**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Commission’s Investigation of RPA Energy, Inc.’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance. | )  )  )  )  ) | Case No. 22-441-GE-COI |

**MEMORANDUM CONTRA GREEN CHOICE’S**

**MOTION TO STAY ENFORCEMENT OF THE PUCO’S ORDER**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

1. **INTRODUCTION**

Energy marketer Green Choice[[1]](#footnote-2) misled and deceived Ohioans when soliciting and enrolling them in natural gas and electric service.[[2]](#footnote-3) A recent PUCO order put an end to Green Choice’s abuse of consumers by revoking Green Choice’s certificates to market natural gas and electric service in Ohio.[[3]](#footnote-4) The PUCO also ordered Green Choice to re-rate consumers and to pay $1 million (toward a total $1.44 million) forfeiture.[[4]](#footnote-5) Under R.C. 4903.15, the PUCO’s Order should be enforced without delay.

Green Choice filed a Motion to Stay the enforcement of the PUCO’s Order.[[5]](#footnote-6) The Motion to Stay should be denied. The PUCO correctly determined that making consumers harmed by Green Choice “whole is of paramount importance.”[[6]](#footnote-7) ***Ohio consumers victimized by Green Choice deserve justice*** ***now***.

1. **ARGUMENT**

There is no basis for staying the PUCO’s Order. R.C. 4903.15 provides that “[u]less a different time is specified therein or by law, every order made by the [PUCO] ***shall become effective immediately*** upon entry thereof upon the journal of the [PUCO].”[[7]](#footnote-8) Under R.C. 4903.10, an application for rehearing of a PUCO order typically will not “operate to stay or postpone the enforcement thereof, without a special order of the [PUCO].” Green Choice acknowledges Ohio law but argues that a “special order” by the PUCO staying enforcement of the Order is warranted. Green Choice is wrong.

When considering whether to grant a motion to stay enforcement of an order, the PUCO will consider four factors: (1) whether there has been a strong showing that the party seeking the stay is likely to prevail on the merits; (2) whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; (3) whether the stay would cause substantial harm to other parties; and (4) where lies the public interest. [[8]](#footnote-9) Green Choice’s Motion to Stay fails all four factors. There is also no good cause for delaying enforcement of the Order. Green Choice’s Motion to Stay should be denied.

## Green Choice admits that it is unlikely to succeed on the merits if it seeks rehearing of the PUCO’s Order.

Green Choice is unlikely to prevail on the merits if it seeks rehearing of the Order. Green Choice itself states that “it is safe to assume the [PUCO] would rule for itself on issues related to the merits of the Order.”[[9]](#footnote-10) Green Choice’s Motion to Stay should be denied.

According to Green Choice, the Order should be stayed because “the Order must be clarified” with respect to customer re-rates.[[10]](#footnote-11) But the PUCO’s Order ***is*** clear. The Order states that Green Choice is required to re-rate the following customer groups: customers enrolled through door-to-door or telemarketing between May 1, 2021 and June 30, 2021;[[11]](#footnote-12) customers who filed a complaint (with any entity) disputing enrollment with Green Choice starting from February 1, 2022;[[12]](#footnote-13) and all customers enrolled between January 1, 2021, and July 20, 2021.[[13]](#footnote-14) There is nothing ambiguous about the Order. There is overlap in the customer groups to be re-rated, but they do not contradict each other.

Green Choice also claims the Order is unclear because it does not specify whether customer re-rates should be “for, gas, electric, or both” or whether the re-rates apply only to customers enrolled through certain sales channels.[[14]](#footnote-15) However, the Order expressly states that Green Choice is to re-rate “***all customers***.” “[A]ll customers” plainly means both gas and electric consumers, regardless of how they were enrolled.[[15]](#footnote-16)

Green Choice claims that the Order is unclear because it does not specify a service period to be re-rated.[[16]](#footnote-17) That argument should be rejected too. The PUCO found that Green Choice engaged in misleading and deceptive acts in soliciting and enrolling consumers. Thus, re-rates would be for the entire period of customers’ enrollments. Reading the Order as requiring re-rates for any other time period would make no sense.

In short, the PUCO’s Order is clear. There is no reason to deny re-rates to consumers while Green Choice seeks rehearing, which is unlikely to succeed on the merits anyway (by Green Choice’s own admission). As the PUCO correctly determined, making the consumers harmed by Green Choice “whole is of paramount importance.”[[17]](#footnote-18)

Green Choice’s payment of the forfeiture ordered by the PUCO also should not be delayed, as a portion ($440,000) will be held in abeyance to ensure Green Choice’s compliance with the Order’s consumer re-rate requirements. Accordingly, Green Choice’s Motion to Stay should be denied.

## Green Choice will not suffer irreparable harm absent a stay of the PUCO’s Order.

Green Choice argues that it will be irreparably harmed if the PUCO does not stay enforcement of the Order’s requirement to pay the $1 million forfeiture pending rehearing.[[18]](#footnote-19) Green Choice’s argument has little merit and should be rejected.

Green Choice acknowledges that if it “made this payment, appealed the Order, and eventually won, ***it could presumably get this money back***.”[[19]](#footnote-20) And as noted above, Green Choice concedes that it likely will not be successful on rehearing of the PUCO’s Order.[[20]](#footnote-21) In light of Green Choice’s statements, it is difficult to understand just how Green Choice would be irreparably harmed if the Order is enforced now.

Green Choice claims that the forfeiture and re-rates should be paid only after a final order on appeal.[[21]](#footnote-22) Green Choice cites Ohio Civ. Rule 62(B) to support the claim that it is entitled to a stay of the PUCO’s Order pending appeal.[[22]](#footnote-23) However, Green Choice ignores R.C. 4903.16, which expressly states that “[a] proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission ***does not stay execution of such order*** unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay . . .”[[23]](#footnote-24) Thus, contrary to Green Choice’s assessment of “how justice normally works,”[[24]](#footnote-25) Green Choice is *not* entitled to a stay of the Order pending rehearing or an appeal to the Supreme Court of Ohio. Green Choice’s Motion to Stay should therefore be denied.

## Delaying enforcement of the Order and re-rates would cause further harm to the consumers victimized by Green Choice.

Green Choice claims that granting the Motion to Stay would not harm consumers.[[25]](#footnote-26) That is not true. Consumers are being squeezed on all sides these days from inflation, increased energy prices and increased utility rates. The consumers who Green Choice deceived should be re-rated sooner rather than later. Indeed, as the PUCO found, “making customers who have been harmed by [Green Choice’s] violations whole is of paramount importance.”[[26]](#footnote-27) The Motion to Stay should be denied.

The Order requires that the forfeiture and re-rates be paid as compensation for Green Choice’s egregiously dishonest marketing and enrollment practices. The PUCO Order is not solely punitive – it is a *remedy*. The people of Ohio have been harmed by Green Choice’s conduct, and the relief provided for in the Order is intended to compensate for that harm. The longer that relief is delayed, the greater the harm to consumers.

Green Choice argues that a stay would “maintain the status quo.”[[27]](#footnote-28) But the status quo– letting Green Choice continue to serve existing customers –is *unjust.* This is true despite the fact that Green Choice no longer solicits and enrolls new consumers. The PUCO should deny the Motion to Stay.

## Delaying enforcement of the Order is contrary to the public interest. Swift enforcement of the Order is necessary to protect Ohioans from bad actor energy marketers and to protect competition in Ohio.

The PUCO should reject Green Choice’s claims that staying enforcement of the Order is in the public interest. The public interest (and Ohio law) requires the PUCO to protect consumers from bad actor energy marketers like Green Choice.[[28]](#footnote-29) Staying enforcement of the Order does not protect consumers or the public interest, because it would delay re-rates and returning Green Choice’s existing customers to the default service provider.

In addition, the public interest favors electric and natural gas competition in Ohio to benefit consumers. But all marketers should compete on a level playing field and comply with the PUCO’s minimum service standards. Allowing Green Choice to delay payment of the forfeiture is unfair to marketers that do comply with the PUCO’s rules and Ohio law. And it sends a message that the PUCO will be soft in enforcing its orders against marketers engaging in deceptive marketing practices. That could increase bad

behavior by unscrupulous marketers, ultimately harming electric and natural gas competition in Ohio. For these reasons, the Motion to Stay should be denied.

# III. CONCLUSION

Green Choice states no good cause for staying the enforcement of the PUCO’s Order. As the PUCO correctly recognized, consumers victimized by Green Choice should be made whole. Re-rates to consumers should be paid now, not later. Green Choice should also pay the forfeiture without delay to show that the PUCO will not tolerate misleading and deceptive marketing and enrollment practices. For all of the reasons set forth above, Green Choice’s Motion to Stay should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Memorandum Contra was served by electronic transmission upon the parties below this 13th day of November 2023.

*/s/ Angela D. O’Brien*  Angela D. O’Brien (0097579)

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

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1. RPA Energy, Inc. d/b/a Green Choice Energy (“Green Choice”). [↑](#footnote-ref-2)
2. PUCO Opinion and Order (October 18, 2023), ¶ 1. [↑](#footnote-ref-3)
3. *Id.* [↑](#footnote-ref-4)
4. *Id.* [↑](#footnote-ref-5)
5. Green Choice Motion to Stay Enforcement of October 18, 2023 Opinion and Order (“Motion to Stay”). [↑](#footnote-ref-6)
6. PUCO Opinion and Order (October 18, 2023), ¶ 80. [↑](#footnote-ref-7)
7. Emphasis added. [↑](#footnote-ref-8)
8. *Complaint of Ohio Power Co.,* 21-990-EL-CSS, p. 5 (December 28, 2021). [↑](#footnote-ref-9)
9. Motion to Stay, at 6. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. Order, ¶82. [↑](#footnote-ref-12)
12. *Id.* [↑](#footnote-ref-13)
13. *Id.* at ¶1. [↑](#footnote-ref-14)
14. Motion to Stay, at 6. [↑](#footnote-ref-15)
15. PUCO Opinion and Order (October 18, 2023), ¶ 1 (emphasis added). [↑](#footnote-ref-16)
16. Motion to Stay, at 6. [↑](#footnote-ref-17)
17. PUCO Opinion and Order (October 18, 2023), ¶ 80. [↑](#footnote-ref-18)
18. Motion to Stay, at 4-5. [↑](#footnote-ref-19)
19. Motion to Stay, at 5 (emphasis added). [↑](#footnote-ref-20)
20. Motion to Stay, at 6. [↑](#footnote-ref-21)
21. Motion to Stay, at 5. [↑](#footnote-ref-22)
22. *Id.* at note 7. [↑](#footnote-ref-23)
23. Emphasis added. [↑](#footnote-ref-24)
24. Motion to Stay, at 5. [↑](#footnote-ref-25)
25. *Id.* at 4. [↑](#footnote-ref-26)
26. PUCO Opinion and Order (October 18, 2023), ¶ 80. [↑](#footnote-ref-27)
27. Motion to Stay, p. 4. [↑](#footnote-ref-28)
28. *See e.g.* R.C. 4928.10, R.C. 4929.22. [↑](#footnote-ref-29)