

**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 |) | Case No. 22-441-GE-COI |
| Administrative Code and Potential |) | |
| Remedial Actions for Non-Compliance |) | |

**MEMORANDUM CONTRA GREEN CHOICE'S DEFECTIVE MOTION FOR
PROTECTIVE ORDER
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

Electric and natural gas marketer RPA Energy, Inc., d/b/a Green Choice Energy ("Green Choice") seeks to deny the Ohio Consumers' Counsel ("OCC") discovery that it is entitled to by law. OCC's discovery is directly relevant to Green Choice's unfair, deceptive, and unconscionable marketing tactics currently under investigation by the Public Utilities Commission ("PUCO"). OCC filed a motion to intervene in this case on April 27, 2022.¹

It is long settled that parties, including OCC, have a right to engage in discovery without delay under the Ohio Administrative Code.² But what continues to be unsettled is that regulated entities who interpose this improper delay will face meaningful consequences at the PUCO for violating discovery law and rules. The PUCO has such consequences at its disposal, including the imposition of penalties (forfeitures) on Green Choice.

¹ OCC's Motion to Intervene (April 27, 2022).

² O.A.C. 4901-1-16(H).

OCC served Green Choice with discovery requests on May 3, 2022.³ Despite gathering data and documents for the PUCO Staff⁴—and also insisting it could meet an “expedited deadline” for discovery responses if OCC’s motion to intervene is granted⁵—Green Choice now seeks a broad protective order completely suspending its obligation to answer OCC’s discovery requests.⁶ In the meantime, Green Choice has unilaterally disregarded its discovery response requirements under Ohio rules.

In its motion, Green Choice makes two arguments. First, Green Choice argues that it should not be obligated to answer discovery until OCC’s motion to intervene is granted.⁷ Second, Green Choice contends OCC’s discovery requests are outside the scope of the issues raised by PUCO Staff.⁸ Neither argument holds water.

As a party that has moved to intervene in this matter, OCC has an explicit right under the Ohio Administrative Code to serve discovery and receive responses, regardless of whether another party contests the intervention.⁹ Furthermore, the discovery that OCC served in this case is directly relevant to the issues raised by PUCO staff, *i.e.* Green Choice’s unlawful and unscrupulous telephone and door-to-door solicitation schemes.¹⁰

Further, Green Choice’s motion does not comply with the rules. Green Choice’s motion is defective. O.A.C. 4901-1-24(B)(3) requires Green Choice to file an “affidavit

³ Green Choice’s Motion for Protective Order, (May 20, 2022), Ex. B.

⁴ Green Choice’s Memorandum in Opposition to OCC’s Motion to Intervene (May 10, 2022), p. 10.

⁵ Green Choice’s Motion for Protective Order, (May 20, 2022), p. 4.

⁶ *Id.* at p. 1.

⁷ *Id.*

⁸ *Id.*

⁹ O.A.C. 4901-1-16(H).

¹⁰ Green Choice’s Motion for Protective Order, Ex. B.

of counsel.” But Green Choice didn’t file the required affidavit. Green Choice’s motion should be denied.

Finally, Green Choice’s motion is intended to contribute to undue delay of these proceedings. The rules seek to avoid unnecessary delay.¹¹ For these reasons, Green Choice’s motion for protective order should be denied and Green Choice should be held to its obligations.

II. ARGUMENT

A. The Green Choice motion violated O.A.C. 4901-1-24(B)(3) by failing to file an affidavit of counsel setting forth efforts it undertook to resolve the discovery dispute.

Green Choice’s motion should summarily be denied without further consideration because Green Choice failed to comply with the PUCO’s rules for filing for a protective order.¹² The PUCO’s rules prohibit a party from filing for a protective order until the party seeking the order “has exhausted all other reasonable means of resolving any differences with the party seeking discovery.”¹³ Consistent with this requirement, a motion for a protective order “*shall* be accompanied by...[a]n *affidavit* of counsel...setting for the efforts that have been made to resolve any differences with the party seeking discovery.”¹⁴

Green Choice’s motion does not meet these bare-minimum requirements. As an initial matter, the motion does not include any *affidavit* evincing Green Choice’s efforts to resolve differences with OCC. Rather, Green Choice simply attached a two-page email

¹¹ See O.A.C. 4901-1-16(A).

¹² O.A.C. 4901-1-24(B).

¹³ O.A.C. 4901-1-24(B).

¹⁴ (Emphasis added.) Ohio Adm. Code 4901-1-24(B)(3).

correspondence between its counsel and OCC's counsel.¹⁵ Thus, the motion does not comply with the mandatory requirements of the PUCO's rules and should be denied on that basis alone. Furthermore, even if the PUCO considers the actual content of the email attachment, the text of the exchange makes clear that Green Choice did not exhaust all reasonable means of resolving its differences with OCC.

In the email exchange, Green Choice took no issue with any specific discovery requests and did not propose a compromise. Rather, Green Choice simply declared that "it's probably safe to assume that OCC will not be getting the information it is seeking by the current discovery deadline" and asked OCC to agree to a stay of discovery pending PUCO's ruling on OCC's motion to intervene.¹⁶ In response, OCC did not consent to a formal stay of discovery, but did express a willingness to discuss an extension of discovery deadlines.¹⁷ Rather than responding to this overture, Green Choice filed its defective motion.

Green Choice's refusal to put forth any effort to resolve discovery issues demonstrates Green Choice's disregard for the PUCO's rules and process. The PUCO should not reward this bad behavior by granting Green Choice's noncompliant motion.

B. Green Choice's opposition to OCC's intervention has no bearing on OCC's discovery rights.

Green Choice admits that, as a party actively seeking intervention in this case, OCC is "permitted under the rules" to serve discovery.¹⁸ Yet, Green Choice asserts that its duty to respond to OCC's discovery requests "should depend on OCC's right (or not)

¹⁵ Green Choice's Motion for Protective Order, (May 20, 2022), Ex. A.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at p. 2.

to participate in this case.”¹⁹ As an initial matter, OCC demonstrated in its motion to intervene that it satisfies the standards for intervention and that it is entitled, under Ohio law, to participate in this investigation to protect consumers. Notably, OCC’s intervention was recently *granted* over marketer opposition in the PUCO investigation of marketer XOOM Energy Ohio, LLC.²⁰ There, the Attorney Examiner noted that “the Supreme Court of Ohio has held that statutes and rules governing intervention should be “generally liberally construed in favor of intervention.””²¹

Moreover, Green Choice’s apparent belief that it should be free from any obligation to respond to discovery *before* the PUCO officially grants OCC intervention directly contradicts the PUCO’s well known discovery process. The Ohio Administrative Code states, “the term ‘party’ includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.”²² There is no exclusion or carve-out for situations where another party opposes the movant’s intervention.²³ This is consistent with the Ohio Administrative Code, which states that the purpose of the discovery rules is “to encourage the *prompt and expeditious* use of prehearing discovery in order to facilitate thorough and adequate participation in commission proceedings.”²⁴

¹⁹ *Id.* at p. 3.

²⁰ *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, Entry (May 20, 2022), ¶ 10.

²¹ *Id.* (citing *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 384).

²² O.A.C. 4901-1-16(H).

²³ *Id.*

²⁴ O.A.C. 4901-1-16(A) (emphasis added).

“When interpreting an administrative rule, unambiguous text must be applied according to its terms, without adding or subtracting words.”²⁵ The discovery process set forth in the Ohio Administrative Code plainly contemplates the situation at hand and explicitly gives OCC the right to participate in discovery while its motion to intervene is pending, regardless of Green Choice’s opposition. Accordingly, PUCO should deny Green Choice’s motion and require it to respond to OCC’s discovery.

C. The Green Choice motion asks the PUCO to violate OCC’s discovery and case preparation rights.

The Green Choice motion asks the PUCO to violate OCC’s discovery and case preparation rights. OCC’s discovery and case preparation rights are protected by R.C. 4903.082, which states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” *See OCC v. PUC*, 111 Ohio St.3d 300 (2006). The PUCO has also adopted rules that broadly define the scope of discovery and case preparation. O.A.C. 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

Green Choice’s efforts to involve the PUCO in denying OCC its ample rights of discovery to prepare its case should be rejected. It would require the PUCO to violate rights guaranteed by Ohio statute, rule, and Supreme Court precedent.

²⁵ *Twism Ents., LLC v. State Bd. of Registration*, 1st Dist. Hamilton Nos. C-200411 and C-210125, 2021-Ohio-3665, ¶ 20, citing *State ex rel. Fire Rock, Ltd. v. Ohio Dept. of Commerce*, 163 Ohio St.3d 277, 2021-Ohio-673, 169 N.E.3d 665, ¶ 13.

D. OCC’s discovery requests are directly relevant to the issues in this PUCO investigation of Green Choice.

Perhaps cognizant of the fact that its mere opposition to OCC’s intervention does not warrant a stay of discovery, Green Choice also asserts that OCC’s discovery requests “venture[] into areas well beyond the scope of the [Notice of Probability of Non-Compliance].”²⁶

But Green Choice never raised this concern with OCC’s counsel. Nor did Green Choice bother to serve specific objections to OCC’s discovery requests. In fact, Green Choice fails to cite to *any* example of a discovery request that falls outside the scope of PUCO’s investigation.²⁷ Rather Green Choice just claims that it is “obvious from even the most cursory review of [OCC’s discovery requests].”²⁸ That bald assertion is not enough to justify Green Choice’s attempts to avoid OCC’s discovery.

If OCC’s discovery requests so obviously exceed the scope of this proceeding (they do not), then Green Choice could have – and should have – attempted to resolve the issue with OCC *before* burdening the PUCO (as the rules require). But Green Choice did not.

In fact, contrary to Green Choice’s claim, OCC’s discovery to Green Choice is plainly relevant to this investigation. The PUCO’s Notice of Probability of Non-Compliance (“Notice”) specifically described multiple issues related to Green Choice’s telephone and door-to-door solicitations of electric and natural gas consumers.²⁹ Green

²⁶ Green Choice’s Motion for Protective Order, (May 20, 2022), p. 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *In the Matter of the RPA Energy, Inc., dba Green Choice Energy’s Compliance with the Ohio Administrative Code and Proposed Remedial Action*, PUCO Staff Letter (April 18, 2022), Attachment A.

Choice's misleading and abusive tactics include, but are not limited to: manipulation of telemarketing call recordings submitted to PUCO, the spoofing of telemarketer numbers to make calls appear local, misleading and deceptive statements by telemarketers and door-to-door marketers, attempting to enroll consumers without consent, initialing contracts on behalf of customers without consent, failing to timely provide copies of contracts in accordance with PUCO's rules, failure to explain material terms that affect variable rate contracts, and failure to monitor vendors and sales agents.³⁰

Each of OCC's discovery requests is relevant to these issues. Of OCC's 24 interrogatories, Nos. 1 and 2 relate to any expert witnesses *Green Choice* chooses to call at hearing; Nos. 3-4 and 10-13 concern Green Choice's use and/or supervision of sales employees, agents, or vendors; Nos. 5-9 relate to the compensation, training, and compliance monitoring of such employees, agents, or vendors; No. 14 concerns Green Choice's processes for validating consumer enrollment; Nos. 15-22 seek identification of the electric and natural gas customers that Green Choice serves and whether those customers are on fixed or variable contracts; and Nos. 23-24 seek information about what, if any, disciplinary action Green Choice has faced in other states—consistent with PUCO staff's stated concern about the “pervasive nature”³¹ of Green Choice's conduct.

Additionally, of OCC's 10 requests for the production of documents, Nos. 1-6 request documents that Green Choice has *already provided* to PUCO staff relating either to this hearing or to the allegations in the Notice; Nos. 7-8 request copies of the standard electric and natural gas contract used by Green Choice in Ohio; No. 9 requests copies of

³⁰ *Id.*

³¹ *In the Matter of the RPA Energy, Inc., dba Green Choice Energy's Compliance with the Ohio Administrative Code and Proposed Remedial Action*, PUCO Staff Letter (April 18, 2022), p. 2.

training materials, scripts, and instructions that Green Choice provides to representatives who solicit Ohio consumers on Green Choice's behalf; and No. 10 requests copies of contracts between Green Choice and vendors that engage in marketing and/or enrollment of Ohio consumers on Green Choice's behalf.

In short, Green Choice does not – and cannot – point to a single OCC discovery request that exceeds the scope of this investigation. The PUCO should reject Green Choice's baseless attempt to wholly deny discovery to OCC in this investigation.

E. Granting Green Choice's motion will unjustifiably delay resolution of this case, to the benefit of Green Choice and detriment of Ohio consumers.

In addition to failing to comply with the PUCO's rules for protective orders and failing to ground its arguments in law or fact, Green Choice's motion threatens to delay timely resolution of this case for consumers, something Green Choice previously stated it wished to avoid.³² As noted above, the Ohio Administrative Code allows parties who have moved for intervention to *immediately* engage in discovery to expedite proceedings.³³ Green Choice's deficient and meritless attempt to avoid its obligations to answer OCC's discovery flout the rules and PUCO process. The PUCO should enforce the discovery rules to make sure this matter proceeds in an efficient manner. Green Choice's motion should be denied.

³² See Green Choice's Memorandum in Opposition to OCC's Motion to Intervene (May 10, 2022), p. 9.

³³ O.A.C. 4901-1-16(A).

III. CONCLUSION

The PUCO's discovery rules are clear. A party seeking intervention in a hearing is entitled to fully participate in pre-hearing discovery while its intervention motion is pending.³⁴ The rules also require parties to "exhaust[] all other reasonable means of resolving any differences with the party seeking discovery" before filing a motion for protective order.³⁵ Instead of following the proper process, Green Choice prematurely burdened the PUCO with a motion for protective order that doesn't even include the affidavit required by O.A.C. 4901-1-24(B)(3).

It is long settled that parties, including OCC, have a right to engage in discovery without delay under the Ohio Administrative Code.³⁶ But what continues to be unsettled is that regulated entities who interpose this improper delay will face meaningful consequences at the PUCO for violating discovery law and rules. The PUCO has such consequences at its disposal, including the imposition of penalties (forfeitures) on Green Choice.

The PUCO should deny Green Choice's inappropriate and improper attempt to end-run the PUCO's discovery process. OCC is entitled to seek discovery from Green Choice. The PUCO should deny Green Choice's motion for protective order and order Green Choice to respond to OCC's discovery.

³⁴ O.A.C. 4901-1-16(H).

³⁵ O.A.C. 4901-1-24(B).

³⁶ O.A.C. 4901-1-16(H).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Green Choice's Deficient Motion for Protective Order was served on the persons stated below via electronic transmission, this 6th day of June 2022.

/s/ Angela D. O'Brien
Angela D. O'Brien
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