

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application for)
Waiver of the Restrictions on In-Person) Case No. 20-1040-GE-UNC
Marketing.)

**MOTION TO INTERVENE
AND
COMMENTS FOR CONSUMER PROTECTION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Ohio consumers are facing perilous times – a health crisis and an ensuing personal financial crisis. The harm to Ohioans from these crises will persist for some time, potentially years, after the formal health emergency ends. In Ohio, even before the crisis, residents already were at risk with poverty at 14% of the population and food insecurity at 14.5% of the population, with a number of Ohio cities above 30% poverty. These already dire circumstances are now greatly magnified for people. Unemployment in the country is now considered the worst since the Great Depression.

Energy marketers¹ have requested waivers of important consumer protections adopted by the Public Utilities Commission of Ohio (“PUCO”) during the current coronavirus emergency. OCC sought consumer protections from energy marketing in its

¹ AEP Energy, Inc., Direct Energy Business, LLC, Direct Energy Services, LLC, Energy Harbor LLC, Energy Professionals of Ohio, Interstate Gas Supply, Inc., and Vistra Energy Corp. are certified by the Commission to provide competitive retail electric services (CRES) and/or competitive retail natural gas services (CRNGS) in Ohio pursuant to R.C. 4928.08 and R.C. 4929.20, and are thereby subject to the Commission’s jurisdiction pursuant to R.C. 4928.16 and R.C. 4929.24. The Retail Energy Supply Association is a national group of CRES and CRNGS suppliers. Attorney Examiner Entry (May 19, 2020) at ¶ 1.

filing in the emergency docket.² The marketers seek to resume face to face marketing which the PUCO suspended during the emergency until further notice. The ongoing emergency is both a health emergency and financial crisis. Both of which give the PUCO ample reason for denying the waiver request. No one in Ohio should die or suffer from transmission of the coronavirus so the marketers can sell energy in-person to Ohioans. The marketers can sell energy without in-person contact with Ohioans, as they do.

The Office of the Ohio Consumers' Counsel ("OCC") moves to intervene³ on behalf of residential customers throughout the state who will be put at risk if face to face marketing is resumed, as requested by the energy marketers. Door-to-door sales of energy are inherently problematic for consumers, but now are an unacceptable risk during the public health emergency. The PUCO should continue to suspend door-to-door solicitation of Ohio utility customers by marketers of natural gas and electricity. Additionally, the financial well-being of consumers would be aided by the PUCO continuing its order preventing energy marketers from engaging in face-to-face marketing.⁴ The reasons PUCO should grant OCC's Motion are further set forth in the attached Memorandum in Support.

By Entry of May 19, 2020, the Attorney Examiner set simultaneous dates for filing of motions to intervene and of comments on the marketers' proposals.⁵ Thus, OCC includes both in this filing.

² Comments Recommending the PUCO Immediately Halt Door-To-Door Sales of Electricity and Natural Gas by Energy Marketers, to Prevent Unnecessary Coronavirus Risks to Ohioans by the Office of the Consumers' Counsel (March 16, 2020).

³ See ORC 4903.221; ORC 4911.

⁴ *In re the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC (Emergency Case), Order (March 17, 2020) ("Emergency Order").

⁵ Attorney Examiner Entry, ¶7.

Respectfully submitted,

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/s/ David C. Bergmann

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**MEMORANDUM IN SUPPORT
AND
COMMENTS FOR CONSUMER PROTECTION**

I. MEMORANDUM IN SUPPORT OF INTERVENTION

In response to the coronavirus emergency, the PUCO adopted a number of consumer protections. One of those consumer protections was to immediately suspend all door-to-door and in-store marketing to customers as well as any other sales or solicitation practice that involves in-person contact in this state, for the duration of the emergency.⁶

Now a group of energy marketers⁷ is seeking waiver of the March 17, 2020 Order.⁸ Whether door-to-door or in-store, such marketing puts consumers at increased risk of contracting the coronavirus.⁹ OCC has authority under law¹⁰ to represent the interests of Ohio residential utility customers.

R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of

⁶ Emergency Case, Entry (Mar. 17, 2020) at ¶ 7.

⁷ Retail Energy Supply Association, AEP Energy, Inc., Direct Energy Business, LLC and Direct Energy Services, LLC (“Direct Energy”), Energy Harbor LLC, Energy Professionals of Ohio (“EPO”), Interstate Gas Supply, Inc. (“IGS”), and Vistra Energy Corp. (“Vistra”).

⁸ “Marketers’ Joint Application.”

⁹ On May 8, 2020, Reliant Energy Northeast, LLC and Green Mountain Energy Company (collectively “NRG”) filed for a waiver of the portion of the PUCO Order that protected consumers by prohibiting in-store marketing by utilities.

¹⁰ See ORC Chapter 4911.

Ohio's residential customers may be "adversely affected" by this case, especially if customers are unrepresented in a proceeding where marketers are seeking to remove consumer protections. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the PUCO to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

First, the nature and extent of OCC's interest is representing residential customers where their health and financial well-being are put at risk because they will be targeted with in-person solicitations. This interest is different than that of any other party and especially different than that of the marketers whose advocacy includes promoting their sales and profits.

Second, OCC's advocacy for residential customers will include, among other things, advancing the position that residential customers should be protected from the coronavirus by continuing the PUCO's prohibition on face-to-face marketing during the emergency. OCC's position is therefore directly related to the merits of this case, which is pending before the PUCO, the authority with regulatory control of utility marketing in Ohio.

Third, OCC's intervention will not unduly prolong or delay the proceedings. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC's intervention will significantly contribute to full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Administrative Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the advocate for residential utility customers, OCC has a very real and substantial interest in this case where marketing will increase customers' risk of contracting the coronavirus.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B), which OCC already has addressed and which OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the PUCO shall consider "[t]he extent to which the person's interest is represented by existing parties." While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion in that it uniquely has been designated as the state representative of the interests of Ohio's residential utility

customers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio (“Court”) confirmed OCC’s right to intervene in PUCO proceedings, in deciding two appeals in which OCC claimed the PUCO erred by denying its interventions. The Court found that the PUCO abused its discretion in denying OCC’s interventions and that OCC should have been granted intervention in both proceedings.¹¹

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of Ohio residential customers, the PUCO should grant OCC’s Motion to Intervene.

II. COMMENTS FOR CONSUMER PROTECTION: THE PUCO SHOULD DENY THE ENERGY MARKETERS’ REQUESTS FOR A WAIVER OF THE PUCO’S SUSPENSION OF IN-PERSON MARKETING.

Governor DeWine issued his stay-at-home order in response to the coronavirus emergency on March 9, 2020.¹² The PUCO thereafter issued a series of Orders protecting customers during the state-declared emergency. One of those decisions was the March 17, 2020 Order that required, among other things, an immediate suspension of all door-to-door and in-store marketing to customers as well as any other sales or solicitation practice that involves in-person contact in this state, for the duration of the emergency unless otherwise ordered by the PUCO.

¹¹ See *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶13-20.

¹² <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/news-releases-news-you-can-use/gov-dewine-signs-emergency-order-regarding-coronavirus-response>

The marketers claim that things have changed.¹³ Things *have* changed since the PUCO adopted the consumer protections in the March 17 Order. Primarily, the Governor and the Ohio Department of Health have set in place policies for reopening the economy.¹⁴ But those changes do not justify granting the waivers that the marketers request.

The PUCO's March 20, 2020 Order required all utilities to cease marketing "non-essential" services during the emergency. To protect consumers, the PUCO should require the marketers to show that they should be able to do what other utilities are not allowed to do.

A. The energy marketers' waiver request should be denied because the health crisis continues to adversely impact Ohioans and allowing in-person marketing is not conducive to subduing the crisis.

Under the PUCO's rules, personal direct contact with customers cannot be avoided with direct solicitation marketing. The PUCO rules define direct solicitation as "face-to-face solicitation of a customer initiated by a certified electric services company at a place other than the normal place of business of the provider."¹⁵

In addition to the face-to-face contact with customers, direct solicitations involve the exchange of written materials such as marketing information, sales contracts, pens and other instruments to sign contracts, and third-party verification forms. Direct solicitations can also involve customers' interacting with a marketer's electronic media such as kiosks at malls, laptops, keyboards, and cellular phones. These all pose the risk of exposing customers **and** the marketing personnel who are engaged in the solicitation

¹³ Marketers' Application at 4.

¹⁴ See <https://coronavirus.ohio.gov/static/publicorders/Directors-Stay-Safe-Ohio-Order.pdf>.

¹⁵ OAC 4901:1-21-01(N).

to health risks. No one in Ohio should die or suffer from transmission of the coronavirus so the marketers can sell energy in-person to Ohioans. The marketers can sell energy without in-person contact with Ohioans, as they do now.

In many other retail establishments, qualified health officials are responsible and are assigned for physically verifying that health protections and rules are actually being complied with. This is not the case for the marketers' Application, where there is no practical method for health officials (or even the PUCO) to physically verify in customer homes and front porches; or malls and grocery stores where sales agents are "hanging around," that public health is not being placed at risk.

With schools closed and businesses working out how to safely reopen – protecting customers and employees, there will still be more Ohioans at home and subject to what are now health risks of door-to-door sales. Responsible marketers would already be suspending their door-to-door sales. But, as is clear from several recent mismarketing cases, the PUCO cannot allow the marketing industry to self-regulate.¹⁶

Unlike other retail establishments, the marketers have many other ways to reach consumers that do not require face-to-face contact. Customers routinely receive marketer offers through the mail. Marketer offers can also be communicated to the public via public broadcasts. In addition, marketers have inbound and outbound telemarketing capabilities (unless the customer has enrolled in the Do Not Call list) that are available to enroll customers in energy choice. Government aggregation can result in customers

¹⁶ See, e.g., *In the Matter of the Commission's Investigation into PALMco Power OH LLC*, Case No. 19-957-GE-COI; *In the Matter of the Commission's Investigation into PALMco Power OH, LLC*, Case No. 19-2153-GE-COI; *In the Matter of the Commission's Investigation into Verde Energy USA Ohio LLC.*, Case No. 19-958-GE-COI; *In the Matter of the Motion to Modify the Exemption Granted to the East Ohio Gas Company*, Case No. 18-1419-GA-EXM.

enrolling in energy choice without the need for face to face contact. Therefore, there are more than sufficient ways for customers to participate in energy choice without involving the risky marketing methods proposed in the Application.

B. The financial fallout from the pandemic has been very difficult for many Ohioans, and now is not the time to allow energy marketers access to consumers.

According to the marketers, their proposals will benefit the economy.¹⁷ They do not even bother to assert that customers will benefit from face-to-face contact with a marketer at a mall or on their front porch. The increase in consumer risk is hardly outweighed by any alleged marginal benefit to the economy.

For consumers' personal finances, choosing a natural gas marketer's offer can be a *detriment*. A substantial majority of natural gas marketer offers available to consumers on the Energy Choice Ohio webpage are higher than the rates that natural gas customers pay (or could pay) for their utility's competitive standard choice offer. Recent data from Columbia Gas's shadow-billing shows that its customers have paid an incredible and terrible \$1.8 billion more than they would have paid under Columbia's offer.¹⁸

The pandemic has brought even more financial harm to hundreds of thousands of Ohioans who have lost wages through layoffs and furloughs.¹⁹ Many of these Ohioans are unable to pay their utility bills now and could eventually face being disconnected. Especially with regard to natural gas consumers, the result of paying more for gas than the utility's standard offer simply drives up utility bills. Such marketing is not needed

¹⁷ Marketers Application at 1, 8.

¹⁸ See Columbia Shadow Billing Report attached hereto as Exhibit A (Data through March 2020).

¹⁹ In April 2020, an unprecedented 16.8% unemployment level was reported.
<https://www.cincinnati.com/story/news/2020/05/22/ohio-unemployment-rate-april-kentucky-indiana/5242749002/>

now, when because of the medical **and financial** crises, vulnerable consumers are especially at risk.²⁰

III. CONCLUSION

OCC's motion to intervene should be granted. For the protection of consumers, the marketers' request for a waiver of the protections against face-to-face marketing should be denied.

Respectfully submitted,

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²⁰ See <https://spotlightonpoverty.org/spotlight-exclusives/low-income-communities-are-most-at-risk-from-coronavirus-outbreak/>. The impact of COVID-19 also falls heavily on communities of color. See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Intervene and Comments were served on the persons stated below via electronic transmission, this 26th day of May 2020.

/s/ David C. Bergmann

David C. Bergmann

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Month	Res. Savings CAB	Com. Savings CAB	Ind. Savings CAB	Com. Savings GAS	Ind. Savings GAS	Total Monthly Choice Savings	Monthly PIPP Savings	Monthly Savings Including PIPP	Cumulative PIPP Savings	Cumulative Savings (Incl PIPP)	Cumulative Savings (Excl PIPP)
Jan-17	-\$8,602,412	-\$1,932,895	-\$23,094	-\$197,580	\$16,657	-\$10,739,324	\$0	-\$10,739,324	\$23,412,227	-\$1,421,409,259	-\$1,444,821,488
Feb-17	-\$10,479,905	-\$3,212,465	-\$45,344	-\$189,553	\$20,621	-\$13,906,646	\$0	-\$13,906,646	\$23,412,227	-\$1,435,315,906	-\$1,458,728,134
Mar-17	-\$12,403,111	-\$3,981,768	-\$66,462	-\$14,808	\$13,044	-\$16,453,105	\$0	-16,453,105	\$23,412,227	-\$1,451,769,011	-\$1,475,181,239
Apr-17	-\$7,152,840	-\$2,079,943	-\$33,637	-\$44,992	\$20,985	-\$9,290,427	\$0	-9,290,427	\$23,412,227	-\$1,461,059,438	-\$1,484,471,666
May-17	-\$4,249,551	-\$1,084,496	-\$16,756	-\$19,605	\$51,743	-\$5,318,664	\$0	-5,318,664	\$23,412,227	-\$1,466,378,103	-\$1,489,790,331
Jun-17	-\$2,846,544	-\$749,126	-\$12,220	-\$29,457	\$67,299	-\$3,570,047	\$0	-3,570,047	\$23,412,227	-\$1,469,948,150	-\$1,493,360,378
Jul-17	-\$2,432,674	-\$673,504	-\$11,964	\$17,247	\$53,984	-\$3,046,912	\$0	-3,046,912	\$23,412,227	-\$1,472,995,062	-\$1,496,407,290
Aug-17	-\$2,371,761	-\$675,104	-\$12,487	\$2,572	\$16	-\$3,056,763	\$0	-3,056,763	\$23,412,227	-\$1,476,051,825	-\$1,499,464,053
Sep-17	-\$2,539,390	-\$714,249	-\$12,382	\$5,325	\$60,276	-\$3,200,419	\$0	-3,200,419	\$23,412,227	-\$1,479,252,244	-\$1,502,664,472
Oct-17	-\$2,648,172	-\$744,642	-\$15,885	\$22,212	\$43,730	-\$3,342,756	\$0	-3,342,756	\$23,412,227	-\$1,482,595,000	-\$1,506,007,228
Nov-17	-\$7,587,488	-\$1,966,136	-\$50,909	\$30,457	\$50,781	-\$9,523,295	\$0	-9,523,295	\$23,412,227	-\$1,492,118,295	-\$1,515,530,523
Dec-17	-\$12,595,841	-\$3,405,446	-\$73,570	-\$42,110	\$70,159	-\$16,046,808	\$0	-16,046,808	\$23,412,227	-\$1,508,165,103	-\$1,531,577,331
Jan-18	-\$22,918,445	-\$6,713,323	-\$115,325	\$16,576	\$56,107	-\$29,674,409	\$0	-29,674,409	\$23,412,227	-\$1,537,839,513	-\$1,561,251,741
Feb-18	-\$11,398,416	-\$2,573,054	-\$37,638	\$32,141	\$35,553	-\$13,941,414	\$0	-\$13,941,414	\$23,412,227	-\$1,551,780,927	-\$1,575,193,155
Mar-18	-\$13,701,257	-\$4,102,488	-\$71,874	\$97,706	\$23,532	-\$17,754,381	\$0	-\$17,754,381	\$23,412,227	-\$1,569,535,308	-\$1,592,947,536
Apr-18	-\$14,252,376	-\$4,362,801	-\$80,331	\$48,637	\$20,711	-\$18,626,161	\$0	-\$18,626,161	\$23,412,227	-\$1,588,161,468	-\$1,611,573,696
May-18	-\$6,279,749	-\$1,859,047	-\$35,776	\$20,324	\$15,933	-\$8,138,314	\$0	-\$8,138,314	\$23,412,227	-\$1,596,299,783	-\$1,619,712,011
Jun-18	-\$2,785,837	-\$866,876	-\$13,609	\$15,332	\$43,914	-\$3,607,076	\$0	-\$3,607,076	\$23,412,227	-\$1,599,906,859	-\$1,623,319,087
Jul-18	-\$2,391,788	-\$728,416	-\$12,355	\$17,243	\$71,279	-\$3,044,037	\$0	-\$3,044,037	\$23,412,227	-\$1,602,950,896	-\$1,626,363,124
Aug-18	-\$2,370,543	-\$763,545	-\$11,058	-\$8,968	\$73,229	-\$3,080,885	\$0	-\$3,080,885	\$23,412,227	-\$1,606,031,780	-\$1,629,444,009
Sep-18	-\$2,377,345	-\$747,286	-\$11,546	\$8,187	\$48,877	-\$3,079,113	\$0	-\$3,079,113	\$23,412,227	-\$1,609,110,894	-\$1,632,523,122
Oct-18	-\$3,048,855	-\$877,058	-\$21,557	-\$8,173	\$41,244	-\$3,914,399	\$0	-\$3,914,399	\$23,412,227	-\$1,613,025,293	-\$1,636,437,521
Nov-18	-\$8,245,795	-\$2,195,153	-\$46,857	\$49,759	\$57,367	-\$10,380,680	\$0	-\$10,380,680	\$23,412,227	-\$1,623,405,972	-\$1,646,818,201
Dec-18	-\$7,107,855	-\$486,892	-\$11,127	-\$131,642	\$36,444	-\$7,701,071	\$0	-\$7,701,071	\$23,412,227	-\$1,631,107,044	-\$1,654,519,272
Jan-19	-\$14,432,062	-\$4,330,882	-\$90,482	-\$9,463	-\$117,386	-\$18,980,275	\$0	-\$18,980,275	\$23,412,227	-\$1,650,087,319	-\$1,673,499,547
Feb-19	-\$20,526,817	-\$6,533,568	-\$128,396	\$24,773	\$23,583	-\$27,140,424	\$0	-\$27,140,424	\$23,412,227	-\$1,636,251,318	-\$1,659,663,546
Mar-19	-\$17,106,315	-\$5,386,552	-\$109,858	-\$51,686	-\$1,770	-\$22,656,180	\$0	-\$22,656,180	\$23,412,227	-\$1,658,907,497	-\$1,682,319,726
Apr-19	-\$11,367,867	-\$3,623,774	-\$74,339	\$49,716	\$10,455	-\$15,005,809	\$0	-\$15,005,809	\$23,412,227	-\$1,673,913,306	-\$1,697,325,534
May-19	-\$6,410,621	-\$1,840,759	-\$28,594	\$17,288	\$30,188	-\$8,232,499	\$0	-\$8,232,499	\$23,412,227	-\$1,682,145,805	-\$1,705,558,033
Jun-19	-\$3,592,368	-\$1,200,432	-\$15,590	-\$6,574	\$26,184	-\$4,788,780	\$0	-\$4,788,780	\$23,412,227	-\$1,686,934,584	-\$1,710,346,813
Jul-19	-\$2,998,675	-\$1,087,420	-\$14,994	\$18,709	\$39,386	-\$4,042,994	\$0	-\$4,042,994	\$23,412,227	-\$1,690,977,578	-\$1,714,389,806
Aug-19	-\$2,813,061	-\$1,067,297	-\$15,342	\$18,693	\$40,760	-\$3,836,246	\$0	-\$3,836,246	\$23,412,227	-\$1,694,813,825	-\$1,718,226,053
Sep-19	-\$2,859,421	-\$1,071,283	-\$14,214	\$25,450	\$46,097	-\$3,873,371	\$0	-\$3,873,371	\$23,412,227	-\$1,698,687,196	-\$1,722,099,424
Oct-19	-\$3,348,874	-\$1,102,361	-\$19,762	\$2,084	\$44,122	-\$4,424,791	\$0	-\$4,424,791	\$23,412,227	-\$1,703,111,987	-\$1,726,524,215
Nov-19	-\$8,645,982	-\$2,655,864	-\$57,042	\$107,477	\$56,498	-\$11,194,913	\$0	-\$11,194,913	\$23,412,227	-\$1,714,306,900	-\$1,737,719,128
Dec-19	-\$16,457,094	-\$5,480,208	-\$131,140	\$96,260	\$42,802	-\$21,929,380	\$0	-\$21,929,380	\$23,412,227	-\$1,736,236,280	-\$1,759,648,508
Jan-20	-\$18,659,395	-\$6,818,494	-\$157,018	\$112,697	\$23,420	-\$25,498,789	\$0	-\$25,498,789	\$23,412,227	-\$1,761,735,069	-\$1,785,147,297
Feb-20	-\$20,153,919	-\$7,318,893	-\$164,857	\$119,648	\$8,427	-\$27,509,594	\$0	-\$27,509,594	\$23,412,227	-\$1,789,244,663	-\$1,812,656,891
Mar-20	-\$18,103,090	-\$6,385,425	-\$141,270	\$82,100	\$4,253	-\$24,543,434	\$0	-\$24,543,434	\$23,412,227	-\$1,813,788,097	-\$1,837,200,325

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Case No(s). 20-1040-GE-UNC

Summary: Motion Motion to Intervene and Comments for Consumer Protection by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of David C. Bergmann