settlement ¶ 27 at 7; Appendix B (I&E Statement in Support) at 9. More customers may have been affected, but the number of additional affected customers is unknown because they did not respond to the Company’s multiple efforts to contact them or file informal complaints with BCS. Appendix B (I&E Statement in Support) at 9.

Regarding the deceptive marketing and disclosure statements, as noted, Liberty Power presented two prices in its residential disclosure statements – a Liberty Power PTC and a Liberty Power “Energy Only Rate,” which did not include the GRT. Settlement ¶ 35 at 8-9; Appendix B (I&E Statement in Support) at 10. In addition, I&E’s investigation uncovered instances where Liberty Power sales agents wrote the lower “Energy Only Rate” on marketing materials. Settlement ¶ 37 at 9; Appendix B (I&E Statement in Support) at 10.

We are of the opinion that the violations uncovered by I&E’s investigation are of a serious nature in that they involve changing, or slamming, a customer’s electric generation supplier without consent as well as deceptive and ambiguous pricing information in violation of our “zero tolerance” policy towards slamming. Consequently, we believe that the seriousness of these violations militates in favor of a higher civil penalty.

The second factor to consider is whether the resulting consequences of the alleged conduct were of a serious nature. 52 Pa. Code § 69.1201(c)(2). We note that the consequences of the alleged violations resulted in some customers paying higher electric generation service charges than they may have otherwise paid if their service was not changed to Liberty Power. Most of the impacted customers received only one bill for Liberty Power charges after they were slammed. Appendix C (Liberty Power Statement in Support of Settlement) at 4. To alleviate these consequences, Liberty Power previously sent a limited number of refund checks to customers who were adversely financially impacted and, under the Settlement, will provide a full refund for the entire electric generation supply portion on these customers’ bills for the first two billing periods billed for its charges. Settlement at ¶ 44.B. at 11; Appendix B (I&E Statement in Support of Settlement) at 10-11. Nevertheless, the resulting consequences of the alleged conduct are considered serious and warrants in favor of a higher penalty.

The third factor considers whether the alleged conduct was intentional or negligent. 52 Pa. Code § 69.1201(c)(3). “This factor may only be considered in evaluating litigated cases.” *Id.* This factor does not apply to the present case because this proceeding is a settled matter that did not involve formal litigation.

The fourth factor to be considered is whether the Company has made efforts to change its practices and procedures to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). First, we note that upon learning of the alleged slamming incidents, Liberty Power took swift action to terminate its contract with MIB who was responsible for the scheme used to slam other utilities’ customer accounts. Settlement at ¶ 13 at 4. Second, because of Liberty Power’s experience with MIB, Liberty Power now audits 10% of all contracts submitted through door-to-door third party agents to confirm that the customer telephone number being provided to Liberty Power is legitimate and connected to the name submitted for enrollment from the agent. Appendix B (I&E Statement in Support of Settlement) at 11. If either of these checks indicate there is a problem, then the prospective customer is not submitted by Liberty Power for enrollment. *Id.* Furthermore, if a trend is discovered, then Liberty Power initiates an in-depth investigation concerning the proposed enrollments. *Id.* The objective of this new process is to identify fraudulent proposed enrollments and address any potential issues with agents as soon as possible. *Id.* A third change made by Liberty Power to address its advertised misleading or confusing pricing information included revisions to its enrollment and disclosure documents, effective February 10, 2017, to set forth only one price that includes all relevant components of the generation price charged by the Company including the GRT. Settlement at ¶ 39 at 9. We are of the opinion that this factor supports a lower penalty because Liberty Power has taken prompt and appropriate action to promptly address any similar concerns it had experienced with MIB with its sales partners and to decrease the likelihood of similar incidents in the future.

The fifth factor to be considered relates to the number of customers affected by the Company's actions and the duration of the violations. 52 Pa. Code § 69.1201 (c)(5). As set forth in the Settlement Petition, MIB contacted 921 potential residential customers in Pennsylvania and 533 of the 921 contacted consumers were enrolled to receive electric generation supply from Liberty Power. Settlement Petition at ¶ 21. Within two months of these submissions, only 270 accounts were still actively enrolled with Liberty Power. Settlement Petition at ¶ 25. After reaching out to these accounts, Liberty Power was contacted by 85 customers. Settlement Petition at ¶ 26. Of these 85 customers, 56 of them had been enrolled with Liberty Power at that time. Settlement Petition at ¶27. The enrollments were in process for the other 29 consumers but those were successfully canceled so that no electric generation supply from Liberty Power was ever billed to these consumers. *Id.* Additionally, a non-quantifiable and unknown number of customers who were not discovered by Liberty Power’s internal investigation of the incident may have been potentially affected by the unauthorized switching; however, I&E is uncertain as to whether this number is significant as BCS only received 6 informal complaints complaining of slamming. Appendix B (I&E Statement in Support of Settlement) at 12.

In light of the fact that MIB, the Company’s agent responsible for the unauthorized switching, was engaged by Liberty Power between February 2, 2016 and June 14, 2016, it appears that the period in which slamming would have occurred was not excessively long. On the other hand, with regard to the allegations concerning misleading or confusing pricing information, Liberty Power marketed the “Energy Only Rate” from October 2014 until February 10, 2017 – a period of 2 1/3 years, which, in our opinion, is considerable. However, as noted, the number of instances in which the “Energy Only Rate” was presented to customers is unknown, and BCS received no informal complaints from consumers regarding the inclusion of the “Energy Only Rate” on Liberty Power’s disclosure statements and marketing materials. Appendix B (I&E Statement in Support of Statement) at 12. Nevertheless, the length of time in which the potential for slamming occurred, when taken into consideration with the amount of time the “Energy Only” rate was marketed, leans toward the imposition of a higher penalty.

The sixth factor to be considered relates to the compliance history of the Company. 52 Pa. Code § 69.1201(c)(6). An isolated incident from an otherwise compliant company may result in a lower penalty, whereas frequent, recurrent violations by a company may result in a higher penalty. *Id.* During the 10 years that Liberty Power has been licensed as an EGS provider in Pennsylvania, numerous formal complaints have been filed by consumers against Liberty Power, all of which were either withdrawn, dismissed, or resulted in the filing of Certificates of Satisfaction pursuant to 52 Pa. Code § 5.24. Appendix B (I&E Statement in Support of Settlement) at 12-13. Accordingly, no formal complaints have been sustained against the Company. *Id.* at 13. Additionally, this matter is the Commission’s first enforcement action and the first time it imposes a civil penalty, against Liberty Power. Thus, we find that Liberty Power’s compliance history leans towards a lower penalty. *Id.*

The seventh factor to be considered relates to whether the Company cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). As noted in the Settlement, Liberty Power cooperated with I&E during the investigation. Settlement at ¶¶ 17, 18. Liberty Power and I&E note that this cooperation included the immediate revision by Liberty Power of its pricing presentation to consumers, engaging in the informal discovery process, and negotiating an amicable resolution of the investigation in good faith. Appendix C (Liberty Power Statement in Support of Settlement) at 8-9; Appendix B (I&E Statement in Support of Settlement) at 13. Furthermore, Liberty Power indicates that after self-reporting the matter to OCMO, it initiated discussions with OCMO, provided Staff with full information about what it was uncovering in its internal investigation and discussed its going-forward plan to remediate the situation. Appendix B (Liberty Power Statement in Support of Settlement at 11). For these reasons, we find that this factor merits a lower penalty.

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations. 52 Pa. Code § 69.1201(c)(8). I&E submits that a civil penalty amount of $82,800, which is not tax deductible, in combination with the issuance of customer refunds, is substantial and sufficient to deter Liberty Power from committing future violations. Appendix B (I&E Statement in Support of Settlement) at 13. Liberty Power states that the civil penalty of $82,800 reasonably recognizes the seriousness of the unauthorized switching allegations while offering an appropriate deterrence for future violations. Appendix C (Liberty Power Statement in Support of Settlement) at 9. We agree with the Parties that the $82,800 penalty is sufficient to deter any future violations.

The ninth factor to be considered relates to past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). I&E provided a summary of Commission cases in which the Parties relied upon in their determination of a reasonable penalty in this proceeding as follows:

The Settlement Agreement between I&E and Liberty Power provides a civil penalty of $1,000 for each of the fifty-six customer accounts that were physically switched to and received electric generation supply service from Liberty Power. This per account civil penalty is identical to the $1,000 per account penalty imposed by the Commission in previous slamming matters where a customer’s account was switched and received electric generation supply service from a company without the customer’s authorization. *See Pa. Pub. Util. Comm 'n, Law Bureau Prosecutory Staff v.* *MXenergy Electric, Inc.,* Docket No. M-2012-2201861 (Order entered August 29, 2013); and *Pa. Pub. Util Comm’n, Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pa. Gas &Electric and U.S. Gas & Electric, Inc. d/b/a Pa. Gas & Electric,* Docket No. M‑2013‑2325122 (Order entered October 2, 2014) (hereinafter referred to as the *PaG&E Order).*

The Settlement also provides for a $200 per account penalty for the twenty-nine (29) customers whose accounts were in the process of being switched to Liberty Power. This per account civil penalty is identical to the $200 per account penalty imposed by the Commission in the *PaG&E Order* where the switching process had been initiated but not completed.

Moreover, I&E asserts that the agreed-upon civil penalty of $20,000 regarding Liberty Power’s marketing of an “Energy Only Rate” on the Company’s disclosure statement and marketing materials is largely comparable to civil penalties imposed by the Commission in settled matters where it was alleged that deceptive marketing occurred. *See Commonwealth of Pa., et ah,* v. *Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric,* Docket No. C‑2014‑2427656 (Orders entered March 9, 2016 and March 18, 2016) (Approving a settlement agreement with a civil penalty of $25,000 to resolve allegations of misleading and deceptive representations, slamming, failing to handle complaints in good faith, failing to comply with the telemarketer registration act, failing to provide accurate pricing information and charging prices that did not conform to the disclosure statement); *Commonwealth of Pa., et al.,* v. *IDT Energy, Inc.,* Docket No. C-2014-2427657 (Orders entered June 30, 2016 and July 8, 2016) (Approving a settlement agreement with a civil penalty of $25,000 to resolve allegations of misleading and deceptive representations, slamming, failing to handle customer complaints in good faith, failing to provide accurate pricing information, charging prices that did not conform to the disclosure statement and failing to comply with the telemarketer registration act); *Pa. Pub. Util. Comm ’n, Bureau of Investigation and Enforcement* v. *American Power & Gas of Pa.*,Docket No. M-2017-2508002 (Order entered June 14, 2018) (Approving a settlement agreement with a civil penalty of $30,000 to resolve allegations that the company used misleading sales scripts and instructions to sales agents that impeded the presentation of clear and adequate information to customers).

Appendix B (I&E Statement in Support of Settlement) at 13-15.

Liberty Power provided citations to two additional cases of the Commission’s decisions in similar cases. The first case involves the Settlement between I&E and Vista Energy Marketing L.P. (Vista) where the Commission increased the proposed civil penalty on the basis that Vista made the business decision to temporarily authorize personnel to market door-to-door without fully completing criminal background reviews.[[7]](#footnote-8) In that case, the Commission increased the civil penalty from $37,500 to $52,700, which represented an increase in the per violation fine amount from approximately $302 to $425 per each of the 124 violations.[[8]](#footnote-9) The second case cited by Liberty Power involved allegations of unauthorized switching in the Settlement between I&E and Residents Energy, LLC (Residents Energy), where Residents Energy faced multiple violations associated with a fraudulent third-party verification recording used by a Residents Energy rogue door-to-door agent.[[9]](#footnote-10) In that case, the mitigating actions by Residents Energy to promptly identify the agent, sever business relations with him, and to issue a refund to the customer resulted in a total civil penalty of $6,000 for multiple violations committed by the rogue agent.[[10]](#footnote-11) In the instant Settlement, Liberty Power states that it similarly took swift, proactive measures to identify the issues related to MIB, mitigate customer impact and self-report the incident to OCMO Staff. In addition, Liberty Power states that MIB only enrolled customers via telemarketing and none through door-to-door marketing. Thus, Liberty believes the $1,000 penalty for each known unauthorized switch where service did flow, supports adoption of the proposed civil penalty set forth in the Settlement. Appendix B (Liberty Power in Support of Settlement) at 10-11.

I&E also submits that the instant Settlement Agreement should be viewed on its own merits as there are no past Commission decisions that are directly responsive to an identical situation. For example, I&E explains that it was unable to determine whether consumers experienced confusion by the inclusion of Liberty Power’s “Energy Only Rate” in addition to the Company’s PTC rate on disclosure statements and marketing materials as no consumers complained to BCS regarding this issue. However, in looking at the relevant factors that are comparable to other matters involving allegations of ambiguous or misleading marketing that are subject to the Commission’s jurisdiction and comparing the allegations to the relief provided in the Settlement (*i.e.*, a civil penalty), I&E opines that this Settlement is consistent with past Commission actions and presents a fair and reasonable outcome.

We agree with I&E that not every case involving the assessment of a penalty can be directly compared with a previous Commission determination. Assessing civil penalties is an evolving process and in many instances this Commission may not have imposed a penalty for a specific violation that the Parties may rely upon. In those instances, we agree with I&E that those types of issues should be viewed on their own merits. We commend the Parties for their thorough review of our past Orders addressing civil penalty assessments. We are of the opinion that the $82,800 penalty reached in the instant Settlement appears to be consistent with our past determinations.

The tenth factor considers “other relevant factors.” 52 Pa. Code § 69.1201(c)(10). I&E submits that adoption of the Settlement reached by the Parties would avoid the necessity by the Commission to prove elements of each allegation and, in return, the opposing party in a settlement agrees to a lesser fine or penalty, or other remedial action. Appendix B (I&E Statement in Support of Settlement) at 15. Liberty Power submits that a unique fact in this case that supports approval of the negotiated civil penalty is Liberty Power’s voluntary decision to self-report the incident involving its independent third-party telemarketing agent to Commission Staff in a timely manner. Liberty Power urges the Commission to give this fact significant weight so as to positively incent future EGSs to also self-report incidents. Appendix B (Liberty Power Statement in Support of Settlement) at 11.

We believe, consistent with our policy that encourages settlements, it is in the public interest to settle this matter so as to avoid the expense of formal litigation. Furthermore, we are of the opinion that the action by Liberty Power to self-report the illegal actions conducted by MIB served to lessen the effects of the violations that may have otherwise occurred.

**V. 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 Liberty Power is in the public interest and merits approval. We, therefore, shall grant the Joint Petition, and thereby, approve the Settlement consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Joint Petition for Approval of Settlement, filed on June 6, 2019, between the Commission’s Bureau of Investigation and Enforcement (I&E) and Liberty Power Holdings, LLC, hereby, is granted, and the Settlement, therefore, is approved, in its entirety without modification, consistent with this Opinion and Order.

2. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within sixty (60) days of the date of entry of this Opinion and Order, Liberty Power Holdings, LLC shall pay Eighty-Two Thousand Eight-Hundred Dollars ($82,800). 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 within thirty (30) days of the date of entry of this Opinion and Order, Liberty Power Holdings, LLC (Liberty Power) shall provide to each of the customers who had one or more of the fifty-six (56) accounts physically switched to Liberty Power, a refund for the entire electric generation supply portion on the customers’ bills for the first two (2) billing periods that the customers were switched to Liberty Power, pursuant to 52 Pa. Code § 57.177(b). Following payment of the refunds, Liberty Power shall file with the Commission a verification acknowledging that all refund payments have been disbursed.

4. That a copy of this Opinion and Order, along with a copy of the comments filed by Mr. Dan Ocko on August 27, 2019, at Docket No. M-2019-2568471, be served on the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement for any such action that they may deem necessary.

5. That a copy of this Opinion and Order be served on the Financial and Assessment Chief, Office of Administrative Services, the Office of Consumer Advocate, and the Office of Small Business Advocate.

6. That after Liberty Power Holdings, LLC remits the civil penalty as set forth in Ordering Paragraph No. 2, above, and upon receipt of the civil penalty and verification indicating that all customer refunds have been disbursed, the Secretary’s Bureau shall mark this proceeding closed.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 15, 2021

ORDER ENTERED: April 15, 2021

1. Liberty Power is a licensed electric generation supplier (EGS) as defined by 66 Pa. C.S. § 2803. On April 11, 2008, at Docket No. A-110175, the Commission granted Liberty Power approval to begin to offer, render, furnish or supply electricity or electric generation services as a generator and supplier of electric power to the public in Pennsylvania. [↑](#footnote-ref-2)
2. This practice is known as “slamming.” *HIKO Energy LLC v. Pa. PUC*, 163 A.3d 1079, 1090 (Pa. Cmwlth. 2017). [↑](#footnote-ref-3)
3. Although MIB and not Liberty Power caused the unauthorized enrollments, Liberty Power bears responsibility for fraudulent, deceptive, or other unlawful marketing acts performed by its agent pursuant to 52 Pa. Code §§ 54.43(f) and 111.3(b). Settlement ¶ 34 at 8. [↑](#footnote-ref-4)
4. Pursuant to 52 Pa. Code § 111.3(b), a supplier is responsible for fraudulent, deceptive, or other unlawful marketing acts performed by its agent. [↑](#footnote-ref-5)
5. Mr. Ocko also attached a copy of the CT PURA’s Decision to his comments. *See, Application of Liberty Power Holdings, LLC for and Electric Supplier License – Review of Allegations of Consumer Protection Violations,* Docket No. 06‑12‑07RE07, Decision adopted July 31, 2019. [↑](#footnote-ref-6)
6. We shall address the reasonableness of the proposed penalty in more detail in our discussion below. [↑](#footnote-ref-7)
7. *See Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v.* *Vista Energy Marketing, L.P.*,Docket No. M-2018-2624484, Opinion and Order entered March 14, 2019 (*2019 Vista Energy Order*) at 12. [↑](#footnote-ref-8)
8. *2019 Vista Energy Order* at 16. [↑](#footnote-ref-9)
9. *See Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Residents Energy, LLC,* Docket No. M-2017-2511372, Opinion and Order entered July 12, 2018 (*2018 Residents Energy Order*). [↑](#footnote-ref-10)
10. *2018 Residents Energy Order* at 11. [↑](#footnote-ref-11)