

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of RPA Energy           )  
Inc. d/b/a Green Choice Energy for Renewal           )   Case No. 16-0893-GA-CRS  
Certification as a Retail Natural Gas Supplier           )

**MEMORANDUM CONTRA OFFICE OF CONSUMERS' COUNSEL  
MOTION TO INTERVENE AND MOTION TO DENY RENEWAL APPLICATION**

Office of Consumers' Counsel (OCC) has filed a motion asking for three things: (1) permission to intervene; (2) suspension of RPA Energy, Inc. d/b/a/ Green Choice Energy's (Green Choice) renewal application; and (3) that the application be "outright denied."<sup>1</sup> The first request for relief is premature, the second is duplicative and unnecessary, and the third is frivolous. OCC should withdraw its motion; if it does not, the motion should be denied.

**I. INTRODUCTION**

Green Choice has been a licensed CRNG supplier since 2016. The day after filing its most recent renewal application, Green Choice filed a motion to suspend the application and to waive the subsequent 90-day deadline for full consideration.<sup>2</sup> This would allow the Commission to consider the outcome of the pending enforcement action in Case No. 22-441-GE-COI before deciding the renewal application. OCC has requested to intervene in the enforcement proceeding but the request has not been ruled on. Regardless of whether intervention is ultimately granted or

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<sup>1</sup> OCC Mem. Supp. at 8.

<sup>2</sup> What OCC characterizes as the "poor timing" of the renewal application is, in fact, dictated by Commission rules. OCC Mem. Supp. at 1. *See* O.A.C. 4901:1-27-09(A). Green Choice continues to serve existing customers, so it is required to file a renewal application.



denied, resolving the enforcement action before considering the renewal application would serve OCC's interests just as much as Green Choice's and Commission Staff's.

Unable to recognize a mutually beneficial proposal when it sees one, OCC has decided to swing for the fences. Merely suspending the application is not good enough for OCC; OCC asks that the application be "outright denied."<sup>3</sup> This utterly frivolous request reflects a total disregard of established processes for adjudicating enforcement actions and license applications.<sup>4</sup> There is no pressing reason for OCC to seek leave to intervene in the licensing proceeding at this time, but since it has done so, intervention should be denied.

## **II. ARGUMENT**

The statutes granting OCC's powers and authority do not confer authority to participate in retail supplier licensing proceedings, and even if OCC had this authority, the Commission has discretion to decide whether OCC may exercise this authority in a particular case. Granting intervention here would do nothing but reward frivolous conduct. OCC has nothing of substance to contribute to this proceeding.

### **A. OCC lacks authority to participate in retail supplier license proceedings.**

"The OCC possesses only the jurisdiction and powers conferred upon him by his enabling statute."<sup>5</sup> R.C. Chapter 4911 confers no authority whatsoever to participate in licensing or complaint proceedings involving competitive retail natural gas suppliers. "All of the specifically enumerated powers described in R.C. 4911.02 concern the OCC's powers and duties

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<sup>3</sup> OCC Mem. Supp. at 8.

<sup>4</sup> See O.A.C. 4901:1-27-09 (certificate renewal proceedings); O.A.C. Chapter 4901:1-34 (enforcement procedures).

<sup>5</sup> *Tongren v. D&L Gas Mktg., Ltd.*, 2002-Ohio-5006, ¶ 9, 149 Ohio App. 3d 508, 510 (emphasis in original).



as they relate to *public utility* rates and services and proceedings before the PUCO.”<sup>6</sup> Green Choice is not a public utility.

In introducing retail competition, the General Assembly recognized OCC’s lack of authority to represent customers of retail suppliers. It addressed this by granting OCC limited, additional authority to represent such consumers in certain complaint proceedings. Under R.C. 4929.24(C)(1), “[i]n addition to the authority conferred under section 4911.15 of the Revised Code,” OCC may “file a complaint under division (A)(1) or (2) of this section on behalf of residential consumers in this state or appear before the commission as a representative of those consumers pursuant to any complaint filed under division (A)(1) or (2) of this section.” Divisions (A)(1) and (2) refer to complaints filed under R.C. 4905.26.

The language in R.C. 4929.24(C)(1) is significant for two reasons. First, the prefatory clause “[i]n addition to the authority conferred under [R.C.] 4911.15” expressly acknowledges that OCC *does not* have the authority under R.C. 4911.15 to participate in complaint proceedings involving retail suppliers. R.C. 4929.24 was enacted to give OCC authority it previously lacked. Second, the grant of authority is limited to complaint proceedings under R.C. 4905.26. Licensing proceedings are governed by R.C. 4929.10 and 4929.20, and statutory language authorizing OCC’s participation in those proceedings is nowhere to be found.

OCC’s desire to appoint itself sheriff of the retail energy market is not a substitute for legal authority. The legislature simply has not granted the authority OCC seeks to exercise. The Commission and Staff are responsible for licensing decisions, not OCC.

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<sup>6</sup> *Id.* ¶ 20



Green Choice recognizes that OCC was allowed to intervene in a 2019 license renewal proceeding involving Verde Energy USA, LLC (Verde).<sup>7</sup> Verde opposed intervention because OCC wanted to oppose the license renewal on the same grounds previously argued in a recent enforcement proceeding.<sup>8</sup> The statutory arguments presented above were neither raised nor considered. *Verde* is not “precedent” for ignoring arguments that were not brought to the Commission’s attention then but are now. Considering the ridiculous number of motions and delay that OCC’s participation caused, the grant of intervention in *Verde* is the *least* persuasive argument for granting intervention here.

**B. OCC does not meet the intervention standard.**

Even if OCC had statutory authority to participate in licensing proceedings, this authority is subject to the Commission’s discretion to permit or deny the exercise of this authority. R.C. 4903.221 and O.A.C. 4901-1-11 govern intervention in Commission proceedings and are patterned after Rule 24 of the Ohio and federal Rules of Civil Procedure.<sup>9</sup> “Permission to intervene is largely discretionary, and to be exercised carefully.”<sup>10</sup> The statutory and rule-based factors are applied on a case-by-case basis and tilt lopsidedly against OCC’s intervention here.

The first factor the Commission must first consider “[t]he nature and extent of the prospective intervenor’s interest.”<sup>11</sup> This requires OCC to demonstrate “an interest recognized by

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<sup>7</sup> See Case No. 13-2164-GA-CRS, Entry (March 3, 2020).

<sup>8</sup> Case No. 13-2164-GA-CRS, Verde Mem. Contra OCC Motion to Intervene (Dec. 6, 2019) at 4-5.

<sup>9</sup> *Ohio Consumers’ Couns. v. Pub. Util. Comm.*, 2006-Ohio-5853, ¶ 16, 111 Ohio St. 3d 384, 387 (noting that Commission rule on intervention “is very similar to Civ.R. 24”).

<sup>10</sup> *City of Columbus ex rel. Willits v. Cremean*, 27 Ohio App. 2d 137, 158 (1971) (citation omitted) (finding error in grant of intervention).

<sup>11</sup> O.A.C. 4901-1-11(B)(1).



law,”<sup>12</sup> which it cannot do for the reason explained above. OCC’s legally protectible interests are statutorily defined and the governing statutes do not grant a legal interest in retail supplier licensing proceedings.

The Commission must also consider “[t]he legal position advanced by the prospective intervenor and its probable relation to the merits of the case” and “[w]hether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.”<sup>13</sup> OCC asks that “[i]n advance of the expiration of Green Choice’s certificate,” the Commission strip Green Choice of its customers and return them to their respective utility, and that the renewal application be “outright denied.”<sup>14</sup> These positions cannot have any relation to the merits of the case because OCC has made clear it doesn’t care about the “merits” or the “full development and equitable resolution of the factual issues.”

As far as OCC is concerned, if the Staff Report in the enforcement action says it, Green Choice must have done it—no need to hear the other side of the story, no need for the Commission to weigh the evidence, and no need to endure the formality of a process established to fairly decide the merits of an enforcement action or renewal application. Just consider the Staff Report as fully developed facts, revoke the existing license, deny the renewal, and move on. All of this begs the question: If the Staff Report is enough to decide Green Choice’s fate, what is the point of granting intervention to OCC in either this case or the enforcement action? To the extent OCC’s positions are based entirely on the Staff Report, OCC has merely

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<sup>12</sup> See *State ex rel. Dispatch Printing Co. v. Columbus*, 2000-Ohio-8, 90 Ohio St. 3d 39, 43; *Rumpke Sanitary Landfill, Inc. v. State*, 2010-Ohio-6037, ¶ 14, 128 Ohio St. 3d 41, 44.

<sup>13</sup> O.A.C. 4901-1-11(B)(2) and (4).

<sup>14</sup> OCC Motion at 2; Mem. Supp. at 8.



established that Staff adequately represents consumers' interests, and this too is sufficient to deny intervention.<sup>15</sup>

OCC "arguments" are so utterly unmeritorious that the only reason OCC could possibly have for asserting them is harassment and delay. Rule 3.1 of the Ohio Rules of Professional Conduct is clear: "A lawyer shall not bring or defend a proceeding, *or assert or controvert an issue in a proceeding*, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Conduct which "obviously serves merely to harass or maliciously injure another party" or is for some other improper purpose, "including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation" is frivolous.<sup>16</sup>

OCC's motion reads like a rant from an online chat room rather than a legal filing in a quasi-judicial proceeding. What law allows the Commission to "outright den[y]" a license renewal application before undertaking the "evaluation" process specified by statute or Commission rules?<sup>17</sup> OCC doesn't say. Is there an argument that laws preventing the Commission from taking such action should be modified or reversed? If there is, OCC hasn't made it. Nor has OCC explained the legal or factual basis for stripping Green Choice of its customers "[i]n advance of the expiration of Green Choice's certificate."<sup>18</sup> OCC insinuates that

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<sup>15</sup> O.A.C. 4901-1-11(B)(5) ("The extent to which the person's interest is represented by existing parties.").

<sup>16</sup> See R.C. 2323.51.

<sup>17</sup> See O.A.C 4901:1-27-10(B) ("In evaluating the application, the commission will consider the information contained in the application, supporting evidence and attachments, evidence filed by any interested parties, and recommendations of its staff."). This evaluation may include a hearing. *Id.* at (A)(2)(a).

<sup>18</sup> OCC. Motion at 2.



the Staff Report in Case No. 22-441-GE-COI represents *Commission findings* resulting from a litigated proceeding, but OCC knows this is not true. To characterize these findings as an adjudication that Green Choice has or will use its license “to steal from Ohioans”<sup>19</sup> is to accuse the company of a criminal offense, and that sort of irresponsible talk runs perilously close to violating the Ohio Rules of Professional Conduct as well. Commission proceedings are *not* online chat rooms, and arguments must be supported by law and evidence, not uninformed opinions and pre-drawn conclusions.

Where “[a]ny basic understanding of the legal system makes clear” that a tribunal “has no authority to grant such relief” and a party requests the relief anyway, the requesting party engages in frivolous, sanctionable conduct.<sup>20</sup> That is exactly what OCC has done here—it is asking the Commission to grant relief that anyone with a “basic understanding” of governing law knows the Commission cannot grant. One suspects that if OCC were paying hourly rates to prepare these motions (as most opposing parties do to respond to them), these frivolous motions would disappear.

Finally, the Commission must consider whether “intervention by the prospective intervenor will unduly prolong or delay the proceeding.”<sup>21</sup> Delay is not an immediate concern because both Green Choice and OCC have asked the Commission to suspend the application (OCC hasn’t addressed the inconsistency of asking the Commission to both “suspend” the application and decide it simultaneously, but that is another matter). The *Verde* renewal docket speaks for itself in terms of what to expect from OCC.

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<sup>19</sup> OCC Motion at 1.

<sup>20</sup> *Jones v. Nichols*, 2012-Ohio-4344, ¶¶ 23-24.

<sup>21</sup> O.A.C. 4901-1-11(B)(3).



OCC could redeem itself by withdrawing its improper motion. Doing so would allow it to live to fight another day. If OCC persists in pursuing frivolous requests for relief, it has only itself to blame for the consequences.

### **III. CONCLUSION**

If OCC's motion to intervene is not deferred, it should be denied. The request to ignore due process and immediately reject the renewal application must also be denied.

Dated: July 5, 2022

Respectfully submitted,

*/s/ Mark A. Whitt*

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was filed on the Commission's DIS and a courtesy copy served by electronic mail this 5th<sup>st</sup> day of July, 2022 to the following individuals:

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*/s/ Mark A. Whitt*

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Summary: Memorandum Memorandum Contra OCC Motion to Intervene and  
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behalf of RPA Energy, Inc.