



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

BP8# 2201861

May 16, 2013

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**ORIGINAL**

RECEIVED  
2013 MAY 16 PM 12:37  
PA PUC  
SECRETARY'S BUREAU

**Re: Pennsylvania Public Utility Commission, Law Bureau  
Prosecutory Staff vs. MXenergy Electric Inc.;  
Docket No. M-2012-2201861**

Dear Ms. Chiavetta:

Enclosed for filing is the original copy of the Settlement Agreement in the above-captioned proceeding. As evidence by the enclosed certificate of service, all parties have been served as indicated.

If you have any further questions regarding this matter, please contact me at 717-783-3459.

Sincerely,

Terrence J. Buda  
Assistant Counsel

Enclosures

cc: As per Certificate of Service  
Karen Oill Moury, Director of Regulatory Operations (cover letter only)  
Robert F. Young, Deputy Chief Counsel (cover letter only)

**PENNSYLVANIA PUBLIC UTILITY COMMISSION,**  
**LAW BUREAU PROSECUTORY STAFF**

**V.**  
**MXENERGY ELECTRIC INC.**

**SETTLEMENT AGREEMENT**

RECEIVED  
2013 MAY 16 PM 12:37  
PA PUC  
SECRETARY'S BUREAU

**I. Introduction**

1. The Parties to this Settlement Agreement (Agreement) are the Pennsylvania Public Utility Commission's (Commission) Law Bureau Prosecutory Staff (Prosecutory Staff), P.O. Box 3265, Harrisburg, PA 17105-3265, and MXenergy Electric Inc. (MXenergy or Company), 10010 Junction Drive, Suite 104-5, Annapolis Junction, MD 20701-1180. MXenergy is a licensed electric generation supplier (EGS) in Pennsylvania providing these services to residential and small business customers.<sup>1</sup>

2. This matter concerns an informal investigation regarding MXenergy's compliance with the Public Utility Code and Commission regulations. As a result of negotiations, the Parties have agreed to resolve this matter as encouraged by the Commission's policy to promote settlements. *See* 52 Pa. Code § 5.231. The duly authorized Parties executing this Agreement agree to the settlement terms set forth herein and urge the Commission to approve them as being in the public interest.

---

<sup>1</sup> On July 1, 2011, Constellation Energy Resources, LLC ("CER") acquired MXenergy's parent company, MX Holdings, Inc. Subsequent to MXenergy's acquisition by CER, the Company was rebranded to Constellation Energy Power Choice, Inc. *See* May 30, 2012 Notice of Update Application Information filed with the Commission at Docket A-110168. Therefore, Constellation Energy Power Choice, Inc. is the corporate entity bound by the Settlement Agreement. However, for purposes of this Agreement, we shall continue to use the name MXenergy.

## **II. Prosecutory Staff Investigation**

3. On November 4, 2010, Prosecutory Staff initiated an informal investigation of MXenergy focusing on the Company's marketing of its residential electric generation supplier services and specifically its door-to-door sales practices. This action was taken as a result of a referral by the Office of Competitive Market Oversight, based on information that Gateway Energy Services Corporation (Gateway) had filed a federal lawsuit against MXenergy. In that suit, Gateway alleged, *inter alia*, that certain third party independent contractors representing MXenergy engaged in "slamming," with the intent to confuse and deceive four of Gateway's existing customers into terminating their existing contracts with Gateway and entering into new contracts with MXenergy. The lawsuit was resolved by Consent Order dated November 18, 2010. MXenergy in the Consent Order denied all wrong doing, but agreed to refrain from altering, writing on, or changing any contracts or enrollment forms bearing Gateway's name or trademark. All litigation expenses incurred by the parties in the litigation were borne by each party, and all parties' requests for additional costs were waived. A complete and detailed summary of Prosecutory Staff's investigation is set forth in Attachment A to this Agreement and incorporated herein by reference.

4. Throughout the entire investigatory process, Prosecutory Staff and MXenergy remained active in informal discovery and continued to explore the possibility of resolving this investigation, which culminated in this Settlement Agreement. During

the discovery process, MXenergy complied with the Prosecutory Staff's requests by, among other things, providing to Prosecutory Staff substantial amounts of information and documentation. Throughout the investigation, MXenergy and the Prosecutory Staff likewise convened meetings and maintained ongoing communication.

5. Prosecutory Staff acknowledges that MXenergy has cooperated fully with this investigation.

6. The Parties initially filed a Settlement Agreement on January 6, 2012. On May 3, 2012, the Commission issued an Opinion and Order rejecting the Agreement and referring the matter back to Law Bureau for any further action deemed warranted pursuant to 52 Pa. Code § 3.113(b). The Commission concluded that a \$500 per-customer penalty, even when combined with corrective action, was not enough to remedy this situation or to deter potential future violations of the Public Utility Code or Commission regulations by an EGS. Furthermore, the Commission determined that it was not clear which corporate entity, i.e., MXenergy, an MXenergy affiliate or the parent company, was impacted by the Agreement. The Parties have revised the Settlement Agreement to address these issues. Specifically, the civil penalty was increased to \$1,000 per violation and Constellation Energy Power Choice, Inc. is identified as the entity bound by this Agreement.

### **III. Settlement Terms**

7. Prosecutory Staff and MXenergy representatives conducted additional settlement negotiations concerning the informal investigation and the Commission's

May 3, 2012 Opinion and Order, and these negotiations culminated in this Agreement.

8. MXenergy and Prosecutory Staff desire to settle fully and completely and without further litigation all matters related to MXenergy's electric generation service up to and including the date that this Settlement Agreement is signed by the Parties.

9. Nothing contained herein may be taken as, or construed to be, an admission or confession of any violation of law, or any other matter of fact or law.

10. Although MXenergy disputes Prosecutory Staff's allegations and assertion of purported violations, any liability or wrongdoing, or any of the findings of Prosecutory Staff's investigation, MXenergy fully recognizes the seriousness of these allegations and the need to prevent violations such as those alleged by Prosecutory Staff.

11. Prosecutory Staff and MXenergy recognize the benefits of amicably resolving these differences. In recognition of the cost of further litigation, the time and expense of holding a hearing, and the merits of the Parties' respective positions, the Parties have entered into negotiations and have agreed to settle the investigation according to the terms and conditions set forth herein.

12. Prosecutory Staff and MXenergy, intending to be legally bound and for consideration given, desire to conclude this informal investigation and agree to stipulate as to the following terms:

a) Solely for purposes of this Agreement, Prosecutory Staff alleges MXenergy switched 22 consumers to its generation service without proper authorization in violation of 52 Pa. Code § 57.173.

b) MXenergy agrees to pay a Settlement in the amount of \$22,000 – i.e., \$1,000 per alleged violation – to the Commonwealth pursuant to Section 3301 of the Public Utility Code, to resolve, through this Agreement, the allegations raised by Prosecutory Staff's investigation. MXenergy shall remit the entire amount within 30 days from the date that the Commission approves this Agreement. The check shall be made payable to the "Commonwealth of Pennsylvania" and addressed to "Rosemary Chiavetta, Secretary, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17105-3265."

c) The Company acknowledges that it is responsible for violations of the Commission's regulations resulting from unauthorized conduct and activities of independent representatives, contractors and vendors who, though not employees of MXenergy, market and/or assist in providing its services pursuant to contractual agreements.

d) In addition, to the extent that MXenergy has not done so already, the Company shall take the following corrective action:

1) MXenergy or its Direct Marketing Organizations (DMOs) will conduct background checks on all potential independent contractors or agents. MXenergy agrees to provide the background check criteria to the Commission's Bureau of Consumer Services (BCS), Manager of the Field Review Unit (Commission Staff), when requested but no later than ten (10) days after the Settlement Agreement is signed by both parties.

2) MXenergy will provide a single point of contact to

Commission Staff for resolution of consumer inquiries and/or complaints received by the BCS and will respond to all consumer inquiries and complaints in accordance with BCS requirements, including by providing all information regarding the customer and complaint as requested by Commission Staff, and providing a copy of the contract and any audio recordings of the verification call related to such complaint. MXenergy will also update the Commission Staff on a quarterly basis regarding the resolution by the Company of any such complaint.

3) MXenergy will provide an extended cancellation period of up to 30 days after the issuance of the first bill for the Company's electric generation supply service during which the customer will not pay a termination fee, though a customer shall remain responsible for costs of supply provided by MXenergy prior to cancellation and until such time that the customer is able to be switched away from, and is no longer served by, MXenergy.

4) MXenergy will hire or designate an employee whose role is to oversee operations of the sales office(s) consistent with all applicable law and Company policies.

5) Any early termination or exit fee imposed by MXenergy will not exceed \$150.00 per residential contract. This does not affect any MXenergy commercial or industrial early termination or exit fee.

6) MXenergy will provide Law Bureau Prosecutory Staff a quarterly report of the Company's DMOs complaints that identifies complaints received, the type of complaint, the time at which action was taken, and the type of action taken.

This report shall be similar or identical in form to the Company's Exhibit A, provided in the Response to Data Request II, Questions #3 and #12.

7) MXenergy will be released from these conditions, imposed by this Agreement, at the end of a twelve (12) month probationary period that will begin the first day of the month after the Agreement receives final Commission approval, if it has exhibited good faith and exhibited reasonable compliance with the Conditions set forth and applicable Laws.

8) If MXenergy does not satisfy within reason the requirement set forth in Paragraph 12(d)(7), and does not take steps reasonably acceptable to Prosecutory Staff to address any failure that may arise, such failure will be considered a violation of the Settlement Agreement and may subject the Company to a civil penalty or additional remedial action.

9) Any release of conditions pursuant to this Agreement shall not take effect if the Commission adopts such conditions on an industry-wide basis through a rulemaking or guidelines.

13. For and in consideration of the promises and representations described in paragraphs 3 through 12, the Commission does hereby completely release and forever discharge MXenergy, and past or present subsidiaries, parents, affiliates, successors, predecessors, and each of their present or former officers, directors, shareholders, employees, attorneys, successors in interest or assigns, of and from any and all manner of claims, demands, liabilities, actions or causes of action relating to allegations of violations of provisions of 52 Pa. Code § 57.173 of the Pennsylvania Code brought by the



Commission or its Staff on its own motion up to and including the date of this Agreement. Nothing contained in this Settlement Agreement shall adversely affect the Commission's authority to receive and resolve any informal or formal complaints filed by any affected party with respect to allegations of violations of 52 Pa. Code § 57.173, except that no further sanctions may be imposed by the Commission for any such actions.

14. This Settlement Agreement is contingent on the Commission's approval without modification of this Settlement and any waivers, temporary exemptions, or other approvals necessary to effectuate its terms. In the event that the Commission denies a temporary exemption or attaches one or more conditions to its approval that one or both parties find unacceptable, either party may declare the Agreement null and void.

15. None of the provisions of this Agreement shall be considered an admission or finding of any fact or culpability in this or any subsequent proceeding. This Agreement is proposed by the Parties without any admission against, or prejudice to, any position that either Party may adopt during any subsequent proceeding of whatever nature.

16. The Parties agree that this Settlement Agreement should be presented directly to the Commission for review pursuant to 52 Pa. Code § 5.232(g).

17. Prosecutory Staff and MXenergy agree to file, if necessary, responsive pleadings contesting or rebutting any attempts by any party or commentator seeking to modify or challenge this Agreement.

#### **IV. Statement in Support of Settlement**

Pursuant to the Commission's Regulations at 52 Pa. Code § 5.231, it is the Commission's policy to promote settlements that are in the public interest. *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, M-00031768 (Order entered January 7, 2004).

18. In *Joseph A. Rosi v. Bell-Atlantic-Pennsylvania, Inc.*, C-00992409 (March 16, 2000), the Commission adopted standards that are to be applied in determining settlements in slamming cases. The Commission subsequently determined that all alleged violations of the Public Utility Code and Commission regulations shall be subject to review under the standards enunciated in *Rosi. Pa. P.U.C. v. NCIC Operator Services*, M-00001440 (December 21, 2000). Prosecutory Staff and MXenergy submit that this Settlement Agreement complies with the requirements set forth in *Rosi* and that the terms of this Agreement are in the public interest.

19. The Parties further assert that approval of this Settlement is consistent with the Commission's Policy Statement regarding factors and standards for evaluating litigated and settled proceedings at 52 Pa. Code § 69.1201.<sup>2</sup> Under this Policy Statement, while many of the same factors and standards may still be considered in both litigated and settled cases, the Commission specifically recognized that in settled cases the 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). The ten factors of the Policy Statement, as applied to this case are addressed herein.

---

<sup>2</sup> This policy statement became effective upon publication in the Pennsylvania Bulletin on December 22, 2007, at 37 *Pa. Bull.* 6755.

20. The first factor to be considered under the Policy Statement is whether the alleged actions were of a serious nature, such as willful fraud or misrepresentation, or were merely administrative or technical errors. 52 Pa. Code § 69.1201(c) (1). The violations alleged here should be deemed willful fraud or misrepresentation, as changing a customer's electricity generation supplier without authorization by independent representatives, contractors and vendors is akin to intentional conduct.

21. The second factor to be considered under the Policy Statement is whether the resulting consequences of the actions, were of a serious nature. 52 Pa. Code § 69.1201(c) (2). This alleged violation should be deemed serious as the actions discussed in this investigation could adversely impact the integrity of electric competition.

22. 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.* Since this matter is being resolved by settlement of the parties, this standard is not relevant here.

23. The fourth factor to be considered under the Policy Statement is whether the Respondent has made efforts to change its practices and procedures to prevent similar conduct in the future. 52 Pa. Code § 69.1201(c) (4). MXenergy has made significant efforts to implement practices and procedures to prevent violations of 52 Pa. Code § 57.173.

24. The fifth factor to be considered under the Policy Statement relates to the number of customers affected by the Company's actions and the duration of its violations. 52 Pa. Code § 69.1201(c) (5). Although the public is adversely affected by a

failure to comply with 52 Pa. Code § 57.173, a large number of customers were not affected by the alleged conduct by MXenergy.

25. The sixth factor to be considered under the Policy Statement relates to the Respondent's compliance history. 52 Pa. Code § 69.1201(c) (6). MXenergy has a satisfactory compliance history with the Public Utility Code and the Commission's regulations.

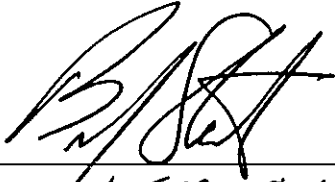
26. The seventh and eighth factors to be considered under the Policy Statement relate to whether the Respondent cooperated with the Commission's investigation and the appropriate settlement amount. 52 Pa. Code § 69.1201(c) (7) and (8). MXenergy fully cooperated with the Commission's Staff in this proceeding during the investigative phase and settlement discussions. Furthermore, consistent settlement amounts are a reliable method for assuring that market participants are compliant with the Public Utility Code and Commission regulations. Prosecutory Staff submits that MXenergy's payment of the agreed \$22,000.00 constitutes a reasonable and appropriate resolution of the dispute in this proceeding. For 22 alleged customer violations that were the subject of this Settlement, this amount represents \$1,000 per alleged customer incident.


27. The ninth factor to be considered under the Policy Statement relates to past Commission decisions in similar matters. This Agreement is consistent with prior decisions based upon the circumstances of this case.

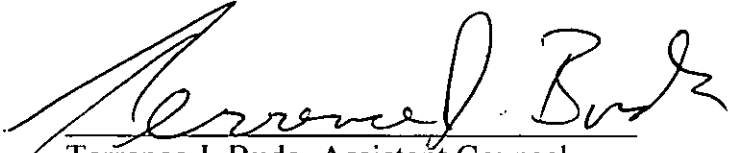
28. This Agreement represents the entire agreement between the Prosecutory Staff and MXenergy with respect to the matters addressed herein. The Agreement addresses and attempts to remedy all allegations raised in this matter. The Law Bureau

Prosecutory Staff and MXenergy request that the Commission adopt an order approving the terms of this Agreement as being in the public interest.

IN WITNESS WHERE OF, the Prosecutory Staff and MXenergy by their authorized representatives have hereunto set their hands and seals, intending to be legally bound hereby.



 Bruce Stewart, SVP & CMO  
MXenergy Electric Inc.  
n/k/a Constellation Energy  
Power Choice, Inc.



Terrence J. Buda, Assistant Counsel  
Law Bureau Prosecutory Staff  
Pennsylvania Public Utility Commission

Date: May 8, 2013

Date: May 15, 2013

RECEIVED  
2013 MAY 16 PM 12:38  
PA PUC  
SECRETARY'S BUREAU

## ATTACHMENT A

### SUMMARY OF INFORMAL INVESTIGATION

#### Background

On November 4, 2010, Law Bureau Prosecutory Staff (Prosecutory Staff) initiated an informal investigation of MXenergy Electric Inc. (MXenergy or the Company) focusing on the Company's marketing of its residential electric generation supplier services and specifically its door-to-door sales practices. This action was taken as a result of a referral by the Office of Competitive Market Oversight based on allegations that Gateway Energy Services Corporation (Gateway) filed in a federal lawsuit against MXenergy. In that suit, Gateway alleged, *inter alia*, that certain third party independent agents of MXenergy engaged in "slamming" with the intent to confuse and deceive four of Gateway's existing customers into terminating their existing contracts with Gateway and entering into new contracts with MXenergy. Gateway and MXenergy entered into a Consent Agreement, on November 18, 2010, wherein MXenergy did not admit to any fraud, wrongdoing, or liability of any kind, nor did MXenergy make any admissions concerning the truth or correctness of any claims or allegations raised in the Complaint or Motion for a Preliminary Injunction. The letter, that initiated this Informal Investigation, listed discovery requests to be answered by MXenergy. On December 2, 2010, MXenergy provided answers to the first set of discovery questions. Thereafter, Prosecutory Staff sent four additional sets of data requests and MXenergy provided responses. For the most part, these data requests and responses provide the substance for this summary.

## **MXenergy's Residential Electric Generation Marketing Program**

MXenergy of its own volition ceased its door-to-door marketing campaigns for MXenergy electric supply in Pennsylvania in 2011, pending the outcome of the instant proceeding. However, certain MXenergy affiliates including, but not limited to, Constellation NewEnergy, Inc. (CNE) have had their own door-to-door campaigns from time-to-time.

In response to Prosecutory Staff's data requests, the Company identified its sales and marketing staff and four (4) contractor vendors used by MXenergy. The Company's sales and marketing staff includes a Director of Direct Sales, Director of Field Sales, and Field Sales Supervisor. Also provided were marketing agreements with the contractors or Direct Marketing Organizations (DMOs). Platinum Advertising (Platinum) began selling for MXenergy in May 2009 and began selling in PA in November 2009. Platinum was terminated as a DMO for MXenergy in August 2011. Fusion Telesales began selling for MXenergy in January 2010 and began selling in Pennsylvania in July 2010. Watts Marketing Services, Inc. (Watts) began selling for MXenergy in Pennsylvania in September 2010. Watts stopped selling for MXenergy in October 2010. Your Choice Energy (YCE) began selling for MXenergy in Pennsylvania in January 2010. YCE stopped selling for MXenergy in April 2010.

The marketing agreements provide that the DMOs, Independent Agents (IAs) and their employees act as independent contractors and will identify and attempt to secure contracts with customers. The DMO may contract with one or more IAs, to market the Company's services, subject to the prior written consent of MXenergy. Written

agreements between the DMO and IA shall conform to the obligations of the DMO under the DMO's Supplier Agreement with MXenergy. DMOs, upon request of MXenergy, must provide written copies of the DMO-IA Agreements to the Company. MXenergy has the right to monitor the DMO or IA to ensure proper quality control. MXenergy is to provide uniforms and the DMO will ensure that all IAs and employees of DMOs wear identification badges. All DMOs and IAs and their employees must agree to follow the Company's Code of Conduct (attached as Exhibit No. 1) and all other applicable laws.

DMOs must use reasonable care in selecting, training, and supervising employees and IAs. DMOs are responsible for providing MXenergy with background checks and a drug screen for all employees and IAs. All DMO employees and IAs must pass an agents exam provided by MXenergy, prior to marketing the Company's services. DMOs and IAs must obtain all required licenses and permits and comply with all federal, state, and local laws and regulations. The vendor is required to obtain and keep all copies of required permits in specific towns or communities. This is a DMO responsibility, but the permits are provided to MXenergy, upon request. When MXenergy receives a complaint about selling without a permit, the Company immediately investigates and shuts down all sales in the community in question until the DMO meets all permitting requirements. MXenergy provides DMOs, IAs and their employees with the sales and training presentation materials. MXenergy may, in-its sole discretion, require DMOs to immediately suspend agent performance for any reason.

The monitoring of performance by DMO employees or IAs is conducted by first visiting a local sales office to participate in the daily morning sales meeting. A different



training module is covered each day during this meeting, such as deregulation, rebuttals, Commission regulations, professional presentation skills, etc. At times, the MXenergy employee may facilitate specific modules. After the morning meeting is completed, MXenergy employees sometimes accompany the teams into the field. Field shadowing allows the Company to observe firsthand what is happening at the door. MXenergy employees never sell directly. Any feedback for the agent, positive or negative, is provided while walking to the next door. One to two hours are spent with a single agent, and then the MXenergy employee then may shift to a different agent. Typically, three to five agents are shadowed in Pennsylvania each day by an MXenergy employee. The Direct Sales team at MXenergy makes decisions as to the general areas that will be canvassed by each of the vendors, such as, for example, the Lancaster, Harrisburg or Allentown areas. The vendors will decide where agents sell on a daily basis unless the sales efforts are coordinated with a targeted direct mail campaign. MXenergy requests weekly reports from DMOs to let the Company know which areas are targeted. MXenergy does cover the entire service territories of the two electric distribution companies – PPL Electric Utilities Corporation (PPL Electric) and PECO Energy Company (PECO) – where the Company is selling its electric generation service.

The sales agent asks to see the customer's bill after the customer has expressed interest in hearing the offer. Once there is interest, agents are trained to ask the customer for the bill to best explain where MXenergy will show up on the bill, what rate will appear on the bill, and clearly explain the Gross Receipts Tax. However, not everyone who brings their bill back to the agent signs up with MXenergy. In those circumstances,

the agent simply thanks the customer for their time and goes onto the next house. Sales agents are not to write down any customer account information, nor are they instructed to take the bill. Sales agents merely note the address and that the customer did not sign up after hearing the presentation.

MXenergy from time to time uses the telephone to call and sell to prospective customers. MXenergy created the telesales script with the help of outside counsel. Copies of the scripts previously used in the PPL Electric and PECO service territories were provided to Prosecutory Staff. MXenergy uses the written contracts at events only, such as the Commission sponsored PAMPowerSwitch events.

All of MXenergy's door-to-door sales are verified using the Third Party Verification (TPV) process. MXenergy determined that the recorded TPV call provided the highest level of protection for the consumer, the sales agent and the Company in delivering the best customer experience. MXenergy has all TPVs housed at DXC (Data Exchange), its TPV vendor, located in Tulsa, Oklahoma. The TPVs are accessible to MXenergy at any time. When MXenergy enrolls customers that do not speak English as a native language but rather speak Spanish, the TPV is also done in Spanish.

MXenergy sales agents also use the "MXenergy Verification Process Checklist – PPL Electric Utilities." This form is used by the sales representatives at the time of the sales to describe the questions asked in the TPV process. A Verification Checklist is designed for each utility serviced by MXenergy including PPL Electric and sales representatives review the form with the customer prior to the TPV calls. This form does

not replace the TPV process and at no time is the form accepted in lieu of the verification call. The Company has used the form for almost four years.

MXenergy asserts that it complies with the Commission's current guidelines. The new interim rule, *Final Order on Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (November 4, 2010), requires agents to leave the customer's home prior to beginning the verification call in order to complete the sale with the TPV process. The Commission's Interim Guidelines are now the subject of a Notice of Proposed Rulemaking (NOPR), *Notice of Proposed Rulemaking Concerning the Interim Order on Marketing and Sales Practices for Retail Residential Energy Markets*, Docket No. L-2010-2208332 (February 10, 2011).

MXenergy occasionally distributes leads to direct sales teams. In Pennsylvania, the utilities (PPL Electric and PECO) provide to MXenergy and other electric generation suppliers a monthly list of their customers including estimated annual usage and other customer information. MXenergy periodically provided portions of these lists to its sales representatives. Sales agents are instructed to clearly explain that by choosing MXenergy as a supplier, they are switching from their current supplier, whether that is the local utility or a retail energy supplier. Since MXenergy representatives are only experts on MXenergy products, they do not inform the customer of any potential early termination fees that a competitor may charge. MXenergy represents that sales agents do not know such information and, because competitive products are constantly changing, any information they may have could very well be outdated or inaccurate. MXenergy's

Pennsylvania service area for electricity had exclusively been the PPL Electric service territory until MXenergy began selling electricity in the PECO market on December 7, 2010. Nearly all of MXenergy's fixed price contracts sold to PPL Electric and PECO customers in 2010 and 2011 did not contain a cancellation fee.

MXenergy provides uniforms to all of its field agents. In addition to a picture ID badge containing the MXenergy logo, agents wear the following, as may be weather-appropriate:

- MXenergy short sleeve polo shirt;
- MXenergy rain jacket;
- MXenergy baseball cap;
- MXenergy long sleeve polo shirt ;
- MXenergy turtleneck shirt;
- MXenergy winter knit hat;
- MXenergy winter head band; and/or
- MXenergy button.

MXenergy explained that there is no specific educational background or work experience the DMO must require in selecting an independent contractor to market the Company's services, as it is an entry level position. As indicated previously, every agent must go through background and drug screening, participate in a sales training program, and pass an exam. In addition to passing this exam, an individual is disqualified if the individual has ever been convicted, found guilty or entered a plea of guilty or nolo contendere (no contest), regardless of the adjudication, for any of the following disqualifying offenses:

1. Any crimes against children;
2. Any felony involving violence;

3. Any sexual offense; and/or
4. Any felony.

In addition, an applicant is disqualified if the individual has been convicted, found guilty, or entered a plea of guilty or nolo contendere (no contest), regardless of the adjudication, for any of the following disqualifying offenses within the past two (2) years:

1. Any drug related offense;
2. Misdemeanor offense or other crimes; and/or
3. Driving while impaired.

The independent contractor may be subject to random drug testing at any time. No random drug test has been performed in Pennsylvania in the last two years beyond the initial drug testing. The Vendor (DMO) maintains all background checks and drug tests and will be provided to MX upon request.

Initially, MXenergy contacted 10% of all customer sales through follow-up survey calls to gauge compliance with Company policies and assess the overall customer experience. The DMO did a further internal Q&A to ensure that no issues or customer confusion existed. The Company also contacted customers regarding specific complaints when appropriate to ensure MXenergy had a complete understanding of the problem/complaint and could take the most effective steps to both remedy the situation and prevent future problems. In the event of a complaint or alleged violation of MXenergy's Code of Conduct, all sales of a particular agent would be called. Currently, this has changed and the following process is implemented:

- New Agents – Call back ALL sales for the 1<sup>st</sup> month;
- Agent's employed less than a year – Call back 50% of sales;

- Agent's employed over a year – Call back 25% of sales; and
- Suspended Agents that are re-activated – Call back ALL sales for the 1<sup>st</sup> month after being reactivated.

In addition, about 10% of MXenergy's TPV calls are monitored to ensure compliance with policies and to detect possible anomalies with sales. Additionally, TPVs will be reviewed where red flags are raised due to such things as:

1. Sales Agent seems to have induced the sale;
2. Sales Agent may have acted as the customer;
3. The customer sounded underage; and/or
4. The customer sounded confused.

Depending on the severity of the case, every TPV associated with a particular sales agent for the previous 30 days will be reviewed.

When MXenergy receives a complaint about an agent, the Company suspends the agent based on the allegation, pending an investigation into the matter, making the assumption of innocent until proven guilty. As part of the investigation, MXenergy will research recent TPV and QA recordings, and get input from the agent's manager. The Company will also try to speak directly to the customer, although that is not always possible. If MXenergy uncovers no problems with the agent's other sales, and the complaint may be related more to customer confusion than any wrongdoing by the agent, the Company reinstates the agent, provides additional training, if necessary, and allows him/her to return to work.

During the initial launch into the PPL Electric territory, MXenergy agents, as did other door- to-door sales agents from other companies, carried around a letter from PPL Electric that informed customers of their ability to select an electricity supplier. They

also carried around a bill sample, provided by PPL Electric, to help educate customers on how to read the bill and what portion of the bill would change should they select MXenergy as their supplier. MXenergy agents are provided an MXenergy binder with the MXenergy logo clearly on the front and spine.

However, in mid April 2010, MXenergy forbid any MXenergy agent to carry any materials, bills, or letters with the PPL Electric logo on them. Managers personally inspected agent binders at that time and physically destroyed any materials with the PPL Electric logo on them. MXenergy took this step based on apparent confusion of some potential consumers thinking the Company was from PPL Electric, despite MXenergy's red uniforms, MXenergy badges, MXenergy branded materials, MXenergy business cards and clear identification of MXenergy in the TPV call that required the customer to acknowledge that they knew MXenergy was an independent company unaffiliated with the local utility. MXenergy proactively took this step of removing all PPL Electric materials to eliminate confusion.

MXenergy Sales and Field Director's compensation is a base salary with a quarterly or annual bonus. Vendors are paid by MXenergy on sales "accepted" by the utility. The definition of an "accepted" sale is a sale to a customer who is scheduled to be switched to MXenergy, is approved by PPL Electric or PECO, and does not cancel within the first two weeks. Occasionally, MXenergy will run incentives that may pay an additional dollar amount per sale.

MXenergy has a call center that is located at 10010 Junction Drive, Suite 104-S Annapolis Junction, Maryland 20701-1180. Hours of operation are 8:00 am to 8:00 pm Monday through Friday, EST. The Company also has a sister call center through its vendor partner, Protocol, located in Sarasota, Florida. In the event that either call center needs to implement disaster recovery procedures (DRP), the respective 800 numbers are redirected to the needed site. The redirect process can be executed within minutes.

At the end of January 2011, MXenergy was down to 127 agents actively selling in Pennsylvania from approximately 3,987 agents working in Pennsylvania since the door-to-door program began in 2009. Since the beginning of 2010 and through approximately April, 2011, MXenergy enrolled 82,350 retail electric customers in Pennsylvania. MXenergy's door-to-door sales account for 46,900 enrollments, or 57% of total enrollments during this period. According to MXenergy, at the time no state attorney general's office or state agency had ever conducted an investigation of MXenergy's marketing practices.

### **MXenergy Litigation**

In December 2010, in response to a question about identifying all legal actions taken against MXenergy, the Company identified five (5) cases, as follows:

**1. Connecticut Department of Public Utility Control, Docket No. 09-08-55**

On August 26, 2008, the Connecticut Department of Public Utility Control ("Department") established Docket No. 09-08-55 to investigate customer complaints against MXenergy's billing practices. The basis of the customer complaint stemmed



from a combination of system and human errors that led to electric rate change notices being mailed to customers approximately two months late. On June 22, 2009, a Settlement Agreement was reached by the parties and filed with the Connecticut Department. Based on the review of the Settlement Agreement, the Department found that MXenergy had undertaken a series of actions to make up for the notice deficiencies and this has been resolved through rate relief payments, special discounted rates or an extension of the lower introductory rate with the rate relief payments accumulating to \$2,144,982. The Company has also undertaken a series of actions to improve its customer service operations including adding staff, evaluating customer service practices, procedures and policies, and utilizing another call center to handle customer calls. The Department found that MXenergy took the appropriate corrective measures and remedied the customer concerns. MXenergy also implemented a number of corrective measures to improve customer service and compliance.

**2. Rochester Gas & Electric Complaint, Case No. 06-M-0124 and Civil Action No. 06-CV-6025 CJS (P)**

On January 6, 2006, both Rochester Gas & Electric (RGE) and NYSEG Solutions suspended MXenergy from enrolling new customers in their territories, alleging improper sales practices. MXenergy instituted a proceeding in federal court for injunctive relief to prevent the suspension. The matter was settled and the Company's license was reinstated. This complaint stemmed from a single rogue door-to-door sales agent who had allegedly modified his MXenergy issued ID by putting "RG&E" prominently on the badge. In addition, this agent purportedly made misleading statements to the customers.

MXenergy terminated the agent immediately upon learning of this agent's conduct, which was in direct violation of the Company's policies and code of conduct.

3. ***Claude Lightfoot, Trustee for the MBS Unsecured Creditors' Trust v. MXenergy.*<sup>1</sup> United States District Court, Eastern District of Louisiana, Case No. 2:10-cv-02794-ILRL-SS.**

This was a routine bankruptcy matter in which the Trustee sought reimbursement of voidable payments made within 60 days of a bankruptcy filing. MXenergy successfully instituted a forward contract defense. The Trustee has taken it up on appeal.

4. ***8200 Boulevard Corp. v. MXenergy, Inc., et al, Superior Court, New Jersey, Ocean County, Docket No. OCN-L-292-10***

A Commercial customer brought action alleging misrepresentation of potential savings during an electric retail sales presentation. MXenergy denied any misrepresentation, and the matter was settled after the serving of pleadings.

5. ***Gateway Energy Services v. MXenergy Inc.*<sup>2</sup>, United States District Court, Eastern District of Pennsylvania, Civil Action No. 5:10-cv-04836-JKG**

Gateway brought this action for injunctive relief alleging deceptive sales practices involving four customers. MXenergy denied that any deceptive sales practices were taking place, and the matter was settled by Consent Order after pleadings, depositions and a hearing. The Consent Order is attached as Exhibit No. 3. The agent for MXenergy denied that he told a customer that there was a mistake on Gateway's paperwork.

---

<sup>1</sup> The wrong Corporation was sued in this case. The Lightfoot case involved electric not gas supply but MXenergy Inc. is the corporation that sells retail gas supply and MXenergy Electric Inc. is the company that sells retail electric supply.

<sup>2</sup> The wrong Corporation was sued in this case. The Gateway case involved electric not gas supply but MXenergy Inc. is the Corporation that sells retail gas supply and MXenergy Electric Inc. is the Company that sells retail electric supply.

Moreover, the agent states that he never represented himself as an affiliate or extension of Gateway and denied that he had a Gateway pamphlet or knew its rates. The sales agent for MXenergy admitted that he did write on the Gateway Energy Residential Enrollment consent form (Pennsylvania) provided to him by three customers. The sales agent testified that he wrote on the forms in order to avoid confusion, so that the customers would know that MXenergy was not affiliated with Gateway and that he was not affiliated with Gateway. MXenergy provided the recordings of the TPV phone calls that verified the MXenergy sales to four customers. MXenergy actively coordinates its marketing through multiple channels such as direct mail, advertising media, telemarketing and door-to-door direct sales. Representatives frequently encounter customers who have encountered MXenergy through one of these other channels and may use the term "to follow-up" as part of their initial greeting to coincide with these other marketing efforts. The sales agent testified that on the day in question, he said to these four customers that he was there to follow-up. He further testified that the reason that he made this statement was because MXenergy sales representatives had previously solicited the Slatington area. According to MXenergy, the sales agent never represented himself as an affiliate or extension of Gateway, and that he was wearing his MXenergy uniform and provided the customer with his MXenergy badge number. Although Prosecutory Staff and MXenergy disagreed on the significance of the agents' conduct, regardless of the Consent Order, Prosecutory Staff agrees that the TPVs on the four customers would support a finding that the enrollments were authorized.

Prosecutory Staff also requested that the Company provide all information concerning the allegations of sexual assault charged against an MXenergy employee engaged in door-to-door sales in Connecticut. MXenergy's statement to the Connecticut Department of Public Utilities was provided on October 29, 2010, and is attached as Exhibit No. 2. The agents involved in this incident worked for Fusion and both had passed background checks prior to actively selling.

**6. GEORGIA PUBLIC SERVICE COMMISSION INVESTIGATION OF SLAMMING COMPLAINTS BY MXENERGY, INC., DOCKET NO. 35270**

MXenergy's affiliate, MXenergy, Inc. (MXI), conducted a door-to-door natural gas supplier marketing campaign beginning in late 2011 in Georgia. An investigation by the Georgia Public Service Commission Staff (Staff) revealed that MXI failed on different occasions during this door-to-door marketing campaign to receive proper authorization to switch customers from their preferred natural gas supplier to MXI. MXI cooperated fully with this investigation. Georgia Staff and MXI conducted settlement negotiations which culminated in a Stipulation dated July 10, 2012.

As a result of the investigation, the Georgia Staff identified 136 cases of alleged slamming committed by MXI. Although MXI disputed the number of allegations and assertions of purported "slamming" violations, any liability or wrongdoing, or any of the findings of Staff's investigation, MXI fully recognized the seriousness of the allegations and the need to prevent "slamming" violations. In order to close the investigation and for purposes of settling the matter, MXI accepted Georgia Staff's 136 cases of slamming.

Respondent also acknowledged that it failed to file with the Commission required slamming reports for the period of January 2012 through June 2012 that included the 136 customers. By engaging in the foregoing conduct, the Respondent was alleged to have violated the terms of its Interim Natural Gas Certificate of Authority, the "Natural Gas Competition and Deregulation Act," as well as numerous Commission Rules and Regulations.

Georgia state law mandates that a supplier make three forms of payment when settling alleged slamming incidents. The first is an administrative fee; the second payment is a refund to the customer of all costs incurred as a result of the enrollment; and the third is a set flat fee per account to be made to the customers. In the Georgia Settlement, MXI agreed to pay a one-time administrative fee of \$50,000, or approximately \$367 per account. Consistent with the statutory requirements in Georgia, MXI also agreed to fully refund the impacted customers for their costs incurred after enrollment as well as a one-time flat fee of \$735 per account.

Finally, upon notice of the investigation in Georgia, MXI terminated its contract with its vendor and immediately suspended its door-to-door operations in the State and has not returned to the market. In addition, while the Georgia incidents occurred shortly after MXI's merger into Constellation, the program had not yet been integrated into the Constellation procedures. Since the merger of MXI into Constellation, the Company and its affiliates have become subject to Constellation's more stringent controls over door-to-door vendors and their operations, which will apply when and if MXI goes back into the Georgia market.

## **Due Diligence Review After Georgia Litigation**

MXenergy had a continuing obligation to update data requests and Prosecutory Staff was informed of the Georgia legal action taken against the Company the beginning of August 2012. Therefore, based on the lapse of time, and a desire to update the investigation given the Georgia Investigation and Stipulation, Prosecutory Staff requested additional information, referred to herein.

## **Conclusion**

In response to Prosecutory Staff data requests, MXenergy provided a listing by street address of all current and former Pennsylvania customers that received electricity generation supplier service from MXenergy in 2010. Later the Company updated the response by including Philadelphia customers. The Company also provided records of all billing disputes filed by Pennsylvania customers against MXenergy from January 2010 until April 2011. In fact, MXenergy provided Prosecutory Staff with an exhibit that outlined the source of complaints received, the type of complaint, when action was taken against an agent, if action was taken against an agent, and what type of action was taken - whether suspension or termination. MXenergy also provided this agent infraction report from April 2011 until June 2012, then for the remainder of 2012.

Prosecutory Staff also reviewed customer contact complaints received by PPL Electric between April and August 2010. These complaints had to do with increased electric generation supplier (EGS or supplier) marketing activity and EGS door-to-door

solicitations. PPL Electric's customer contact complaints involved many suppliers, not just MXenergy.

PPL Electric assessed that some customer contact complaints appeared to be minor infractions whereby the customer did not understand what the EGS was trying to tell them or if the supplier was a legitimate EGS. Apparently, customers called PPL Electric's customer contact center asking questions about shopping, EGSs in general or for confirmation that an EGS was legitimate.

In some instances, PPL Electric received complaints that were more serious involving allegation of improper conduct by sales representatives, misrepresentation, and unauthorized enrollments. The documentation provided was sometimes cryptic because customer service representatives attempted to capture the essence of the communication in taking notes of the phone conversation. In addition, the documentation from PPL Electric did not always identify the supplier; provide the customers' name or address, or even the PPL Electric account number.

During this investigation, Prosecutory Staff also received complaints from EGSs about the activities of their competitors. Again, these complaints involved many suppliers, not just MXenergy.

In cases where MXenergy was somehow identified, Prosecutory Staff provided the PPL Electric account number, customer name and/or address, and requested that MXenergy identify whether these PPL Electric customers are current or past MXenergy customers, including the period of time they have been MXenergy customers, and if so, provide the TPV on the account. Prosecutory Staff reviewed approximately 15 TPVs

from accounts identified in PPL Electric customer contact complaints and complaints from other competitors.

Prosecutory Staff's informal investigation also involved an examination of Bureau of Consumer Services (BCS) informal complaints. Prosecutory Staff reviewed informal complaints filed against MXenergy from February 1, 2010 until March 30, 2011. These complaints involved payment arrangements, billing disputes and unauthorized enrollments or slamming. As a part of this investigation, Prosecutory Staff reviewed approximately 90 informal complaints and, at Staff's request, MXenergy provided the TPVs for approximately 13 BCS informal complaint cases that alleged slamming. MXenergy also reviewed BCS informal complaints for the remainder of 2011 and informal complaints for all of 2012. These complaints involved allegations of slamming, misrepresentation, and deceptive sales practices.

Prosecutory Staff reviewed all the formal complaints filed against MXenergy from May 2010 to November 2010. Most of these complaints reviewed by Prosecutory Staff were settled with a Certification of Satisfaction filed by the Company. Prosecutory Staff then reviewed more current formal complaints from the remainder of 2011 and all of 2012, and the beginning of 2013. Except for the most recent complaint that involved the cancellation fee, the complaint proceedings have been closed.

Prosecutory Staff reviewed the listing of current and former Pennsylvania customers. Prosecutory Staff reviewed a sampling of accounts that may have indicated problems because accounts signed up on the same date on the same street were dropped



at the same time. MXenergy provided and Prosecutory Staff reviewed approximately 26 TPVs from this list. As indicated previously, Prosecutory Staff reviewed the MXenergy TPVs of the former customers alleged to have been slammed in the federal complaint filed by Gateway against MXenergy. Finally, after the conclusion of the Georgia litigation, MXenergy's counsel, at Prosecutory Staff's request, provided TPVs from MXenergy's affiliate, CNE, of a sample of PECO customers who rescinded during the 10-day confirmation period and customers who dropped service. Prosecutory Staff reviewed an additional 30 CNE TPVs from this list of customers.

Prosecutory Staff's review of all TPV calls indicated in the preceding nine paragraphs *did not uncover* any enrollments that were not appropriately verified by the questions posed by the third party and the answers given by the customer. Prosecutory Staff believes that all TPVs correctly evidenced the customer's authorization of the enrollment with MXenergy or CNE, as appropriate.

Based on the data requests propounded upon the Company, and referred to herein, MXenergy has provided information to Prosecutory Staff indicating that MXenergy terminated 17 sales agents for unauthorized enrollment incidents including, but not limited to, self-verified sales. Prosecutory Staff believes that these enrollment incidents involving these sales agents represent approximately 22 individual cases of alleged

slamming or alleged unauthorized enrollments. Prosecutory Staff believes that if this matter were litigated, and Staff met its burden of proof, a preponderance of the evidence would establish that 22 consumers to MXenergy's electric generation service were switched without proper authorization in violation of 52 Pa. Code § 57.173.

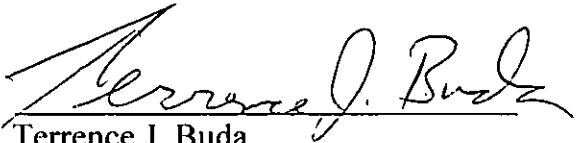
Dated: May 16, 2013      Prepared by:   
Terrence J. Buda  
Assistant Counsel  
Law Bureau Prosecutory Staff  
Pennsylvania Public Utility Commission

EXHIBIT No. 1

RECEIVED  
2013 MAY 16 PM 12:37  
PA PJC  
SECRETARY'S BUREAU

RECEIVED

MAY 16 2013

EXHIBIT D

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

MXenergy Code of Conduct

MXenergy, Inc. (the "Company") and Direct Marketing Organization ("DMO") are committed to conducting business at the highest legal, ethical and moral standards. The Company and DMO adhere to these tenets and believe that it is a good business practice to behave in such a manner, as well as an effective way to protect consumers. The Company and DMO believe in adhering to both the letter of the law and the spirit of the law. This Code of Conduct embodies and reflects these beliefs. As a DMO, Independent Agent, or employee of either, you are expected to fully read, understand and comply with this Code of Conduct at all times and to sign a copy of this Code of Conduct prior to your Marketing the Company's Services. Failure to do so will result in immediate termination of your position.

- All Marketing presentations must be honest and clear.
- You must convey all material information to the consumer.
- You may not omit information necessary for the consumer to make an informed decision about whether to switch from their current electricity or natural gas supplier to the Company.
- You must adhere to the Marketing training materials provided.
- All information must be conveyed fully and fairly.
- The Company does not want unhappy customers. The Company would rather lose a sale than have a customer sign up without full knowledge and a willingness to participate in our program.
  - The following activities are strictly PROHIBITED:
    - The unauthorized switching of customers (i.e. slamming).
    - Misrepresentations to consumers regarding the Company's Services, pricing or its affiliation with any distribution company or government agency.
    - Discriminatory marketing practices.
    - Fraud of any kind.

Your Responsibilities

- Review and understand all training and Marketing materials.
- Be familiar with relevant law governing the sale of electricity or natural gas in your state that has been provided to you by DMO.
- Be familiar with consumer education materials provided to you by DMO regarding deregulation in your state.
- Never attempt to solicit a customer who speaks another language in which you are not fluent.
- Stay in contact with your manager on a regular basis.
- Submit your completed program Enrollment Forms daily, or as more frequently as required by DMO management.
- Bring grievances to your manager's attention immediately.
- Complete all necessary paperwork correctly and legibly.
- Remember that most customers don't understand or have never thought about alternative energy options.

Responsibilities To The Customer

- NEVER misrepresent your association with any electricity or natural gas supplier or local utility.
- NEVER exaggerate or speculate regarding potential savings – we do not promise savings, but we offer price protection.
- NEVER make statements that are untrue or misleading.
- ALWAYS be polite and professional, even if the customer is unpleasant.
- ALWAYS answer the customer's questions responsively and effectively, to the best of your ability. Ensure that the customer is satisfied with your response.
- ALWAYS leave your business card and/or Company brochure behind with each consumer.

I have read and agree to abide by the terms of the MXenergy Code of Conduct. I understand that failure to abide by the MXenergy Code of Conduct may result in the termination of my position.

(TO BE SIGNED BY EACH SALES REPRESENTATIVE)

\_\_\_\_\_  
Sales Representative Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

EXHIBIT No. 2

RECEIVED

MAY 16 2013

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

GATEWAY ENERGY SERVICES CORPORATION,

Plaintiff,

-against-

MXENERGY, INC.,

Defendant.

CIVIL ACTION

NO.: 5:100-cv-04836-JKG

CONSENT ORDER

WHEREAS Plaintiff Gateway Energy Services Corporation commenced this action against Defendant MXenergy Inc. seeking monetary, injunctive and declaratory relief under the federal Lanham Act and state common law, and moved for a preliminary injunction pursuant to Fed. R. Civ. Pro. 65; and the parties having proceeded with a hearing before the court on November 4, 2010 addressing the motion and now desiring to resolve the motion and the action in their entirety on consent without further costs and expenses; and

WHEREAS the parties enter into this consent order without Defendant admitting any fault, wrongdoing or liability of any kind or evidencing any admission of the truth or correctness of any claims or allegations raised in the complaint or motion for a preliminary injunction, all of which Defendant expressly denies; it is, on consent of the parties and approval of the Court,

ORDERED this 18<sup>th</sup> day of November, 2010 as follows:

1. While MXenergy Inc. denies that its affiliates, officers, employees, agents, and brokers engaged in the following conduct, Defendant MXenergy Inc., its affiliates, officers, employees, agents, and brokers shall refrain from altering, writing on, or changing any contracts or enrollment forms bearing the name or trademark Gateway Energy Services Corporation.

2. While Defendant MXenergy Inc. denies that its affiliates, officers, employees, agents, and brokers engaged in the following conduct, Defendant MXenergy Inc., its affiliates, officers, employees, agents, and brokers shall refrain from stating or suggesting to any customers or potential customers that its variable rates for electricity or gas are cheaper than Plaintiff's prices for the same commodities, whenever Defendant lacks sufficient knowledge of Plaintiff's variable prices..

3. While Defendant MXEnergy, Inc., denies that its affiliates, officers, employees, agents, and brokers engaged in the following conduct, Defendant MXenergy Inc., its affiliates, officers, employees, agents, and brokers shall refrain from making any statements or taking any action in furtherance of Defendant's selling activities that would likely cause any individual to falsely conclude that Defendant is related to or affiliated with Plaintiff Gateway Energy Services Corporation, including, but not limited to, making any statement to any customer or enrollee of Plaintiff that Defendant is an affiliate of Plaintiff; that Plaintiff's employee had made a mistake or error on its enrollment form and that Defendant will correct the mistake; or that Defendant is following up with the customer or enrollee of Plaintiff.

*J. M.* 4. Neither party will publicize nor advertise this Consent Order or its issuance in any promotional, advertising or marketing materials, <sup>or sales practices,</sup> nor issue any press release concerning its terms or issuance. In the event the media contacts either party, the party shall refer the media to the case and docket and say that the case has been settled and that the party is not permitted to discuss the terms of the settlement.

5. All litigation expenses incurred by the Parties in the instant litigation to date shall be borne by each party respectively, and any claim for reimbursement of same through the date of this Consent Order's entry is hereby waived.

6. The parties hereby release each other, including the respective party's contractors, subcontractors, agents, employees, officers and directors, with prejudice from and against any and all claims, liabilities, controversies, actions, disputes or causes of action arising at any time in any location prior to the date of this consent order's entry. Nothing herein, however, shall prevent either party from bringing any claim against the other for any dispute that arises after the date of this consent order, nor does anything herein prevent or bar Plaintiff from seeking appropriate relief at law and/or equity, including attorneys' fees incurred to enforce this Consent Order or due to a violation of the Lanham Act, in the event that Defendant or its agents violate any aspect of this order.

7. In the event that Plaintiff hereafter believes that Defendant has violated any term or provision of this order, Plaintiff will notify Defendant, in writing, by sending such notice by overnight mail to Phillip Mittleman, Esq., MXenergy Inc., 595 Summer Street, Suite 300, Stamford, CT 06901-1407, explaining the alleged violation(s) so as to give Defendant ten (10) business days to investigate and cure the alleged violation(s). Defendant shall within such ten-day period notify Plaintiff in writing via overnight mail, sent to Avram Keilson, Esq. at Gateway Energy Services Corporation, 400 Rella Blvd., Suite 300, Montebello, New York 10901, with a copy to Gary M. Fellner, Esq., Porzio Bromberg & Newman, P.C, 156 West 56 Street, New York, New York, 10019, so as to notify Plaintiff of Defendant's findings, conclusions, and corrective action taken, if any.

8. If written notice as provided in paragraph 7 is provided to Defendant and such issue or issues raised are not fully resolved to the reasonable satisfaction of Plaintiff within the ten-business-day period, Plaintiff may pursue all remedies available to it, including filing an action to pursue any remedies at law and/or at equity, , including recovery of attorneys' fees, for any violation of the Lanham Act or any violation of this Order.




9. Plaintiff shall not be required to provide advance notice to Defendant as stated in paragraph 7 if Plaintiff believes that immediate injunctive relief is warranted.

10. This Agreement shall be binding upon and inure to the benefit of the Parties hereto, and their respective legal representatives, agents, successors, and assigns.

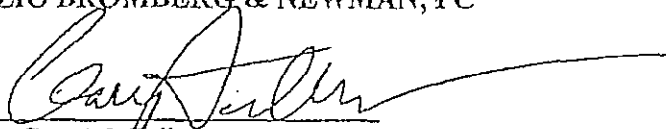
11. The attorneys executing this Consent Order on behalf of the Parties have the requisite legal authority to bind their respective clients hereto.

12. The United States District Court will retain jurisdiction over this action and all parties herein should they have a need to enforce any provision of this Consent Order. *The CLERK of the COURT IS DIRECTED TO CLOSE THE CASE FOR STATISTICAL PURPOSES. THE ACTION IS DISMISSED, WITHOUT PREJUDICE FOR EITHER PARTY TO RE-INSTITUTE THE RHOADS & SINON LLP CASE IF THERE IS A VIOLATION OF THIS ORDER.* *CA*

By:   
Timothy J. Nieman

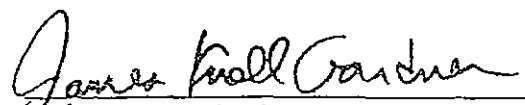
*Attorneys for Defendant*  
One South Market Square  
P.O. Box 1146  
Harrisburg, PA 17108  
Tel: (717) 231-6614  
Fax: (717) 238-8623

PORZIO BROMBERG & NEWMAN, PC

By:   
Gary M. Fellner

*Attorneys for Plaintiff*  
156 West 56 Street  
New York, New York 10019  
Tel: (646) 348-6722 (direct)  
Fax: (212) 957-3983

SO ORDERED:

(ARG)   
James H. Gardner, U.S.D.J.  
KNOLL  
November 18, 2010

1417213

RECEIVED  
2013 MAY 16 PM 12:37  
PA PUC  
SECRETARY'S BUREAU