

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of RPA)
Energy, Inc. for Waivers of Certain) Case No. 21-157-GE-WVR
Provisions of Chapters 4901:1-21 and)
4901:1-29, O.A.C., to Permit Third-Party)
Verification by Digital Confirmation.)

**AMENDED COMMENTS OPPOSING REQUEST OF RPA ENERGY FOR A
PUCO WAIVER OF CERTAIN CONSUMER PROTECTIONS FROM ENERGY
MARKETING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
PRO SENIORS, INC.**

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April 9, 2021

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I. INTRODUCTION

RPA Energy, Inc. ("RPA Energy"), an energy marketer, wants the PUCO to exempt it from having to provide consumers with the protection of live, in-person independent third-party verification when it signs-up customers. No, should be the PUCO's answer. The sign-ups relate to telephone and door-to-door marketing.

For some context, the PUCO's own apples-to-apples chart shows that RPA Energy's electric and natural gas offers to consumers would generally cost them double or more than comparable marketer 100% green offers. If RPA Energy does not find the PUCO's consumer protection rules to be satisfactory for its business, then it can consider going elsewhere (other than Ohio). Consumers would not miss RPA Energy if it were to leave (taking with it the offers to charge consumers double the green rate of its competitors).

The PUCO's rules in the Ohio Administrative Code resulted from a rulemaking process that hopefully was intended to achieve consumer protection under law. The

PUCO should have a presumption against granting waivers to reduce consumer protections. Indeed, the PUCO's rules should be strengthened for consumer protection from energy marketing. In our view, the PUCO's rules should be waived to outright *ban* marketer door-to-door sales that RPA Energy wants to make easier for it to conduct.

We invite the PUCO's attention to the recent several stories in The Wall Street Journal.¹ The Journal wrote of a concern that nationally, in the aggregate, consumers tend to lose money by choosing marketer offers compared to utility offers.

RPA Energy wants to offer consumers a choice² between verification of their energy sign-up via a new digital process or the traditional telephonic live third-party verification in the PUCO's rules. The Public Utilities Commission of Ohio ("PUCO") should protect consumers by denying RPA Energy's request. There is no good cause for RPA Energy's request. If the request is granted, it should include the additional protections that OCC and Pro Seniors recommends.

II. RECOMMENDATIONS

A. Ohio law and rules require a robust, interactive third-party verification process that is protective of consumers.

Ohio law protects consumers against unlawful changes of their utility service provider.³ These statutes require the PUCO to adopt rules prohibiting switching, or

¹ See, Tom McGinty & Scott Patterson, *Deregulation Aimed to Lower Home-Power Bills. For Many, It Didn't*, Wall Street Journal (March 8, 2021, 12:24 PM), <https://www.wsj.com/articles/electricity-deregulation-utility-retail-energy-bills-11615213623>; see also, Tom McGinty, *How We Calculated Electricity-Rate Comparisons*, Wall Street Journal, (March 8, 2021, 12:17 PM), <https://www.wsj.com/articles/how-we-calculated-electricity-rate-comparisons-11615223851?tesla=y>; see also, Scott Patterson, *Are You Overpaying for Electricity? Here's How to Find Out*, Wall Street Journal, (March 8, 2021, 12:15PM), <https://www.wsj.com/articles/are-you-overpaying-for-electricity-heres-how-to-find-out-11615223723?tesla=y>.

² Application (Feb. 18, 2021) at ¶8.

³ R.C. 4928.10(D)(4); R.C. 4929.22(D)(3).

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."⁴

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.⁵ The call involves an interactive process that includes a live person confirming that the customer expressly wishes to change their electric or natural gas supply service to the marketer and also confirm several other elements of the sales transaction. For example, per the PUCO's rules, the live third-party verifier must inform the customer of the exact purpose of the verification call and confirm that the marketer's sales agent has left the customer's residence in a door-to-door transaction.⁶

Third-party telephonic verification involving back-and-forth interactive human communication remains the best protection for consumers to verify whether they want to switch natural gas or electric suppliers. Accordingly, the PUCO's rules help prevent harm to consumers by requiring that an independent third party will speak with the customer and record the customer's assent to switch their utility service.⁷ This is a protection from the pressure of a door-to-door sales call. 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

⁴ *Id.*

⁵ O.A.C. 4901:1-21-06(D)(1)(h); O.A.C. 4901:1-29-06(D)(6)(b).

⁶ *Id.*

⁷ O.A.C. 4901:1-21-06(D)(2)(a); O.A.C. 4901:1-29-06(E)(1).

penalties, etc.⁸ The independent third-party verification provides a recording of the customer's consent and allows for a deeper understanding of the customer's comprehension of the contract they signed. A recorded interaction provides a record of the customer's consent instead of a digital interaction that could be completed by anybody.

The requirements for 100% third-party verification of telephone solicitations were adopted because of significant abuses that occurred during telephonic and door-to-door 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. Allowing electronic verification of door-to-door utility sales transactions is unlawful because it puts consumers at risk of harm. Geolocation tracking systems are not always accurate and can be turned off.⁹ 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.

Under the current rules there are still a disturbing amount of marketer violations; the PUCO should protect consumers by denying RPA Energy's request.

B. RPA Energy has not shown good cause for its request to diminish the consumer protection of telephonic third-party verification. The PUCO should protect consumers by denying the RPA Energy's request.

The PUCO may waive any rule, other than a requirement mandated by statute, for good cause shown.¹⁰ In this case, RPA Energy has not shown good cause for its proposed waiver to enroll customers via digital confirmation.

⁸ *Id.*

⁹ *See* OCC Comments (August 8, 2019) at 4-6.

¹⁰ O.A.C. 4901:1-21-02(C); O.A.C. 4901:1-29-02(C).

First, RPA Energy asserts that the PUCO’s rules do not require third-party verification by telephone.¹¹ This is not true. Both the electric and natural gas marketing rules concerning door-to-door solicitation state that third-party verification must be conducted in accordance with third-party verification under the telephone solicitation rules.¹² Third-party verification for telephone solicitation is done by telephone, as evidenced by frequent references to “the call.”¹³

RPA Energy also contends that under the current rules neither it nor the independent third-party verifier is able to confirm whether the door-to-door salesperson has left the consumer’s property.¹⁴ That’s not true. *And the PUCO should not find it encouraging that the marketer requesting a rule waiver may not be complying with or may be circumventing the rule it wants the PUCO to waive.* The PUCO’s rules require the independent third-party verifier to confirm with the customer that the sales agent has left the customer’s property.¹⁵ The insinuation that RPA’s agents could still be at the door during independent third-party verification is quite disturbing. RPA Energy has the obligation under state law to provide sufficient management oversight of its sales agents separate and apart from any waiver to the third-party verification rules.¹⁶

RPA Energy also claims that its digital confirmation proposal is better for consumer comprehension of the questions and disclosures than telephonic independent

¹¹ Application (Feb. 18, 2021), ¶7.

¹² O.A.C. 4901:1-21-06(D)(1)(h); O.A.C. 4901:1-29-06(D)(6)(b).

¹³ See the subparagraphs in O.A.C. 4901:1-21-06(D)(2)(a); O.A.C. 4901:1-29-06(E)(1)(a).

¹⁴ Application, ¶11.

¹⁵ O.A.C. 4901:1-21-06(D)(1)(h)(ii); O.A.C. 4901:1-29-06(D)(6)(b)(ii).

¹⁶ R.C. 4928.10(D); R.C. 4929.22(D).

third-party verification.¹⁷ According to RPA Energy, electronic verification allows consumers to reread the information if necessary. RPA Energy assumes that consumers would not ask the independent third-party verifier to repeat the information when verification is made by phone. But consumers can, and often do, ask the verifier to repeat a question or disclosure during telephonic verification.

And in fact, questions that a consumer asks during the third-party verification call can reveal if they truly understand the terms and conditions in the contract they were sold by sales marketers. Further, the PUCO's rules specifically require the independent third-party verifier to structure the verification interview to give the customer adequate time to respond to questions.¹⁸ That interactive process would not be possible through the digital process RPA Energy is proposing.

RPA Energy also asserts that its proposal would make it easier for consumers to decline switching to its services.¹⁹ This assumes that the average consumer would not change his or her mind during the conversation with the independent third-party verifier. But consumers can, and often do, change their minds during telephonic verification and simply *hang up* or decline to switch their service.

RPA makes many claims that its proposal is “easier” for the customer when, in reality, it is much easier, and much less expensive, only for RPA. The false assumptions relied on by RPA Energy undermine its arguments to support its application. RPA Energy has not shown good cause for its waiver request and the PUCO should deny it to safeguard consumers from deceptive or high-pressure door-to-door solicitations.

¹⁷ Application, ¶13.

¹⁸ O.A.C. 4901:1-21-06(D)(1)(h)(iii); O.A.C. 4901:1-29-06(D)(6)(b)(iii).

¹⁹ Application, ¶14.

C. Consumer protection rules requiring third-party telephone confirmation of a supplier sign-up should be maintained at all times, but especially during these financially challenging times for consumers during the pandemic and given problems with unscrupulous marketers.

These financially challenging times of the pandemic make it all the more important for consumer protection to deny waiving the existing rule. Consumers need more protections, not less, with regard to energy marketing, including more protections from subsets of marketers that are unscrupulous. The pandemic, where residential consumers are suffering medically, emotionally, and financially, is all the more not the time to relax consumer protection rules.

Ohioans are busy. They have jobs or are seeking employment. They have concerns regarding the pandemic health and financial crisis. They have responsibilities raising families and caring for elderly parents. They are experiencing health concerns prompted by the pandemic. Adding to their problems involving time and money are not welcomed. That would include some problems that can result from a knock on the door or other intrusions by energy marketers.

Moreover, some of these interactions can come at an unfair and high price for consumers. The PUCO has investigated marketers who took advantage of Ohio consumers to their detriment.²⁰ Commissioner Friedeman very recently expressed concern with a “disturbing” increase in marketer incidents leading to recent PUCO

²⁰ See, e.g., *PALMco Energy*, Case Nos. 19-957-GE-COI, 19-2153-GE-COI; *Statewise Energy/SFE Energy*, Case No. 20-1216-GE-COI; *Verde Energy*, Case Nos. 19-0958-GE0-COI, 13-2164-GA-CRS, 11-5886-EL-CRS, *Dominion Energy*, Case No. 18-1419-GA-EXM, *Reliant Energy Northeast LLC, d/b/a/ NRG Energy*, Case No. 20-1758-GE-UNC.

enforcement actions to protect consumers from marketers.²¹ His comments were supported by Commissioner Conway. Commissioner Friedeman's remarks were made in the course of approving a settlement, but as noted in *Energy Choice Matters*,²² he stated that they were applicable to marketers in general:

During today's PUCO meeting in which the stipulation was approved, Commissioner Lawrence Friedeman offered a few general remarks which were "germane but not specific to this particular docket matter."

Friedeman noted that the PUCO has needed to address alleged supplier marketing violations with a "disturbing" frequency as of late, and Friedeman noted that resolutions of such investigations have included remedial and corrective actions taken by suppliers.

However, Friedeman said that suppliers should integrate effective quality assurance plans into their operations which would avoid the occurrence of problematic behavior in the first place.

"Preventive plans are an appropriate element of a supplier's demonstration of technical and operational capabilities in both the initial certification application and re-certification applications," Friedeman said.

"Depending on the specific facts and circumstances, should there be behavioral issues in the future, for any competitive supplier, I'm inclined to believe that there can be reasonable inferences drawn from the absence of a formal operational emphasis on quality assurance in regard to whether a competitive supplier possesses the requisite technical and operational capabilities to warrant continued certification in this state," Friedeman said.

Commissioner Daniel Conway supported Friedeman's comments.²³

²¹ The Public Utilities Commission of Ohio, Remarks by Commissioner Friedeman regarding *Reliant Energy Northeast LLC d/b/a/ NRG Business, NRG Home and NRG Retail Solutions*, Case No. 20-1758-GE-UNC, YOUTUBE at 09:40 (March 14, 2021) https://www.youtube.com/watch?v=_IxqdAgNJck

²² <http://www.energychoicematters.com/stories/20210324c.html>.

²³ *Id.*

Experience and data are reflecting that consumer expectations from marketing about the potential to save money may not match reality.²⁴ Columbia Gas of Ohio has performed a study since the beginning of its natural gas choice program. Columbia's analysis, known as shadow billing, has shown that its customers who have shopped with marketers for natural gas service between 1998 and March 2021 have paid nearly \$2 billion more than they would have paid had those customers been served on Columbia's own standard offer.

The Wall Street Journal (WSJ) ran several articles about energy marketing problems on March 8, 2021.²⁵ The WSJ reported that consumers of energy marketers had been charged more than \$19 billion above the standard offer available from their utility.²⁶ The article noted how minority families often represent a disproportionate share of retail energy consumers, and that vulnerable consumers are harmed the most.²⁷

The Massachusetts Attorney General reached similar conclusions. On April 1, 2021, the agency released a report that found in the last five years, individual residential customers who received their electricity from competitive suppliers paid \$426 million more on their bills than they would have paid if they had stayed with their utility

²⁴ Dan Gearino, *Ohio customers losing big on unregulated natural gas plans*, Columbus Dispatch, (April 4, 2016, 12:01 AM), <https://www.dispatch.com/article/20160404/NEWS/304049819>.

²⁵ See, Tom McGinty & Scott Patterson, *Deregulation Aimed to Lower Home-Power Bills. For Many, It Didn't*, Wall Street Journal (March 8, 2021, 12:24 PM), <https://www.wsj.com/articles/electricity-deregulation-utility-retail-energy-bills-11615213623>; see also, Tom McGinty, *How We Calculated Electricity-Rate Comparisons*, Wall Street Journal, (March 8, 2021, 12:17 PM), <https://www.wsj.com/articles/how-we-calculated-electricity-rate-comparisons-11615223851?tesla=y>; see also, Scott Patterson, *Are You Overpaying for Electricity? Here's How to Find Out*, Wall Street Journal, (March 8, 2021, 12:15PM), <https://www.wsj.com/articles/are-you-overpaying-for-electricity-heres-how-to-find-out-11615223723?tesla=y>.

²⁶ *Id.*

²⁷ *Id.*

companies.²⁸ The AG’s report also found that these suppliers continue to charge low-income residents and residents in communities of color higher rates for their electricity.²⁹

“Our report shows that these companies continue to drain millions from communities across our state, and worse, our most vulnerable neighbors are being hit hardest in the midst of a deadly pandemic,” Attorney General Maura Healey stated.

In the case of RPA Energy, analysis from the PUCO’s own apples-to-apples chart confirms that RPA’s electric and natural gas offers are generally two or more times higher than the comparable 100% green products offered by other marketers. RPA Energy’s electric rates show some one-month teaser offers that are about the same as the price to compares, but they include a \$5.00 per month fee and after one month the price switches to an unspecified variable rate. In the case of natural gas rates, RPA Energy’s current gas offers to the current SCO/GCR rates on the gas apples-to-apples charts as of 4/8/21 show that the marketer’s rates were higher (as much as two or more times higher) than comparable gas utility standard service offer rates.³⁰

The PUCO should not relax the consumer protections built into its rules in order to make it easier for RPA Energy to persuade customers at their door to pay more for marketer services than they would if they remained on their utility’s standard offer. And it is unconscionable for consumer protection standards to be weakened during a time

²⁸ *Are Consumers Benefiting From Competition? An Analysis of the Individual Residential Electric Supply Market in Massachusetts: 2021 Update*. A Report by the Massachusetts Attorney General’s Office Prepared by Susan M. Baldwin, March 2021.

²⁹ Press Release, New AG Report: Massachusetts Residents Lost \$426 Million Through Competitive Electric Supply Contracts in Last Five Years, April 1, 2021,

³⁰ In the Duke Energy service territory, RPA (listed as Green Choice Energy) offered a 1-month variable contract for \$0.7835 per ccf and the Duke April GCR was listed at \$0.3994 per ccf a 96% “premium” for a 1-month contract.

where Ohioans are also experiencing serious financial losses due to the worst pandemic in more than 100 years.

D. RPA Energy’s proposed use of geolocation tracking may not accurately determine whether its salesperson has left the consumer’s home after a door-to-door sale, which could thwart the intended consumer protections of the PUCO’s rules.

RPA Energy states that it would use a geolocator function to determine whether its door-to-door salesperson has left the customer’s home before third-party verification would begin.³¹ Thus, the accuracy of the geolocation function is important in considering whether consumer protections would be lessened under RPA Energy’s proposal.

Allowing electronic verification of door-to-door utility sales transactions is unlawful because it puts consumers at risk of harm.³² Geolocation tracking systems are not always accurate. 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. Finally, there is no independence in the verification process if RPA is involved in confirming the validity of the sales transaction between the consumer and their employee/agent.

Depending on the device and system used, geolocation tracking can have a wide range of accuracy, especially in urban areas. Global positioning systems (“GPS”) are accurate between three and 15 meters (about ten feet to 50 feet), depending on the equipment used.³³ But even a variance of ten feet could mean that the geolocation function inaccurately showing that the salesperson has left the customer’s home when in

³¹ Application, ¶9.

³² R.C. 4929.22

³³ See <https://www.lifewire.com/how-gps-works-1683296>.

fact they haven't. Further, GPS doesn't work well in urban areas and indoors.³⁴ Ohio law requires that the PUCO's rules consistently protect consumers.³⁵

WiFi location tracking can be used to enhance GPS signals. This function tracks the location of devices relative to WiFi hotspots in a neighborhood.³⁶ But WiFi tracking will not work in areas where no WiFi is available or if the WiFi owner has opted out of the tracking function.³⁷

Other tracking systems are less accurate. Mobile network location – which tracks a device's location through cell tower signals – is accurate only within three-quarters of a mile.³⁸ Internet Protocol based geolocation is typically accurate to a city or an area within a city.³⁹

The inaccuracy of these systems could thwart the consumer protections in the PUCO's rules regarding switching of consumers' energy suppliers. The purpose of independent third-party verification is to provide assurance that a marketer's sales pitch does not unduly influence a consumer's choice of energy suppliers. Under the proposed waiver, however, the systems could show that a salesperson has left the customer's home when in fact the salesperson is still in the home and capable of manipulating the customer's responses to the independent third-party verifier.

³⁴ *See id.*

³⁵ R.C. 4928.10; R.C. 4929.22.

³⁶ *See* <https://www.lifewire.com/wifi-positioning-system-1683343>.

³⁷ *Id.*

³⁸ *See* https://www.storelocatorwidgets.com/blogpost/20453/Everything_you_ever_wanted_to_know_about_HTML5_Geolocation_Accuracy.

³⁹ *See* <https://www.lifewire.com/does-ip-address-geolocation-really-work-818154>.

The geolocation function in RPA Energy’s proposal might not accurately determine whether the salesperson has left the customer’s home, which could thwart the consumer protections in the PUCO’s rules. RPA Energy’s proposed system is an inadequate substitute for the independent third-party verifier asking the consumer whether the salesperson is still at the consumer’s home.

The consumer protections offered by the rule simply cannot be duplicated by an electronic verification. The telephone 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 RPA’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 consumer can simply hang up on the call.

Previous PUCO entries addressing marketers’ third-party verification waivers have required the PUCO Staff to monitor complaints against the marketer.⁴⁰ 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.

⁴⁰ See, e.g., *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, Entry, ¶13 (Sept. 26, 2019).

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,⁴¹ where the third-party verification recordings helped show how salespeople misled and deceived consumers. RPA Energy's application should be denied because good cause has not been shown, and customers would otherwise be placed at risk. The PUCO should protect consumers by rejecting RPA Energy's proposal.

E. RPA Energy's waiver allowing it to enroll customers via digital confirmation should not be granted, but if it is, the PUCO should mandate consumer protections.

Given the abundant issues involving marketers overcharging Ohioans, it is imperative that the PUCO make certain that existing consumer protections are enforced, if not strengthened. To protect consumers, the PUCO should deny RPA Energy's request.

If, however, the PUCO allows RPA Energy to offer digital third-party verification, against OCC's and Pro Seniors' recommendation, it should insist upon the following conditions. To help prevent consumer abuse, OCC and Pro Seniors recommend that the PUCO approach this request conservatively, and if approved (which it should not be), then that approval should contain a zero-tolerance condition. That is, if RPA Energy's waiver request is granted, and a single instance of consumer abuse is attributable to this digital GPS customer verification process, the waiver should be denied going forward, and the independent third-party verification process should be the only option available for verification.

⁴¹ Case Nos. 19-957-GE-COI and 19-958-GE-COI.

At a minimum, customers should be informed of this choice. Specifically, consumers should be informed that under the telephonic third-party verification, the enrollment will be verified by a person where there is an opportunity to ask questions and seek clarity on the terms and conditions. Under the digital option, verification is performed through a computer and/or text messaging with no opportunity to ask another human questions or to seek clarity.

The PUCO should also require that the digital third-party verification is presented in a neutral manner, especially given that many of the consumers RPA Energy is marketing may not be as familiar with electronic devices or their usage as they are with phone conversations. The PUCO should require that RPA Energy neither recommend nor entice customers to choose the digital third-party verification option over the telephonic confirmation. Finally, recognizing that many consumers to which RPA Energy is soliciting may not be comfortable with electronic platforms, customers who choose the digital method should have the choice to switch to the telephonic confirmation if they later decide they want to speak to a “real person” during the third-party verification.

But to be clear, we think it would be a mistake for consumers were the PUCO to grant RPA Energy’s request.

III. CONCLUSION

RPA Energy has the burden to show good cause for its waiver request. It has not. The PUCO should not reduce the consumer protections in its rules concerning the switching of consumers’ electric and natural gas suppliers. If anything, the PUCO’s rules should be strengthened for consumer protection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Comments was served on the persons stated below via electronic transmission, this 9th day of April 2021.

/s/ Amy Botschner O'Brien
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in

Case No(s). 21-0157-GE-WVR

Summary: Comments Amended Comments Opposing Request of RPA Energy for a PUCO Waiver of Certain Consumer Protections from Energy Marketing by Office of the Ohio Consumers' Counsel and Pro Seniors, Inc. electronically filed by Ms. Patricia J Mallarnee on behalf of Botschner-O'Brien, Amy