**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Direct Energy Business, LLC and Direct Energy Services, LLC for Waivers of Certain Provisions of Chapters 4901:1-21 and 4901:1-29, O.A.C., to Permit Third-Party Verification by Digital Confirmation. | )  )  )  )  )  ) | Case No. 18-382-GE-WVR |

**APPLICATION FOR REHEARING OF THE PUCO’S ENTRY GRANTING A WAIVER OF CONSUMER PROTECTION RULES**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) is filing for rehearing of the Entry approving Direct Energy’s[[1]](#footnote-2) request to replace the usual consumer protection of third-party verification when Ohioans change their utility service supplier.[[2]](#footnote-3) Ohio law protects consumers against unlawful changes of their utility service provider.[[3]](#footnote-4) In this case, the Public Utilities Commission of Ohio (“PUCO”) has allowed a marketer to cease providing an important consumer protection on door-to-door sales of utility service.

The PUCO has adopted rules to protect Ohio residential consumers in the marketing of competitive utility service.[[4]](#footnote-5) The PUCO’s rules require independent third-party verification of a consumer’s enrollment for a marketer’s utility service through door-to-door sales.[[5]](#footnote-6) Under the PUCO’s Entry, the independent third-party recording will be replaced by electronic verification of consumers’ changes to their utility service provider unless the customer requests telephonic verification.[[6]](#footnote-7)

The ruling is in effect until the PUCO issues an order in its five-year review of the electric and natural gas marketing rules.[[7]](#footnote-8) Those rulemakings were initiated more than a year ago, yet no procedural schedule has been established for them. Thus, consumers could “temporarily” lose an important consumer protection regarding the marketing of utility service for a substantial time.

The Office of the Ohio Consumers’ Counsel (“OCC”) files an Application for Rehearing of the PUCO’s Entry. The Entry was unjust, unlawful, and unreasonable in the following respects:

1. The Entry is unjust, unlawful, and unreasonable because it does not effectively protect consumers against misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail utility service.
2. The Entry violates R.C. 4903.09 by granting a waiver of the independent third-party verification rules without explaining how good cause was shown for a waiver of rules designed to protect consumers against misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail utility service.

The PUCO should grant OCC’s Application for Rehearing and abrogate the Entry. The PUCO should also stay implementation of the waiver while rehearing is pending. The grounds for this Application for Rehearing are set forth in the accompanying Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)

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*/s/ Terry L. Etter*

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**MEMORANDUM IN SUPPORT**

**I. INTRODUCTION**

Ohio law protects consumers against unlawful changes of their utility service provider.[[8]](#footnote-9) The statutes require the PUCO to adopt rules prohibiting switching, or authorizing the switching of, a customer’s supplier of retail electric or natural gas service “without the prior consent of the customer in accordance with appropriate confirmation practices, which may include independent, third-party verification procedures.”

The PUCO’s rules require that changes to a consumer’s utility service provider resulting from a door-to-door solicitation must be verified through a telephone call to an independent third-party verifier.[[9]](#footnote-10) In this case, the PUCO allowed Direct Energy[[10]](#footnote-11) to replace the consumer protection of a telephone call to an independent third-party verifier with electronic verification of consumers’ changes to their utility service provider. The PUCO stated that Direct Energy had shown good cause for the waiver.[[11]](#footnote-12) The PUCO granted the waiver until completion of the pending rulemakings concerning retail the electric and natural gas services.[[12]](#footnote-13)

As discussed below, the Entry is unlawful, unjust, and unreasonable. The PUCO should abrogate the Entry as OCC recommends in this Application for Rehearing.

**II. STANDARD OF REVIEW**

Applications for rehearing are governed by R.C. 4903.10. The statute allows that, within 30 days after issuance of a PUCO order,[[13]](#footnote-14) “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” OCC intervened in this proceeding[[14]](#footnote-15) and participated through filing comments and reply comments.

R.C. 4903.10 requires that an application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” In addition, Ohio Adm. Code **4901-1-35**(A) states: “An application for rehearing must be accompanied by a memorandum in support, which shall be filed no later than the application for rehearing.”

In considering an application for rehearing, R.C. 4903.10 provides that “the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear.” The statute also provides: “If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed.” As shown herein, the statutory standard to abrogate the Entry is met here.

**III. DISCUSSION**

## A. The Entry is unjust, unlawful, and unreasonable because it does not effectively protect consumers against misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail utility service.

The PUCO acknowledged that its rules for retail electric and natural gas service are consumer protection rules. The PUCO noted that retail electric and natural gas rules are intended, among other things, to “protect customers against deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of [retail utility service] and in the administration of any contracts for such services.”[[15]](#footnote-16) Yet the PUCO did not explain how Direct Energy’s proposal accomplishes the same consumer protections as independent third-party verification of residential door-to-door sales by retail electric and natural gas marketers.

The requirements for 100% third-party verification of telephone solicitations were adopted because of significant abuses that occurred during telephonic sales by marketers. R.C. 4929.22 requires the PUCO to adopt rules for the protection of consumers in this state. Protection means preventing harm. The PUCO’s rules help prevent harm to consumers by expressly providing that, outside of the pressure of a door-to-door sales call, an independent third party will speak with the customer and record the customer’s assent to switch their utility service.[[16]](#footnote-17) The independent third party will also record that the customer understands and agrees to all other principal terms and conditions of the supply contract, including the price, contract term, additional fees, early termination penalties, etc.[[17]](#footnote-18)

The PUCO’s action in allowing electronic verification of door-to-door utility sales transactions is unlawful because it puts consumers at risk of harm. As OCC discussed in its Comments, geolocation tracking systems are not always accurate.[[18]](#footnote-19) There is no way to be certain that a salesperson has left the consumer’s home. The salesperson could still be there coaching the consumer on the answers to give concerning the verification questions.

The consumer protections offered by the rule simply cannot be duplicated by an electronic verification. A recording of an entire sales call could reveal deceptive, unscrupulous, or unconscionable acts or practices by a marketer. For example, a recording could reveal that the salesperson has not left the customer’s home and is coaching the customer to give certain answers to the verifier’s questions. But because of the limitation on the accuracy of geolocation systems, such coaching might not be caught by Direct Energy’s electronic verification system.

Independent third-party verification recordings could also serve as a basis for redressing consumer harm and/or enforcement actions after harm has occurred. Importantly, they provide an immediate means for consumers to prevent harm by rejecting the transaction.

The Entry requires the PUCO Staff to monitor complaints against Direct Energy.[[19]](#footnote-20) But consumers sometimes do not immediately realize that their utility service supplier has been changed, so a complaint might not occur until months after the consumer’s utility service has been unlawfully switched. In addition, the Entry does not require Direct Energy to provide any data that might help the PUCO Staff in monitoring the effect of electronic verification on consumers.

Relying solely on a marketer’s verification of the sales transaction cannot prevent the consumer harm in the first place, like independent third-party verification can. The value of independent third-party verification has been highlighted in the PALMco and Verde cases,[[20]](#footnote-21) where the third-party verification recordings helped show how salespeople misled and deceived consumers. The PUCO’s Entry does not adequately protect consumers. The PUCO should abrogate the Entry.

## B. The Entry violates R.C. 4903.09 by granting a waiver of the independent third-party verification rules without explaining how good cause was shown for a waiver of rules designed to protect consumers against misleading, deceptive, unfair, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive retail utility service.

The PUCO has adopted a “good cause” standard for waiver of PUCO rules in Ohio Adm. Code Chapters 4901:1-21 and 4901:1-29. Both Ohio Adm. Code 4901:1-1-21-02(C) and Ohio Adm. Code 4901:1-29-02(C) state: “The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.”

In this case, the PUCO found that good cause was shown for a waiver of the third-party verification rules. But the PUCO’s ruling does not explain how Direct Energy’s proposed electronic verification is an adequate substitute for independent third-party verification of a customer’s change in electric and/or natural gas supplier.

R.C. 4903.09 requires the PUCO to issue “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” The Entry, however, contains no findings of facts. The Entry merely states that the PUCO has reviewed the arguments of the parties and discusses the good cause requirement.[[21]](#footnote-22) It then states the conclusion that Direct Energy had shown good cause for its waiver request.[[22]](#footnote-23) The PUCO offers no reasoning for its determination.

The Entry does not issue findings of fact. The Entry also does not give the reasons prompting approval of the waiver, based upon the findings of fact, as required by R.C. 4903.09. The PUCO’s Entry does not satisfy the requirements of R.C. 4903.09. The PUCO should abrogate the Entry.

**IV. CONCLUSION**

The independent third-party verification required by the PUCO’s rules helps protect consumers from door-to-door marketers’ bad acts. By allowing Direct Energy to avoid these consumer protections, the PUCO substantially increased the risk of harm for consumers. The PUCO’s Entry also does not explain the reasons for approving the waiver, as required by R.C. 4903.09. The Entry is unjust, unlawful, and unreasonable. To protect consumers, the PUCO should abrogate the Entry.

Respectfully submitted,

Bruce Weston (0016973)

Ohio Consumers’ Counsel

*/s/ Terry L. Etter*

Terry L. Etter (0067445)

Counsel of Record

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Application for Rehearing was served on the persons stated below via electronic transmission, this 28th day of October 2019.

*/s/ Terry L. Etter*

Terry L. Etter

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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1. Direct Energy Business, LLC and Direct Energy Services, LLC. [↑](#footnote-ref-2)
2. Entry (September 26, 2019) (“Entry”). [↑](#footnote-ref-3)
3. R.C. 4928.10(D)(4); R.C. 4929.22(D)(3). [↑](#footnote-ref-4)
4. Ohio Adm. Code Chapter 4901:1-29. [↑](#footnote-ref-5)
5. Ohio Adm. Code 4901:1-20-06(E)(1). [↑](#footnote-ref-6)
6. Entry (September 26, 2019), ¶15. [↑](#footnote-ref-7)
7. *Id*., ¶16. [↑](#footnote-ref-8)
8. R.C. 4928.10(D)(4); R.C. 4929.22(D)(3). [↑](#footnote-ref-9)
9. Ohio Adm. Code 4901:1-21-06(D)(1)(h); Ohio Adm. Code 4901:1-29-06(D)(6)(b). [↑](#footnote-ref-10)
10. Direct Energy Business, LLC and Direct Energy Services, LLC. [↑](#footnote-ref-11)
11. Entry, ¶14. [↑](#footnote-ref-12)
12. *Id*., ¶16. [↑](#footnote-ref-13)
13. In this instance, the Entry (at ¶19) orders that Direct Energy’s waiver be granted and thus serves the same purpose as a PUCO order. [↑](#footnote-ref-14)
14. *See id*., ¶4. [↑](#footnote-ref-15)
15. *Id*., ¶13. [↑](#footnote-ref-16)
16. Ohio Adm. Code 4901:1-21-06(D)(1)(h); Ohio Adm. Code 4901:1-29-06(E)(1). [↑](#footnote-ref-17)
17. *Id*. [↑](#footnote-ref-18)
18. *See* OCC Comments (August 8, 2019) at 4-6. [↑](#footnote-ref-19)
19. Entry, ¶13. [↑](#footnote-ref-20)
20. Case Nos. 19-957-GE-COI and 19-958-GE-COI. [↑](#footnote-ref-21)
21. *Id*., ¶14. [↑](#footnote-ref-22)
22. *Id*. [↑](#footnote-ref-23)