

ORDER NO: 87418

IN THE MATTER OF THE
 INVESTIGATION INTO THE
 MARKETING, ADVERTISING, AND
 TRADE PRACTICES OF AMERICAN
 POWER PARTNERS, LLC; BLUE PILOT
 ENERGY, LLC; MAJOR ENERGY
 ELECTRIC SERVICES, LLC AND MAJOR
 ENERGY SERVICES, LLC; AND XOOM
 ENERGY MARYLAND, LLC

* BEFORE THE
 * PUBLIC SERVICE COMMISSION
 * OF MARYLAND

 CASE NO. 9346

**MAJOR ENERGY ELECTRIC
 SERVICES, LLC AND MAJOR ENERGY
 SERVICES, LLC**

CASE NO. 9346(b)

This matter comes before the Public Service Commission of Maryland (“Commission”) on appeal from a Proposed Order of the Chief Public Utility Law Judge (“CPULJ”) issued on October 23, 2015. Upon consideration of the record developed in this matter, and as more fully explained herein, the Commission hereby denies the Maryland Office of People’s Counsel (“OPC”) requests for customer refunds and the finding of an additional violation. The Commission also denies the requests by Major Energy Electric Services, LLC and Major Energy Services, LLC (collectively, “Major” or “the Company”) for a modification of the civil penalties imposed and the elimination of the customer cancellation notices. The Commission also denies Major’s request for elimination of the marketing moratorium, but does modify the moratorium requirements outlined in the Proposed Order as stated below.

I. Procedural Background

On April 1, 2014, the Commission issued a Show Cause Order to Major.¹ The Order directed Major to respond to a series of questions pertaining to alleged violations by the Company in its customer marketing, advertising, and trade practices. Major submitted its Response on April 22, 2014. On December 17, 2014, the Commission delegated the matter to the PULJ Division. On June 2 and June 3, 2015, evidentiary hearings were conducted in the matter. Post-hearing briefs and reply briefs were subsequently filed.

On October 23, 2015, the CPULJ issued a Proposed Order which, among other decisions, directed Major Energy Electricity Services, LLC to pay a \$250,000 civil penalty; directed Major Energy Services, LLC and Major Energy Services, LLC to pay, jointly or severally, a \$50,000 civil penalty; prohibited Major from marketing until marketing and sales scripts are revised and approved;² and directed Major to notify certain customers of their right to cancel their contracts without penalty.³ On November 23, 2015, both Major and OPC filed a Notice of Appeal of the Proposed Order. On December 7, 2015, both Major and OPC filed their Memorandum on Appeal (“Major

¹ Order No. 86274 was also issued to American Power Partners, LLC, Blue Pilot Energy, LLC, and Xoom Energy Maryland, LLC. The Show Cause Order issued to American Power Partners, LLC was dismissed in Order No. 86769. The Blue Pilot Energy, LLC and Xoom Energy Maryland, LLC matters were delegated to the Commission’s PULJ Division as Case Nos. 9346(c) and 9346(a), respectively.

² “That Major Energy Electric Services, LLC and Major Energy Services, LLC are prohibited from marketing in their licensed service territories until they take the steps to revise the marketing and sales scripts as discussed in the Proposed Order, and may not market in any other service territory in Maryland until an application to expand their authority is granted by the Commission.” Proposed Order at 44 and 45.

³ “That, for all active residential customers, whether fixed rate or variable rate or for natural gas or electricity supply, I direct Major Energy Electric Services, LLC and Major Energy Services, LLC to send a notice to each of their active residential customers advising the customer of the opportunity to cancel his/her contract within three days without penalty. That Major Energy Electric Services, LLC is directed to send a letter to each active customer in the service territories of Potomac Electric Power Company, Delmarva Power & Light Company, and The Potomac Edison Company advising the customer that it did not have a authority to contract with the customer, and the customer has 30 days to cancel the contract without penalty.” *Id.* at 45.

Appeal Memo” and “OPC Appeal Memo,” respectively). On December 28, 2015, Major, OPC, and Commission Staff (“Staff”) filed a Reply Memorandum on Appeal (“Major Reply Memo,” “OPC Reply Memo,” and “Staff Reply Memo,” respectively).

II. Issues on Appeal

A. Major

On appeal, Major challenges several of the Proposed Order’s findings and requirements. The Company disputes the CPULJ findings of false and misleading statements by Major agents and an obligation on the part of the Company to warn customers of the risks associated with variable rates. Major contends that these findings led to the imposition of undue penalties to the Company. Major requests that the Commission decrease the civil penalty levied against it to no more than \$100,000, eliminate the proposed marketing moratoriums, and eliminate the customer cancellation notices.

In support of its request that the Commission decrease the proposed civil penalty, Major relies heavily on Commission precedent. The Company points to the cases of *North American Power*,⁴ *Viridian*,⁵ and *Starion*,⁶ all of which Major alleges involved findings of more serious violations than in the instant matter. In *North American Power*, the Commission levied a \$100,000 civil penalty for the use of a series of deceptive and misleading marketing statements as well as three violations within North American Power’s terms and conditions.⁷ In *Viridian*, the Commission levied a \$60,000 civil penalty for making false and misleading representations about Viridian’s relationship

⁴ Case No. 9253.

⁵ Case No. 9255.

⁶ See Case No. 9324, Order No. 86531 (Aug. 7, 2014).

⁷ Order No. 84096 (June 9, 2011).

with utility companies and the savings customers would achieve.⁸ And in *Starion*, the Commission levied a \$350,000 civil penalty based on the large number of consumer complaints filed against Starion for slamming and misrepresentations.⁹ Major contends that, based upon the findings made in the instant matter as compared to in the other matters referenced, any civil penalty levied against the Company should be towards the lower end of the previous penalties imposed, or at least no more than \$100,000.

What is clear from the comparisons made by Major is that the Commission routinely evaluates matters on a case-by-case basis rather than simply in the context of those that came before. This is particularly true when civil penalties are involved, and rightfully so, as the Commission is tasked with considering specific factual criteria as well as with using its discretion when arriving at the amount of a civil penalty to be issued.¹⁰ We deny Major's request for a reduction of the civil penalty called for in the Proposed Order as we find that the CPULJ performed a thorough examination of the facts in this matter and a comprehensive examination of the factors as required by § 13-201(d) when determining the penalty amount.

In support of its request for a decreased civil penalty, Major also points to the Maryland Uniform Electronic Transactions Act ("UETA") provision, "if a law requires a signature, an electronic signature satisfies the law"¹¹ in defense of its failure to attain wet signatures.¹² As amply noted by OPC and Staff,¹³ UETA does not supersede the signed

⁸ Order No. 84959 (June 7, 2012).

⁹ Order No. 86211 (March 7, 2014).

¹⁰ Public Utilities Article §13-201.

¹¹ Md. Comm. L Art. § 21-106(d).

¹² Major Appeal Memo at 11.

¹³ Staff Reply Memo at 11-14; OPC Reply Memo at 10-12.

contract requirement in the Maryland Telephone Solicitations Act (“MTSA”).¹⁴

Presentation of records. – If a law other than this title requires a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specific method, or contain information that is formatted in a certain manner, the following rules apply: (1) the record must be posted or displayed in the manner specified in the other law; (2) Except as otherwise provided in subsection (d)(2) of this section, the record must be sent, communicated, or transmitted by the method specified in the other law; and (3) The record must contain the information formatted in the manner specified in the other law.¹⁵

By the plain language of UETA, it does not trump the MTSA signature requirement. We deny Major’s argument otherwise.

As previously stated, the Proposed Order includes a moratorium on marketing by Major until modifications are made to specified agreements and both Staff and OPC approve the modified materials prior to requesting relief from the moratorium.¹⁶ In

¹⁴ Md. Comm. L. Art, § 14-2203. Enforceability of contract. (a) In general.- A contract made pursuant to a telephone solicitation is not valid and enforceable against a consumer unless made in compliance with this subtitle. (b) Requirements.- A contract made pursuant to a telephone solicitation: (1) Shall be reduced to writing and signed by the consumer.

¹⁵ Md. Comm. L. Art. §21-107(b).

¹⁶ “I find that a moratorium on residential door-to-door solicitations by either Major Energy Services or Major Energy Electric is necessary until Major Energy has revised its sales agreement to strictly conform the disclosure of the rescission period to applicable provisions of the Maryland Door-to-Door Solicitations Act. I further find that a moratorium on the marketing of the variable rate product (either electricity or natural gas) is warranted until Major Energy has modified its sales script to require its sales agents to discuss the nature and risks associated with the variable rate, to represent that there is no guarantee the customer will see savings in any given month over the default energy rate in effect at the time of the solicitation, to disclose the current established variable rate to allow the customer to compare it to the price to compare on the utility bill and to describe how to obtain the monthly variable rate in effect thereafter; and to disclose that even though it is a month-to-month contract and may be canceled without any fee, the Major Energy rate in effect may be billed to the customer until the local utility makes the change in its system and the approximate length of time it may take for the switch. Major Energy shall revise its sales agreement to provide similar disclosures to advise the customer in more detail the nature and risk of a variable rate. Major Energy is directed to provide OPC and Staff a copy of its revised sales agreement as well as any marketing material or sales script specific to Maryland for review. Upon OPC’s and Staff’s concurrence that the materials are compliant, Major Energy may seek approval from the Commission to lift the moratoriums.” Proposed Order at 41 and 42.

support of its request that the Commission lift the proposed marketing moratorium, Major states that it has already made the required revisions; that the Company is no longer marketing variable contracts; that the Commission has not previously issued such a moratorium in cases of misrepresentative marketing; and that Maryland law does not require pre-approval of materials. Major suggests that, rather than enact the moratorium, the Commission should instead “simply direct Major to ensure its contracts and materials comply with Maryland law.”¹⁷

We disagree in large part. As previously stated, every case that comes before the Commission is evaluated on its own facts; therefore, whether or not we have previously issued such a moratorium is irrelevant. The moratorium called for in the Proposed Order will stand as directed. To eliminate it would potentially allow Major’s sales and marketing transgressions to continue. We do, however, lift the requirement that Staff and OPC shall approve the Company’s revised materials before the moratorium will be lifted, because, as Major argues, it would be unfair to leave Major at their mercy¹⁸. Instead, we direct Major to revise its sales agreements and marketing materials to comply with Maryland law, and file them with Commission Staff and OPC. Upon so filing, Major may resume door-to-door marketing and marketing its variable rate product (if it wishes to resume so) in Maryland. Major shall not market in Pepco, Delmarva, or Potomac Edison territory until it amends its application to do so and receives Commission approval.¹⁹

Finally, Major takes issue with the proposed customer cancellation notices. In short, the Proposed Order directs Major to inform all active residential customers of the

¹⁷ Major Appeal Memo at 12.

¹⁸ *Id.* at 13.

¹⁹ Major has filed a request to expand its license and awaits Commission approval. *Id.* at 14.

opportunity to cancel their contract with Major within three days without penalty, and to inform all active customers in the territories in which Major was not licensed²⁰ that the Company did not have authority to contract with the customer and as a result the customer may cancel the contract within 30 days without penalty. Major asks that the Commission eliminate the proposed customer cancellation notices, and in support of its request notes that no customers were harmed by its transgressions and suggests that its errors be corrected administratively through the Commission's approval of Major's application to amend its licenses.

Major's rationale in support of its request is not persuasive. Aside from the fact that the Company's contention that "no customers were harmed by its transgressions" is arguable, wrongdoing is not nullified based on no harm having been done. The CPULJ clearly held that Major's specified customers deserve to be informed of their supplier's misconduct, and further have a right to choose whether or not to remain in the Company's service. We agree and therefore deny Major's request for elimination of the customer cancellation notices called for in the Proposed Order.

B. OPC

On appeal, OPC challenges two denials by the CPULJ regarding an alleged violation on the part of the Company and relief awarded to its customers. Specifically, the Proposed Order declined to make a finding that Major violated Commission regulations and consumer protection laws by allowing non-account holders to contract

²⁰ Potomac Electric Power Company, Delmarva Power & Light Company, and The Potomac Edison Company.

with the Company. The Proposed Order also declined to provide refunds to customers affected by Major's unlawful practices. OPC requests that the Commission order Major to issue refunds to those customers who were the subject of the Company's violations and make an additional finding of violation based on Major's policy of enrolling non-account holders.

OPC's position is that the CPULJ erred by not directing Major to give every one of its customers a refund of the difference between Major's rate and the utility's default rate. In support of its position, OPC claims, among other things, that "the Commission's historic civil penalties are insufficient to ensure that suppliers take appropriate actions to comply with Maryland's laws and regulations,"²¹ and that failure to award refunds allows Major to retain the financial benefits of its unlawful activity. OPC also contends that the failure to provide refunds "will chill consumers' willingness, and incentive, to alert the Commission to issues in the future."²²

OPC asks the Commission to award refunds of unspecified amounts to all Major customers. This would include electric and gas customers, despite the fact that no finding was made by the CPULJ that Major's gas customers were misled into contracting with the Company. Presumably, this would also include past and current customers, as OPC did not identify an enrollment period for which refunds should be awarded. This widespread request would also include Major customers that did not file complaints with the Commission's Office of External Relations ("OER"), potentially because of

²¹ OPC Appeal Memo at 9.

²² *Id.* at 4.

satisfaction with their enrollment and service from Major.

We decline OPC's request for refunds. We stand by the finding of the CPULJ that the record did not support every customer being entitled to a refund. We also stand by the CPULJ's position that refunds cannot be awarded without sufficient evidence, and acknowledge that the evidence presented in this matter, whether at or post trial, is insufficient for determining recipients and amounts of refunds.²³ Moreover, we find OPC's contention that "failure to provide customer refunds will discourage customer complaints in the future"²⁴ to be incongruous given the existence of Code of Maryland Regulations ("COMAR") 20.53.07.05 which expressly includes refunds as a potential remedy for consumers that file disputes with OER. Indeed, customers sought and received refunds from Major through the OER complaint process.²⁵

OPC also takes issue with the CPULJ's refusal to find a violation by the Company for "slamming," which is defined by OPC as "both fraudulent enrollments and those where a Major accepted consent to contract from a non-account holder."²⁶ In response to the Proposed Order noting the low number of complaints lodged on the issue, OPC takes the position that any instance of slamming should be sufficient for finding a violation. OPC requests that the Commission find that Major engaged in unauthorized enrollments, thereby violating consumer protection laws and Commission regulations.

OPC appears to interpret the CPULJ as stating that there are not enough instances

²³ Proposed Order at 32, 35 – 36, 44.

²⁴ OPC Appeal Memo at 12.

²⁵ Major Reply Memo at 10.

²⁶ OPC Appeal Memo at 5.

of slamming to substantiate the finding of a violation. We disagree. The Proposed Order states, “[T]here are a number of allegations of unauthorized enrollments,”²⁷ but goes on to note that Major provided refunds for those it acknowledged were unauthorized; that Major claimed to have proof of authorization for several others; and that no additional evidence was presented to bolster the lack of authorization claims. The CPULJ was unable to determine the credibility of the claims of slamming.²⁸ Given the lack of supporting evidence and the number of slamming complaints in comparison to the number of overall complaints, we support the CPULJ’s refusal to find a violation by Major. We further note that the matter of non-account holders entering into service contracts is addressed in RM54, and so to the extent that it is an unsettled area of law, any necessary determinations shall be made under that docket and not the instant matter as suggested by OPC.²⁹

IT IS THEREFORE, this 26th day of February, in the year Two Thousand Sixteen, by the Public Service Commission of Maryland,

ORDERED: (1) That, as stated in the Proposed Order, Major is required to provide OPC and Staff a copy of its revised sales agreement as well as any marketing material or sales script specific to Maryland for review; however, Major is not required to wait for OPC and Staff’s concurrence that the materials are compliant prior to using the materials, nor is Major required to seek approval from the Commission to lift the

²⁷ Proposed Order at 32.

²⁸ *Id.* at 33.

²⁹ OPC Appeal Memo at 15.

moratoriums; and

(2) That the Proposed Order is otherwise affirmed; and

(3) That the docket on this matter is hereby closed.

/s/ W. Kevin Hughes _____

/s/ Harold D. Williams _____

/s/ Anne E. Hoskins _____

/s/ Jeannette M. Mills _____

/s/ Michael T. Richard _____

Commissioners