



ORDER NUMBER
A-3-23

IN THE MATTER OF
the *Utilities Commission Act*, RSBC 1996, Chapter 473

and

Easy Energy Inc.
Potential Non-Compliance with Code of Conduct for Gas Marketers

BEFORE:

B. A. Magnan, Panel Chair
E. B. Lockhart, Commissioner

on September 12, 2023

ORDER

WHEREAS:

- A. On August 8, 2022, the British Columbia Utilities Commission (BCUC) received a dispute (Dispute) regarding a gas marketing agreement (Agreement) between a customer and Easy Energy Inc. (Easy Energy);
- B. Easy Energy is a licensed gas marketer (Gas Marketer) located in Surrey, BC, with approximately 19,000 customers and operates as part of the Natural Gas Customer Choice Marketing Program in BC (Customer Choice);
- C. By Order A-5-21 dated October 28, 2021, the BCUC issued Easy Energy a gas marketer licence for the period of November 1, 2021, to October 31, 2022. As a condition of the license, Easy Energy was required to abide by the Rules for Gas Marketers, approved by Order A-12-13 dated October 18, 2013, and the Code of Conduct for Gas Marketers (Code of Conduct), approved by Order A-12-15 dated September 29, 2015. The Code of Conduct requires that Gas Marketers enrol customers on fair and ethical terms;
- D. On September 1, 2022, in accordance with the Customer Choice dispute process, Easy Energy filed with the BCUC its response to the Dispute, along with a copy of the Third-Party Verification (TPV) call conducted with the customer in relation to the Agreement (collectively, Submission);
- E. A TPV is a digitally recorded telephone call, or electronic process, conducted by the Gas Marketer, where, after signing an agreement, a customer is required to verify certain aspects of their enrolment and agreement. TPVs follow a script approved by the BCUC, as set out in the Code of Conduct;
- F. As part of the Customer Choice dispute process, BCUC staff reviewed Easy Energy's Submission and noted inconsistencies between the approved TPV script and the TPV call placed to the customer who filed the Dispute;

- G. By Order G-79-23 dated April 12, 2023, the BCUC determined that a public hearing to investigate whether Easy Energy is in breach of the Code of Conduct was warranted. The BCUC established a regulatory timetable that included public notice, letters of comment, BCUC information requests (IR), with further process to be determined;
- H. By Order G-138-23 dated June 12, 2023, the BCUC established a further regulatory timetable to proceed to final argument; and
- I. The BCUC has reviewed the evidence in this proceeding and finds the following determination to be warranted.

NOW THEREFORE pursuant to section 109.1(1) of the *Utilities Commission Act* (UCA), and for the reasons attached as Appendix A to this order, the BCUC determines that Easy Energy has contravened section 71.1(3) of the UCA, by failing to comply with the conditions on Easy Energy's gas marketer licence set out in Directives 3b, 3c and 3h of Order A-5-21.

DATED at the City of Vancouver, in the Province of British Columbia, this 12th day of September 2023.

BY ORDER

Original signed by:

B. A. Magnan
Commissioner

Attachment

Easy Energy Inc.
Potential Non-Compliance with Code of Conduct for Gas Marketers

REASONS FOR DECISION

1.0 BACKGROUND

Easy Energy Inc. (Easy Energy) is a licensed gas marketer (Gas Marketer) located in Surrey, BC, with approximately 19,000 customers and operates as part of the Natural Gas Customer Choice Marketing Program in BC (Customer Choice). The Customer Choice program enables direct natural gas sales by Gas Marketers to low-volume customers, who have the option to purchase their natural gas from FortisBC or from an independent Gas Marketer at fixed rates. Easy Energy contracts to supply gas to the public utility, in this case FortisBC Energy Inc. (FEI), and also enters into gas supply contracts with residential and commercial consumers who are served by FEI. FEI delivers the gas to the Easy Energy customers and bills them at a fixed rate as established, for periods of up to five years, in each customer's Easy Energy agreement.

On August 8, 2022, the British Columbia Utilities Commission (BCUC) received a Customer Choice dispute (Dispute) regarding a gas marketing contract between a residential customer (Customer) and Easy Energy (Agreement). The Customer alleged that the door-to-door Easy Energy sales agent (Door Agent) misrepresented themselves as an FEI agent and this misrepresentation was the reason why the Customer had signed the Agreement offered by the Door Agent on July 19, 2022.

Easy Energy was obliged to respond to the Dispute and to attempt to resolve the matter with the Customer. In accordance with the Dispute Guidelines of the Customer Choice program (Dispute Guidelines)¹, a customer is given the opportunity to review the Gas Marketer's evidence and its response to the dispute. The Customer accepted Easy Energy's offer to cancel the Agreement prior to its start date.² Easy Energy filed details regarding its resolution of the Dispute with the BCUC on September 1, 2022.³

When a customer and Gas Marketer resolve a dispute following its filing with and review by the BCUC, the BCUC closes the dispute and issues a letter to both parties on the outcome.⁴

In this instance, the BCUC has reviewed the Easy Energy filing in preparation for issuing a closing letter.

2.0 Additional Investigation

Pursuant to 2.3 of the Dispute Guidelines, the Gas Marketer's evidence must include, if applicable, a recording of the Third Party Verification (TPV) call⁵. For a sale to be completed, a residential customer must verify certain aspects of their enrolment and their agreement with another representative of the Gas Marketer, i.e., a *third-*

¹ Order A-12-13, Appendix B.

² Exhibit A2-1-1, p. 1.

³ Ibid.

⁴ Order A-12-13, Appendix B, section 2.5.

⁵ Order A-12-13, Appendix B, p. 4.

party, no sooner than 24 hours, and no later than 20 days after the signing of an agreement.⁶ In the Dispute, the TPV call occurred on July 26, 2022⁷ via a phone call initiated by an Easy Energy sales agent (TPV Agent). Easy Energy was also required to follow the TPV script approved by the BCUC (Approved TPV Script),⁸ as set out in the Code of Conduct for Gas Marketers (Code of Conduct).⁹

BCUC staff reviewed the evidence, including the audio file of the TPV call, that Easy Energy filed on September 1, 2022. From the dialogue on the TPV recording, staff observed that the Customer sounded rushed and stressed. The Customer said they were in the process of selling their house and dealing with serious health and safety concerns. Likewise, staff observed that the TPV Agent spoke very rapidly and interrupted or talked over the Customer, and in some cases did not respond to or ignored what the Customer said and persisted in asking questions from the Approved TPV Script.

In its review of the TPV call, BCUC staff noted potential non-compliance with the Code of Conduct, including the following:

- The Customer stated they were informed by the Easy Energy Door Agent that their Agreement was transferable to a “new tenant”. The Customer explained that their house was “going on the market” and that the “most important thing I asked him is whether this is transferable to the people who eventually buy our house and he said ‘yes’ and this was very important to me because this becomes part of the information that I will pass on to the new tenants”;
- When the Customer was asked if they had a copy of the Agreement, their initial response was they did not have a copy on hand and wished to have a copy mailed to them. The Customer said that they did not have access to their email because their computer was not working. The Customer said that the Door Agent “probably left a copy of the agreement, but I can’t put my finger on it right now and please just mail me a copy”. The TPV Agent continued the call despite receiving a negative response; and
- When asked if the Customer received a copy of the Standard Information Booklet entitled “It’s Your Choice” the Customer stated “No” they had not received a copy. The TPV Agent then told the Customer that a copy had been sent by email. Despite the Customer having stated they were unable to access their emails, the TPV Agent repeated the question, asking if the Customer had received a copy of the Standard Information Booklet. The TPV Agent persisted in asking the question, to which the Customer responded “yes ... whatever”, and the TPV Agent asked the question again, asking the Customer to “just answer ‘yes’ or ‘no’”. Once the Customer says “yes” the TPV Agent continued with the TPV call.¹⁰

On September 8, 2022, BCUC staff issued several questions to Easy Energy. On September 16, 2022, Easy Energy responded to the BCUC staff questions, as set out below¹¹:

In response to the question why the Customer was informed that their Agreement was transferable (to a new tenant), Easy Energy submitted that the Door Agent did not recall specifically¹² and then Easy Energy stated that:

On occasion, Easy does write replacement agreements (which are new agreements) for tenants taking over a location from a consumer that closed their FortisBC account. While the word

⁶ Order A-12-15, Appendix A, Article 33.

⁷ Exhibit B-2, BCUC IR 1.1.

⁸ BCUC Letter L-3-22.

⁹ Order A-12-15, Appendix A.

¹⁰ Exhibit A2-1-1.

¹¹ Exhibit A2-1-1, p. 2.

¹² Ibid.

transferable may be appropriate when discussing residential portability, the manner in which it was used by [the Customer] in the verification recording does not accurately reflect the mechanics of a replacement agreement or a portability enrollment.¹³

In response to the question why the TPV call was not terminated after the Customer had stated that they did not have a copy of the Agreement available Easy Energy stated that:

“[t]he call should not have continued in this instance” [and] that the TPV Agent was “...attempting to jog [the Customer’s] memory because [the Customer had] provided Easy with the email address to which the agreement had been delivered.”¹⁴

In response to the question why the TPV Agent continued to request an answer from the Customer after the Customer stated they did not have a copy of the Standard Information Booklet, Easy Energy stated:

[f]or clarity, Easy's electronic contracting application appends the Standard Information Booklet directly to the executed agreement when it is emailed to a consumer. This ensures delivery of the Standard Information Booklet when the email containing the electronic copy of the executed agreement is delivered to the consumer.¹⁵

In response to the question regarding what steps Easy Energy takes to ensure quality control for TPV calls, Easy Energy described the process by which residential TPV calls are reviewed prior to approval in its system:

When an agreement has been successfully verified, the verifier will upload the verification recording directly into our CRM at which point the upload is logged and timestamped...

...Our system captures who reviewed the recording and the date/time it was approved. ...

Residential verifications are reviewed either overnight by an Easy support contractor or during normal business hours by an Easy CSR. Our overnight support contractor was instructed to listen to the entirety of each recording and flag for further review recordings that did not adhere to Easy's prescribed script. During the day, Easy's CSRs also review residential verifications when not on the phone assisting customers; however, our CSRs were not always listening to the entirety of each recording due to time constraints. On high volume days and/or when short-staffed, our CSRs would trust that the verifiers were uploading only positively affirmed verifications and our CSRs would skip ahead only reviewing answers to the questions pertaining to name and price/term. The noted recording for [the TPV Agent] was reviewed by an Easy CSR on July 26, 2022 at 3:54 PM, six minutes prior to Easy's close of business. The Easy CSR has confirmed that she did not review the recording in its entirety and she did not catch [the Customer’s] noted hesitation...Following our discovery and review of this recording, Easy's process was changed. Easy's CSRs now leave residential verifications for our overnight support contractor who has been instructed to listen to the entirety of each recording. In the event our CSRs are idle, they will now take the time to listen to the entirety of each recording and Easy has

¹³ Ibid.

¹⁴ Exhibit A2-1-1, p. 2.

¹⁵ Exhibit A2-1-1, p. 3.

eliminated the expectation that our CSRs finish reviewing all queued verification recordings prior to heading home for the day.¹⁶

Overall, Easy Energy acknowledged that “there were two failures here: 1) the [TPV Agent] did not terminate the call when it was appropriate to do so, and 2) the Easy [Energy] CSR did not review the entirety of the recording. Easy [Energy] has already taken the necessary steps to redress both failures and a similar occurrence should not arise again in the future.”¹⁷

Finding possible contraventions of Articles 14, 15, and 33 of the Code of Conduct, regarding honesty, fairness and veracity, and compliance with TPV call requirements, BCUC staff recommended on April 12, 2023 that the BCUC hold a hearing to determine if there was a breach of the Code of Conduct.

On April 12, 2023, the BCUC established a public hearing including public notice, letters of comment, and information requests to determine whether Easy Energy was in breach of the Code of Conduct. On April 28, 2023, BCUC Staff submitted their investigation report (Investigation Report) into the evidentiary record. No letters of comment were submitted to the BCUC and Easy Energy was further directed to provide final argument by June 29, 2023.

3.0 LEGISLATIVE AUTHORITY

Section 71.1 (3) of the *Utilities Commission Act* (UCA) requires that:

A gas marketer must comply with the commission rules issued under subsection (10) and the terms and conditions, if any, attached to the gas marketer licence held by the gas marketer.

Through Order A-5-21 (Licence Order), the BCUC issued Easy Energy a gas marketer licence for the period November 1, 2021 to October 31, 2022, during which period the TPV call to the Customer occurred. Directives 3b, 3c and 3h of the Licence Order required Easy Energy to comply with the following conditions on its gas marketer licence:

This Gas Marketer Licence is subject to the following conditions:

...

b. Easy Energy must comply with the Code of Conduct for Gas Marketers and Rate Schedule 36 of FortisBC Energy Inc.

c. Easy Energy shall ensure that its employees, salespersons or other representatives of its products and services comply with the standards required of a Gas Marketer as set out in the Code of Conduct for Gas Marketers, and Easy Energy shall be responsible for any non-compliance of its employees, salespersons or other representatives of its products and services.

...

h. Easy Energy must strictly adhere to the script as outlined in Article 33 of the Code of Conduct for Gas Marketers.

¹⁶ Ibid.

¹⁷ Exhibit A2-1-1, p. 3.

Sections 109.1(1), (3) and (4)(a) of the UCA provide that:

(1) After giving a person an opportunity to be heard, the commission, for the purposes of section 109.2, may find that the person has contravened a provision of

- (a) this Act or the regulations, or
- (b) an order, standard or rule of the commission or a reliability standard adopted by the commission.

...

(3) Without limiting section 112, if an employee, contractor or agent of a corporation contravenes a provision referred to in subsection (1) of this section in the course of carrying out the employment, contract or agency, the corporation also contravenes the provision.

(4) The commission may not find that a person has contravened a provision referred to in subsection (1) if the person demonstrates to the satisfaction of the commission that

- (a) the person exercised due diligence to prevent the contravention, or

...

Further to the conditions set out in the Licence Order, Easy Energy was required to comply with the Articles 14, 15, and 33 of the Code of Conduct, and ensure that its employees, salespersons or other representatives complied, as follows:

Article 14

A Salesperson shall not abuse the trust of individual Consumers or exploit their lack of experience or knowledge, nor play on ignorance or on fear, thereby exerting undue pressure on Consumers. All Offers must, therefore, be clear and honest.

A Salesperson shall not make any statement or take any measure which, directly or by implication, omission, ambiguity or exaggeration, is likely to mislead a Consumer with regard to the benefits of the Program, terms of the Offer, Consumer's Agreement or any other matter. ...

A Salesperson shall, to the best of his or her knowledge and ability, give complete, accurate and clear answers to a Consumer's questions concerning the Offer or any other matter.

Article 15

A Salesperson shall ensure that the Consumers clearly and thoroughly understand the information given. ...

A Salesperson shall not make any verbal representations regarding agreements, rights or obligation unless those representations are contained in the Consumer's Agreement.

Gas Marketers shall ensure that their Salespersons are generally knowledgeable in the natural gas business, fully informed as to the characteristics of gas supplies and/or services offered and the Consumer's Agreement utilized by the Gas Marketer, to enable them to give Consumers all necessary information to make informed decisions.

A Salesperson shall ensure that the Consumer has been provided with a copy of the Customer Choice Standard Information Booklet and shall advise the Consumer to fully review the information contained within before the expiration of the 10-day Cancellation Period.

Article 33

... The Salesperson must conduct the TPV call clearly in an understandable pace and tone.

... The Consumer who signed the contract with a Gas Marketer must confirm their understanding of the key elements of the agreement through a TPV.

... For Residential Customers, the TPV must follow the standardized scripting set out below... If the Gas Marketer wishes to request an amendment to the standardized script, the Gas Marketer may file the modified TPV script with Commission staff for comment and approval.

4.0 APPARENT CONTRAVENTION OF THE CODE OF CONDUCT FOR GAS MARKETERS

Easy Energy Final Argument

In its final argument, Easy Energy addresses the alleged breaches of the Code of Conduct noted in the Investigation Report:

- a. The Door Agent incorrectly informed the Customer that the Agreement was transferable to a new tenant and the TPV Agent did not correct that misrepresentation;
- b. The TPV Agent did not end the call when the Customer advised that they did not have access to a copy of the Agreement;
- c. The TPV Agent did not end the call when the Customer advised that they did not have access to a copy of the Standard Information Booklet; and
- d. The pace and tone of the TPV call did not comply with the Code of Conduct.¹⁸

In addition, Easy Energy provides information about the steps it takes to ensure quality control for TPV calls. Finally, Easy Energy seeks to rely on the defence of due diligence and provides its submissions in support.

Transferability of the Agreement

Easy Energy states it recognizes that an agreement is not transferable to a new customer who moves into the existing premise and that in such a situation, a new customer could decide to enter into a new agreement with Easy Energy.¹⁹ Easy Energy submits that although there may have been a misunderstanding about transferability between the Door Agent and the Customer, Easy Energy does not believe there was any intention to mislead the Customer.²⁰ Further, Easy Energy explains that this issue rarely arises during a TPV call and is not an issue that TPV Agents commonly deal with.²¹

¹⁸ Final Argument, para. 4.

¹⁹ Final Argument, para. 8.

²⁰ Final Argument, para. 16.

²¹ Final Argument, para. 13.

Adherence to the TPV Script – copy of the Agreement

Easy Energy states it agrees that the TPV Agent did not comply with the Approved TPV Script²² or with the default script in the Code of Conduct when the Customer stated they did not have access to a copy of the Agreement. Easy Energy further states that the “call should have ended when the Customer advised the TPV Agent they did not have access to the Agreement.”²³

Adherence to the TPV Script – copy of the Standard Information Booklet

Easy Energy states the “call should have ended when the Customer advised the TPV Agent they did not have access to the Standard Information Booklet. TPV Agents are instructed to end the verification following a negative response. Easy Energy submits that continuance of the call was contrary to the [Approved TPV Script] and Easy Energy’s policies and procedures.”²⁴

Pace and Tone of the TPV Call

On the matter of pace and tone of the TPV call, Easy Energy states it agrees that the TPV Agent’s pace should have been slower and his tone more cordial, and that “there was some frustration in the TPV Agent’s tone when he had to deviate from script.”²⁵ Easy Energy states that it instructs all TPV Agents to use a moderate pace and a polite welcoming tone. It also states that the “Customer advised the TPV Agent at the beginning to ‘be quick please’. The tone of the Customer’s responses indicated impatience with the TPV Agent, which influenced the TPV Agent to proceed more quickly in an attempt to accommodate the Customer.”²⁶

Ensuring Quality Control for TPV Calls

Easy Energy states that it has policies and procedures in place to prevent misrepresentations to customers²⁷ and that it:

- provides initial and ongoing training to all its employees and independent sales contractors on the Code of Conduct;²⁸
- provides further one-on-one training to Easy Energy TPV Agents on the Approved TPV Script including how to handle interruptions;²⁹
- tracks regulatory complaints regarding each sales agent, promptly investigates, and will require additional training, disciplinary action, or dismissal as appropriate;³⁰
- has a secondary review process for each TPV call;³¹ and
- has a low rate of complaints when compared with the number of Agreements it enters into.³²

²² Easy Energy has raised the question of whether V2.0 or V2.1 of this TPV script was approved by the Commission, in the following proceeding: Easy Energy Inc. – Potential Non-Compliance with the Electronic Third-Party Verification Script for Gas Marketers – Project No. 1599497. For the purposes of the present proceeding, it makes no difference whether V2.0 or V2.1 was approved, since both versions require an agent to end the call following a negative response.

²³ Final Argument, para. 18, 20.

²⁴ Final Argument, para. 22.

²⁵ Final Argument, para. 24.

²⁶ Final Argument, para. 23.

²⁷ Final Argument, para. 42.

²⁸ Final Argument, para. 43.

²⁹ Ibid.

³⁰ Final Argument, para. 44.

³¹ Final Argument, para. 45.

³² Final Argument, para. 46.

Application of the Code of Conduct

Easy Energy acknowledges that the circumstances of the TPV call described above amount to contraventions of certain requirements of the Code of Conduct. However, Easy Energy also submits that it is not liable as a result of the defence of due diligence.³³

Easy Energy agrees that the conduct of the TPV Agent contravened Article 14 of the Code of Conduct (subject to the defence of due diligence) in that the TPV Agent omitted to correct the Customer's misunderstanding about the transferability of the Agreement.³⁴

Easy Energy states it agrees that the TPV Agent contravened Article 15 of the Code of Conduct (subject to the defence of due diligence) by failing to ensure that the Customer had been provided with a copy of the Agreement and a copy of the Standard Information Booklet when the Customer indicated that they did not have access to the email address to which the documents had been sent.³⁵

Easy Energy accepts that the pace and tone of the TPV call do not meet its standards, although it also submits that the pace and tone do not amount to a breach of Article 33 of the Code of Conduct because the Customer still clearly understood the TPV Agent's questions.³⁶

However, Easy Energy acknowledges that the TPV Agent contravened the Code of Conduct (subject to the defence of due diligence) by failing to follow the required script. In particular, Easy Energy notes that both the standard script in the Code of Conduct and the Approved TPV Script require the agent to end the call following a negative response, and that the TPV Agent failed to end the call following negative responses to the questions about whether the Customer had copies of the Agreement and the Standard Information Booklet.³⁷

Defence of Due Diligence

Easy Energy submits that it takes reasonable steps to ensure that its policies are implemented and effective at preventing contraventions of the Code of Conduct.³⁸ Easy Energy refers to its policies and procedures, training of sales agents and TPV Agents, complaints tracking, quality control for TPV calls, and a low rate of complaints as evidence of measures that, according to Easy Energy, demonstrate due diligence.³⁹

³³ Final Argument, para. 27.

³⁴ Final Argument, para. 31.

³⁵ Final Argument, para. 34.

³⁶ Final Argument, para. 36.

³⁷ Final Argument, para. 37.

³⁸ Final Argument, para. 48.

³⁹ Final Argument, paras. 42-46.

Easy Energy submits that Section 109.1(1)(4)(a) of the UCA provides that the BCUC may not find that it has contravened the applicable legislation or rules if Easy Energy demonstrates that it exercised due diligence to prevent the contravention.⁴⁰ Easy Energy refers to the test of due diligence set out by the Supreme Court of Canada in *R. v. Sault Ste. Marie (City)*⁴¹, when the accused is a corporation and the contravention was committed by an agent of the corporation.⁴²

... Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself...

Easy Energy argues that it meets the test in *R. v. Sault Ste. Marie (City)* and asserts that it went beyond the standard for a reasonable Gas Marketer in the circumstances of this case.⁴³

Panel Determination

In this section the Panel considers whether Easy Energy contravened section 71.1(3) of the UCA by failing to comply with one or more articles in the Code of Conduct, as required by the conditions set out in the Licence Order. Then the Panel considers whether Easy Energy has demonstrated that it exercised due diligence to prevent the contravention.

Contravention of the Code of Conduct

Section 71.1(3) of the UCA requires Easy Energy to comply with the terms and conditions attached to Easy Energy's gas marketer licence. Directives 3b, 3c and 3h of the Licence Order imposed conditions on Easy Energy's gas marketer licence, requiring it to comply with Articles 14, 15, and 33 of the Code of Conduct, and to ensure that its employees, salespersons or other representatives complied as well.

The Panel finds that the TPV Agent failed to comply with Articles 14, 15, and 33 of the Code of Conduct. The TPV Agent was a representative and salesperson of Easy Energy. Section 109.1(3) of the UCA provides that "if an employee, contractor or agent of a corporation contravenes [a provision of the UCA or an order, standard or rule of the BCUC] in the course of carrying out the employment, contract or agency, the corporation also contravenes the provision". Directive 3c of the Licence Order also requires Easy Energy to ensure that its employees, salespersons or other representatives of its products and services comply with the Code of Conduct and makes Easy Energy responsible for any non-compliance. **Accordingly, the Panel finds that, subject to a potential due diligence defence (discussed in the next section), Easy Energy contravened section 71.1(3) of the UCA by failing to comply with Directives 3b, 3c and 3h of the Licence Order.**

⁴⁰ Final Argument, para. 38.

⁴¹ [1978] 2 S.C.R. 1299 (SCC).

⁴² Final Argument, p. 10, citing *R. v. Sault Ste. Marie (City)*, para. 72.

⁴³ Final Argument, para. 48.

Article 14

The Panel finds that Easy Energy breached Article 14 of the Code of Conduct when its TPV Agent failed to correct the Customer’s misunderstanding regarding the transferability of the Agreement. The TPV Agent did not give complete and accurate information to the Customer during the TPV call. Easy Energy agrees that the conduct of the TPV Agent contravened Article 14 (subject to the defence of due diligence).⁴⁴

Article 15

The Panel finds that Easy Energy breached Article 15 of the Code of Conduct, because the TPV Agent failed to appropriately acknowledge that the Customer indicated they did not have access to a copy of the Agreement or the Standard Information Booklet. The TPV Agent thus failed to ensure that the Customer clearly and thoroughly understood the information provided to them, namely, the Agreement and the Standard Information Booklet. The TPV Agent also did not give sufficient time for the Customer to read the entire Agreement thoughtfully and without interruption or harassment⁴⁵, as required by Article 15. The Panel also considers that the TPV Agent should have realized that someone in the Customer’s situation (i.e., in the process of selling their house, dealing with serious health and safety concerns, and without access to their email) would not have taken the opportunity to ‘read the entire contract form thoughtfully’. The TPV Agent should reasonably have concluded he could not meet the standard of conduct required by Article 15.

In addition, as set out in Article 15, where a “comprehension issue is likely to impede the Consumer’s ability to fully understand the offer and the transactions”, the TPV Agent should not have completed the TPV. The Customer was obviously under tremendous strain⁴⁶, did not know if they had the Agreement or the Standard Information Booklet and therefore had certainly not reviewed either document⁴⁷, and was under a misapprehension regarding the transferability of the Agreement. All of these facts should reasonably have alerted the TPV Agent that the Customer was unlikely to fully understand the offer and transactions.

Easy Energy agrees that the TPV Agent contravened Article 15 in that he failed to ensure that the Customer clearly and thoroughly understood the information given (subject to the due diligence defence).⁴⁸

Article 33

The Panel finds that Easy Energy breached Article 33 of the Code of Conduct, because the TPV Agent failed to conduct the TPV call clearly in an understandable pace and tone. The Panel accepts Easy Energy’s assertion that the Customer understood the questions that the TPV Agent asked. However, Article 33 is concerned with the pace and tone of the TPV call and not with the Customer’s understanding. According to the evidence, the TPV Agent spoke very rapidly, interrupted or talked over the Customer, did not respond to or ignored what the Customer said and persisted to ask questions. Easy Energy acknowledges that the TPV Agent’s tone should have been more cordial and exhibited some frustration. The Panel accepts that, to some extent, the pace and tone of the call were in response to the Customer’s impatience. In the circumstances of this case, however, the TPV Agent’s rapid speech, his interrupting or talking over the Customer, his failure to respond to or ignoring the Customer, do not constitute having conducted the TPV call in an understandable pace and tone.

⁴⁴ Final Argument, para. 31.

⁴⁵ Final Argument, paras. 33, 34.

⁴⁶ Exhibit B-2, BCUC IR 3.4.

⁴⁷ Exhibit B-2, BCUC IR 1.1.1.

⁴⁸ Final Argument, para. 33.

Finally, the Panel also finds that Easy Energy breached Article 33 of the Code of Conduct, because the TPV Agent failed to end the call after realizing that the Customer had not received copies of or did not have access to the Agreement and the Standard Information Booklet. Easy Energy agrees that this was contrary to the Approved TPV Script, which required the TPV Agent to terminate the call in that event. The Panel notes that Article 33 requires that the TPV must follow standardized scripting as approved by the BCUC. The Panel concurs with Easy Energy that the TPV did not adhere to the Approved TPV Script. After the Customer responded with a negative, the TPV Agent did not follow the “if no” script but instead engaged in a non-scripted dialogue with the Customer that resulted in the Customer saying yes to continue the call.⁴⁹

Due Diligence Defence

The Panel now addresses whether Easy Energy has demonstrated that it exercised due diligence in accordance with section 109.1(4)(a) of the UCA, to prevent these contraventions. Easy Energy references company policies and procedures, training of sales agents and TPV Agents, complaints tracking, quality control for TPV calls, and a low rate of complaints as evidence of measures that demonstrate due diligence.

The Supreme Court of Canada set out the common law defence of due diligence in the seminal case of *R. v. Sault Ste. Marie (City)*. The defence is available in administrative penalty proceedings, for example as codified in section 109.1(4)(a) of the UCA. In *R. v. Sault Ste. Marie (City)*, the Supreme Court of Canada describes strict liability offences and the available defences, in part, as follows:⁵⁰

Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. ...

Failure to abide by the Code of Conduct is a violation of the conditions on Easy Energy’s gas marketer licence, as set out in the Licence Order. This is, in turn, a violation of section 71.1(3) of the UCA, regardless of the intent behind the actions. Once the violation is proven, pursuant to section 109.1(4)(a) of the UCA, the onus shifts to Easy Energy to establish the defence of due diligence on the balance of probabilities. To engage due diligence, Easy Energy must provide evidence showing that it is more likely than not that Easy Energy took all reasonable steps to avoid the violations.

In *R. v. MacMillan Bloedel Ltd.*,⁵¹ the majority of the British Columbia Court of Appeal applied and restated the test for due diligence as set out in *R. v. Sault Ste-Marie (City)*, stating:

[47] Thus, there are two alternative branches of the due-diligence defence. The first applies when the accused can establish that he did not know and could not reasonably have known of the existence of the hazard. The second applies when the accused knew or ought to have known of the hazard. In that case, the accused may escape liability by establishing that he took reasonable care to avoid the "particular event"...

...

⁴⁹ Exhibit B-2, BCUC IR 3.1.1.

⁵⁰ *R. v. Sault Ste. Marie (City)*, p. 1326.

⁵¹ 2002 BCCA 510, paras. 47-48.

[48] The important point to be drawn from this discussion is that whether the accused's conduct was "innocent", under the first branch of the defence, or whether the accused took "all reasonable steps", under the second branch, must be considered in the context of the "particular event."

As noted above, the Panel has found that Easy Energy contravened the Code of Conduct through the actions of the TPV Agent during the course of their employment. The Panel now considers Easy Energy's submission that it meets the requirements of the defence of due diligence.

In order to successfully raise the defence of due diligence, Easy Energy must be able to show that it took all reasonable steps to prevent each of the "particular events" that occurred, including:

1. The erroneous statement, or omission of clarification, by the TPV Agent regarding transferability of the Agreement;
2. The TPV Agent's failure to end the call when the Customer stated that they did not have a copy of the Agreement;
3. The TPV Agent's failure to end the call when the Complainant stated that they did not have a copy of the Standard Information Booklet; and
4. The TPV Agent's failure to conduct the TPV call clearly in an understandable pace and tone.

In the circumstances, for the reasons set out below, the Panel finds that Easy Energy did not take "all reasonable steps" to avoid a potential breach of the Code of Conduct. In the Panel's view, Easy Energy has not demonstrated that it exercised due diligence to prevent the contraventions the Panel has found of section 71.1(3) of the UCA.

Easy Energy has provided evidence regarding measures that it claims demonstrate "proper policies and procedures in place to prevent misrepresentations to customers", and that Easy Energy has taken "reasonable steps to ensure that its policies were implemented and were effective at preventing contraventions of the Code of Conduct".⁵² The Panel has assessed the evidence of these measures in the context of the test outlined above in *R. v Sault Ste. Marie*, namely whether Easy Energy "exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system". The Panel finds that, when considered as a whole, Easy Energy's evidence of these measures fails to demonstrate that Easy Energy took all reasonable steps to prevent misrepresentations to customers or the contraventions of the Code of Conduct that occurred.

Of the various items that Easy Energy relies on as evidence of its due diligence, the Panel particularly questions the effectiveness of Easy Energy's staff training and Easy Energy's quality control.

With respect to staff training, the Panel notes that Easy Energy states it provides training on the Code of Conduct as well as one-on-one training to its TPV agents on how to handle interruptions or end a TPV following a negative response. Easy Energy submits that the Customer was impatient, which led the TPV Agent to proceed more quickly to accommodate the Customer.⁵³ In addition, Easy Energy submits that the question regarding transferability was outside the script and that the TPV Agent was not knowledgeable about transferability.⁵⁴

⁵² Final Argument, para. 48.

⁵³ Final Argument, para. 23.

⁵⁴ Final Argument, para. 16.

Easy Energy does not claim to provide training to its TPV agents on how to handle questions for which the agent does not know the answer. The Panel accepts that it is not reasonable to expect TPV Agents to be prepared for all possible questions customers may ask. Easy Energy should, however, first have trained TPV Agents (including the TPV Agent in this case) regarding how to proceed when faced with questions for which they are not prepared, so that customers are not misled by incorrect responses or lack of proper guidance. Secondly, Easy Energy should have measures in place to monitor the effectiveness of the training provided.

The Panel encourages Easy Energy to ensure that its expectations of its sales agents – both those going door-to-door and those conducting TPV calls – match the training that Easy Energy provides. For example, if Easy Energy expects its TPV Agents to be knowledgeable on questions that a Door Agent might receive from a prospective customer, such as whether an agreement can be transferred to new premises, then TPV Agents should be trained accordingly. Or, if TPV Agents are responsible only for following the questions in the TPV Script, then TPV Agents should be trained on how to handle questions that go beyond the TPV Script.

Easy Energy should also have trained its TPV agents (including the TPV Agent) to listen to the customer's answers to the questions in the TPV Script, without ignoring or talking over the customer. Effective listening is a learned skill that should be a requirement for any customer-facing employee, including TPV agents. The TPV call reflects that the TPV Agent was unprepared to deal with ordinary situations, such as the customer being in a hurry and not having access to the Agreement or the Standard Information Booklet. There were several opportunities to end the call. Some of them were specifically stated on the Approved TPV Script. Yet, the TPV Agent disregarded the Customer's responses and persisted with the TPV Script.

The Panel acknowledges, however, the possibility that Easy Energy's training was adequate, and the TPV Agent simply failed to follow it. That is where quality control becomes important, as we discuss below.

To establish due diligence, Easy Energy also relies on evidence of the quality control measures for its TPV calls⁵⁵. Easy Energy describes the process by which residential TPV calls are reviewed prior to approval in its system.⁵⁶ As of July 23, 2022 (approximately the time of the TPV call in this case), some recordings were reviewed by an overnight support contractor who was instructed to listen to the entire recording and flag it for further review if it did not adhere to the Approved TPV Script. Other recordings, including the TPV recording of the call in this case, were reviewed during normal business hours by an Easy CSR who, due to time constraints, might listen only to answers to the questions pertaining to name and price/term, and not to the entire recording. Easy Energy states that its CSR did review the TPV call in the case at hand, albeit not entirely. In fact, in what seems to the Panel to be an implicit admission of the overall inadequacy of its quality control at the time of the TPV call in this case, Easy Energy states that as a result of this incident, it has implemented changes to the process by which TPV calls are reviewed for quality control, including implementing a requirement that Easy CSRs must take the time to listen to the entirety of each recording when engaged in quality control.⁵⁷

Based on the foregoing, the Panel finds that, at the time of the breaches of the Code of Conduct in this case, Easy Energy had not established a proper system to prevent the breaches, nor had Easy Energy taken reasonable steps to ensure the effective operation of the quality control system it had in place. The evidence on the record shows that Easy Energy's quality control system did not constitute the exercise of "all reasonable care" to avoid breaches of the Code of Conduct since, in at least some cases (including the TPV call at issue), Easy Energy was not completely reviewing TPV calls to ensure compliance.

⁵⁵ Final Argument, para. 45.

⁵⁶ Ibid.

⁵⁷ Final Argument, para. 45; Exhibit A2-1-1, p. 3.