

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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)	

**INITIAL BRIEF TO PROTECT CONSUMERS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Ohio Consumers' Counsel

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

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: [O'Brien]: (614) 466-9531
Telephone [Wilson]: (614) 466-1292
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
(willing to accept service by e-mail)

January 6, 2023

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	2
III. ARGUMENT	3
A. The Staff Report and evidence presented during the hearing demonstrate that Green Choice engaged in misleading and deceptive acts to market electric and natural gas service to Ohio consumers. To protect consumers, Green Choice’s certificates should be permanently rescinded.	3
B. The evidence of Green Choice’s misleading and deceptive marketing practices demonstrates that Green Choice lacks the managerial capabilities to market electric and natural gas service in Ohio. To protect consumers, Green Choice’s certificates to market to Ohio consumers should be permanently rescinded.....	12
C. Green Choice’s misleading and deceptive acts and lack of managerial capabilities are amplified by Green Choice’s refusal to cooperate with the PUCO Staff and OCC regarding this investigation. To protect consumers, Green Choice’s certificates to market to Ohio consumers should be permanently rescinded.....	15
D. Green Choice’s bad acts and contempt for the PUCO’s rules and orders warrant a Green Choice forfeiture of at least \$1.5 million, in addition to permanently rescinding Green Choice’s certificates to market electric and natural gas service in Ohio. Other modifications to the PUCO Staff’s recommendations are also necessary for greater consumer protection.....	17
IV. CONCLUSION.....	23

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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)	

**INITIAL BRIEF TO PROTECT CONSUMERS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

This investigation concerns the alleged “unfair, deceptive, or unconscionable acts or practices” of Green Choice¹ in marketing electric and natural gas services to Ohio consumers. Marketing electric and natural gas in Ohio is a privilege² that Green Choice has abused by deceiving consumers and violating the PUCO’s rules. The PUCO should protect consumers by permanently rescinding Green Choice’s marketing certificates. Green Choice’s egregious acts further warrant a forfeiture of a minimum of \$1.5 million.

The Office of the Ohio Consumers’ Counsel (“OCC”), the statutory advocate for Ohio residential consumers, intervened in this case for consumer protection. Green Choice’s alleged deceptive marketing and enrollment practices are among the worst OCC has ever seen. The evidence shows that Green Choice falsified third-party verification (“TPV”) calls and altered sales calls.³ Consumer witnesses testified that Green Choice

¹ PUCO Entry (April 20, 2022) (“April 20 Entry”) at ¶ 1 (RPA Energy, Inc. d/b/a Green Choice Energy (“Green Choice”).

² R.C. 4928.08(B); R.C. 4929.20(A); OCC Ex. 1 (Williams Direct) at 4.

³ PUCO Staff Ex. 4 (Boerstler Direct) at 3-4; PUCO Staff Ex. 9 (Ramsey Direct) at 17-18; OCC Ex. 1 (Williams Direct) at 7.

falsified enrollment contracts.⁴ Green Choice also charged consumers exorbitant variable rates for service.⁵ Moreover, when PUCO Staff tried to investigate consumer complaints, Green Choice refused to cooperate and provide information.⁶

PUCO Staff witnesses testified that Green Choice “spoofed”⁷ (faked) Caller ID so that consumers believed that someone other than Green Choice was calling them.⁸ OCC’s position on spoofing by a marketer is “one and done” – meaning that the PUCO should have zero tolerance for spoofing. Ample evidence demonstrates Green Choice’s spoofing and other abuse of consumers. The PUCO should permanently rescind Green Choice’s certificates to market electric and natural gas to Ohioans and not let them or an affiliate receive a certificate again. It is time for the PUCO to stand up to energy marketers that knowingly deceive consumers to enrich their bottom line.

II. STANDARD OF REVIEW

To be certified by the PUCO to market electric and natural gas service in Ohio, a marketer must have the “managerial, technical, and financial capability” to provide service.⁹ R.C. 4928.08(D) and R.C. 4929.20(C)(1) provide that the PUCO may “suspend, rescind, or conditionally rescind” the certification of an electric or natural gas marketer if the PUCO determines after an opportunity for hearing that the marketer “has failed to

⁴ Tr. Vol. I (Sheila Barton-Johnson) at 26-36; Tr. Vol. 1 (Tyler Beauregard) at 47-53; *see also* PUCO Staff Ex. 9 (Ramsey Direct) at 5.

⁵ PUCO Staff Ex. 4 (Boerstler Direct) at 4.

⁶ PUCO Staff Ex. 9 (Ramsey Direct) at 8-10.

⁷ PUCO Staff Ex. 9 (Ramsey Direct) at 13, 21, 35-38; PUCO Ex. 6 (Bossart Direct) at 5; OCC Ex. 1 (Williams Direct) at 7, 13.

⁸ PUCO Staff Ex. 9 (Ramsey Direct) at 5.

⁹ R.C. 4928.08(B); R.C. 4929.20(A).

comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.”¹⁰ The PUCO may also suspend, rescind, or conditionally rescind a marketer’s certificate if the PUCO finds that the marketer has violated any PUCO order or rule.¹¹

R.C. 4928.10 and R.C. 4929.22 require the PUCO to protect consumers through the establishment of minimum service requirements that prohibit unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of competitive electric and natural gas services. These minimum service standards are set forth in O.A.C. 4901:1-21 and O.A.C. 4901:1-29. In addition to protecting consumers against misleading, deceptive, and unconscionable acts and practices in the marketing and solicitation of electric and natural gas services, the standards govern marketers’ administration of enrollment contracts.

III. ARGUMENT

A. The Staff Report and evidence presented during the hearing demonstrate that Green Choice engaged in misleading and deceptive acts to market electric and natural gas service to Ohio consumers. To protect consumers, Green Choice’s certificates should be permanently rescinded.

On April 18, 2022, the PUCO Staff requested that the PUCO open an investigation to review Green Choice’s compliance with Ohio law and PUCO rules regarding marketing and enrollment practices in the state.¹² On April 20, 2022, the PUCO opened an investigation and directed Green Choice to “show cause” as to why its

¹⁰ See also O.A.C. 4901:1-24-13, O.A.C. 4901:1-27-10.

¹¹ O.A.C. 4901:1-24-13(E)(7), O.A.C. 4901:1-27-13(E)(7).

¹² See OCC Ex. 1 (Williams Direct) at JDW-02.

certifications as an electric and natural gas marketer should not be suspended, rescinded, or conditionally rescinded in accordance with Ohio law.¹³ Green Choice has failed to show cause why it should not be fined and its certificates should not be permanently rescinded.

Prior to its request for an investigation into Green Choice, the PUCO Staff issued a Notice of Probable Non-Compliance to Green Choice identifying numerous instances where Green Choice's telemarketing and door-to-door sales agents provided misleading and deceptive information to consumers.¹⁴ OCC witness Williams testified that the Notice of Probable Non-Compliance alleged rampant unfair, deceptive, and unconscionable acts and practices by Green Choice in the marketing, solicitation, and sales of electric and natural gas service.¹⁵ Among other things, the PUCO Staff alleged that Green Choice did the following in violation of the PUCO's rules:

- Manipulated recordings to make it appear that sales calls were legitimate;
- Used spoofing technology (the practice where the caller uses a fake caller ID so that the person receiving the call thinks the call is coming from someone the person knows);
- Provided misleading and deceptive information to consumers at their front doors like they were representing the utility, or falsified reasons why they needed to see the bill, etc.;
- Engaged in the unlawful anticompetitive behavior of changing consumers' supplier without consent—known as “slamming”;¹⁶
- Misrepresented the high rates that consumers would be charged for Green Choice products and services compared to the utility's standard offer;

¹³ April 20 Entry, at ¶ 9.

¹⁴ See OCC Ex. 1 (Williams Direct) at JDW-02, Attachment A.

¹⁵ OCC Ex. 1 (Williams Direct) at 4.

¹⁶ R.C. 4928.10(D). R.C. 4929.22(D).

- Misrepresented the potential for saving money on consumer bills when in fact, any savings were highly doubtful;
- Caused consumer initials to be forged on contract documents;
- Violated PUCO rules by Green Choice sales agents remaining at the consumer's home during the conduct of independent third-party verification of the enrollments;
- Violated PUCO rules regarding contracting practices and the disclosure of the \$5.00 monthly fee charged to consumers for Green Choice service;
- Placed consumers' health and safety at risk by failing to comply with PUCO orders to inform the PUCO Staff before resuming door-to-door marketing during the coronavirus pandemic;
- Failed to manage agents working on behalf of Green Choice to comply with PUCO mandates over competitive sales, marketing and enrollments;
- Failed to ensure adequate quality control over sales calls and the independent third-party verification of enrollments to weed out unlawful enrollments;
- Violated the PUCO's telephonic third-party verification rules by sending contracts to consumers by text message to engage in third-party verification over their computer without independent consumer protections.¹⁷

According to OCC witness Williams' analysis, the PUCO Staff identified no less than sixteen specific violations of the PUCO's standards for marketing and enrollments that were allegedly committed by Green Choice.¹⁸

On July 21, 2022, the PUCO Staff issued an amended Staff Report of its investigation of Green Choice. According to the Staff Report, the PUCO received 25 contacts from consumers regarding Green Choice between January 1, 2021 to July 20,

¹⁷ Green Choice requested a waiver of PUCO rules in Case 21-0157-GE-WVR in order to text contracts to consumers but the PUCO has not authorized Green Choice's waiver request.

¹⁸ OCC Ex. 1 (Williams Direct) at 9, JDW-02 (Attachment A).

2021.¹⁹ These contacts related primarily to enrollment disputes. In addition to the misleading and deceptive acts and practices identified in the Notice of Probable Non-Compliance and Staff Report, the PUCO Staff found that Green Choice refused to provide important information regarding sales call recordings in response to PUCO Staff's data requests.²⁰

Evidence presented during the hearing supports the allegations in the Notice of Probable Non-Compliance and the Staff Report. PUCO Staff witnesses Ramsey and Boerstler testified about the complaints the PUCO received from consumers regarding Green Choice.²¹ PUCO Staff witness Bossart further testified regarding two separate misleading and deceptive telemarketing calls that she personally received from Green Choice.²²

Ms. Bossart testified that the first call she received from Green Choice appeared to be spoofed, because the phone number on the caller identification had the same prefix as the local high school.²³ During the call, the Green Choice sales agent informed Ms. Bossart that she was currently on a commercial rate and would be switched to a residential rate with Green Choice.²⁴ When Ms. Bossart proceeded to the third-party-verification portion of the call, she hung up because she did not want to enroll with Green Choice.²⁵ That prompted the Green Choice sales agent to call Ms. Bossart back to resume

¹⁹ Staff Report at 2-3; PUCO Staff Ex. 9 (Ramsey Direct) at 6.

²⁰ Staff Report at 3.

²¹ PUCO Staff Ex. 4 (Boerstler Direct); PUCO Staff Ex. 9 (Ramsey Direct).

²² PUCO Staff Ex. 6 (Bossart Direct).

²³ PUCO Staff Ex. 6 (Bossart Direct), at 5.

²⁴ PUCO Staff Ex. 6 (Bossart Direct) at 4.

²⁵ *Id.*

the third-party-verification. Ms. Bossart disconnected the call again because she would not agree to receive text messages from Green Choice.²⁶ The Green Choice sales agent called Ms. Bossart back yet again and told Ms. Bossart to answer “yes” to receiving text messages from Green Choice.²⁷ Ms. Bossart again terminated the call, at which point the Green Choice sales agent called back twice (as indicated by the phone number on the caller identification).²⁸ But Ms. Bossart refused to answer any more calls.²⁹

In another call from Green Choice (unrelated to the first marketing attempt) an automated recording (robo-call) informed Ms. Bossart that she would receive \$50 and a gift card for enrolling.³⁰ However, when Ms. Bossart continued the call with a live sales agent, the sales agent informed Ms. Bossart that the \$50 would be in “rewards”.³¹ The Green Choice sales agent again informed Ms. Bossart that she was on a commercial rate (when she was not) and that she would receive 30%-40% off her bill by enrolling with Green Choice.³² For this call, Ms. Bossart completed the third-party-verification portion of the call to enroll, but later rescinded the enrollment.³³ Ms. Bossart testified that she completed the enrollment with Green Choice so that the recordings of the enrollment would be saved.³⁴

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 3.

³¹ *Id.*

³² PUCO Staff Ex. 6 (Bossart Direct) at 2-3.

³³ *Id.* at 7.

³⁴ PUCO Staff Ex. 6 (Bossart Direct) at 6-7.

The PUCO Staff subsequently reviewed the recordings of Ms. Bossart's enrollment with Green Choice. Ms. Bossart testified that in her opinion, the recordings of her enrollment received from Green Choice were altered.³⁵ The recordings identified a different sales agent than the agent Ms. Bossart spoke with, did not contain the sales agent's representations of a 30%-40% savings, and did not contain the sales agent's representations that Ms. Bossart was on a commercial rate.³⁶ In addition, Ms. Bossart testified that her cell phone records show that the sales call was 24 minutes, but the recording of the call sent to the PUCO for review was just under 15 minutes.³⁷

Other evidence supports the PUCO Staff's allegations that Green Choice altered telephone solicitation recordings. PUCO Staff witness Ramsey testified that the PUCO Staff reviewed several call recordings that were "peculiar" and unlike other call recordings that PUCO Staff has reviewed in the past.³⁸ Ms. Ramsey testified that there were sound anomalies, echoes, and multiple voices on some recordings that were concerning.³⁹ Ms. Ramsey explained that those particular calls could not be analyzed forensically because Green Choice did not provide the uncompressed bit for bit recording or recording equipment information.⁴⁰ Nonetheless, Ms. Ramsey concluded that "more likely than not" Green Choice altered the recordings.

The PUCO Staff also presented the testimony of audio forensic expert Jennifer Owen, who reviewed the audio recordings of Ms. Bossart's enrollment and another

³⁵ PUCO Staff Ex. 6 (Bossart Direct) at 6.

³⁶ *Id.*

³⁷ *Id.*

³⁸ PUCO Staff Ex. 9 (Ramsey Direct) at 17-18.

³⁹ *Id.*

⁴⁰ *Id.* at 18.

suspicious enrollment.⁴¹ Ms. Owen discovered “red flags” consisting of visual and acoustic anomalies on the call recordings.⁴² Ms. Owen was unable to make a definitive conclusion as to whether the recordings were altered because she did not have sufficient information regarding the recording software, hardware, and the chain of control.⁴³ Green Choice claimed that this information was not available because Green Choice’s vendors kept the information, not Green Choice.⁴⁴ Regardless, Ms. Owen testified that the call recordings were “highly suspect.”⁴⁵

PUCO Staff witness Ramsey further testified that Green Choice altered (forged) enrollment contracts.⁴⁶ According to Ms. Ramsey, the contract that Green Choice texted to Ms. Bossart was initialed “BB”, as if Ms. Bossart had signed it.⁴⁷ But Ms. Bossart couldn’t have initialed the contract because the enrollment was by telephone.⁴⁸ In another case involving a door-to-door solicitation, the complaining consumer indicated to PUCO Staff that the signature on the contract was not his.⁴⁹

Consumer witnesses appeared during the evidentiary hearing to testify regarding their experiences with Green Choice’s misleading and deceptive practices.⁵⁰ For example, consumer witness Tyler Beauregard testified that he was switched to Green Choice

⁴¹ PUCO Staff Ex. 12 (Owen Direct).

⁴² Tr. Vol. II (Owens Cross) at 227-228.

⁴³ *Id.*

⁴⁴ PUCO Staff Ex. 9 (Ramsey Direct) at 9-10.

⁴⁵ Tr. Vol. II (Owens Cross) at 229.

⁴⁶ PUCO Staff Ex. 9 (Ramsey Direct) at 13.

⁴⁷ PUCO Staff Ex. 9 (Ramsey Direct) at 6.

⁴⁸ *Id.*

⁴⁹ *Id.* at 19.

⁵⁰ Tr. Vol. I (Testimony of Edward Tokar) at 8-26; Tr. Vol. I (Testimony of Sheila Barton-Johnson) at 26-44; and Tr. Vol. I (Testimony of Tyler Beauregard) at 47-62.

despite rejecting Green Choice's sales pitch.⁵¹ Alarming, the PUCO Staff presented evidence of a third-party-verification call where someone impersonated Mr. Beauregard in order to complete the enrollment.⁵² At the hearing, Green Choice stipulated that the voice on the third-party-verification call was not Mr. Beauregard's voice.⁵³

Consumer witness Ms. Sheila Barton-Johnson testified that Green Choice enrolled her in service without her consent.⁵⁴ The third-party-verification call for Ms. Barton-Johnson's enrollment with Green Choice was completed by someone identifying himself as James Johnson.⁵⁵ Ms. Barton-Johnson testified that she did not know of any James Johnson, although she was married at one time to a Donald Johnson.⁵⁶ However, Ms. Barton-Johnson had been separated from Donald Johnson "for years" and he was deceased at the time of the enrollment.⁵⁷

Consumer witness Edward Tokar testified about his encounter with an "aggressive" Green Choice door-to-door sales agent.⁵⁸ Mr. Tokar testified that the sales agent became argumentative when Mr. Tokar expressed that he was not interested in enrolling with Green Choice.⁵⁹ Mr. Tokar's account of the incident was captured by his doorbell video camera.⁶⁰

⁵¹ Tr. Vol. I (Beauregard Testimony) at 49.

⁵² PUCO Staff Ex. 3 (Beauregard Audio).

⁵³ Tr. Vol. I at 52-53.

⁵⁴ Tr. Vol. I (Barton-Johnson Direct) at 31.

⁵⁵ PUCO Staff Ex. 2 (Barton-Johnson Audio); Tr. Vol. I (Barton-Johnson Direct) at 32.

⁵⁶ Tr. Vol. I (Barton-Johnson Direct) at 32.

⁵⁷ *Id.*

⁵⁸ Tr. Vol. I (Tokar Direct) at 8-14.

⁵⁹ Tr. Vol. I (Tokar Direct) at 8-9.

⁶⁰ PUCO Staff Ex. 14 (Tokar Video).

The evidence also demonstrates that Green Choice put consumers' health at risk by resuming door-to-door sales during the coronavirus pandemic without providing prior notification to the PUCO Staff, in violation of the PUCO's June 17, 2020 Entry in Case No. 20-591-AU-ORD.⁶¹ When questioned by the PUCO Staff as to why Green Choice did not comply with the notification requirements, Green Choice responded by placing the blame on its third-party sales vendors for not following the PUCO orders.⁶²

In addition to the above-mentioned evidence of abuse, the PUCO Staff found numerous other instances of Green Choice's non-compliance with the PUCO's rules and orders. For example, the PUCO Staff found that in a door-to-door enrollment, the Green Choice sales agent remained on the consumer's premises during the third-party-verification.⁶³ Green Choice also failed to disclose a monthly \$5 fee to consumers.⁶⁴ Green Choice texted contracts to consumers without obtaining a waiver from the PUCO's rules to do so.⁶⁵ And Green Choice failed to provide necessary records to the PUCO Staff to support its enrollments.

The evidence of Green Choice's misleading and deceptive solicitation and enrollment practices was largely unrefuted by Green Choice at the evidentiary hearing. Green Choice presented the testimony of Brian Trombino, president and sole shareholder of Green Choice.

⁶¹ Staff Report at 5.

⁶² *Id.* at 5-6.

⁶³ Staff Report at 5.

⁶⁴ *Id.*

⁶⁵ Staff Report at 6.

Mr. Trombino testified that Green Choice’s sales and customer service functions are conducted exclusively by third-party vendors.⁶⁶ Mr. Trombino acknowledged though that Green Choice “is responsible for the actions of people who interact with new and existing customers on the Company’s behalf, regardless of their employment status.”⁶⁷ But in response to the evidence of misleading and deceptive marketing and enrollments, Green Choice placed the blame on its vendors instead of itself, and business disruptions during the coronavirus pandemic.⁶⁸ Green Choice was granted a certificate to market in Ohio and is responsible for the marketing and enrollment, not its vendors.

The evidence overwhelmingly demonstrates Green Choice’s misleading and deceptive acts and practices. Green Choice is not fit to market electric and natural gas service to Ohioans. The PUCO should permanently rescind Green Choice’s certificates.

B. The evidence of Green Choice’s misleading and deceptive marketing practices demonstrates that Green Choice lacks the managerial capabilities to market electric and natural gas service in Ohio. To protect consumers, Green Choice’s certificates to market to Ohio consumers should be permanently rescinded.

The Staff Report concluded that there are “systemic issue[s]” with Green Choice’s “management oversight” of third-party vendors.⁶⁹ According to the PUCO Staff, “[t]hese issues are not related to one rogue agent or one vendor.”⁷⁰ The PUCO Staff found that “these issues are companywide as a result of how the Company is managed.”⁷¹

⁶⁶ Green Choice Ex. 1 (Trombino Direct) at 2.

⁶⁷ *Id.*

⁶⁸ PUCO Staff Ex. 9 (Ramsey Direct) 8-11; Green Choice Ex. 1 (Trombino Direct) at 3-4.

⁶⁹ Staff Report at 6.

⁷⁰ Staff Report at 6.

⁷¹ Staff Report at 6.

OCC witness Williams also testified that Green Choice's operations in Ohio demonstrate that it does not have the managerial capabilities to market energy services in the state as required by Ohio law.⁷² The PUCO's minimum service standards set forth in O.A.C. 4901:1-21 and O.A.C. 4901:1-29 exist to prevent marketers from abusing Ohio residential consumers. But there is ample evidence that Green Choice has done just that by failing to manage third-party vendors interacting with Ohio consumers.

As explained, all Green Choice's sales and customer service functions are conducted by third-party vendors.⁷³ But Green Choice evidently is incapable or unwilling to manage its vendors' marketing and enrollment activities to protect consumers and follow the PUCO's rules. While Green Choice acknowledges that it is responsible for the acts of its third-party vendors, it does little to prevent its vendors' bad acts.

Worse, Green Choice has refused to cooperate with the PUCO Staff's investigation, claiming that it does not have access to its third-party vendor information.⁷⁴ That is unacceptable. As PUCO Staff witness Ramsey testified, Green Choice (as the PUCO-regulated entity) must take responsibility for its vendors and maintain records and data to show compliance with the PUCO's rules.⁷⁵

Examples of Green Choice's lack of managerial capabilities include Green Choice's non-compliance with the PUCO Entry in Case No. 20-591-AU-ORD when it failed to notify the PUCO prior to resuming door-to-door solicitations during the

⁷² OCC Ex. 1 (Williams Direct) at 4; R.C. 4928.08; and R.C. 4929.20.

⁷³ Green Choice Ex. 1 (Trombino Direct) at 2.

⁷⁴ PUCO Staff Ex. 9 (Ramsey Direct) at 8-10.

⁷⁵ PUCO Staff Ex. 9 (Ramsey Direct) at 10-11; O.A.C. 4901:1-21-04; O.A.C. 4901:1-29-04.

coronavirus pandemic.⁷⁶ Green Choice claims that it forwarded the Entry to its vendors and told them to comply with the PUCO's directive,⁷⁷ but it is Green Choice's responsibility to ensure compliance.

The PUCO Staff also compared Green Choice's sales scripts to call recordings. According to the Staff Report, Green Choice's sales scripts inform consumers that they will be enrolled in a "competitive variable rate based on market conditions."⁷⁸ However, the PUCO Staff found "no evidence of market conditions that would justify one month of a rate near \$0.05/kWh and all subsequent months billed above \$0.12/kWh."⁷⁹ The PUCO Staff found that Green Choice agents often did not follow the scripts including for some calls that resulted in consumer enrollments.⁸⁰

The PUCO Staff also found that Green Choice was texting contracts to consumers from door-to-door enrollments in violation of O.A.C. 4901:1-21-06 and 4901:1-29-06.⁸¹ Although Green Choice has sought from the PUCO a waiver of these rules to allow text contracts,⁸² the waiver has not been granted. Moreover, the PUCO Staff also found that Green Choice has failed to provide written contracts to enrolled consumers within timeline required by the PUCO's rules.⁸³

⁷⁶ Staff Report at 5.

⁷⁷ *Id.* at 5-6.

⁷⁸ *Id.* at 6.

⁷⁹ *Id.*

⁸⁰ *Id.*; PUCO Staff Ex. 9 (Ramsey Direct) at 23-24.

⁸¹ Staff Report at 6.

⁸² *See* Case No. 21-157-GE-WVR.

⁸³ Staff Report at 6.

The PUCO Staff also identified numerous issues with respect to Green Choice's third-party verification calls in violation of the PUCO's rules.⁸⁴ The PUCO Staff found that Green Choice's third-party verification scripts and recordings lacked necessary elements to ensure consumers fully understand the terms of enrollment.⁸⁵ For example, third-party verification scripts and calls lacked the price per kWh (or Ccf/Mcf for natural gas) and a verbal statement that Green Choice will send the consumer a written contract explaining the terms and conditions within one business day.⁸⁶

All of these issues identified by the PUCO Staff demonstrate that Green Choice cannot manage the third-party vendors it uses to market to and enroll consumers. Green Choice lacks the managerial capabilities to market electric and natural gas service to Ohio consumers. The PUCO should permanently rescind Green Choice's certificates for this reason as well.

C. Green Choice's misleading and deceptive acts and lack of managerial capabilities are amplified by Green Choice's refusal to cooperate with the PUCO Staff and OCC regarding this investigation. To protect consumers, Green Choice's certificates to market to Ohio consumers should be permanently rescinded.

As if Green Choice's misleading and deceptive acts weren't bad enough, Green Choice deliberately refused to cooperate with the PUCO Staff's (and OCC's) investigation in this case. Green Choice's certificates should be permanently rescinded for this reason as well.

As explained, PUCO Staff witness Ramsey testified that Green Choice refused to provide certain information about sales calls so the PUCO Staff could complete its

⁸⁴ PUCO Staff Ex. 9 (Ramsey Direct) at 38-39.

⁸⁵ *Id.*

⁸⁶ *Id.*

investigation.⁸⁷ When PUCO Staff requested information about a particular sales call and software equipment, Green Choice (through its counsel) told the PUCO Staff that the information was kept by the third-party vendor, that Green Choice would not try to obtain the information from the vendor, and that the PUCO Staff itself should seek the information directly from the vendors.⁸⁸

However, as Green Choice's own president testified, Green Choice is the one responsible for its third-party vendors.⁸⁹ Green Choice is the PUCO-regulated entity and has an obligation under the PUCO's rules to maintain records regarding its marketing and enrollment activities.⁹⁰ Green Choice's refusal to cooperate with PUCO Staff's investigation is a separate and independent reason to permanently rescind Green Choice's certificates.

Further, despite the well-settled precedent permitting OCC to participate and seek discovery in marketer investigations,⁹¹ Green Choice refused to cooperate with OCC's discovery requests in this matter for months. OCC witness Williams testified that Green Choice's attempts to undermine OCC's case preparation made OCC's statutory responsibility to represent residential consumers harmed by Green Choice very

⁸⁷ PUCO Staff Ex. 9 (Ramsey Direct) at 8-10, 18.

⁸⁸ PUCO Staff Ex. 9 (Ramsey Direct) at 9-10.

⁸⁹ Green Choice Ex. 1 (Trombino Direct) at 2.

⁹⁰ PUCO Staff Ex. 9 (Ramsey Direct) at 10-11; O.A.C. 4901:1-21-04; O.A.C. 4901:1-29-04.

⁹¹ See e.g. *In the Matter of the Commission's Investigation Into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC's Compliance with the Ohio Revised Code and Ohio Administrative Code and Potential Remedial Action*, Case No. 20-1216-GE-COI ("SFE Investigation"), Entry (September 28, 2020), at ¶¶ 11, 13; and *In the Matter of Commission's Investigation Into PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-2153-GE-COI, ("PALMco 2 Investigation"), Entry (April 6, 2020), at ¶¶ 10, 19.

difficult.⁹² The PUCO granted OCC's intervention rights in this proceeding, yet Green Choice unreasonably delayed responding to OCC's discovery.⁹³ This further demonstrates Green Choice's general contempt for the PUCO's rules and precedent, and that it has no intention to follow the PUCO rules that protect consumers.

D. Green Choice's bad acts and contempt for the PUCO's rules and orders warrant a Green Choice forfeiture of at least \$1.5 million, in addition to permanently rescinding Green Choice's certificates to market electric and natural gas service in Ohio. Other modifications to the PUCO Staff's recommendations are also necessary for greater consumer protection.

In the Staff Report, the PUCO Staff makes several recommendations with respect to Green Choice. Among other things, the PUCO Staff recommended that the PUCO rescind, conditionally rescind, or suspend Green Choice's certification to market competitive retail electric and natural gas in Ohio.⁹⁴ And the PUCO Staff recommended that Green Choice pay a \$1.5 million forfeiture.⁹⁵

OCC appreciates the PUCO Staff's recommendations to protect consumers, but there is more that can be done. OCC witness Williams provided consumer protection recommendations in his testimony that should be adopted by the PUCO. First, the PUCO should *permanently rescind* Green Choice's certifications to market electric and natural gas service in Ohio.⁹⁶ Green Choice's misleading and deceptive marketing and enrollment methods include unlawful spoofing and slamming, forging consumer initials

⁹² OCC Ex. 1 (Williams Direct) at 1-2.

⁹³ *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 22-441-EL-COI, Entry (July 6, 2022).

⁹⁴ Staff Report at 10-11.

⁹⁵ *Id.*

⁹⁶ OCC Ex. 1 (Williams Direct) at 11-12.

on contract materials, altering sales tape recordings, misrepresenting itself and its offerings to consumers, engaging in high pressure sales tactics, and ignoring telephonic third-party verification requirements.⁹⁷ The evidence more than demonstrates a pattern of unfair, deceptive, and unconscionable acts and practices that the PUCO should not tolerate.⁹⁸

Moreover, Green Choice has proven itself to be managerially unfit to market electric and natural gas services in Ohio.⁹⁹ Retail electric and natural gas services in Ohio should provide consumers with adequate, reliable, safe, efficient, nondiscriminatory, and reasonable priced goods and services.¹⁰⁰ But Green Choice has willfully violated Ohio's policy supporting competitive choices and the requirement to provide consumers with options to obtain reasonably priced retail electric and natural gas services.¹⁰¹

Additionally, consumers are to be protected against unreasonable sales practices, market deficiencies, and market power.¹⁰² But Green Choice has demonstrated an inability (or unwillingness) to operate in a manner that promotes and encourages development of Ohio energy choice policies in violation of Ohio law. The PUCO should not permit this behavior by a marketer to continue. Doing so will result in other marketers flouting the law and will harm Ohio's competitive energy market. The significant harm Green Choice has brought upon consumers—and indeed the energy choice program in Ohio in general—can only be remedied through an immediate, and permanent, exit of

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ R.C. 4928.02(A) and R.C. 4929.02(A)(1).

¹⁰¹ OCC Ex. 1 (Williams Direct) at 12.

¹⁰² R.C. 4928.02(I) and R.C. 4929.

Green Choice from Ohio. Additionally, to protect Ohio consumers from Green Choice's current management or affiliate from restarting business in Ohio those entities should also be banned from being granted a certificate.

Mr. Williams testified that Green Choice has displayed a general contempt for Ohio residential consumers by refusing to provide OCC with information that is necessary to complete a full and open investigation into its business practices.¹⁰³ Green Choice has not cooperated with the PUCO Staff in verifying compliance with requirements of Ohio law, the PUCO rules, and supporting the investigation of consumer complaints. This complete lack of compliance with Ohio law and PUCO rules is yet another reason why Green Choice's certificates should be permanently rescinded.¹⁰⁴

Green Choice's contempt for PUCO rules and orders also supports a forfeiture higher than \$1.5 million. While OCC is not opposed to the \$1.5 million forfeiture as recommended by PUCO Staff, OCC witness Williams testified that \$1.5 million should be the *minimum* forfeiture amount.¹⁰⁵ Under Ohio law and PUCO rules, a marketer that fails to comply with the PUCO's rules can be assessed a forfeiture of not more than ten thousand dollars for each failure, with each day's continuance of the violation being a separate offense.¹⁰⁶ Given the fact that over twenty-two PUCO gas and electric rules were violated by Green Choice over time, and that the current number of consumers who were

¹⁰³ *Id.* at 12.

¹⁰⁴ Ohio Revised Code 4928.08 and Ohio Revised Code 4929.20.

¹⁰⁵ OCC Ex. 1 (Williams Direct) at 13.

¹⁰⁶ O.A.C. 4901:1-10-30(A)(1); *see also* R.C. 4905.54.

harmed remains unknown, the amount of the forfeiture could and should be much higher.¹⁰⁷

The level of the forfeiture should align with the damage that Green Choice caused. In filing the amended Staff Report, PUCO Staff identified two additional PUCO rule violations that were not included in the original PUCO Staff Report or in the proposed \$1.5 million forfeiture amount.¹⁰⁸ And the PUCO Staff acknowledged that the severity of the additional violations alone would warrant the proposed forfeiture.¹⁰⁹

In order to fully hold Green Choice responsible for its actions, the PUCO should order Green Choice to disclose the total number of consumers it enrolled when using telemarketing and door-to-door sales in each electric and natural gas distribution service territory where it has operated as an energy marketer, along with the rate it has charged each consumer on a monthly basis.¹¹⁰ And for each enrollment in retail electric or natural gas services, Green Choice should bear the burden of proof to show that the enrollment fully complies with Ohio law and the PUCO marketing and enrollment rules. In accordance with the PUCO's rules, consumers who were improperly enrolled with Green Choice should be returned to the utility standard offer or their former supplier and Green Choice should provide rerates to make consumers whole.¹¹¹ The term rerate means Green Choice shall provide refunds to consumers calculated as the difference between what their charges were under Green Choice's contract and what the charges would have been

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Staff letter introducing the amended Staff Report (July 21, 2022).

¹¹⁰ OCC Ex. 1 (Williams Direct) at 13.

¹¹¹ Ohio Adm. Code 4901:1-10-21(H) and 4901:1-13-10(I).

under the utility standard service offer beginning the month in which the enrollment occurred.

The PUCO Staff also recommended that Green Choice provide notice to each consumer who was enrolled between February 1, 2021 and May 1, 2021 that they will be returned to the utility standard service offer on a certain date unless they contact Green Choice to affirm their enrollment.¹¹² The PUCO Staff recommended that Green Choice provide notice to each consumer who was enrolled through door-to-door or telemarketing between May 1, 2021 and June 30, 2021 that they will be returned to the SSO and that they will be issued a refund based on the difference in prices between the Green Choice rate and the utility standard offer.¹¹³ Finally, the PUCO Staff recommended that the PUCO order Green Choice to rerate all consumers to the utility standard offer who filed complaints with the PUCO, Green Choice, and any other entity disputing an enrollment starting after February 1, 2022.¹¹⁴

While OCC generally supports these PUCO Staff recommendations, they can be modified for more consumer protection. OCC witness Williams testified that the PUCO Staff's recommendations regarding notice to consumers about rerates and being returned to the utility standard service offer are unreasonably limited and potentially harmful.¹¹⁵

For example, consumers who enrolled with Green Choice between February 1, 2021 and May 1, 2021 are subject to return to the utility standard service offer unless

¹¹² Staff Report at 10.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ OCC Ex. 1 (Williams Direct) at 14.

they contact Green Choice to confirm their enrollment.¹¹⁶ But unfortunately, these consumers are not eligible for rerating based on the utility standard service rates.¹¹⁷ These consumers are denied the opportunity for restitution for the harm that was brought upon them by Green Choice.¹¹⁸ These consumers also would not be eligible for credits for the unreasonable and likely undisclosed \$5.00 monthly service fee that Green Choice charges consumers.¹¹⁹

For consumers who were enrolled between May 1, 2021 and June 30, 2021, the PUCO Staff recommends they be returned to the utility standard offer and provided a refund based on the difference between the standard offer rate and the rate they were charged by Green Choice.¹²⁰ However, again, the PUCO Staff recommendation is silent regarding refunds of the \$5.00 monthly service fee Green Choice charges consumers.¹²¹ Consumers should be refunded all monthly service fees unless Green Choice can prove that the charges were fully disclosed to consumers throughout the marketing and enrollment of their offer, regardless of when the enrollment occurred.¹²²

Finally, the PUCO Staff recommendation limits rerates for Green Choice consumers who are returned to the utility standard offer to only those consumers who contacted the PUCO, Green Choice, or other entities (*e.g.* the local utility or Better Business Bureau) disputing their enrollment with Green Choice after February 1, 2022.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 15.

¹²² *Id.*

Consistent with OCC witness Williams' recommendation that Green Choice's electric and natural gas certifications be permanently rescinded, the PUCO Staff should have recommended that all Green Choice gas and electric consumers be rerated and returned to the utility standard offer.¹²³

Furthermore, the PUCO Staff should have recommended that consumers be refunded the difference between what their charges were under the Green Choice contract and what the charges would have been under the utility standard service offer beginning the month in which the enrollment occurred.¹²⁴

IV. CONCLUSION

Green Choice has failed to show cause that its certificates to market electric and natural gas service should not be permanently rescinded. The nature and extent of Green Choice's misleading and deceptive practices, violation of PUCO rules and order, failure to manage its third-party vendors, and refusal to cooperate with the PUCO Staff's investigation warrants a forfeiture of at least \$1.5 million. Green Choice's consumers should be rerated and returned to the utility's standard service offer. To protect Ohio consumers from malicious marketers like Green Choice, the PUCO should adopt OCC's proposed recommendations.

¹²³ *Id.*

¹²⁴ *Id.*

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

Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
Telephone: [O'Brien]: (614) 466-9531
Telephone [Wilson]: (614) 466-1292
angela.obrien@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Initial Brief was served on the persons stated below via electronic transmission, this 6th day of January 2023.

/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

Attorney Examiner:
jesse.davis@puco.ohio.gov
gregory.price@puco.ohio.gov

btrombino@uerus.com
whitt@whitt-sturtevant.com
fykes@whitt-sturtevant.com
elmer@whitt-sturtevant.com

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

1/6/2023 4:33:05 PM

in

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

Summary: Brief Initial Brief to Protect Consumers by Office of the Ohio Consumers'
Counsel electronically filed by Mrs. Tracy J. Greene on behalf of O'Brien, Angela D.