**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held July 15, 2021

Commissioners Present:

 Gladys Brown Dutrieuille, Chairman

David W. Sweet, Vice Chairman

John F. Coleman, Jr.

Ralph V. Yanora

|  |  |  |
| --- | --- | --- |
| Pennsylvania Public Utility Commission,Bureau of Investigation and Enforcement  v.Eligo Energy PA, LLC |  | M-2020-3019204 |

**Opinion and Order**

**BY THE COMMISSION:**

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a proposed Settlement Agreement (Settlement Agreement or Settlement) filed on October 29, 2020, by the Commission’s Bureau of Investigation and Enforcement (I&E) and Eligo Energy PA, LLC (Eligo or Company)[[1]](#footnote-1) (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 13. For the reasons set forth herein, we shall approve the proposed Settlement, consistent with this Opinion and Order.

**History of the Proceeding**

 This matter concerns alleged misleading and deceptive marketing materials, which included references or quotes allegedly from the Commission that may have violated the Public Utility Code (Code) and the Commission’s Regulations. These marketing materials were issued by Eligo from approximately January 2019 through March 2020. Settlement at 1, 4.

 As a result of customer complaints, the Commission’s Bureau of Consumer Services (BCS) initiated a referral to I&E regarding Eligo’s alleged misleading and deceptive marketing materials. I&E determined that these allegations warranted a further investigation to examine whether the actions of Eligo violated Commission Regulations. Settlement at 1.

 I&E instituted an informal investigation of Eligo based on the information referred to I&E by BCS. 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. Settlement at 4. The Parties filed the instant Settlement on October 29, 2020.

**Background**

 On or about March 10, 2020, BCS initiated a referral to I&E regarding Eligo’s alleged misleading and deceptive marketing materials. Specifically, BCS requested that I&E investigate Eligo’s marketing materials which included references or quotes allegedly from the Commission that may have violated the Code and the Commission’s Regulations. Settlement at 5.

 By letter dated March 13, 2020, I&E notified Eligo of the scope of its informal investigation and requested responses to I&E’s Data Request – Set I. Eligo requested two extensions of the due date for responses to the data request due to issues caused by the COVID-19 pandemic. I&E granted the extension requests and instructed Eligo to provide responses as they became available. Eligo provided responses on May 8, 2020 and May 15, 2020. Settlement at 5-6.

On July 17, 2020, the Parties held a conference call to discuss I&E’s informal investigation. On July 29, 2020, Eligo provided a supplemental response to I&E Data Request-Set I, No. 4. Settlement at 6.

Under Section 111.8(d) of the Commission’s Regulations, a public utility shall not use the name of a governmental agency in a way that suggests a relationship that does not exist. 52 Pa. Code § 111.8(d). Additionally, pursuant to Sections 54.122(3), 111.12(d)(1), and 111.12(d)(2), an electric generation supplier may not engage in misleading or deceptive conduct or representations. 52 Pa. Code § 54.122(3) (“An electric distribution company or electric generation supplier may not engage in false or deceptive advertising to customers with respect to the retail supply of electricity in this Commonwealth); 52 Pa. Code § 111.12(d)(1) (“May not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order”); and 52 Pa. Code § 111.12(d)(2) (“May not make false or misleading representations including misrepresenting rates or savings offered by the supplier”). Settlement at 7.

I&E found that Eligo sent three types of marketing materials that may have contained misleading information. In response to the mailers, one thousand one hundred and ninety-three (1,193) customers enrolled with Eligo. Settlement at 7-9.

The alleged misleading marketing materials are categorized as follows:

| Marketing Material | Mailer Description | Approximate Number Issued |
| --- | --- | --- |
| Exhibit 1 – Use of the Commission’s Name | In response to the Data Request – Set I, Eligo provided eleven (11) mailers that contained the phrase “Pennsylvania Public Utility Commission Notice”, or “Important PUC Notice” printed in bold letters. Specifically, “Pennsylvania Public Utility Commission Notice” was printed in bold on the front of the mailer about the customer address.  | 302,189 |
| Exhibit 2 – Use of Allegedly Misleading or Deceptive Phrases | In response to Data Request – Set I, Eligo provided twenty-two (22) mailers that contained the phrase “Final Electric Notice: Attn Recipient: Request for Immediate Action.” Specifically, the phrase was in bold on the front of the mailer right above the customer address.  | 867,499 |
| Exhibit 3 – Use of Allegedly Misleading or Deceptive Phrases | In response to Data Request – Set I, Eligo provided thirty-four (34) mailers that contained the phrase “Rate Change Notice” in bolded red letters right below the customer address. | 1,200,000 |

Settlement at 7-9.

 I&E determined that the Company became aware of the allegedly deceptive mailers prior to I&E’s informal investigation and immediately implemented a formal review process applicable to mailers. This formal review process, among other things, now prevents any marketing material from being sent for printing unless approved by Eligo’s legal department. Settlement at 10.

 The proposed Settlement was filed by the Parties to resolve I&E’s allegations that Eligo issued misleading and deceptive mailers between approximately January 2019 and March 2020. The Parties urge the Commission to approve the Settlement as being in the public interest. Settlement at 14.

 By Order entered May 20, 2021, (*May 2021 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 *May* *2021 Order*. No comments were filed.

**Terms of the Settlement**

 Pursuant to the proposed Settlement, Eligo will pay a civil penalty of $188,125.00. The penalty includes:

* + - 1. A civil penalty of $1,000.00 for each of the 11 mailers with the phrases “Pennsylvania Public Utility Commission Notice” or “Important PUC Notice,” totaling $11,000.00.
			2. A civil penalty of $500.00 for each of the 22 mailers with the phrase “Final Electric Notice: Attn Recipient: Request for Immediate Action,” totaling $11,000.00.
			3. A civil penalty of $500.00 for each of the 34 mailers with the phrase “Rate Change Notice,” totaling

$17,000.00.

* + - 1. A civil penalty of $125.00 for each of the 1,193 customer enrollments, totaling $149,125.00.

Settlement at 12.

 The civil penalty shall not be tax deductible or passed through as an additional charge to Eligo’s customers in Pennsylvania. *Id.*

 In response, I&E agrees to forgo the institution of any formal complaint against Eligo with respect to allegations of violations of the Code and the Commission’s Regulations related to misleading and deceptive mailers issued between approximately January 2019 and March 2020. Settlement at 14.

 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 12-13.

**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 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). The alleged conduct in this matter involves an administrative or technical error as a result of Eligo’s lack of oversight/formal review process of its marketing department. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 7. Furthermore, Eligo noted that immediately upon becoming aware of the potentially misleading and deceptive mailers being sent to the public, Eligo commenced remediation efforts. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 6. Consequently, the less egregious nature of the conduct was considered in arriving at the civil penalty amount in the Settlement.

The second factor considered is whether the resulting consequences of Eligo’s alleged conduct 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. 52 Pa. Code § 69.1201(c)(2). I&E noted that there is no indication that personal injury or property damage occurred as a result of the alleged violations. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 7. In addition, Eligo noted that while any violation of the Code or any rule or regulation of the Commission is serious, in this case 83% of the customers enrolled after receipt of the mailers received substantial benefits and savings. Eligo has instituted and implemented procedures to ensure the proper vetting of marketing mailers prospectively and believes these procedures will minimize the likelihood of any adverse consequences to the public in the future. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 6. Therefore, this information warrants a lower civil penalty.

The third factor to be considered under the Policy Statement is 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.* Whether Eligo’s alleged conduct was intentional or negligent does not apply because this matter is being resolved via settlement of the Parties. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 7; Appendix B Eligo’s Statement in Support at 6. Therefore, this factor does not need to be considered in this proceeding.

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). Prior to I&E’s investigation, Eligo’s marketing department consisted of two individuals, one who created the marketing material. The marketing materials that are the subject of the informal investigation were sent for printing and distribution without legal review. In response to this administrative error, Eligo implemented a formal review process to ensure that all marketing materials are reviewed by the legal department prior to being sent for printing and distribution. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 8. In addition, Eligo has implemented changes to its processes, and it is confident that these processes will substantially minimize the likelihood of a reoccurrence of the events that transpired here. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 7. Thus, Eligo made efforts to ensure that any marketing materials issued in the future undergo the proper legal review and thus this warrants a lower civil penalty.

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). I&E’s investigation revealed that during the time frame of January 2019 through March 2020, approximately 2,500,000 mailers that were issued by Eligo contained deceptive and misleading phrases. Approximately 1,193 customers were enrolled with Eligo after the receipt of this marketing material. These facts were considered when calculating the civil penalty. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 8. Eligo also noted that although these customers signed service agreements of varying durations, the majority of which are multi-year in nature, the great majority of these impacted customers have and are expected to save substantial money as a result of entering into these agreements with Eligo. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 7. Thus, this information warrants a lower civil penalty.

The sixth factor to be considered relates to the compliance history of Eligo. 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.* Several formal complaints have been filed by consumers against Eligo, all of which resulted in the filing of Certificates of Satisfaction pursuant to 52 Pa. Code § 5.24.[[2]](#footnote-2) Accordingly, no formal complaints have been sustained against the Company. Additionally, the instant matter is the first case involving an I&E enforcement action brought against Eligo and is the first instance in which Eligo would pay a civil penalty imposed by the Commission. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 8-9. In addition, Eligo noted that it has a history of compliance with the Code and/or Commission Regulations with regard to this matter and at a broader level, it consistently complies with applicable Commission Orders and Regulations and the Code in the conduct of its business and the provision of service in Pennsylvania. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 7. Therefore, on balance, we consider Eligo’s compliance history does not support a higher civil penalty.

The seventh factor to be considered relates to whether the Company cooperated with the Commission's investigation. 52 Pa. Code § 69.1201(c)(7). I&E and Eligo submit that Eligo cooperated in the investigation in this matter, including cooperating in both informal discovery as well as settlement discussions. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 9; Appendix B Eligo’s Statement in Support at 8. Therefore, Eligo’s cooperation warrants a lower civil 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 and Eligo both submit that a civil penalty amount of $188,125, which is not tax deductible, is substantial and sufficient to deter Eligo from committing future violations. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 9; Appendix B Eligo’s Statement in Support at 8. Therefore, the civil penalty is appropriate.

The ninth factor to be considered relates to past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). I&E submits that the instant Settlement Agreement should be viewed on its merits as there are no past Commission decisions that are directly responsive to this matter. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 9. Eligo notes that because this case has been settled and not litigated, it should be considered on its own unique circumstances. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 8-9. Thus, the civil penalty is appropriate.

The tenth factor considers “other relevant factors.” 52 Pa. Code § 69.1201(c)(10). I&E submits that an additional relevant factor – whether the case was settled or litigated – is of pivotal importance to this Settlement. A settlement avoids the necessity for the governmental agency to prove elements of each allegation. In return, the opposing party in a settlement agrees to a lesser fine or penalty, or other remedial action. Both parties negotiate from their initial litigation positions. The fines and penalties, and other remedial actions resulting from a fully litigated proceeding are difficult to predict and can differ from those that result from a settlement. Reasonable settlement terms can represent economic and programmatic compromise while allowing the parties to move forward and to focus on implementing the agreed-upon remedial actions. Joint Petition for Settlement, Appendix A I&E’s Statement in Support at 9-10. Eligo noted that reasonable settlement terms agreed to by the parties allow them to refocus their efforts from proving their cases to implementing and enhancing important responsive measures. Joint Petition for Settlement, Appendix B Eligo’s Statement in Support at 9. Therefore, the civil penalty is appropriate.

We determine that other relevant factors weigh in favor of approval of the Settlement here proposed.

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 and the Commission’s Regulations and policy statements, we find that the proposed Settlement between I&E and Eligo 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 October 29, 2020, between the Commission’s Bureau of Investigation and Enforcement and Eligo Energy, PA, LLC (Eligo) is approved in its entirety without modification.
2. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within sixty (60) days of the date this Order becomes final, Eligo shall pay a civil penalty of One Hundred Eighty-Eight Thousand One Hundred Twenty-Five Dollars ($188,125). 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

1. That the civil penalty shall not be tax deductible or passed through as an additional charge to Eligo’s customers in Pennsylvania.
2. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Bureau of Administration.
3. That the above-captioned matter shall be marked closed upon receipt of the civil penalty.

**BY THE COMMISSION,**

****

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: July 15, 2021

ORDER ENTERED: July 15, 2021

1. The Commission granted Eligo approval to operate as a licensed electric generation supplier on January 15, 2015, at Docket No. A-2014-2433211. Settlement at 3, para. 7. [↑](#footnote-ref-1)
2. *See* F-2020-3020024, C-2020-3019233, C-2019-3011480, and C‑2017‑2596873. [↑](#footnote-ref-2)