

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into RPA Energy, Inc.'s)	
Compliance with the Ohio)	Case No. 22-441-GE-COI
Administrative Code and Potential)	
Remedial Actions for Non-Compliance.)	

**MOTION FOR A PREHEARING CONFERENCE
AND
REQUEST FOR EXPEDITED RULING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel moves for a prehearing conference to address discovery and other procedural matters in this investigation regarding RPA Energy, Inc. d/b/a Green Choice Energy's ("Green Choice") alleged deceptive marketing of electric and natural gas service to Ohio consumers. Green Choice continues to dispute OCC's intervention and will not respond to OCC's discovery. A prehearing conference is necessary to address these issues so that OCC can properly advocate for consumers and prepare testimony and for the evidentiary hearing.

On April 20, 2022, the Public Utilities Commission of Ohio ("PUCO") initiated the investigation and directed Green Choice to "show cause why its certification as a CRES provider and its certification as a CRNGS supplier should not be suspended, rescinded, or conditionally rescinded."¹ The Attorney Examiner granted OCC's motion to intervene in this investigation on July 6, 2022.² Green Choice has filed a motion to certify an interlocutory appeal of that Attorney Examiner's Entry (which is pending) and will not

¹ PUCO Entry (April 20, 2022), at ¶¶ 1,9.

² See Attorney Examiner Entry (July 6, 2022).

respond to OCC's discovery until ordered to do so by the PUCO. This greatly impairs OCC's ability to advocate for consumers.

Currently, testimony is due to be filed on July 27, 2022 and the evidentiary hearing is scheduled to commence on August 10, 2022.³ Accordingly, there is good cause for an expedited ruling under O.A.C. 4901-1-12(C). OCC has contacted the parties regarding this Motion and no party opposes a prehearing conference or an expedited ruling on this Motion.

The reasons supporting this Motion for a prehearing conference and request for expedited ruling are contained in the following Memorandum in Support.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien
Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia Wilson (0096598)
Assistant Consumers' Counsel

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(willing to accept service by e-mail)

³ See Attorney Examiner Entry (June 22, 2022).

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case concerns Green Choice's alleged unfair, misleading, and deceptive marketing practices against Ohio consumers. OCC, the statutory advocate for Ohio's residential consumers, moved to intervene on April 27, 2022. The Attorney Examiner granted OCC intervention on July 6, 2022, over the objections of Green Choice.

Yet Green Choice continues to dispute OCC's intervention and will not respond to OCC's discovery. A prehearing conference is necessary to address these issues so that OCC can properly advocate for consumers and prepare testimony and for the evidentiary hearing.

Under the current schedule in this case, parties must file testimony by July 27, 2022, and the evidentiary hearing is scheduled to begin on August 10, 2022. Thus, there is good cause for an expedited ruling on this Motion and a prehearing conference should commence prior to the July 27 testimony date.

II. ARGUMENT

A prehearing conference is necessary because Green Choice has unreasonably and unlawfully refused to respond to any discovery served by OCC. This has stymied OCC's ability to prepare its case for consumer protection.

A prehearing conference is allowed by the PUCO's rules. O.A.C. 4901-1-26(A)(1) allows the PUCO to hold a prehearing conference to resolve discovery matters. O.A.C. 4901-1-26(A)(1)(a) allows the PUCO to hold a prehearing conference to rule on motions to compel and protective orders. O.A.C. 4901-1-26(A)(2) allows the PUCO to hold a prehearing conference on "any other pending procedural motions." And O.A.C. 4901-1-26(A)(7) allows the PUCO to hold a prehearing conference to discuss or rule on "any other procedural matter which the commission or the presiding hearing officer considers appropriate."

Green Choice previously filed a Motion for Protective Order arguing that it should be protected from OCC's discovery because "OCC's right to participate in this proceeding is disputed" by Green Choice.⁴ OCC also filed a Motion to Compel Green Choice to respond to OCC's discovery.⁵ However, the Attorney Examiner has since granted OCC's intervention. In the July 6 Entry granting OCC's intervention, the Attorney Examiner ruled that OCC's Motion to Compel and Green Choice's Motion for Protective Order were moot because both motions "stemm[ed] from, and [were] dependent upon, the outcome of OCC's motion to intervene."⁶

⁴ Green Choice Motion for Protective Order (May 20, 2022), at 1.

⁵ See OCC's Motion to Compel (June 13, 2022).

⁶ Entry (July 6, 2022), ¶ 20.

Green Choice has since sought certification of an interlocutory appeal of the Attorney Examiner's decision granting OCC's intervention and has taken a position – contrary to the PUCO's rules – that Green Choice will not respond to *any* of OCC's discovery until it is ordered to do so by the PUCO.⁷ However, it is unclear when the PUCO will issue such order, and until it does, Green Choice will continue to avoid OCC's discovery preventing OCC's ability to present testimony and prepare for hearings.

The importance of these issues is magnified under the press of the current procedural schedule. The next step would be for OCC to file a second motion to compel Green Choice to respond to discovery and another motion for continuance. But any attempt to obtain relief through such motions would be futile given the current procedural schedule and Green Choice's likely opposition. Further, OCC has already filed one Motion to Compel. And OCC previously sought a continuance of the procedural schedule to allow Green Choice extra time to cooperate with OCC on discovery.

But Green Choice has disregarded the Attorney Examiner's decision granting OCC's intervention as well as the PUCO's rules allowing OCC to obtain discovery. Green Choice should not be allowed to run out the clock for consumers. For consumer protection, the PUCO should act promptly to allow OCC's full participation in this investigation.

OCC also requests an expedited ruling, pursuant to Ohio Adm. Code 4901-1-12(C). The PUCO should rule on an expedited basis so that the prehearing conference can be scheduled as soon as possible before the due date for testimony. OCC has communicated with the parties regarding this Motion. Neither PUCO Staff nor Green

⁷ See Attachment A (July 15, 2022 e-mail from Green Choice counsel Mark Whitt to Angela O'Brien).

Choice oppose a prehearing conference. In addition, no party objects to an expedited ruling on this Motion.

III. CONCLUSION

For the reasons explained above, this Motion for Prehearing Conference should be granted in furtherance of a fair and transparent process for consumers. OCC further requests that the PUCO issue an expedited ruling so that the prehearing conference can be held prior to July 27, 2022, the date for filing testimony in this proceeding.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien
Angela D. O'Brien (0097579)
Counsel of Record
Ambrosia Wilson (0096598)
Assistant Consumers' Counsel

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(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Motion for a Prehearing Conference and Request for Expedited Ruling has been served upon the following parties via electronic transmission this 19th day of July 2022.

/s/ Angela D. O'Brien

Angela D. O'Brien

Assistant Consumers' Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

SERVICE LIST

robert.eubanks@ohioAGO.gov

rhiannon.plant@ohioAGO.gov

whitt@whitt-sturtevant.com

Attorney Examiner:

jesse.davis@puco.ohio.gov

From: Mark Whitt <whitt@whitt-sturtevant.com>
Sent: Friday, July 15, 2022 5:15 PM
To: O'Brien, Angela
Cc: Wilson, Ambrosia
Subject: Re: 22-441 outstanding discovery requests

Green Choice will respond to the 1st and 2nd second sets of discovery (and apparently a 3rd set, too, based on an email I just saw but haven't opened) if and when ordered to do so. (I will remind you that you rejected my offer earlier this week to get you at least partial responses by today.)

If our position on discovery hasn't been made clear I'm not sure what else I can say. OCC's intervention and discovery rights remain at issue in this case. I know you think you are right and we are wrong on these issues and that is fine, but here is a process for resolving disagreements on these issues. Green Choice has followed the process: we have timely filed our motions and timely filed an interlocutory appeal. You can complain until you are blue in the face that our arguments are wrong but OCC is not the decision maker. You are disrespecting the process by insisting that Green Choice proceed in the case as if you have prevailed on the motions. The rules permit interlocutory review of procedural entries so the intervention decision is not final. These are not my rules—they are the Commission's.

I also don't get to decide when the commission rules on motions, and I recognize that the late ruling on intervention and now the request for interlocutory review are creating a potential time crunch. If these circumstances require a discussion of amending the procedural schedule I am willing to have that discussion. I am not trying to run out the clock here and I appreciate any concerns about being confronted with final decision on intervention that keeps OCC in the case but prevents OCC from getting the discovery it needs to participate effectively. That is not my intent. My intent is to act in Green Choice's best interests in a manner consistent with the rules. It does not serve my client's interests to treat the interlocutory appeal as a foregone conclusion and start responding to discovery.

While "technically" on vacation next week, I will be checking emails periodically. If we are going to talk about possibly amending the schedule we probably need to bring Staff into the discussion.

Have a good weekend.

Mark A. Whitt

whittsturtevant LLP

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614.804.6034 (mobile)

whitt@whitt-sturtevant.com



From: Angela.O'Brien@occ.ohio.gov <Angela.O'Brien@occ.ohio.gov>
Date: Friday, July 15, 2022 at 3:14 PM
To: Mark Whitt <whitt@whitt-sturtevant.com>
Cc: Ambrosia.Wilson@occ.ohio.gov <Ambrosia.Wilson@occ.ohio.gov>
Subject: RE: 22-441 outstanding discovery requests

Hi Mark-

We did not receive discovery responses to OCC's 2nd Set, which were due yesterday. We are also still waiting on responses to OCC's 1st Set. Will Green Choice be responding to OCC's 1st or 2nd sets of discovery?

Thank you.

Angela



Angela O'Brien
Assistant Consumers' Counsel

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From: O'Brien, Angela
Sent: Wednesday, July 13, 2022 4:25 PM
To: Mark Whitt <whitt@whitt-sturtevant.com>; Wilson, Ambrosia <Ambrosia.Wilson@occ.ohio.gov>

Cc: Valerie Cahill <cahill@whitt-sturtevant.com>
Subject: RE: 22-441 outstanding discovery requests

Hi Mark-

To follow up on discovery, attached is an executed protective agreement for confidential information. Please sign and return at your earliest convenience.

Thank you.

Angela



Angela O'Brien
Assistant Consumers' Counsel

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From: O'Brien, Angela
Sent: Monday, July 11, 2022 3:58 PM
To: Mark Whitt <whitt@whitt-sturtevant.com>; Wilson, Ambrosia <Ambrosia.Wilson@occ.ohio.gov>
Cc: Valerie Cahill <cahill@whitt-sturtevant.com>
Subject: RE: 22-441 outstanding discovery requests

Will do. Thanks.



Angela O'Brien
Assistant Consumers' Counsel

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angela.obrien@occ.ohio.gov

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From: Mark Whitt <whitt@whitt-sturtevant.com>
Sent: Monday, July 11, 2022 3:57 PM
To: O'Brien, Angela <Angela.OBrien@occ.ohio.gov>; Wilson, Ambrosia <Ambrosia.Wilson@occ.ohio.gov>

Cc: Valerie Cahill <cahill@whitt-sturtevant.com>

Subject: Re: 22-441 outstanding discovery requests

Your lack of willingness to consider compromise is duly noted. Do what you think is best.

Mark A. Whitt

whittsturtevant LLP

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whitt@whitt-sturtevant.com



From: Angela.OBrien@occ.ohio.gov <Angela.OBrien@occ.ohio.gov>

Date: Monday, July 11, 2022 at 3:45 PM

To: Mark Whitt <whitt@whitt-sturtevant.com>, Ambrosia.Wilson@occ.ohio.gov <Ambrosia.Wilson@occ.ohio.gov>

Cc: Valerie Cahill <cahill@whitt-sturtevant.com>

Subject: RE: 22-441 outstanding discovery requests

Mark-

Filing an IA is your choice, however, we both know that the AE Entry was neither a departure from PUCO precedent nor is it a novel issue. To claim otherwise is plainly disingenuous.

Given that testimony is due on July 29, and the hearing will begin August 10, we need the responses to our discovery. If Green Choice does not make a good faith effort to start providing responses to our discovery by Wednesday (the first set has been outstanding for weeks) and the second set is due on the 14th, we will consider moving forward with a second a motion to compel and a motion for sanctions against Green Choice.

I appreciate that you are on vacation next week, but your client should have been in a position to have the responses ready to go. And I'm sure you have someone else in your office to assist you with these efforts.

Thank you.

Angela



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From: Mark Whitt <whitt@whitt-sturtevant.com>
Sent: Monday, July 11, 2022 3:31 PM
To: Wilson, Ambrosia <Ambrosia.Wilson@occ.ohio.gov>
Cc: O'Brien, Angela <Angela.O'Brien@occ.ohio.gov>; Valerie Cahill <cahill@whitt-sturtevant.com>
Subject: Re: 22-441 outstanding discovery requests

Ambrosia –

I apologize for the delay to this message. I was travelling on Thursday and dealing with some other deadlines on Friday.

Later this afternoon, Green Choice will be filing a motion to certify an interlocutory appeal of the intervention issue. This has implications for the discovery responses as well as the procedural schedule, potentially. Even though we have not exhausted our rights on the intervention and discovery issues, I'm willing to look for compromise. The Staff Report includes 1400+ pages of attachments so I would think that would be sufficient to address OCC's immediate document needs. I'd be willing to approach the client about providing responses to most if not all of the interrogatories, and get those to you by the end of this week. I am on vacation the following week, and the week after that I propose we re-group and discuss next steps based on the status of the interlocutory appeal. Let me know what you think.

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From: Ambrosia.Wilson@occ.ohio.gov <Ambrosia.Wilson@occ.ohio.gov>
Date: Thursday, July 7, 2022 at 11:53 AM
To: Mark Whitt <whitt@whitt-sturtevant.com>
Cc: Angela.OBrien@occ.ohio.gov <Angela.OBrien@occ.ohio.gov>, Lucas Fykes <fykes@whitt-sturtevant.com>, Valerie Cahill <cahill@whitt-sturtevant.com>
Subject: 22-441 outstanding discovery requests

Good Morning Mr. Whitt:

I am following up on the discovery that OCC served on 5/3/2022. It was due to OCC by 5/23/22. Given that yesterday the Attorney Examiner granted OCC's intervention in this case and dismissed RPA's Motion for Protective Order and OCC's Motion to Compel, when can OCC expect a response to the discovery requests? You stated in your May 12, 2022 email that "If intervention is granted, RPA would be amendable to an expedited response deadline." Considering that testimony is due in 20 days, OCC is willing to give RPA 5 business days (from today) to respond. RPA has had these discovery requests for nearly three months, so there has been more than adequate time for RPA to prepare responses. I am attaching the original discovery requests for your convenience.

Please let me know by close of business tomorrow (Friday, July 8, 2022) if discovery responses will be produced by July 14, 2022.

Respectfully,

Ambrosia



Ambrosia E. Wilson
Assistant Consumers' Counsel

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in

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

Summary: Motion Motion for a Prehearing Conference and Request for Expedited
Ruling by Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tracy
J. Greene on behalf of O'Brien, Angela D