



Compliance and Enforcement Decision CRTC 2013-356

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Ottawa, 31 July 2013

MDG Newmarket Inc., operating as Ontario Energy Group – Violations of the Unsolicited Telecommunications Rules

File number: PDR 9174-1311

In this decision, the Commission imposes an administrative monetary penalty of \$54,000 on MDG Newmarket Inc., operating as Ontario Energy Group, for initiating, on its own behalf, telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), and for initiating these telemarketing telecommunications without being a registered subscriber of the National DNCL and having paid all applicable fees to the National DNCL operator, in violation of the Unsolicited Telecommunications Rules.

1. Between 3 March 2011 and 21 September 2012, the Commission received numerous complaints in relation to telemarketing telecommunications initiated by MDG Newmarket Inc., operating as Ontario Energy Group (OEG).¹
2. On 27 November 2012, a Notice of Violation was issued to OEG pursuant to section 72.07 of the *Telecommunications Act* (the Act). The notice informed OEG that it had initiated, on its own behalf,
 - 17 telemarketing telecommunications to consumers whose telecommunications numbers were registered on the National Do Not Call List (DNCL), in violation of Part II, section 4² of the Commission's Unsolicited Telecommunications Rules (the Rules); and
 - 17 telemarketing telecommunications to consumers without being a registered subscriber to the National DNCL and having paid all applicable fees to the National DNCL operator, in violation of Part II, section 6³ of the Rules.
3. The Notice of Violation set out an administrative monetary penalty (AMP) for 34 violations at \$3,000 per violation, for a total amount of \$102,000.

¹ MDG Newmarket Inc., operating as Ontario Energy Group, Mississauga, Ontario, Tel.: 905-287-2503 and 1-800-510-4047. Industry – Energy-related home services.

² Part II, section 4 of the Unsolicited Telecommunications Rules states that a telemarketer shall not initiate a telemarketing telecommunication to a consumer's telecommunications number that is registered on the National DNCL, unless express consent has been provided by such consumer to be contacted via a telemarketing telecommunication by that telemarketer.

³ Part II, section 6 of the Rules states that a telemarketer shall not initiate a telemarketing telecommunication on its own behalf unless it is a registered subscriber of the National DNCL and has paid all applicable fees to the National DNCL operator.

4. OEG was given until 14 January 2013 to pay the AMP set out in the Notice of Violation or to make representations to the Commission regarding the violations.
5. The Commission received representations from OEG dated 14 January 2013.
6. Based on the information contained in the representations, the Commission has identified the following issues to be addressed in this decision:

- I. Did OEG commit the violations?
- II. Is the amount of the AMP reasonable?

I. Did OEG commit the violations?

7. The Commission notes that OEG's calling records for the period of 22 May to 17 July 2012 show that the company made 49,093 telemarketing telecommunications to consumers. Further investigation revealed that
 - 3,828 of these telecommunications were made to consumers whose telecommunications numbers were registered on the National DNCL;
 - 1,618 of those 3,828 telecommunications were made from 5 June to 10 July 2012, when OEG was registered with the National DNCL operator but had let its subscription lapse;
 - from 11 to 16 July 2012, 41 telemarketing telecommunications were made to consumers residing in area codes 705 or 905, while OEG's National DNCL subscription was for the 416 area code only; and
 - although OEG subscribed to the National DNCL for the 416 area code on 11 July 2012, it failed to download the list in a timely manner and made 47 telemarketing telecommunications from 11 to 13 July 2012 to consumers in that area code whose telecommunications numbers were registered on the National DNCL.
8. From the telecommunications made, 17 were chosen for the purpose of the Notice of Violation.
9. In its representations, OEG did not dispute making the telemarketing telecommunications for which the Notice of Violation was issued.
10. The Commission therefore finds, on a balance of probabilities, that OEG committed the violations that were the subject of the Notice of Violation.

II. Is the amount of the AMP reasonable?

11. OEG claimed that the AMP is unreasonable, arguing that it was disproportionately high and punitive in light of
 - a) the nature of the violations,
 - b) the number and frequency of complaints and violations, and
 - c) the relative disincentive of the measure, and the potential for future violations.
12. OEG submitted that the AMP should be reduced to \$1,000 per telemarketing telecommunication.

a) Nature of the violations

13. OEG submitted that the amount of the AMP was disproportionately high considering the nature of the violations. It submitted that
 - the alleged violations are minor and were committed unintentionally,
 - it made efforts to ensure that its subscriptions to the National DNCL were up-to-date and operational,
 - the Commission's finding of two violations per telemarketing telecommunication was unnecessarily duplicative, and
 - this was its first violation.
14. The Commission considers that making unsolicited telemarketing telecommunications to consumers whose numbers are registered on the National DNCL, and doing so while not being subscribed to the National DNCL, are serious violations since they go to the heart of the Rules.
15. The Commission notes that the violations were committed after Commission staff informed OEG of its obligations under the Rules and of the complaints received after the company's subscription had expired. Furthermore, OEG let its subscription lapse and only renewed it after Commission staff reminded the company of its obligation to be subscribed if it intended to continue making unsolicited telemarketing telecommunications. Moreover, after renewing its subscription, OEG waited seven days before downloading the National DNCL, even though it was making telemarketing telecommunications during that time.
16. The Commission notes that initiating a single telemarketing telecommunication may, in some circumstances, result in multiple violations of the Rules. Therefore, proof of the existence of a telemarketing telecommunication may be used to support the finding of more than one violation related to that telecommunication. In the present case, two violations occurred during each of the selected 17 calls.

17. The Commission notes that the fact that OEG is a first-time violator of the Rules was considered in the determination of the amount of the AMP. An AMP of \$3,000 per violation is consistent with AMPs generally imposed on a company of OEG's size for a first-time violation.

b) Number and frequency of complaints and violations

18. OEG submitted that the amount of the AMP was disproportionately high considering the number and frequency of the violations. OEG argued that the 17 telemarketing telecommunications in question represented a relatively small number of telecommunications, and that corporations that had committed a similar number of violations were issued AMPs substantially lower than the one issued against OEG.

19. The Commission notes that the amount of the AMP per violation is not determined based on the number of violations committed but rather on the following factors:

- Is the business incorporated or not?
- If it is incorporated, what is the size of the company?
- Is it a first-time violation?

20. In contrast, the number of violations is taken into consideration when the total amount of the AMP is determined. In addition, the company's behaviour after being informed that complaints have been received and instructed on how to bring itself into compliance is also considered.

21. The Commission notes that, in the present case, 17 telemarketing telecommunications were chosen from the 1,618 telecommunications OEG made to consumers whose numbers were registered on the National DNCL, while the company was not subscribed to the National DNCL.

c) Relative disincentive of the measure and potential for future violations

22. OEG submitted that the amount of the AMP set out in the Notice of Violation went well beyond mere incentive for compliance and was punitive and prejudicial, considering the company's profits in the last two years. OEG argued that the amount of the AMP would significantly prejudice its business and hamper its future growth and ability to maintain its business operations.

23. OEG further submitted that the Commission's characterization of its operations as medium-sized was inconsistent with Industry Canada's guidelines, pursuant to which the company argued that it would be considered a small business. OEG argued that when the totality of its business is taken into consideration, including the number of employees, gross revenues, and actual retained earnings, it should be properly recognized as a small business.

24. OEG also submitted that the per-violation AMP was disproportionately high compared to AMPs imposed on other businesses in similar circumstances. OEG argued that an AMP that is three times the typical or expected penalty per violation was disproportionate, unfair, and punitive. The company submitted that, because the violations only pertain to 17 separate telemarketing telecommunications, the Commission is essentially imposing a \$6,000 penalty per telecommunication, which further highlighted, in its view, the disproportionately high nature of the proposed AMP.
25. The Commission notes that the Notice of Violation set out an AMP of \$3,000 for each of the 34 violations at issue (i.e. two violations for each of the 17 telemarketing telecommunications).
26. The Commission notes that it concluded, in Telecom Decision 2007-48, that the ability to pay is not an appropriate factor to be considered in the determination of the amount of an AMP. Further, the Commission considers that it would not be appropriate to use net revenue to determine the size of OEG's operations. Consistent with the Commission's practice and with Telecom Decision 2007-48, and in fairness to other telemarketers that have been issued AMPs, the Commission considers that gross earnings are the appropriate measure to determine the size of OEG's operations.
27. The Commission also considers that the classification of a business as small, medium, or large is mainly a function of the underlying objectives of the entity establishing the classification. Therefore, the factors that Industry Canada uses to help fund small business and which OEG urged the Commission to adopt in this case, are not necessarily the appropriate factors to use to determine the size of a business's operations for the purpose of promoting regulatory compliance.
28. The Commission considers that the classification it used to determine the size of a business's operations is appropriate for the purpose of assessing the per-violation AMP amount because it is meant to promote regulatory compliance by establishing a per-violation AMP amount that is not merely a cost of doing business.
29. In light of the above, and based on the financial statements provided by OEG, the Commission finds that the company is a medium-sized company for the purposes of determining the appropriate AMP amount.
30. The Commission notes that section 72.01 of the Act states that an AMP of up to \$15,000 per violation can be issued for a company.
31. In light of the above, the Commission considers that an AMP of \$3,000 per violation is reasonable with respect to the size of OEG's operations and considers that such an amount is not punitive.

32. OEG submitted that a lower AMP would provide ample incentive for it to comply with the Rules in the future. The company submitted that it has regularly maintained a subscription to the National DNCL since the Notice of Violation was issued and that it has no intention of committing any further violations.
33. OEG also submitted that the total amount sought in the AMP (\$102,000) is nearly 100 times larger than the \$1,066 that it paid for the three-month subscription to the National DNCL for two area codes. OEG argued that a total AMP of \$17,000 (i.e. \$1,000 per telemarketing telecommunication) would accomplish the goal of encouraging it to maintain a proper National DNCL subscription and enact proper procedures to ensure compliance, because such an amount is still significantly higher than the fees required to maintain subscriptions.
34. The Commission notes that OEG's conduct after the Notice of Violation was issued is not relevant, since the Notice of Violation and the associated AMP pertain to the company's conduct during the investigative period. The Commission considers that a change in behaviour by the company could equally be a result of the issuance of the Notice of Violation.

Determination of the reasonableness of total AMP amount

35. While the Commission, as discussed above, finds that an AMP amount of \$3,000 per violation is reasonable, it is of the view that the total AMP amount of \$102,000 established in the Notice of Violation is unduly high in light of the company's size and conduct. In the Commission's view, a total AMP amount of \$54,000 would be more reasonable. Accordingly, the Commission reduces the number of telemarketing telecommunications for which an AMP of \$3,000 is imposed on OEG from 17 to 9. The Commission further notes that the fact that it is not imposing an AMP with respect to 8 of the 17 telemarketing telecommunications does not mean that the Commission is of the view that OEG did not commit the violations stemming from those telecommunications. Rather, the Commission finds that, in light of the record, it is not appropriate to apply AMP amounts for those particular violations because this would result in a total amount that, as discussed above, would be unduly high.

Conclusion

36. In the circumstances of this case, the Commission considers that a penalty of \$3,000 for each of the nine violations of Part II, section 4 and for each of the nine violations of Part II, section 6 of the Rules is appropriate. The Commission therefore imposes a total AMP of \$54,000 on OEG.
37. The Commission hereby notifies OEG 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 90 days of the date of this decision, and the Commission will place all related documentation on its

⁴ 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.

38. The Commission reminds OEG that, should it continue to initiate telemarketing telecommunications on its own behalf or engage telemarketers for the purpose of solicitation of its products and/or services, it is required to comply with the Rules. Examples of measures that OEG should adopt to ensure compliance with the Rules include, but are not limited to, the following:
- registering with the National DNCL operator;
 - subscribing to the National DNCL;
 - downloading the National DNCL at least once every 31 days prior to the date of a telemarketing telecommunication; and
 - establishing and implementing adequate written policies and procedures to comply with the Rules, which include documenting a process to (a) prevent the initiation of telemarketing telecommunications to any telecommunications number that has been registered for more than 31 days on the National DNCL, and (b) honour consumers' requests that they not be contacted by way of telemarketing telecommunications.
39. The Commission advises OEG that in order to ensure compliance with the Rules, the Commission may impose larger AMPs for subsequent violations.
40. The amount of \$54,000 is due by 30 August 2013 and is to be paid in accordance with the instructions contained in the Notice of Violation. For any amount owing that is not paid by 30 August 2013, 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.
41. If payment 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

⁴ In Telecom Information Bulletin 2011-214, the Commission issued, pursuant to the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure*, revised guidelines for review and vary applications to reflect the modified time limit in which such applications must be made.

Related documents

- *Revised guidelines for review and vary applications*, Telecom Information Bulletin CRTC 2011-214, 25 March 2011
- *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