

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter Of The Commission's	)	Case Nos:
Review Of Ohio Adm.Code Chapters	)	17-1843-EL-ORD
4901:1-21, 4901:1-23, 4901:1-24,	)	17-1844-EL-ORD
4901:1-27, 4901:1-28, 4901:1-29,	)	17-1862-EL-ORD
4901:1-30,4901:1-31, 4901:1-32,	)	17-1845-GA-ORD
4901:1-33, And4901:1-34 Regarding	)	17-1846-GA-ORD
Rules Governing Competitive Retail	)	17-1847-GA-ORD
Electric Service And Competitive	)	17-1848-GA-ORD
Retail Natural Gas Service.	)	17-1849-GA-ORD
	)	17-1850-GA-ORD
	)	17-1851-GA-ORD
)	17-1852-GA-ORD

**APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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March 22, 2024

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On February 21, 2024, the PUCO issued an Order adopting limited amendments to its rules governing the certification and practices of retail electric and natural gas marketers that provide energy services to Ohio consumers.¹ The PUCO’s Order fails to address major gaps in the PUCO’s rules that make residential utility consumers vulnerable to abuse by marketers when they solicit and enroll consumers in service. The Order also harms consumers by allowing some marketers to continue avoiding important third-party verification consent rules that protect consumers from unauthorized marketer enrollments (*i.e.* slamming). The PUCO’s decision not to review these consumer protection issues in this rulemaking was unreasonable and rehearing should be granted.

¹ *In the Matter of the Commission’s Review of Ohio Administrative Code Chapters 4901:1-10, 4901:1-21, 4901:1-23, 4901:1-24, 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30,4901:1-31, 4901:1-32, 4901:1-33, And4901:1-34 Regarding Rules Governing Competitive Retail Electric Service and Competitive Retail Natural Gas Service*, Case Nos. 17-1843-EL-ORD et. al., Finding and Order (February 21, 2024) (“Order”).

Consumer protections are needed sooner rather than later to stop energy marketers from exploiting and deceiving consumers and to address what seem to be never-ending complaints by consumers about marketers' bad acts. Indeed, the Office of the Ohio Consumers' Counsel ("OCC") regularly advocates for Ohio's residential utility consumers in PUCO proceedings involving alleged unfair and deceptive practices by marketers.² The PUCO should work without delay to adopt rules to protect consumers from unscrupulous marketers.

Under R.C. 4903.10, OCC applies for rehearing of the PUCO's February 21, 2024 Order. The PUCO should grant rehearing for the following reasons:

ASSIGNMENT OF ERROR 1: The PUCO erred when it refused to consider proposals to protect Ohio's residential utility consumers from marketers' misleading and deceptive solicitation and enrollment practices. The PUCO's decision to put off consideration of these issues until an unknown later time was unreasonable and harms consumers who are subjected to marketer abuse.

ASSIGNMENT OF ERROR 2: The PUCO erred when it indefinitely extended marketers' waivers from the PUCO's rules regarding consumer consent and third-party verification of enrollments. The PUCO's decision to continue the marketer waivers increases the risk of unauthorized enrollments (slamming).

ASSIGNMENT OF ERROR 3: The PUCO erred when it ruled that the credit reports filed by marketers when applying for certificates to serve Ohioans should automatically be treated as confidential. Credit reports and

² See e.g. *In the Matter of the Commission's Investigation into RPA Energy Inc.'s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI; *In the Matter of Inspire Energy Holdings, LLC*, Case No. 23-720-EL-UNC; *In the Matter of Direct Energy Services, LLC*, Case No. 22-583-GE-UNC; *In the Matter of the Commission's Investigation into XOOM Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI; *In the Matter of the Commission's Investigation of PALMco Power OH, LLC, d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-957-GE-COI; *In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI; *In the Matter of the Commission's Investigation of PALMco Power OH, LLC, d/b/a Indra Energy and PALMco Energy OH, LLC, d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI; and *In the Matter of the Commission's Investigation into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 20-1216-GE-COI.

credit ratings that are otherwise in the public domain should not be automatically treated as confidential.

The reasons in support of this Application for Rehearing are set forth in the accompanying memorandum in support. The PUCO should grant rehearing and modify its Order.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This proceeding concerns the PUCO's five-year review of its rules governing retail electric and natural gas marketers.³ Among other things, these rules address certification requirements for marketers and important consumer protection rules regarding marketing, solicitation, enrollment, and consent. Changes to the PUCO's marketer rules are long overdue to address the misleading and deceptive acts and practices of bad actor marketers when soliciting and enrolling consumers.

This five-year rules review was initiated over six years ago.⁴ Since that time, OCC has advocated for Ohio's residential consumers in numerous proceedings where the

³ Order, at ¶ 2.

⁴ *In the Matter of the Commission's Review of Ohio Adm. Code Chapters 4901:1-10, 4901:1-21, 4901:1-23, 4901:1-24, 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30,4901:1-31, 4901:1-32, 4901:1-33, And 4901:1-34 Regarding Rules Governing Competitive Retail Electric Service and Competitive Retail Natural Gas Service*, Case Nos. 17-1843-EL-ORD et. al., Entry (Sept. 1, 2017).

PUCO Staff has alleged unfair and deceptive practices by marketers.⁵ ***Change is needed now.***

On September 8, 2021, the PUCO issued an Entry requesting comments from interested stakeholders on the PUCO Staff's proposed amendments to the marketer rules. The PUCO Staff's proposed amendments were minor and for the most part did not adversely impact residential utility consumers. But there were glaring omissions in consumer protection in the PUCO Staff's proposals. In comments and reply comments, OCC proposed detailed rule amendments to address and protect consumers from marketer abuse, which were ignored.

The PUCO should grant rehearing to modify its order to protect consumers consistent with OCC's recommendations.

⁵ See e.g. *In the Matter of the Commission's Investigation into RPA Energy Inc.'s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI; *In the Matter of Inspire Energy Holdings, LLC*, Case No. 23-720-EL-UNC; *In the Matter of Direct Energy Services, LLC*, Case No. 22-583-GE-UNC; *In the Matter of the Commission's Investigation into XOOM Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI; *In the Matter of the Commission's Investigation of PALMco Power OH, LLC, d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-957-GE-COI; *In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI; *In the Matter of the Commission's Investigation of PALMco Power OH, LLC, d/b/a Indra Energy and PALMco Energy OH, LLC, d/b/a Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI; and *In the Matter of the Commission's Investigation into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 20-1216-GE-COI.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The PUCO erred when it refused to consider proposals to protect Ohio's residential utility consumers from marketers' misleading and deceptive solicitation and enrollment practices. The PUCO's decision to put off consideration of these issues until an unknown later time was unreasonable and harms consumers who are subjected to marketer abuse.

As the PUCO acknowledges, it is required by R.C. 111.15(B) and R.C. 106.03(A) to review its rules every five years.⁶ This rulemaking proceeding was initiated on September 1, 2017.⁷ On September 8, 2021, the PUCO issued its Staff's proposed amendments to the marketer rules and directed interested stakeholders to file comments and reply comments on October 8, 2021 and October 22, 2021 respectively. To advocate for residential utility consumers who are subjected to marketer solicitations, OCC filed detailed comments and reply comments in accordance with the PUCO's schedule. Other interested entities, including distribution utilities, marketers, and industrial consumers also filed comments.

As OCC explained in comments and reply comments, consumer protection issues concern: 1) the marketers' interactions with consumers, 2) the marketing, solicitation, or sale of energy services, and 3) the administration of contracts between marketers and Ohio consumers. The PUCO's rules regarding certification of energy marketers also should ensure that those marketers serving Ohioans have the managerial, technical, and financial capabilities to provide safe and reliable service and to comply with the PUCO's rules.⁸

⁶ Order ¶ 2.

⁷ PUCO Entry, Sept. 1, 2017.

⁸ R.C. 4928.08(B), R.C. 4929.20(A).

On February 21, 2024, the PUCO finally issued its Order, approving limited amendments to the marketer rules. The PUCO “decline[d] to address substantive changes falling outside of that established scope or comments that did not address Staff’s proposed revisions.”⁹ Instead, the PUCO indicated that it “will initiate a more comprehensive and thorough review” “in a subsequent rulemaking” to address the substantive issues raised by OCC and other commenters.¹⁰ The PUCO did not state when the new rulemaking will occur, so resolution of the important consumer issues could take years.

The PUCO should have addressed the lack of consumer protections in the marketer rules to prevent marketers from engaging in unfair, misleading, deceptive, and unconscionable acts or practices. The PUCO has had ample time since this proceeding was initiated to do so. Further delaying the consideration of consumer protections, especially in light of the numerous investigations by the PUCO Staff into misleading and deceptive practices by marketers, harms residential consumers and the competitive market in Ohio. The PUCO’s order is unreasonable, and the PUCO should grant rehearing.

ASSIGNMENT OF ERROR 2: The PUCO erred when it indefinitely extended marketers’ waivers from the PUCO’s rules regarding consumer consent and third-party verification of enrollments. The PUCO’s decision to continue the marketer waivers increases the risk of unauthorized enrollments (slamming).

In the Order, the PUCO notes that it has previously granted some marketers waivers from the PUCO’s rules regarding “certain customer enrollment and consent

⁹ Order ¶ 17.

¹⁰ *Id.*

provisions regarding third-party verification.”¹¹ However, because the PUCO’s Order did not substantively address the third-party verification and enrollment rules (as it should have), the PUCO’s Order allows marketers to continue avoiding these rules until the PUCO “issues an order substantively addressing the TPV and/or enrollment requirements in the next five-year rule review for O.A.C. Chapters 4901:1-21 and 4901:1-29 . . .”¹² The PUCO’s Order is unreasonable and rehearing should be granted.

The purpose of these waivers is to allow marketers to complete customer enrollments and third-party verifications through texts or online digital “chats” rather than telephonic third-party verifications with a live person. While the ability to complete customer enrollments and verifications electronically may seem harmless, the existing PUCO rules are vital to help protect consumers from slamming. “Slamming” is when marketers illegally switch a consumer’s marketer without proper consent. Slamming is a real problem.¹³ Requiring audio recordings of verbal third-party verifications assist the PUCO Staff in investigating complaints of marketer wrongdoing. In recent PUCO investigations of marketers, the PUCO Staff found that marketer sales agents forged electronic signatures and impersonated consumers through the third-party verification process.¹⁴

¹¹ Order, at ¶ 19.

¹² *Id.*

¹³ See e.g. *In the Matter of the Investigation of RPA Energy, Inc. d/b/a Green Choice Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI; and *In the Matter of the Commission’s Investigation of XOOM Energy Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI.

¹⁴ See *In the Matter of the Investigation of RPA Energy, Inc. d/b/a Green Choice Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI, PUCO Staff Report of Investigation (July 21, 2022), Direct Testimony of Nedra Ramsey (September 30, 2022) at 12-13; and *In the Matter of the Commission’s Investigation of XOOM Energy Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI, PUCO Staff Report of Investigation (June 6, 2022).

Moreover, some marketers that have received or have requested such waivers have, according to the PUCO Staff, allegedly engaged in misleading and deceptive marketing practices.¹⁵ Thus, indefinitely extending marketers' waivers from the PUCO's consumer protection rules until the next PUCO rulemaking is unfair to consumers. The PUCO should not reward bad actor marketers by allowing them to avoid the rules. Consumers need protection from unscrupulous marketers, and the PUCO should err on the side of protecting consumers while it considers new rules to address the issue. After all, consumers have no ability to obtain a waiver from a marketer's misleading and deceptive practices.

The PUCO should put consumers first by eliminating the marketer waivers until the PUCO issues and order substantively addressing the rules. The PUCO should grant rehearing and modify the Order.

ASSIGNMENT OF ERROR 3: The PUCO erred when it ruled that the credit reports filed by marketers when applying for certificates to serve Ohioans should automatically be treated as confidential. Credit reports and credit ratings that are otherwise in the public domain should not be automatically treated as confidential.

The PUCO's Order adopts rules that allow marketers to file credit reports and credit ratings under seal.¹⁶ But there is no basis for a blanket rule to automatically treat such information as confidential and withhold it from the public. The PUCO should grant rehearing to modify the Order.

¹⁵ See e.g. *In the Matter of Direct Energy Services, LLC*, Case No. 22-583-GE-UNC; *In the Matter of the Application of RPA Energy, Inc. for Waivers of Certain Provisions of Ohio Adm. Code Chapters 4901:1-21 and 4901:1-29, to Permit Third-Party Verification by Digital Confirmation*, Case No. 21-157-GE-WVR; and *In the Matter of the Application of Inspire Energy Holdings, LLC for Waivers of Certain Provisions of Ohio Adm. Code Chapters 4901:1-21 and 4901:1-29, to Permit Third-Party Verification by Digital Confirmation*, Case No. 22-29-GE-WVR.

¹⁶ Order, at Attachment C, p. 7 of 16.

The burden should remain on the marketer to demonstrate that its credit rating and credit report should be protected from the public, instead of receiving automatic confidential treatment. As the PUCO has recognized, R.C. 4905.07 provides that all facts and information in the possession of the PUCO shall be made public, except as provided in R.C. 149.43.¹⁷

An entity claiming confidentiality bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy.¹⁸ Therefore, where information is publicly available, it should not be automatically entitled to confidential status.¹⁹ The PUCO itself has stated “the Commission and, by extension its attorney examiners retain the right to reconsider the confidential status of information... when it becomes apparent that the information no longer satisfies the criteria for protective treatment, including occasions in which it is later determined that information is available in the public domain.”²⁰

Credit ratings typically are not confidential. And some business credit reports can be obtained through sources such as Dun & Bradstreet, Equifax, and Experian.²¹ Thus, a marketer’s credit rating and report should not be automatically withheld from

¹⁷ *In The Matter Of The OVEC Generation Purchase Rider Audits Required By R.C. 4928.148 For Duke Energy Ohio, Inc., The Dayton Power And Light Company D/B/A AES Ohio, And Ohio Power Company D/B/A AEP Ohio*, Case No. 21-477-EL-RDR, Entry (January 24, 2024) (“OVEC Entry”) at ¶ 21, citing *State ex rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000).

¹⁸ *Id.*

¹⁹ See *Id.* at 402.

²⁰ OVEC Entry at ¶ 26 (emphasis added).

²¹ See <https://www.dnb.com/products/small-business/compare-products-other-business.html>, <https://www.equifax.com/business/product/business-credit-reports>, and <https://smallbusiness.experian.com/main.aspx>.

the public. The burden should be on the marketer to demonstrate that this information is worthy of confidential treatment. The PUCO's Order is unreasonable and rehearing should be granted to reject this rule amendment.

III. CONCLUSION

For the reasons explained above, and to protect consumers, the PUCO should grant rehearing to modify the order consistent with OCC's recommendations.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Angela D. O'Brien
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been served electronically upon those persons listed below this 22nd day of March 2024.

/s/ Angela D. O'Brien

Angela D. O'Brien

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Summary: Application Application for Rehearing by Office of the Ohio Consumers' Counsel electronically filed by Denise Walters on behalf of Angela O'Brien.