



Telecom Decision CRTC 2010-572

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Ottawa, 12 August 2010

Breathe E-Z Homes Ltd. – Violations of the Unsolicited Telecommunications Rules

File numbers: PDR 9174-101 and PDR 9174-758

In this decision, the Commission imposes an administrative monetary penalty totalling \$2,000 on Breathe E-Z Homes Ltd. for initiating two telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List, in violation of the Unsolicited Telecommunications Rules.

Introduction

1. Between 5 September and 11 November 2009, the Commission received numerous complaints in relation to telemarketing telecommunications made by Breathe E-Z Homes Ltd. (Breathe E-Z).
2. On 7 January 2010, a notice of violation (the notice), along with a copy of the Commission's investigation report, was issued to Breathe E-Z pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed Breathe E-Z that it had made four telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4 of the Commission's Unsolicited Telecommunications Rules (the Rules).¹
3. Breathe E-Z was given until 9 February 2010 to pay the administrative monetary penalty (AMP) set out in the notice or to make representations to the Commission regarding the violations. In response to a request from Breathe E-Z, the Commission later extended this deadline to 3 March 2010.
4. The Commission received representations from legal counsel for Breathe E-Z, dated 3 March 2010.

¹ Part II, section 4 of the Rules provides that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer.

Did Breathe E-Z commit the violations?

5. Breathe E-Z argued that it had not committed any of the violations set out in the notice. The company claimed that all of the calls it made during the period covered by the notice were to persons with whom Breathe E-Z had an existing business relationship and who had not made a do not call request directly to the company, or the calls were exempt because they were made based on the express consent of the persons receiving them.
6. In its representations, Breathe E-Z acknowledged placing calls to consumers whose numbers appeared on purchased, pre-qualified lists based on their consent to receiving telemarketing telecommunications in relation to a free prize (qualified contact lists). Breathe E-Z submitted that it had initiated calls to these consumers as part of its product promotion strategy, in order to offer them delivery of the free prize with a demonstration of one of Breathe E-Z's products (free prize calls).
7. According to Breathe E-Z, the qualified contact lists were purchased solely from SPT Business Process Outsourcing Services (SPT), a company in the business of market surveys, research, and call centre services.² Breathe E-Z claimed that SPT conducted independent market surveys by phone and ended its calls by asking for permission to call the interviewee back in order to offer a free prize. According to Breathe E-Z, SPT then sold Breathe E-Z the lists of consumers who had agreed to the follow-up telecommunications.
8. Breathe E-Z argued that SPT's market survey activities were not carried out on Breathe E-Z's behalf and that Breathe E-Z itself does not make any market survey calls. However, Breathe E-Z acknowledged hiring SPT for the purpose of making certain calls on its behalf, but only to those customers who consented to a follow-up call for prize offerings.
9. In addition, Breathe E-Z challenged two of the affidavits relied upon to establish two of the four violations of the Rules in the notice. Breathe E-Z submitted that there was no evidence in the affidavits that the telemarketing telecommunications were made by or on behalf of Breathe E-Z.
10. Finally, Breathe E-Z argued that should the Commission not find in its favour regarding the above, the company should not be liable for the violations set out in the notice as it had exercised due diligence to prevent any violations of the Rules. As evidence of its due diligence, Breathe E-Z submitted that it had only purchased lists of persons who had consented to the free prize calls and that it had reviewed the script to be used and received assurances that the calls and consents were recorded.

² According to its website, <http://sptbpo.com>, SPT is a company located in the Philippines.

Commission's analysis and determinations

11. The Commission notes that according to the Rules, “telemarketing” means “the use of telecommunications facilities to make unsolicited telecommunications for the purpose of solicitation,” and “solicitation” means “the selling or promoting of a product or service, ... whether directly or indirectly and whether on behalf of another person.”³ The Commission considers that an offer to view a product or a product demonstration constitutes solicitation. Accordingly, the Commission finds that the follow-up calls made by Breathe E-Z to consumers on the qualified contact lists were telemarketing calls.
12. The Commission notes that according to Part II, section 5 of the Rules, “express consent shall clearly evidence the consumer’s authorization that a telemarketing telecommunication made by or on behalf of a specific person may be placed to that consumer ...” However, the consent obtained by SPT during the survey calls did not specifically refer to Breathe E-Z nor to the fact that the free prize would be tied to a product demonstration. Accordingly, the Commission finds that Breathe E-Z has not demonstrated that express consent was obtained from consumers prior to the telemarketing telecommunications.
13. The Commission considers that a defence of due diligence can only be accepted if Breathe E-Z has provided evidence that it took all reasonable care to comply with the Rules. Examples of evidence that a person has exercised due diligence include having routine business practices demonstrating the establishment and implementation of written policies and procedures that comply with the Rules, honouring consumers’ requests not to be contacted by way of telemarketing telecommunications, and monitoring and enforcing compliance with the Rules.⁴
14. The Commission notes that Breathe E-Z’s evidence of due diligence is limited to its purchase of qualified contact lists of consumers who had purportedly provided express consent for the free prize calls. However, given that express consent was not obtained for the free prize calls, there was no consent for the accompanying product demonstration, and the consent did not specifically refer to Breathe E-Z, the Commission considers that Breathe E-Z’s business practices do not demonstrate compliance with the Rules. Accordingly, the Commission finds that Breathe E-Z did not provide sufficient evidence demonstrating due diligence in complying with the Rules.
15. The Commission accepts Breathe E-Z’s representations that, on a balance of probabilities, two of the affidavits relied upon to establish two of the four violations of the Rules in the notice contain insufficient evidence to find that the associated telemarketing telecommunications were made by or on behalf of Breathe E-Z. The

³ Part I of the Rules: Definitions (www.crtc.gc.ca/eng/trules-reglest.htm)

⁴ Based on *Unsolicited Telecommunications Rules framework and the National Do Not Call List*, Telecom Decision CRTC 2007-48, 3 July 2007, as amended by Telecom Decision CRTC 2007-48-1, 19 July 2007

Commission notes that Breathe E-Z was not specifically identified as the caller in either of the affidavits and that the telemarketing telecommunications referred to appear to be related solely to SPT's market survey activities.

16. The Commission concludes that Breathe E-Z initiated two telemarketing telecommunications on its own behalf to telecommunications numbers registered on the National DNCL when it was not registered with the National DNCL operator, and without having subscribed to the National DNCL.

Conclusion

17. In the circumstances of this case, the Commission is imposing an AMP totalling \$2,000, instead of the original amount of \$4,000 set out in the notice. This AMP relates to the remaining two telemarketing telecommunications listed in the notice.
18. The Commission hereby notifies Breathe E-Z of its right to apply to the Commission to review and rescind or vary this decision under section 62 of the Act and to appeal this decision to the Federal Court of Appeal under section 64 of the Act. Any review and vary application under section 62 of the Act must be made within 30 days of the date of this decision and the Commission will place all related documentation on its website. An appeal from this decision may be brought in the Federal Court of Appeal with the leave of that Court. Leave to appeal must be applied for within 30 days of the date of this decision or within such further time as a judge of the Court grants in exceptional circumstances.
19. The amount of \$2,000 is due by **13 September 2010** and is to be paid in accordance with the instructions contained in the notice. For any amount owing that is not paid by **13 September 2010**, interest calculated and compounded monthly at the average bank rate plus three percent will be payable on that amount and will accrue during the period beginning on the due date and ending on the day before the date on which payment is received.
20. If payment of the debt has not been received within 30 days of the date of this decision, the Commission intends to take measures to collect the amount owing, which may include certifying the unpaid amount and registering the certificate with the Federal Court.

Secretary General