

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
INVESTIGATION INTO RPA ENERGY
INC.'S COMPLIANCE WITH THE OHIO
ADMINISTRATIVE CODE AND POTENTIAL
REMEDIAL ACTIONS FOR NON-
COMPLIANCE.

CASE No. 22-441-GE-COI

ENTRY

Entered in the Journal on July 6, 2022

{¶ 1} RPA Energy, Inc. d/b/a Green Choice Energy (RPA) is an electric services company as defined in R.C. 4928.01 and a retail natural gas supplier as defined in R.C. 4929.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08 and to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16 and R.C. 4929.24. Accordingly, RPA is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21, as well as the minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 2} R.C. 4928.08 states that no electric services company shall provide a CRES to a consumer in this state without first being certified by the Commission regarding its managerial, technical, and financial capability to provide such service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from default. Similarly, R.C. 4929.20 states that no retail natural gas supplier shall provide CRNGS to a consumer without first being certified by the Commission regarding its managerial, technical, and financial capability to provide that service and providing reasonable financial assurances sufficient to protect customers and natural gas companies from default.

{¶ 3} On October 5, 2016, the Commission granted RPA's application for certification as a CRES provider in this state. *In the Matter of the Application of RPA Energy, Inc. for Certification as a Competitive Retail Electric Service Provider in Ohio*, Case No. 16-892-EL-CRS. RPA timely filed renewal applications for certification as a CRES provider every

two years pursuant to Ohio Adm.Code 4901:1-24-09; its first renewal application was automatically approved by the Commission pursuant to R.C. 4928.08. RPA Energy's most recent renewal application was filed on September 1, 2020; this renewal application was approved by the Commission on November 18, 2020. Additionally, on July 20, 2016, the Commission granted RPA's application for certification as a CRNGS supplier in this state. *In the Matter of the Application of RPA Energy Inc. for Certification as a Competitive Retail Natural Gas Marketer*, Case No. 16-893-GA-CRS. RPA timely filed renewal applications for certification as a CRNGS provider every two years pursuant to Ohio Adm.Code 4901:1-27-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4929.20. RPA's most recent renewal application was filed on June 19, 2020; this renewal application also was automatically approved by the Commission pursuant to R.C. 4929.20.

{¶ 4} Both R.C. 4928.08 and 4929.20 allow the Commission to suspend, rescind, or conditionally rescind the certification of any electric services company or retail natural gas supplier issued under these sections if the Commission determines, after reasonable notice and opportunity for hearing, that the electric services company or retail natural gas supplier 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. Additionally, R.C. 4928.16 and 4929.24 grant the Commission the authority to order any remedy or forfeiture provided under R.C. 4905.54 to 4905.60 and 4905.64, and to order restitution to customers and rescission of customer contracts.

{¶ 5} On April 18, 2022, Staff of the Commission's Service Monitoring and Enforcement Department (Staff) filed a letter stating that, after reviewing customer contacts received by the Commission's call center from January 1, 2021, to October 1, 2021, as well as an audio recording provided by RPA, Staff believes that RPA has engaged in a pattern of misleading and deceptive practices to market and enroll customers during both door to door and telephonic sales practices. Staff states that it has received 35 customer

contacts regarding RPA. Further, on June 4, 2021, the Chief of the Commission's Reliability and Service Analysis Division, Barbara Bossart, was solicited on her personal cell phone by a representative of RPA. When she spoke to a sales representative during the call, Ms. Bossart noted several misleading statements, so she documented the call and forwarded that information to a supervisor in the Commission's call center. After being solicited again by an RPA sales agent, Ms. Bossart filed a complaint with the Commission's call center, resulting in an investigation that yielded a recording, which Ms. Bossart claims is missing parts of her exchange with the sales representative. Staff also references other specific instances where it believes that RPA engaged in misleading and deceptive marketing and solicitation practices.

{¶ 6} Staff stated that, on October 16, 2021, a notice of probable non-compliance (notice) was sent to RPA; however, after many discussions, RPA and Staff were unable to resolve the issues raised in the notice. Staff concluded that: RPA used inaccurate caller identification information, including inaccurate third-party-verification; RPA used robo-calling with automated messages which included misleading and deceptive information to entice a customer to speak to a sales representative; RPA sales representatives provided misleading information during telemarketing efforts; RPA did not clearly make an offer for sale when marketing to a customer; RPA failed to provide signed contracts for customers who were enrolled through door to door enrollment; and RPA's completed third-party verifications did not contain all of the elements required by rule. As a result of its conclusions indicating probable non-compliance with statutory and rule requirements, Staff recommended that the Commission open a formal proceeding to review RPA's compliance with Ohio law. Further, Staff noted that, at the urging of Staff, RPA ceased marketing in Ohio after receiving the notice. Staff requested that the Commission order RPA to continue the suspension of marketing pending the outcome of the investigation.

{¶ 7} On April 20, 2022, the Commission found that a hearing should be held at which RPA shall, among other things, have the opportunity to respond to the findings contained in the Staff Report and show cause why its certification as a CRES provider and its certification as a CRNGS supplier should not be suspended, rescinded, or conditionally rescinded. The Commission established a procedural schedule whereby motions to intervene were to be filed by May 18, 2022, a Staff Report was to be filed by June 10, 2022, testimony was to be filed by June 24, 2022, and an evidentiary hearing was scheduled for July 11, 2022.

{¶ 8} On April 27, 2022, the Ohio Consumers' Counsel (OCC) filed a motion to intervene, citing generally to its role as a consumer advocate and arguing that its intervention satisfies the requirements of Ohio Adm.Code 4901-1-11(B)(1)-(4) and R.C. 4903.221. OCC stated that its intervention would enhance the development of a full record and would not unduly delay the proceedings.

{¶ 9} On May 10, 2022, RPA filed a memorandum contra the motion to intervene. RPA argued that OCC's intervention should be denied where it does not have legal authority to intervene in a Commission-initiated case such as the matter at hand. RPA argues that R.C. 4911.02 confers upon OCC the right to intervene and represent all utility customers as concerns public utility service, but that this case involves no legally protectable interest of OCC where it centers on a CRES/CRNGS provider's service and charges. RPA further argues that the interests of affected consumers are adequately represented by Staff. Finally, RPA argues that OCC's intervention would both unduly delay the proceedings and prejudice the existing parties by interfering with Staff's conduct and RPA by subjecting it to duplicative investigation through its own discovery requests.,

{¶ 10} On May 17, 2022, OCC filed its reply to RPA's memorandum. OCC argues that RPA errs when it states that OCC has no legal authority to intervene. Specifically, OCC cites to R.C. 4911.02(B)(2), which provides that "[w]ithout limitation because of

enumeration, the counsel shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters* * *” OCC argues that this provision, in conjunction with the Commission’s precedent and rules, conveys the intent of the legislature that the provisions of R.C. 4911.02 be construed as broadly as is possible. Further, OCC argues that it should not be denied intervention because its interests are represented by Staff. OCC states that Staff considers the interests of consumers and marketers, where OCC is the only party whose sole advocacy is on behalf of all utility consumers in Ohio. Finally, OCC reiterates that its motion to intervene satisfies the criteria of R.C. 4903.221 and 4901-1-11(B)(1)-(4) and that its intervention would neither prejudice any party nor unduly delay the proceedings.

{¶ 11} On May 19, 2022, RPA filed a surreply to OCC’s reply to RPA’s memorandum contra. In its surreply, RPA generally restates its arguments from its memorandum contra and states that OCC’s authority to intervene in “public utility” complaints and investigations is clear, but that this is not so in retail supplier investigations. RPA states that the Commission should deny OCC’s motion to intervene and invite OCC to participate in post-hearing briefing.

{¶ 12} On May 20, 2022, RPA filed a motion for protective order, seeking to protect itself from “annoyance, embarrassment, oppression, or undue burden or expense” stemming from OCC’s discovery requests. RPA further argues that it is inappropriate for a party other than Staff, in an enforcement action, to undermine Staff’s efforts by introducing additional issues in pursuit of its own agenda. Finally, RPA argues that RPA’s discovery both has no purpose before its intervention is determined, and that said determination should be reached before RPA has to respond to OCC’s requests, otherwise RPA will suffer undue burden and expense if, ultimately, OCC is not granted intervention.

{¶ 13} On June 6, 2022, OCC filed a memorandum contra RPA's motion for protective order. OCC argues that it has a right under Ohio Adm.Code 4901-1-16(H) to engage in discovery without delay, regardless of the status of or opposition to its motion to intervene. OCC also argues that its discovery requests are directly relevant to the issues raised by Staff in this case, contrary to RPA's argument. Finally, OCC argues that RPA's motion for protective order is defective where it fails to satisfy the requirements of Ohio Adm.Code 4901-1-24(B)(3), which requires, among other things, RPA file an affidavit of counsel, which sets forth the efforts that have been made to resolve any differences with the party seeking discovery. OCC states RPA did not file such an affidavit.

{¶ 14} On June 10, 2022, Staff submitted its Report of Investigation.

{¶ 15} On June 13, 2022, OCC filed a motion to compel RPA to respond to its discovery request. In its accompanying memorandum, OCC generally restates the arguments from its memorandum contra RPA's motion for protective order. Notably, OCC discusses its efforts to resolve the dispute with RPA, as is detailed in its attached affidavit. OCC states that RPA was not amenable to any offer to negotiate any sort of extension of time to respond to the discovery request. OCC states that RPA has unreasonably delayed and, in OCC's opinion, does not plan to provide any response to the discovery request, and should therefore be compelled to do so where OCC has moved to intervene and testimony in the case is due only 11 days from OCC's filing the motion to compel.

{¶ 16} On June 16, 2022, RPA filed a memorandum contra OCC's motion to compel discovery. In its memorandum, RPA generally restates the arguments made in both its motion for protective order and its memorandum contra OCC's motion to intervene. Notably, RPA argues that it did, in fact, attempt to negotiate to an extension with OCC when it requested OCC wait until after the motion to intervene was ruled

upon. RPA states that OCC's refusal to do so was not in good faith and only attempted to delay the proceeding.

{¶ 17} On June 15, 2022, OCC filed a motion to extend the procedural schedule with a request for expedited ruling.

{¶ 18} On June 22, 2022, the attorney examiner by Entry granted the motion to extend the procedural schedule, rescheduling the hearing for August 10, 2022, and moving the deadline for testimony to July 27, 2022.

{¶ 19} The attorney examiner finds that OCC's motion to intervene is reasonable and should be granted subject to the limitation that intervention is limited to the investigation instituted by Staff against RPA for alleged noncompliance with Commission marketing rules, as well as any additional issues that are identified in the Staff report of investigation. OCC has satisfied the intervention criteria set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11 because OCC's participation in this case on behalf of residential customers may contribute to full development and equitable resolution of the issues identified by Staff without causing any unreasonable delay in the proceeding. Further, the Commission has previously permitted OCC to intervene in Commission-initiated enforcement proceedings. *See, e.g., In re SFE Energy Ohio, Inc., and Statewise Energy Ohio, LLC*, Case No. 20-1216-GE-COI, Entry (Sept. 28, 2020); *In re PALMco Power OH, LLC dba Indra Energy & PALMco Energy OH, LLC dba Indra Energy*, Case No. 19-2153-GE-COI, Entry (Apr. 6, 2020); *In re PALMco Power OH, LLC dba Indra Energy & PALMco Energy OH, LLC dba Indra Energy*, 19-957-GE-COI, Entry (Sept. 3, 2019); *In re Verde Energy USA Ohio, LLC*, Case No. 19-958-GE-COI, Entry (May 16, 2019); *In re Ohio Utilities Company*, Case No. 92-550-WS-COI, Entry (June 2, 1992); *In re Suburban Fuel Gas, Inc.*, Case No. 90-1825-GA-COI, Order (Dec. 13, 1990).

{¶ 20} As discussed above, both OCC and RPA filed motions stemming from, and dependent upon, the outcome of OCC's motion to intervene. Specifically, RPA filed a

motion for protective order, citing the pendency of OCC's intervention as its reason to not respond to OCC's discovery requests, and OCC filed a motion to compel discovery, citing to its ability to do so as an interested person who has moved to intervene. Pursuant to Paragraph 19 above, both issues are moot where OCC's intervention has been granted.

{¶ 21} It is, therefore,

{¶ 22} ORDERED, That OCC's motion to intervene be granted. It is, further,

{¶ 23} ORDERED, That the RPA's motion for protective order be denied as moot. It is, further,

{¶ 24} ORDERED, That OCC's motion to compel discovery be denied as moot. It is, further,

{¶ 25} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Jesse M. Davis

By: Jesse M. Davis
Attorney Examiner

JMD/dmh

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Case No(s). 22-0441-GE-COI

Summary: Attorney Examiner Entry granting motion to intervene; denying motion for protective order; and denying motion to compel discovery as detailed herein electronically filed by Ms. Donielle M Hunter on behalf of Davis, Jesse Mr.