**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 APPLICATION FOR REHEARING**

**BY**

**OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# INTRODUCTION

Green Choice seeks rehearing of the PUCO’s October 18, 2023 Order where the PUCO found that Green Choice misled and deceived Ohioans when soliciting and enrolling them in natural gas and electric service. The PUCO found that Green Choice falsified third-party verification (“TPV”) calls and altered sales calls.[[1]](#footnote-2) Green Choice falsified enrollment contracts.[[2]](#footnote-3) Green Choice also misled consumers about variable rates for service.[[3]](#footnote-4) Green Choice “spoofed” (faked) Caller ID so that consumers believed that someone other than Green Choice was calling them.[[4]](#footnote-5) There is no basis for Green Choice’s Application for Rehearing, and it should be denied.

The evidence showed that Green Choice “committed numerous violations of the [PUCO’s] rules and regulations prohibiting deceptive and misleading practices in marketing, soliciting, selling, and providing [natural gas and electric service].”[[5]](#footnote-6)The PUCO concluded that Green Choice “lacks managerial capability to provide [natural gas and electric service],” and directed Green Choice to “cease” marketing and providing service in Ohio.[[6]](#footnote-7) The PUCO also ordered Green Choice to re-rate consumers and to pay $1 million (toward a total $1.44 million) forfeiture.[[7]](#footnote-8)

There is ample evidence to support the PUCO’s Order, and Green Choice’s due process rights were not violated. Green Choice’s Application for Rehearing should be denied.

# ARGUMENT

## The PUCO properly exercised its authority under R.C. 4929.08, R.C. 4929.20, and R.C. 4905.54, and Green Choice’s claims that its due process rights were violated have no merit.

Green Choice’s Application for Rehearing rehashes its previous arguments that it has been denied due process.[[8]](#footnote-9) Nothing could be further from the truth.

OCC thoroughly rebutted Green Choice’s due process arguments in post-hearing briefs.[[9]](#footnote-10) OCC also addressed Green Choice’s arguments that the PUCO disregarded prior decisions in the PALMco and Verde marketer investigations.[[10]](#footnote-11) OCC will not repeat those arguments here. Suffice to say, marketing electric and natural gas service to Ohioans ***is a privilege – not a right***. And the PUCO afforded Green Choice ample due process in this case as required by Ohio law. Green Choice’s Application for Rehearing should be denied.

R.C. 4928.08(D) and R.C. 4929.20(C)(1) plainly state that the PUCO may “suspend, rescind, or conditionally rescind” the certification of an electric or natural gas marketer if the PUCO determines after an opportunity for hearing that the marketer “has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.”[[11]](#footnote-12) The PUCO may also suspend, rescind, or conditionally rescind a marketer’s certificate if the PUCO finds that the marketer has violated any PUCO order or rule.[[12]](#footnote-13) In addition, the PUCO is authorized under R.C. 4905.54 to assess forfeitures against marketers for violations of PUCO orders or rules. There is overwhelming evidence of Green Choice’s bad acts and rule violations.[[13]](#footnote-14)

A PUCO investigation into a marketer’s practice can be initiated with or without a notice of probable non-compliance being issued by the PUCO Staff.[[14]](#footnote-15) Unless otherwise ordered by the attorney examiner or PUCO, forty-five days after the complaint proceeding is initiated the PUCO Staff must file an investigative report (Staff Report).[[15]](#footnote-16) The Staff Report is required to include the PUCO Staff’s findings regarding violations and its recommendations.[[16]](#footnote-17) And, contrary to Green Choice’s claims,[[17]](#footnote-18) the PUCO Staff is permitted to amend its Staff Report.[[18]](#footnote-19) The procedure was proper in this case against Green Choice.

Moreover, if a proceeding is initiated in response to a notice of probable non-compliance, violations not included in the notice may be included in the Staff Report provided that such additional violations “relate to” the same investigation referenced in the notice.[[19]](#footnote-20) In other words, when the proceedings are initiated by the notice of probable non-compliance - the investigation parameters described in the notice define the scope of the proceedings before the PUCO.[[20]](#footnote-21) Any additional violations introduced via the Staff Report (or an amendment to the Staff Report) during the investigation merely have to “relate to” the investigation.[[21]](#footnote-22)

Green Choice also argues that the evidence does not support the forfeiture ordered by the PUCO.[[22]](#footnote-23) However, in post-hearing briefs, the PUCO Staff and OCC explained how the evidence supports *more* than the forfeiture ordered in this case.[[23]](#footnote-24)

In short, there were no enforcement or due process concerns in these proceedings. Green Choice had notice of the PUCO’s investigation. The PUCO Staff amended its Staff Report as allowed by the rules to include additional violations that occurred after its original filing. Green Choice was provided with the Amended Staff Report about three months before hearing[[24]](#footnote-25) and with the PUCO Staff testimony within several weeks of the hearing. [[25]](#footnote-26) The Amended PUCO Staff Report and the PUCO Staff Testimony were admitted without objection.[[26]](#footnote-27) The PUCO was generous with the hearing date extension to ensure all parties had enough time to prepare for the hearing. All parties were able to and did present direct testimony and cross examine witnesses at the hearing. Other than the PUCO Staff, no party motioned to strike the prefiled direct testimony of any other party at the hearing. The PUCO also allowed plenty of time for the parties to prepare their initial and reply briefs.

Green Choice received all the process it was due under Ohio law, and more. The PUCO should deny Green Choice’s Application for Rehearing.

## Green Choice’s claim that OCC had no legal authority to intervene in this proceeding to protect consumers has no merit. The law gives OCC the authority to protect Ohio consumers from Green Choice. The PUCO has granted OCC’s intervention to protect consumers in PUCO investigations of marketers, even where the marketer opposed OCC’s intervention.

Green Choice asserts that R.C. 4911 does not expressly authorize OCC’s intervention in enforcement proceedings concerning the services and charges of electric and natural gas marketers, and OCC should have been denied intervention in this case.[[27]](#footnote-28)

Green Choice is wrong. Green Choice ignores precedent where the PUCO granted OCC intervention, rejecting the same arguments made by other marketers.[[28]](#footnote-29)

The General Assembly wrote into R.C. 4911.02(B)(2) that the Consumers’ Counsel has rights to protect consumers *“Without limitation because of enumeration….”* (Emphasis added.) Green Choice continues to ignore these important words and persists in arguing OCC cannot intervene in an enforcement action because it is not enumerated in the law. Even what is enumerated in the law, such as R.C. 4911.02(B)(2)(b), allows OCC to intervene. But again, the law has no “limitation because of enumeration.” And the PUCO has found that [t]his language conveys the intent of the legislature that the provisions of Section 4911.02 should be construed *as broadly as possible*.”[[29]](#footnote-30)

The PUCO rejected this same argument in the PALMco 2 Investigation when marketer PALMco opposed OCC’s intervention in that PUCO initiated enforcement proceeding.[[30]](#footnote-31) The PUCO granted OCC’s intervention in PALMco 2 stating: “Upon consideration of OCC’s motion to intervene in this proceeding, the attorney examiner finds that OCC’s motion is supported by statute, the PUCO’s intervention rule, and prior PUCO precedent, and should be granted.”[[31]](#footnote-32)

The PUCO also rejected similar arguments by marketer SFE in the SFE Investigation when it opposed OCC’s motion to intervene in that case.[[32]](#footnote-33) There, not only did the PUCO grant OCC’s motion to intervene, but it also denied SFE’s request to limit OCC’s participation in discovery.[[33]](#footnote-34)

*In the Matter of the Complaint of Jeffrey Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS, an investigation into a utility’s misdeeds, the PUCO granted OCC’s motion to intervene over Duke’s opposition. The PUCO rejected Duke’s argument that OCC was precluded from intervening in matters not specifically enumerated in R.C. 4911.02.[[34]](#footnote-35) OCC has authority under Ohio law to intervene in this case to represent the interests of residential utility consumers.[[35]](#footnote-36)

Green Choice argues that OCC should have been denied intervention because residential consumers’ interests are already adequately represented by the PUCO Staff.[[36]](#footnote-37) But the PUCO previously rejected that argument in the PALMco 2 and SFE Investigations as well.[[37]](#footnote-38) The PUCO Staff considers the interests of all consumers *and* marketers in this PUCO investigation. Only OCC, as the statutory representative of Ohio’s residential utility consumers, is in the unique position of representing the interests of the residential consumers harmed by Green Choice.

Green Choice’s claim that OCC has no authority to intervene in “an enforcement proceeding” also ignores the plain language of R.C. 4903.221, which provides “[a]ny other person who may be adversely affected by a public utilities commission *proceeding* may intervene in such *proceeding* \*\*\*.” (Emphasis added). R.C. 4903.221 makes no distinction between an enforcement or any other type of PUCO proceeding. OCC regularly intervenes in proceedings concerning bad acts such as those the PUCO Staff alleges concerning Green Choice. As noted, the PUCO has granted OCC intervention even when the marketer has opposed OCC’s participation.

Lastly, Green Choice complains that OCC’s participation has “unquestionably” increased its costs in these proceedings.[[38]](#footnote-39) However, the only things “unquestionable” in these proceedings are Green Choice’s bad acts. The PUCO should deny Green Choice’s Application for Rehearing.

# III. CONCLUSION

There is no merit to Green Choice’s claims that it was denied due process in this case and that there is no evidence to support the PUCO’s Order. OCC’s intervention in this case was also lawful and consistent with prior PUCO precedent. For the reasons explained above, the PUCO should deny Green Choice’s Application for Rehearing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 27th day of November, 2023.

*/s/* *Angela D. O’Brien*

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Deputy Consumers’ Counsel

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1. Order, at ¶ 68. [↑](#footnote-ref-2)
2. Order, at ¶ 69. [↑](#footnote-ref-3)
3. *Id.* at ¶ 67. [↑](#footnote-ref-4)
4. *Id.* at ¶ 70. [↑](#footnote-ref-5)
5. Order at ¶ 81. [↑](#footnote-ref-6)
6. *Id.* [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. Green Choice Application for Rehearing (“AFR”) at 5. [↑](#footnote-ref-9)
9. *See* OCC Reply Brief (Jan. 27, 2023) at 2-6. [↑](#footnote-ref-10)
10. *Id.* [↑](#footnote-ref-11)
11. O.A.C. 4901-1-24-13 and 4901-1-27-10. [↑](#footnote-ref-12)
12. O.A.C. 4901-1-24-13(E)(7) and 4901-1-27-13(E)(7). [↑](#footnote-ref-13)
13. PUCO Staff Initial Brief (Jan. 6, 2023); OCC Reply Brief (Jan. 27, 2023) at 19-21. [↑](#footnote-ref-14)
14. O.A.C 4901-1-34-06(A) and 4901-1-23-05(A). [↑](#footnote-ref-15)
15. O.A.C. 4901-1-34-06(C) and 4901-1-23-05(C). [↑](#footnote-ref-16)
16. O.A.C. 4901-1- 34-06(C)(1)-(2) and 4901-1-23-05(C)(1)-(2). [↑](#footnote-ref-17)
17. Green Choice AFR at 4. [↑](#footnote-ref-18)
18. O.A.C*.* 4901-1-06. [↑](#footnote-ref-19)
19. O.A.C*.* 4901:1-34-06(B)(1)(a) and 4901:1-23-05(C)(1)(a). [↑](#footnote-ref-20)
20. *Id*. [↑](#footnote-ref-21)
21. *Id*. [↑](#footnote-ref-22)
22. Green Choice AFR at 18-24. [↑](#footnote-ref-23)
23. PUCO Staff Initial Brief (Jan. 6, 2023); OCC Reply Brief (Jan. 27, 2023) at 19-21. [↑](#footnote-ref-24)
24. Amended Staff Report (July 21, 2022). [↑](#footnote-ref-25)
25. PUCO Staff prefiled testimony (Sept. 30 and Oct. 3, 2022). [↑](#footnote-ref-26)
26. Transcript Vol. I at 127, 163 (Nov. 8, 2022), Transcript Vol. II at 217, 238 (Nov. 23, 2022). [↑](#footnote-ref-27)
27. Green Choice AFR at 14. [↑](#footnote-ref-28)
28. *See In the Matter of the Commission’s Investigation Into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC’s Compliance with the Ohio Revised Code and Ohio Administrative Code and Potential Remedial Action*, Case No. 20-1216-GE-COI (“SFE Investigation”), Entry (Sept. 28, 2020), at ¶¶ 11, 13; and *In the Matter of Commission’s Investigation Into PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI, (“PALMco 2 Investigation”), Entry (April 6, 2020), at ¶¶ 10, 19. [↑](#footnote-ref-29)
29. *In the Matter of the Complaint of the Office of Consumers’ Counsel on Behalf of the Residents of Copley Village Condominium Association I and Copley Village Condominium Association II v. Ohio Edison Company*, Case No. 89-1031-EL-CSS, 1989 Ohio PUC LEXIS 1100, \*5 (emphasis added). [↑](#footnote-ref-30)
30. *See* PALMco 2 Investigation, Case No. 19-2153-GE-COI, PALMco Memorandum Contra Office of the Ohio Consumers’ Counsel’s Motion to Intervene (Jan. 13, 2020), at 5-6. [↑](#footnote-ref-31)
31. PALMco 2 Investigation, Entry (April 6, 2020), at ¶ 19. [↑](#footnote-ref-32)
32. SFE Investigation, Case No. 20-1216-GE-COI, Entry (Sept. 28, 2020), at ¶ 13. [↑](#footnote-ref-33)
33. *Id.* [↑](#footnote-ref-34)
34. *See In the Matter of the Complaint of Jeffrey Pitzer v. Duke Energy Ohio, Inc.*, Case No. 15-298-GE-CSS, Entry (July 10, 2015). [↑](#footnote-ref-35)
35. R.C. 4911.02(B). [↑](#footnote-ref-36)
36. Green Choice AFR at 15. [↑](#footnote-ref-37)
37. *See supra* note 28. [↑](#footnote-ref-38)
38. Green Choice AFR at 15. [↑](#footnote-ref-39)