**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held February 24, 2022

Commissioners Present:

 Gladys Brown Dutrieuille, Chairman

John F. Coleman, Jr., Vice Chairman

Ralph V. Yanora

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| Pennsylvania Public Utility Commission,Bureau of Investigation and Enforcement  v.Green Mountain Energy Company |  | M-2021-3009235 |

**Opinion and Order**

**BY THE COMMISSION:**

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are: (1) the proposed Joint Petition for Approval of Settlement (Joint Petition, Settlement, or Settlement Agreement) filed on July 9, 2021, by the Commission’s Bureau of Investigation and Enforcement (I&E) and Green Mountain Energy Company[[1]](#footnote-1) (Green Mountain or Company) (collectively, the Parties), and (2) the comments filed in response to our Tentative Opinion and Order, entered November 18, 2021 at this docket (*November 2021 Order*), in which we sought comments from interested parties regarding the proposed Settlement Agreement between I&E and Green Mountain. 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 changes to customers’ electric generation supply service committed by Green Mountain agents. Both Parties submitted Statements in Support of the Settlement. The 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 at 4. For the reasons set forth herein, we shall approve the Joint Petition, as modified, based on our finding that the Settlement, as modified by clarification of the Settlement terms pertaining to customer refunds, is in the public interest.

# History of the Proceeding

 This matter concerns alleged unauthorized changes to customers’ electric generation supply service. Between June 1, 2018 and September 30, 2020, the Commission’s Bureau of Consumer Services (BCS) received approximately twenty-two informal complaints from residential customers alleging that their electricity accounts had been switched to receive the Company’s electric generation supply without authorization. Joint Petition at 3-4. The unauthorized switching allegations stemmed from Green Mountain’s marketing activities at in-person locations, including retail and event sites, where Green Mountain agents were utilizing eligible customer lists[[2]](#footnote-2) (ECL) to obtain the information of prospective customers. *Id*.

Upon determining that the allegations warranted a further investigation to examine whether the actions of Green Mountain violated Commission Regulations, I&E instituted an informal investigation of Green Mountain based on information referred to I&E by BCS. Joint Petition at 3.

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. *Id.* at 4. The Parties filed the instant Settlement on July 9, 2021.

In our *November 2021 Order*, we provided interested parties with the opportunity to file comments. To be considered timely, the Commission directed those comments be filed no later than twenty-five days after the date that the *November 2021 Order* and the attached Joint Petition and the Statements in Support thereof are published in the *Pennsylvania Bulletin*, or by January 5, 2022.[[3]](#footnote-3)

Comments were filed by one interested party, the Office of Consumer Advocate (OCA), on January 5, 2022. These comments in conjunction with our analysis and disposition of the proposed Settlement will be discussed in this Opinion and Order, *infra.*

# Background

BCS received approximately twenty-two informal complaints submitted by residential customers alleging that their electricity accounts had been switched to receive electric generation service supplied by Green Mountain without their authorization. A review by BCS of the informal complaints determined that the alleged unauthorized enrollments were set up by agents who used the ECL at in-person marketing locations. BCS became concerned that Green Mountain agents were improperly using the ECL, which contains customer information, to switch customers to Green Mountain without the customers’ consent. Therefore, BCS referred the matter to I&E. Joint Petition at 4.

By letter dated January 8, 2021, I&E notified Green Mountain that it had initiated an informal investigation of the Company 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. I&E advised Green Mountain that its investigation would focus on the Company’s marketing, sales and enrollment practices as an EGS in Pennsylvania. *Id*. at 4-5.

I&E’s investigation primarily consisted of the review of the Company’s responses to two sets of data requests served to Green Mountain on January 8, 2021 and April 2, 2021, respectively. The results of I&E’s investigation determined that between June 1, 2018 and September 30, 2020, Green Mountain, or agents acting on behalf of Green Mountain, enrolled 156 residential customers to receive electric generation supply provided by the Company without the customers’ authorization, with such enrollments originating from Green Mountain’s in-person marketing locations. I&E found that, of the 156 unauthorized enrollments, 141 were the direct result of enrollment processing errors, which occurred when Green Mountain agents inadvertently selected the incorrect customer account from the ECL or where the agent failed to advise the customer that he or she was switching suppliers until after the enrollment was signed. The remaining fifteen unauthorized enrollments involved either sales agent misrepresentation (ten instances) or consisted of straightforward unauthorized switching (five instances). Joint Petition at 5.

I&E provided that as a supplier, Green Mountain is responsible for fraudulent, deceptive or other unlawful marketing acts performed by its agents. Joint Petition at 5, n. 2 (citing 52 Pa. Code § 54.43(f) and 52 Pa. Code § 111.3). Therefore, based on its investigation, I&E alleged that Green Mountain’s conduct potentially 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).  *Id*. at 6. If this matter had been fully litigated, I&E would have sought a civil penalty of $1,000 per violation for each of the 156 accounts that were switched without the authorization of the customers, and $1,000 per day for each day that a customer received electric generation supplied by Green Mountain without the customer’s consent. *See* 66 Pa. C.S. § 3301(a)‑(b). *Id*. at 7.

In turn, if this matter had been fully litigated, Green Mountain intended to raise defenses to I&E’s allegations and defend against the same at hearing, presenting evidence and making legal arguments as follows:

* Because 141, or over 90%, of the alleged unauthorized switches involved ECL processing errors, the imposition of $1,000 per violation is not warranted.
* An unauthorized switch is a single violation, not an ongoing violation that warrants a $1,000 per day civil penalty for each and every day that a customer received electric generation supplied by Green Mountain, and to the extent the Commission views it as such, no penalties should be assessed after two billing periods. *See* 52 Pa. Code § 57.177(b) (customer should have reasonably known of a change within that time period).
* The 10 instances involving customers’ allegations about the agents’ representations are not credible given the process that Green Mountain follows to complete an enrollment.
* A lower civil penalty per violation should be imposed due to: (a) the actions that Green Mountain has taken to avoid a recurrence; (b) the small percentage of Green Mountain’s total customer base that is the subject of this investigation; (c) Green Mountain’s history of compliance with the Commission’s regulations, as well as its cooperation with I&E’s investigation; and (d) the programs that Green Mountain has in place, and continuously improves, to train sales agents, monitor agent performance, enforce agent compliance with requirements, complete enrollment verifications, and conduct quality assurance activities.
* Notwithstanding the provision in the regulations at 52 Pa. Code § 57.177(b) regarding refunds, the Commission does not have statutory authority to direct Green Mountain to issue refunds. *See Blue Pilot Energy, LLC v. Pa. PUC*,241 A.3d 1254 (2020), 2020 Pa. Commw. LEXIS 720. At most, refunds should be limited to the customers who disputed the switch within the first two billing periods.

Joint Petition at 7-8.

I&E’s investigation further found that the Company undertook a number of proactive, corrective measures designed to prevent similar occurrences in the future. Most notably, Green Mountain eliminated the ability for sales agents to scroll through the ECL to locate a certain customer. The ECL tool now utilizes advanced identification scanning technology to authenticate customer identities, thereby reducing the potential for ECL mismatches. Additionally, to prevent exploitation of the ECL, Green Mountain tightened its disciplinary policy for ECL misuse, which may result in the loss of ECL privileges and potential removal from working on behalf of Green Mountain. Joint Petition at 6.

Weighing the seriousness of the allegations against various mitigating circumstances that are present here, I&E determined that the Settlement was appropriate. I&E noted the proactive measures taken by Green Mountain, prior to the initiation of its investigation, which targeted ECL misuse in an effort to prevent unauthorized switching at in-person locations. Additionally, I&E acknowledged that the Company has been cooperative with I&E’s investigation, as exemplified by the Company’s responsiveness to data requests and through its cooperation during settlement discussions. I&E Statement in Support at 4, 11.

# Terms and Conditions of the Settlement

The Parties indicate that the Settlement, which they have entered into, resolves all issues related to I&E’s informal investigation and represents a compromise by both I&E and Green Mountain of their respective competing positions in this proceeding. Additionally, the Parties submit that the 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*. The Parties further state that the Settlement constitutes a carefully crafted package representing reasonably negotiated compromises on the issues addressed herein. Joint Petition at 11-12. The Parties urge the Commission to approve the Settlement as being in the public interest. *Id*. at 13.

The Settlement consists of the Joint Petition for Approval of Settlement containing the terms and conditions of the Settlement and three appendices. Appendix A contains Proposed Ordering Paragraphs, while Appendices B and C to the Settlement are the Statements in Support of the Settlement submitted by I&E and Green Mountain, respectively.

The essential terms of the Settlement are set forth in Paragraph 29. Joint Petition at 9-10. The Parties agreed to the following terms and conditions, excerpted in relevant part, as follows:

1. A. Green Mountain will pay a civil penalty in the amount of One Hundred Fifty-Six Thousand Dollars ($156,000), pursuant to 66 Pa. C.S. § 3301, to resolve all allegations of unauthorized switching, 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. Said payment shall be made within thirty (30) 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:

Secretary

Pennsylvania Public Utility Commission

Commonwealth Keystone Building

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.S. § 162(f).

B. Green Mountain will provide to each of the one hundred fifty-six (156) customers a refund for the entire electric generation supply portion on the customer’s bill for the first two (2) billing periods that the customers were switched to Green Mountain, pursuant to 52 Pa. Code § 57.177(b). Green Mountain 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, Green Mountain will file with the Commission a verification acknowledging that all refund payments have been disbursed, satisfying this settlement provision.

C. Green Mountain shall refund any cancellation fee or early termination fee imposed by other EGSs and incurred by any of the aforementioned customers as a result of the unauthorized switch to Green Mountain, pursuant to 52 Pa. Code § 57.177(c), provided that the customer supplies documentation of incurring the fee.

D. After the entry of a Final Commission Order in this matter, Green Mountain will provide I&E with a monthly report by the 30th of each month, for a period of one (1) year, detailing complaints from Pennsylvania consumers that were received by the Company from BCS, the Pennsylvania Attorney General’s Office, the Better Business Bureau and/or complaints directed to the Company related to allegations of unauthorized switching that originated from in-person marketing locations. The monthly report to I&E shall include customer complaint data from the previous month.

E. Green Mountain agrees to retain customer signatures placed on enrollment tablets used at in-person marketing locations for a period of one (1) year starting after the entry of a Final Commission Order in this matter, and will provide such records to BCS and I&E upon request.

Joint Petition at 9-10.

In response, I&E agrees to forgo the institution of any formal complaint against Green Mountain with respect to allegations of unauthorized enrollments committed by Green Mountain agents at in-person marketing locations during the time period in question. Joint Petition at 10.

 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 11.

# 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’s *Policy Statement* at 52 Pa. Code § 69.1201 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 and the OCA’s comments in response to our *November 2021 Order*, we find, as discussed in more detail below, that the application of these factors supports approval of the Settlement, as modified by this Opinion and Order.

## Comments in Response to the *November 2021 Order*

As noted, we received comments from one party in response to our *November 2021 Order* issuing the proposed Settlement for comment. Those comments were filed by the OCA on January 5, 2022. In its comments, the OCA requests that the Commission clarify the Settlement terms dealing with customer refunds. OCA Comments at 2, 4-5. As an additional matter, the OCA is seeking a re-examination of safeguards and related provisions for the ECL, as the OCA stated that it is “concerned” about alleged “abuses” of the ECL. OCA Comments at 2, 5-6.

The OCA notes that, while it appreciates the effort of the Parties to partially refund customers unfairly charged excess amounts for being switched without their authorization, it is unclear: (1) if this commitment includes refunds for the electric generation supply portion for the first two months for *all* customers affected by Green Mountain’s unauthorized switching, regardless of whether the customer paid those two months of service; (2) how this commitment will be executed (*i.e.* the exact manner in which Green Mountain intends to compensate the affected customers); and (3) what information must be included in the verification to be filed with the Commission, indicating Green Mountain’s compliance with the refund provision and ensuring that the affected customers are properly receiving the refunds. OCA Comments at 4-5.

As such, the OCA requests that the Commission modify the terms of the Settlement, requiring the verification filed with the Commission in compliance with Paragraph 29(B) of the Settlement be accompanied by an attachment providing: (1) the number of customers contacted in reference to the refund; (2) the total refunded amounts to each customer; and (3) the number of checks sent to customers that were not cashed, if any. *Id*. at 5.

Additionally, as previously indicated, the OCA expresses its concern about Green Mountain’s misuse of the ECL. The OCA contends that, based on the information disclosed in the *November 2021 Order*, it appears that Green Mountain “had insufficient protections in place to ensure that its agents were not misusing customer information disclosed in the ECL to facilitate unauthorized enrollments.” OCA Comments at 3.

The OCA acknowledges that many of the unauthorized enrollments were characterized as “processing errors” and Green Mountain’s efforts in imposing limitations, modifying the ECL search tool to eliminate the ability of both third-party and in-house sales agents from scrolling through the list to locate a customer, as well as its enhanced disciplinary policy for ECL misuse. However, the OCA remains “concerned that the number of mismatches that I&E’s investigation discovered may point to a more widespread issue among all suppliers and their agents.” *Id*. at 3, 5-6. Referencing a recent Commission order approving a settlement agreement between I&E and NRG Home, an affiliate of Green Mountain,[[4]](#footnote-4) the OCA notes the presence of similar allegations as in the instant proceeding and the “apparent rise of allegations” stemming from the misuse of the ECL. *Id.* at 6 (*citing* *Pa. PUC, Bureau of Investigation and Enforcement v. Reliant Energy Northeast LLC d/b/a Reliant Energy, NRG Business Solutions, Reliant-NRG, NRG Residential Solutions, NRG Retail Solutions, NRG Home and NRG Business*, Docket No. M-2020-3006647 (Order entered March 25, 2021) (*NRG Home*) (Many of the 168 unauthorized switching allegations stemmed from NRG Home’s marketing activities at public retail locations where NRG Home agents were utilizing the ECL to obtain the information of prospective customers.)). Therefore, the OCA submits that “it may well be time for the Commission to reexamine use of the ECL by suppliers to ensure that proper safeguards are in place to prevent misuse of customer data in the future.” *Id.* at 6.

## Disposition of the OCA’s Comments

While we do not have traditional utility ratemaking authority over competitive suppliers, and we do not regulate competitive supply prices, we do have subject matter jurisdiction to regulate aspects of EGS services, including marketing, sales, and billing. This is so not only under our plenary authority in Section 501 of the Code but also under the Competition Act itself. *See* 66 Pa. C.S. § 501; Electricity Generation Customer Choice and Competition Act, Act 138 of 1996, as amended by Act 129 of 2008, 66 Pa. C.S. §§ 2801-2815 (Competition Act). This authority includes approving the voluntary issuance of refunds agreed to by an EGS in the context of a comprehensive settlement, consisting of terms and conditions that are deemed to be in the public interest.

As previously indicated, to determine whether the Settlement should be approved, we must decide whether the proposed terms and conditions are in the public interest. *See, e.g.,* *Pa. PUC v. York Water Co*., Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C.S. Water and Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC LBPS v. PPL Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009); *Pa. PUC v. Phila. Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Warner v. GTE North, Inc*., Docket No. C-00902815 (Order entered April 1, 1996); 52 Pa. Code § 69.1201. Our assessment of the benefits of the terms and conditions meeting the criteria of what is in the public interest need not be quantifiable. *Popowsky v. Pa. PUC*, 594 Pa. 583, 937 A.2d 1040 (2007) (“substantial” public interest standard discussed in the context of a merger reviewed under Section 1103 of the Code, 66 Pa. C.S. § 1103). We must, as the circumstances dictate, exercise our informed judgment, and evaluate the public interest so as to take into consideration the various interests and concerns of the stakeholders involved. *Id*.

Furthermore, the Commission’s authority to review settlements for approval that are in the public interest, includes the authority to *sua sponte* modify the terms of the settlement where the Commission deems it reasonable and necessary in the public interest. *See, e.g., Pa. PUC v. West Penn Power*, Docket No. C-2012-2307244 (Order entered January 9, 2014) (*West Penn*).

In addressing the OCA’s comments, we are mindful that the proposed Settlement before us for review and approval in the public interest involves allegations of violations of statutorily-prescribed consumer protections. We are also cognizant of the fact that the Parties to this proceeding have engaged in lengthy negotiations to resolve these serious issues which are encompassed by the Settlement terms. Both I&E and Green Mountain have expressed their support for the positive outcomes achieved by the proposed Settlement, which the Parties assert “…avoids the time and expense of litigation, which entails hearings, travel for the Company’s witnesses, and the preparation and filing of briefs, exceptions, reply exceptions, as well as possible appeals.” Joint Petition at ¶ 32.

The OCA comments that the proposed Settlement should be modified in order to clarify the process for which Green Mountain is to issue refunds to the affected customers and ensure that the affected customers are properly receiving the refunds. OCA Comments at 4-5. Therefore, as the agency responsible for reviewing and approving a Settlement in the public interest, it is within our authority and therefore, is our duty, where possible to require reasonable and necessary provisions to assure transparency of the procedures used to facilitate the refunds to all affected customers. We agree with the OCA and find that this clarification is reasonable and necessary in the public interest for approval of the Settlement. Therefore, we shall adopt the requirement proposed by the OCA’s comments. As such, Paragraph 29(B) of the Settlement is modified, in pertinent part, as follows:

B. Green Mountain will provide to each of the one hundred fifty-six (156) customers a refund for the entire electric generation supply portion on the customer’s bill for the first two (2) billing periods that the customers were switched to Green Mountain, pursuant to 52 Pa. Code § 57.177(b). Green Mountain 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, Green Mountain will file with the Commission a verification acknowledging that all refund payments have been disbursed, satisfying this settlement provision. The verification will be accompanied by an attachment providing: (1) the number of customers contacted in reference to the refund; (2) the total refunded amounts to each customer; and (3) the number of checks sent to customers that were not cashed, if any.

The Commission’s authority to *sua sponte* modify the terms of the settlement is subject to the consent of the parties to be bound by the terms of the settlement, as modified. *See, e.g., West Penn.* Pursuant to the Settlement, the Parties remain free to withdraw from the Settlement within twenty (20) days after the entry of an Order modifying the Settlement, if the terms, as modified, are unacceptable. Joint Petition at 11.

At issue here is not Green Mountain’s rate or our regulatory powers over rates and ratemaking under Chapter 13 of the Code, but rather Green Mountain’s *service*, specifically the sales and marketing activities of its agents. These are activities *expressly, not impliedly*, within our jurisdiction under Sections 2802(14), 2807(d)(1) and (2), and 2809(e) and (f) of the Competition Act, and that we have expressly regulated in Chapters 54, 57 and 111 of our Regulations.

With regard to the OCA’s concern with the Company’s use of ECL, notwithstanding Green Mountain’s proactive implementation of several corrective measures targeting ECL misuse in an effort to prevent unauthorized switching at in-person locations, the OCA’s comments indicate its belief that this docket is the appropriate avenue to request the Commission re-examine the use of the ECL among all suppliers and their agents. This request is based on the OCA’s concern of the possibility of a more widespread issue, assumed from I&E’s investigations in the instant proceeding and a similar proceeding involving a Green Mountain affiliated EGS, NRG Home, which uncovered insufficient protections were in place at the time to ensure that agents were not misusing customer information disclosed in the ECL to facilitate the alleged unauthorized enrollments.

Specifically, since the discovery of the alleged unauthorized enrollments at issue in this proceeding, Green Mountain eliminated the sales agent’s ability to scroll through the ECL to locate a certain customer. The ECL tool now utilizes advanced identification scanning technology to authenticate customer identities, thereby reducing the potential for ECL mismatches. Additionally, to prevent exploitation of the ECL, Green Mountain tightened its disciplinary policy for ECL misuse, which may result in the loss of ECL privileges and potential removal from working on behalf of Green Mountain.

Similarly, in the *NRG Home* case, NRG Home also took corrective measures to prevent similar occurrences in the future:

…NRG Home indicated that it had terminated all agents involved in this scheme and that the Company took corrective actions to prevent misuse of the ECL from occurring in the future. Settlement at 5, n. 2.

\* \* \*

I&E determined that the Company instituted several corrective measures designed to prevent similar occurrences in the future. NRG Home eliminated the ability for sales agents to scroll through the ECL to locate a certain customer. Agents can now only search for a specific name and the information populates only if a match is located. NRG Home also has since deployed a technology solution to authenticate customers’ identities, thereby narrowing the ECL search results. Finally, NRG Home tightened its discipline policy for agents found to have committed ECL errors. Settlement at 7.

*NRG Home* at 3, 5.

In evaluating the Settlement, the Commission reviews the allegations investigated by I&E and determines if the civil penalty is appropriate and whether the provisions of the Settlement properly address those allegations. [52 Pa. Code § 69.1201](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000636&cite=52PAADCS69.1201&originatingDoc=Ic3124394af4811e8ab20b3103407982a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The focus of the investigation here is limited, in relevant part, to incidents of unauthorized enrollments originating from Green Mountain’s sales activities at in-person locations that took place between June 1, 2018 and September 30, 2020. To the extent that there is a question as to the sufficiency of the Settlement terms, we decline to modify the remedial measures agreed-upon by the Parties, pertaining to the use of the ECL. Parties to settled cases are afforded flexibility in reaching amicable resolutions, so long as the settlement is in the public interest. Here, I&E appears satisfied with the remedial measures in the Settlement as well as those proactively taken by Green Mountain:

Green Mountain has extensive practices and procedures in place to vet potential new vendors, train agents, conduct quality assurance and ensure the proper enrollment of customers. In August 2019, Green Mountain modified the ECL search tool to eliminate the ability of third-party sales agents from scrolling through the list to locate a customer. This limitation was expanded in August 2020 to include all Green Mountain sales agents, both third-party and in-house. The tool now only permits searching for a specific name and populates information if a match is located. Moreover, Green Mountain maintains a stringent ECL misuse policy that enables Green Mountain to suspend a sales agent or entire sales team from using the ECL for one week, thirty days or indefinitely, depending on the severity of the offense.

Green Mountain has also agreed to provide I&E with a monthly report by the 30th of each month, for a period of one year, detailing complaints from Pennsylvania consumers that were received by the Company from BCS, the Pennsylvania Attorney General’s Office, the Better Business Bureau and/or complaints directed to the Company related to allegations of unauthorized switching that originated from in-person locations. Green Mountain further agreed to retain customer signatures obtained on enrollment tablets at in-person locations during the enrollment process for a period of one year. Thus, heightened scrutiny will continue to be placed on Green Mountains sales activities at in-person locations.

I&E Statement in Support at 9-10.

Nevertheless, out of an abundance of caution, we shall serve a copy of this Opinion and Order, along with a copy of the OCA’s Comments, on I&E for any such action that they may deem necessary.

## Analysis of the Settlement Under the Policy Statement

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 alleged conduct in this matter involves unauthorized switching performed by Green Mountain agents at in-person marketing locations where the ECL was accessible to agents. In this case the majority of the allegations of unauthorized switching were not of an intentional nature, where over 90 percent of the accounts that were switched, allegedly without consent, occurred as a result of enrollment processing errors where Green Mountain agents inadvertently selected the incorrect customer account. Nevertheless, the alleged violations are of a serious nature in that they involve changing a customer’s EGS without consent. Consequently, the seriousness of these violations was considered in arriving at the proposed civil penalty in the Settlement.

The second factor considered is whether the resulting consequences of Green Mountain’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). The Parties submit that no personal injury or property damage occurred as a result of the alleged violations. I&E Statement in Support at 8; Green Mountain Statement in Support at 7. Nevertheless, the consequences of the alleged violations may have resulted in customers, who received electric generation supplied by Green Mountain, being charged a more expensive rate than the local electric distribution company’s price-to-compare (PTC) or the rate of another EGS. Accordingly, some customers may have experienced financial consequences as a result of the actions of Green Mountain agents and such consequences should be deemed serious.

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 Green Mountain’s alleged conduct was intentional or negligent does not apply because this matter is being resolved via settlement of the Parties. I&E Statement in Support at 9. 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 modify its 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). Green Mountain has extensive practices and procedures in place to vet potential new vendors, train agents, conduct quality assurance and ensure the proper enrollment of customers. In August 2019, Green Mountain modified the ECL search tool to eliminate the ability of third-party sales agents from scrolling through the list to locate a customer. This limitation was expanded in August 2020 to include all Green Mountain sales agents, both third-party and in-house. The tool now only permits searching for a specific name and populates information if a match is located. Moreover, Green Mountain maintains a stringent ECL misuse policy that enables Green Mountain to suspend a sales agent or entire sales team from using the ECL for one week, thirty days or indefinitely, depending on the severity of the offense. I&E Statement in Support at 9-10.

Green Mountain has also agreed to provide I&E with a monthly report by the 30th of each month, for a period of 1 year, detailing complaints from Pennsylvania consumers that were received by the Company from BCS, the Pennsylvania Attorney General’s Office, the Better Business Bureau and/or complaints directed to the Company related to allegations of unauthorized switching that originated from in-person retail and event solicitations. Thus, heightened scrutiny will continue to be placed on Green Mountain’s sales activities at in-person locations. I&E Statement in Support at 10. Accordingly, we determine that the fourth factor has been satisfied through Green Mountain’s actions in response to the complaints and as agreed in the Settlement.

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 156 customer accounts were switched to receive electric generation service provided by Green Mountain without the customers’ authorizations. The incidents of unauthorized enrollments originated from Green Mountain’s sales activities at in-person locations that took place between June 1, 2018 and September 30, 2020. We note that some customers detected the unauthorized enrollment, promptly contacted Green Mountain to complain and were served by Green Mountain for less than a billing cycle, but other customers received electric generation supply provided by Green Mountain for upwards of a year prior to being switched back to default service or another EGS. I&E Statement in Support at 10-11. We thus determine that this factor weighs in favor of a higher penalty.

The sixth factor that may be considered is 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*. Since receiving its EGS license, I&E noted that a total of nine formal complaints have been filed by consumers against Green Mountain, all of which resulted in the filing of Certificates of Satisfaction pursuant to 52 Pa. Code § 5.24.[[5]](#footnote-5) 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 Green Mountain and is the first instance in which Green Mountain would pay a civil penalty imposed by the Commission. On balance, we consider Green Mountain’s compliance history does not support a heavy 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 submits that Green Mountain cooperated in the investigation in this matter, including cooperating in both informal discovery as well as settlement discussions. I&E Statement in Support at 11. Therefore, Green Mountain’s cooperation warrants a lower civil penalty.

The eighth factor we may consider is the amount of the civil penalty necessary to deter future violations. 52 Pa. Code § 69.1202(c)(8). Here, I&E submits that a civil penalty amount of $156,000, which is not tax deductible, in combination with the issuance of customer refunds is substantial and sufficient to deter Green Mountain from committing future violations. I&E Statement in Support at 11. Accordingly, we agree, and therefore, find that the civil penalty is appropriate.

The ninth factor examines whether the results of a proposed settlement are consistent with past Commission decisions in similar situations. 52 Pa. Code § 69.1201(c)(9). I&E references a recent Commission order approving a settlement between I&E and NRG Home involving substantially similar facts, with settlement terms identical to the agreed-upon terms set forth in the instant matter. I&E Statement in Support at 12 (*citing* *NRG Home*). Specifically, in *NRG Home* the Commission approved a civil penalty of $1,000 for each customer account that was switched without authority, with the unauthorized enrollments originating from marketing activities that took place at retail and event locations where the ECL was used to obtain customer information. In *NRG Home* the Commissionalso approved settlement terms pertaining to the issuance of customer refunds for the first two billing periods in which customers were switched, reimbursement of any cancellation or early termination fees incurred by customers from another EGS as a result of the unauthorized switch, the provision of monthly reports for a period of one year detailing complaints from Pennsylvania consumers reported to BCS and other agencies related to allegations of unauthorized switching, and the retention of customer signatures on enrollment tablets used at retail and event locations for one year.

Likewise, Commission precedent in other decisions supports the imposition of a $1,000 civil penalty for each account that was switched and received electric generation supply service from an EGS without customer consent. *See Pa. PUC, Law Bureau Prosecutory Staff v. MXenergy Electric, Inc.*, Docket No. M-2012-2201861 (Order entered August 29, 2013); and *Pa. PUC, 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).

Green Mountain noted that the civil penalty is consistent with prior Commission decisions addressing investigations involving allegations of unauthorized switches. Green Mountain Statement in Support at 10.

 In looking at the relevant factors that are comparable to other matters involving allegations of unauthorized switching and comparing the allegations to the relief provided in the Settlement - specifically, a civil penalty and customer refunds – we find that this Settlement is consistent with past Commission decisions and presents a fair and reasonable outcome.

The tenth standard provides that the Commission may consider “other relevant factors” in assessing a penalty. 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 Agreement. 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. I&E Statement in Support at 13. Green Mountain noted that it is in the public interest to approve the Settlement and avoid the expense and uncertainty of litigation. In addition, the Settlement provides for refunds to affected customers and reflects modifications to Green Mountain’s business practices that will provide a public benefit to all prospective customers. Green Mountain Statement in Support at 10-11. We agree that it is in the public interest to settle this matter; therefore, we are of the opinion that other relevant factors weigh in favor of approval of the agreed upon civil penalty, as well as the other settlement terms, established in the Settlement, as modified by this Opinion and Order.

As we are approving the Settlement subject to modification, the Parties may withdraw from the Settlement. Therefore, the Parties will have twenty (20) days from the date of entry of this Opinion and Order to file an election to withdraw from the Settlement. If either Party notifies the Commission that it wishes to withdraw from the Settlement, the Settlement shall be disapproved without further action by this Commission. If no Party withdraws from the Settlement Agreement, then this Opinion and Order shall become final, and the Settlement, with the modifications discussed herein, will be approved, without further action by this Commission.

# 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, as modified by this Opinion and Order, between I&E and Green Mountain is in the public interest and merits approval. We will therefore grant the Joint Petition and, thereby, approve the proposed Settlement, as modified, consistent with this Opinion and Order; **THEREFORE,**

 **IT IS ORDERED:**

 1. That the Joint Petition for Approval of Settlement filed on July 9, 2021, between the Commission’s Bureau of Investigation and Enforcement and Green Mountain Energy Company is approved, as modified, by this Opinion and Order, subject to the conditions set forth in Ordering Paragraph Nos. 2 and 3.

 2. That Green Mountain Energy Company or the Commission’s Bureau of Investigation and Enforcement may withdraw from the Settlement Agreement within twenty (20) days from the date of entry of this Opinion and Order, and if any Party timely files an election to withdraw from the Joint Petition for Approval of Settlement, the Joint Petition for Approval of Settlement shall be disapproved without further action by this Commission, and this matter shall be referred to the Bureau of Investigation and Enforcement to take such further action as may be warranted.

 3. That, if Green Mountain Energy Company or the Commission’s Bureau of Investigation and Enforcement do not file an election to withdraw from the Joint Petition for Approval of Settlement in accordance with Ordering Paragraph No. 2, this Opinion and Order shall become final without further Commission action, and it is further ordered:

1. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within thirty (30) days of the date of the entry of this Opinion and Order, Green Mountain Energy Company shall pay a civil penalty of One Hundred and Fifty-Six Thousand Dollars ($156,000). Said payment shall be made by certified check or money order payable to “Commonwealth of Pennsylvania.” The docket number of this proceeding shall be indicated with the certified check or money order 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 pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).
2. That, within thirty (30) days of the date of entry of this Opinion and Order, Green Mountain Energy Company shall provide to each of the customers who had one or more of the 156 accounts switched to receive its service, 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, pursuant to 52 Pa. Code § 57.177(b). Following payment of the refunds, Green Mountain Energy Company shall file with the Commission a verification acknowledging that all refund payments have been disbursed. The verification shall be accompanied by an attachment providing: (1) the number of customers contacted in reference to the refund; (2) the total refunded amounts to each customer; and (3) the number of checks sent to customers that were not cashed, if any.
3. That Green Mountain Energy Company shall refund any cancellation fee or early termination fee charged by another electric generation supplier and incurred by a customer impacted by the unauthorized switching that is the subject of this informal investigation proceeding, pursuant to 52 Pa. Code § 57.177(c), provided that the customer supplies documentation of incurring the fee.
4. That upon entry of this Opinion and Order, Green Mountain Energy Company shall provide the Bureau of Investigation and Enforcement with a monthly report by the 30th of each month, for a period of one year, detailing complaints from Pennsylvania consumers that were received by the Green Mountain Energy Company from Bureau of Consumer Services, the Pennsylvania Attorney General’s Office, the Better Business Bureau and/or complaints directed to Green Mountain Energy Company related to allegations of unauthorized switching that originated from in-person marketing locations.
5. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Bureau of Administration.
6. That that above-captioned matter shall be marked closed upon receipt of the civil penalty of $156,000 and the verification indicating that all customer refunds have been disbursed.

 4. That a copy of this Opinion and Order shall be served upon all parties of record in the instant proceeding.

 5. That a copy of this Opinion and Order, along with a copy of the Comments filed by the Office of Consumer Advocate on January 5, 2022, at Docket No. M-2021-3009235, shall be served upon the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement for any such action that it may deem necessary.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 24, 2022

ORDER ENTERED: February 24, 2022

1. Green Mountain is a licensed electric generation supplier (EGS) as defined by 66 Pa. C.S. § 2803. On June 10, 2011, at Docket No. A-2011-2229050, the Commission granted Green Mountain approval to begin to offer, render, furnish or supply electricity or electric generation supplier services to large commercial, industrial and governmental customers in all electric distribution company (EDC) service territories within the Commonwealth of Pennsylvania. On February 16, 2012, Green Mountain’s license was amended to enable Green Mountain to begin to offer, render, furnish or supply electric generation supplier services as a supplier to residential and small commercial (25 kilowatt and under) customers in all EDC service territories throughout the Commonwealth of Pennsylvania. [↑](#footnote-ref-1)
2. ECLs include customer information that is made available to EGSs by EDCs. [↑](#footnote-ref-2)
3. The *November 2021 Order* was published in the *Pennsylvania Bulletin* on December 11, 2021, at 51 *Pa. B*. 7826. [↑](#footnote-ref-3)
4. The OCA notes that Green Mountain is an NRG Energy, Inc. company. OCA Comments at 6, n. 3 (citing Joint Petition, Appendix B at 12, n. 4). [↑](#footnote-ref-4)
5. *See* I&E Statement in Support at 11 (citingDocket Nos. C-2014-2419106, F-2015-2472063, F-2017-2635714, C-2017-2639266, C-2018-3000504, C‑2018‑3004734, C-2019-3007060, C-2020-3015594, and C-2020-3020255). [↑](#footnote-ref-5)