BEFORE

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

INITIAL BRIEF OF RPA ENERGY, INC. D/B/A GREEN CHOICE ENERGY

January 6, 2023

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I. INTRODUCTION

Every industry attracts its fair share of morally and ethically challenged individuals and the retail energy industry is no exception. The Ohio CRES and CRNG rules are designed to protect consumers from such individuals, and Commission Staff are responsible for compliance monitoring and enforcement. RPA Energy, Inc. d/b/a Green Choice Energy (the Company) recognizes that it, too, has a role in play in protecting consumers from bad behavior, and it has fulfilled this role by developing and implementing a robust Quality Assurance Program. Any retail supplier quality assurance program that looks for bad behavior is likely to find it; that is just reality. Staff's indictment of the Company reflects the *success* of the Company's program, not a failure.

The Company stands to gain nothing from bad behavior by employees or agents; it is legally responsible for this behavior which makes bad enrollments bad business. Therefore, the Company goes above and beyond the CRES and CRNG minimum service standards in several ways. Rather than just instruct its contracted, third-party sales force to follow the Ohio rules (and then stick its head in the sand and hope for compliance), the Company monitors their real-time, real-world performance by (among other things) requiring that every sales call be recorded; that consumers enrolled telephonically complete the verification process with an independent third-party; that Company quality assurance personnel review all sales calls for all new customers; and that quality assurance personnel place a "welcome call" to all new customers. None of these measures are required under the Commission's rules, and their existence ensured that the incident that triggered the investigation in this proceeding was handled swiftly and decisively.

In June 2021, Staff notified the Company that it believed a recorded sales call with a Commission Staff member had been altered. The Company was not party to this conversation, so it took Staff at its word. The Company immediately terminated the vendor who made and recorded the sales call, released all customers enrolled by this vendor from their contracts, and issued refunds to those customers. In short, the Company accepted responsibility for its vendor's actions. The potential liability for the acts of third parties is what led it to implement an enhanced quality assurance program in the first place.[1]

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[1] *Clark v. Southview Hosp. & Fam. Health Ctr.,* 1994-Ohio-519, 68 Ohio St. 3d 435, 438 ("Generally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine

The Company's quality assurance program is effective, but it is not perfect. Quality assurance personnel have no way of knowing whether the voices heard on recordings are authentic or those of an imposter. Staff's own expert was unable to determine whether the recording initially brought to the Company's attention was altered or edited. But in the end, the mere existence of the recording enabled one of the participants in the call to determine that something was amiss, and this evidences a compliance success, not a failure.

Staff, unfortunately, does not see it that way. The June 2021 incident became a springboard for an investigation designed not to get to the bottom of any legitimate, unresolved concerns but to find an excuse to attempt to pressure the Company into releasing a substantial portion of its customers from their variable rate electricity contracts and "re-rating" these customers to the utility price to compare—not because the enrollments are actually invalid or unlawful, but because Staff does not believe the product customers voluntarily chose is "competitive." There is no legal or factual basis for these re-rates. Nor has Staff justified a $1.5 million forfeiture. The unexplained, five-fold increase from the forfeiture recommended in the PNC exposes this figure as the unsupported and contrived figure that it is.

The rules at issue in this case exist primarily for the benefit of consumers. To the extent the record reveals informal concerns or complaints by specific customers, every one of them has been resolved. The Commission may (but is not required) to sanction the Company for purposes of deterrence and punishment, but any such sanctions must consider the *Company's* culpability for any underlying offenses. Staff has approached this case as if the *vendor* were on trial and the Company assigned to stand in the vendor's shoes. The Company may be legally responsible for the consequence of the vendor's actions but that does not make the Company culpable of committing those acts. The law has always recognized that a person's mental state, or "culpability," may have dramatically different consequences depending on whether an act is deemed "negligent," "grossly negligent," "willful," "wanton," "intentional," or some variation thereof.[2]

The concept of culpability informs the intuitively sensible notion that a CRES or CRNG supplier that concocts a fraudulent scheme and instructs its vendors to implement it should be subject to different consequences than the

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of *respondeat superior,* but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work.").

[2] *See Anderson v. Massillon*, 2012-Ohio-5711, ¶ 31, 134 Ohio St. 3d 380, 388 ("[A]s the historical development of these terms in our jurisprudence demonstrates, 'willful,' 'wanton,' and reckless' describe different and distinct degrees of care and are not interchangeable.").

supplier who instituted measures to prevent fraudulent activity, and took appropriate action when those measures *worked*. Different actions deserve different consequences. The Company's legal liability for alleged non-compliances does not justify sanctioning the Company as if it intentionally committed them directly or through willful and wanton negligence. Doing so would merely encourage other suppliers to lower their internal compliance bar in an environment where the Commission should be encouraging them to raise it. The CRES and CRNG rules *do not* exist for the purpose Staff is attempting to use them; *i.e.,* as regulatory landmines that, when slipped in a supplier's path and detonated, automatically invalidate all customer contacts and trigger a seven-figure forfeiture.

The Commission must interpret and apply its rules, not Staff's version of them. The Company and its customers are entitled to the benefit of their bargain, regardless of whether Staff believes it is a bad bargain or that a better bargain could be had elsewhere. The rules are founded on the twin pillars of disclosure and consent, and the Company's enrollment practices honor these principles.

The record simply does not support Staff's findings or its recommendations.

II. FACTS AND BACKGROUND

A. The Company and its Quality Assurance Process.

The Company has been licensed to sell retail gas and electricity in Ohio since 2016 and is also certified to supply competitive retail gas and/or electricity in Pennsylvania, Illinois, Maryland, New Jersey, Delaware, Michigan, and the District of Columbia.[3] The Company's electricity product is a 100% "green" product fully backed by renewable energy credits; hence, the tradename "Green Choice."[4]

As is common in the industry, the Company retains third-party vendors to market its products, primarily through telephone and door-to-door solicitation.[5] Vendors are compensated on a commission basis for each valid new enrollment.[6] The Company requires vendors to contractually agree to know, understand and follow the Commission's rules, and individual agents assigned by the vendor to work on the Company's account are subject to background checks and must sign the Company's code of conduct.[7] These two measures sufficiently deter most

[3] Company Ex. 1 (Direct Testimony of Brian Trombino) at 1.
[4] *Id*. at BT-13 at 1; *see also* Tr. I at 106:11-21.
[5] Company Ex. 1 at 2.
[6] Tr. II at 305:19-25.
[7] Tr. II at 353:20-354:2.

vendors and agents, most of the time. Turning a blind eye to vendor conduct does not serve the Company's interests, and this fundamental reality drives the Company's entire quality assurance process.

Most of the 19 people directly employed by the Company are assigned to Quality Assurance full time, which largely entails monitoring and supervising third-party vendors.[8] The Company's quality assurance program emphasizes the quality of enrollments over sheer quantity and *exceeds* the Commission's minimum requirements in several key ways.

First, the Company requires vendors to record all telemarketing sales calls that result in an enrollment and rejects enrollments that do not comply with Commission rules or the Company's policies.[9] The Company also uses the recordings for training purposes, and conducts "calibration calls" with vendors to provide feedback based on recorded calls to ensure vendors are following Company policies and works with them to either retrain agents, or in case of more serious instances of noncompliance, require that agents are barred from selling on the Company's behalf.[10]

Second, the Company uses an independent third-party verifier to perform the third-party verification (TPV) required for each new telephonic enrollment.[11] (Suppliers are required to use an independent third-party verifier for door-to-door enrollments but this is *not* required for telephone sales; the rules allow the telephone sales agent to ask the verification questions.[12]) The TPV vendor the Company uses is a large reputable company, representing the "gold standard" for such services.[13] As Ms. Bossart conceded based on her personal experience with the Company's enrollment process, "the TPV is good, very clear that I'm signing up with RPA, dba Green Choice Energy on a variable rate with a $5 monthly fee."[14] The Company also listens to 100% of TPV recordings for completed enrollments to ensure compliance and pays the TPV vendor an additional fee to perform an initial QC review.[15]

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[8] Tr. II at 281:3-8.
[9] Company Ex. 1 at 2.
[10] Tr. II at 312:21-313:7; 327:18-329:17.
[11] Company Ex. 1 at 2.
[12] *Compare* O.A.C. 4901:1-21-06(D)(1)(h) (requiring independent third-party verification for door-to-door enrollments) *with* O.A.C. 4901:1-21-06(D)(2)(a) (requiring verification either by "the CRES provider[] or independent third-party").
[13] Tr. II at 322:23-323:21.
[14] Tr. I at 144:1-12.
[15] Tr. II, at 344:3-12.

Third, the Company places a "welcome call" to every new customer, regardless of the sales channel through which the customer enrolled.[16] These calls ask the customer about their experience with the salesperson, invite questions about the enrollment process and the Company's product, and otherwise offer a forum for customers to voice any concerns. Staff concedes that these follow-up calls are not required by the rules.[17]

The Company goes above and beyond its minimum compliance obligations in other ways as well. For door-to-door enrollments, the Company uses a geolocation service to ensure agents are at the specific address of the enrolled customer.[18] To help prevent vendors from "spoofing" local phone numbers for outgoing sales calls, the company requires its vendors to provide them with a list of numbers being used for approval.[19] The Company also requires its vendors to send them the list of leads so that the Company can scrub the phone numbers to ensure that leads being called are not on the do-not-call list, rather than merely relying on Vendors' assurances that leads are pre-scrubbed.[20]

The Company takes its Quality Assurance program seriously and the record evidence proves that it is effective.

B. Pandemic-related Suspension and Resumption of Door-to-Door Marketing.

Based in New York City, the Company was acutely affected by the Covid-19 pandemic. By the end of March 2020, every regulatory agency in each jurisdiction in which the Company operated had issued directives halting door-to-door marketing and, effectively, preventing company employees from coming to the office to work.[21] In Ohio, the Governor declared a state of emergency on March 9, 2020 and this was followed by a Commission order of March 17 directing suppliers to cease door-to-door marketing.[22] A subsequent Commission entry of June 17, 2020 allowed suppliers to resume door-to-door marketing, subject to certain restrictions (such as wearing masks and avoiding physical contact) and including a requirement to notify the Director of Service Monitoring and

[16] *Id.* at 296:17-24.
[17] Tr. I at 151:10-12.
[18] Tr. II, at 296:9-16.
[19] *Id.* at 369:15-22.
[20] *Id.* at 377:2-10.
[21] See Company Ex. 1 at 3.
[22] *Id.,* BT-3 at 5; Case No. 20-591-AU-UNC, Entry (Mar. 17, 2020).

Enforcement (SMED) at least 48 hours prior to resuming solicitations.[23]

The Company resumed door-to-door marketing in Ohio in the Spring of 2021, a few months before the Governor formally rescinded the March 2020 Executive Order that was the basis for the Commission's directives in Case No. 20-591-AU-UNC.[24] Unfortunately, the June 17, 2020 entry requiring notice to SMED before resuming door-to-door marketing, which had been forwarded to vendors shortly after issuance the previous Summer, apparently was not complied with.[25] The Company did, however, comply with the masking and social distancing directives, and these directives informed the decision to provide door-to-door enrollees with electronic versions of the contracts instead of paper copies.[26]

C. Staff's June 2021 Contact with the Company.

The Company was first alerted about concerns with the integrity of its vendors' call recordings on June 22, 2021, when Ms. Nedra Ramsey sent an email to Mr. Trombino about an incident involving another member of Commission Staff.[27] According to the Staff Report:

> On June 4, 2021, the Chief of RSAD, Barbara Bossart, was solicited on her personal cellphone by a sales agent representing RPA Energy. Mrs. Bossart completed the enrollment. The Call Center, through an investigation, requested the sales recording, third-party verification recording, and the contract. After listening to the call recordings, it was clear to Mrs. Bossart that parts of her conversation with the sales agent were not included in the call.[28]

Mr. Trombino responded later the same day:

> We take the matters you have described very seriously and have instructed the vendor responsible for this call to cease all telemarketing on our behalf. I've instructed my staff to have the information you've requested ready for delivery to you the end of this week. If you think it would be helpful, I would be happy to meet with Staff after the July 4 holiday to review the information we will

[23] Company Ex. 1, BT-3 at 5.
[24] Case No. 20-591-AU-UNC, Entry (Mar. 17, 2020).
[25] See Staff Ex. 7, Staff Report at 5. Note that citations to the body of the Staff Report (prior to the PNC attached as Exhibit 1 and the case reports) are based on the pagination in the bottom center of each page.
[26] Company Ex. 1 at 4.
[27] *Id.*
[28] Staff Ex. 7, Staff Report at 2.

be sending. If you come across any additional information pertinent to staff's concerns, please relay it to me so we can include it in our investigation.[29]

In testimony, Staff revealed that it had similar concerns about a call recording reviewed in February 2021, several months prior to the incident involving Ms. Bossart.[30] These concerns were not made known to the Company in February 2021.[31] And while concerns about the integrity of the recording of Ms. Bossart's call were raised in June 2021, Staff's earlier concerns were not disclosed in the June 2021 correspondence with Company, and remained unmentioned in the October 6, 2021 notice of probable non-compliance (PNC).

Two days after the June 22, 2021 email exchange between Ms. Ramsey and Mr. Trombino, the Company's legal counsel informed Staff that the Company had ceased *all* telemarketing in Ohio, had terminated the vendor involved in the call with Ms. Bossart, returned all customers enrolled by that vendor to the applicable utility, and "re-rated" these customers to the utility standard service offer rate.[32] Thereafter followed a series of data requests and responses between the Company and Staff until issuance of the PNC on October 6, 2021.

D. Staff Notice of Probable Non-compliance (PNC).

By the time the PNC was served in early October 2021, the concern raised in June 2021 about the integrity of Ms. Bossart's call recording had ballooned into wide-ranging allegations of misconduct—very little of which pertained to telemarketing sales. These allegations are repeated in the Staff Report and will be addressed in the next section of this brief. This section will briefly focus on Staff's recommended corrective actions and the Company's response.

The company's response to the PNC attempted to resolve Staff's concerns through "a collaborative approach that focuses on the future but also reflects accountability for the past."[33] The PNC proposed five corrective actions; the Company immediately agreed to most of them, and eventually agreed to all of them except Staff's re-rate proposal.[34] Staff proposed that for all customers enrolled since May 2021, RPA re-rate these customers to the utility's price-to-

[29] Company Ex. 1, BT-1 at 1.
[30] Staff Ex. 9 (Direct Testimony of Nedra Ramsey) at Q6.
[31] Tr. I, at 190:11-20.
[32] Company Ex. 1, BT-2.
[33] *Id.*, BT-5 at 1.
[34] *Id.* at 7:8-10.

compare "unless RPA has evidence that the customers were aware, or should have been aware, that the rate may increase substantially" (for customers who were offered "an introductory rate for a variable rate contract") or "unless RPA has evidence that the customers were not misled in the solicitation of the offer" (for customers offered a fixed rate above the utility PTC).[35] As discussed later, this proposed corrective action was unwarranted then and remains unwarranted now.

Instead of generating any feedback or movement from Staff, the Company's response to the PNC generated more data requests—not because Staff was interested in a resolution, but in an effort to continue to build an indictment against the Company. Nearly all of the data Staff testified about at hearing was requested from the company *after* issuance of the PNC. Staff's discovery included a series of requests, beginning at the end of February 2022 and continuing into March, for information about the call recording system and software used by the vendor the Company had terminated roughly eight months earlier in June 2021 because of the call involving Ms. Bossart. As explained to Staff by the Company's counsel:[36]

[35] Staff Report 0007. Please note that for this and other citations to the PNC and the case reports attached to the Staff Report and testimony of Nedra Ramsey, the Company is using the bates numbering from the version it provided to the parties prior to the hearing which was intended to address the absence of any bates numbering in the version filed by Staff. Specifically, the Company's bates numbering begins with Staff Report 0001 on the "Exhibit 1" page, Staff Report 0002 on the first page of the PNC, and Staff Report 0010 for the first page of the case report for Case Number 00656313.
[36] Company Ex. 1, BT-11 at 4.

Nedra –

Thanks for your patience. I've conferred with the company and here's what I can report:

To the company's knowledge, the recordings already provided to Staff are "digital bit-for-bit" duplicates of the original recordings. The recordings were produced as the company received them from their former vendors. The company does not have the ability to retrieve recordings directly from the vendors' digital storage, so the files already produced are the best the company can do.

The company is also unable to provide the technical specifications for the vendors' recording and storage systems. The contracts with these vendors did not disclose these specifications, and even if the company asked the vendors to provide this information voluntarily, the company would not be in a position to verify the information without performing a physical site inspection. Even then, the company would be unable to verify that systems in use currently are the same systems (or versions) in use during the relevant time period.

Please let us know if you have any questions.

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Shortly afterwards, on April 18, 2022, Staff requested that the Commission commence a formal enforcement proceeding.

E. The Staff Report

Staff's report of investigation (Staff Report) issued on June 10, 2022 and an amended version was filed on July 21. "Staff reviewed the Company's marketing, sales, enrollment, and contract administration practices from January 1, 2021, to July 20, 2021."[37] Notwithstanding the additional discovery produced to Staff since October 2021, the Staff Report is largely a cut-and-paste of the PNC. The only significant changes were an increase in the requested forfeiture from $300,000 to $1.5 million and slightly revised and re-ordered corrective actions now presented as "staff recommendations." The amendment addresses the Company's supposed "refusal" to respond to a data request issued *after* Staff filed its first report concerning information Staff *knew* the Company did not have.

Much of the Staff Report centers on 25 consumer "contacts" to the

[37] Staff Ex. 7, Staff Report at 2.

Commission's Call Center involving the Company. (For context, the Call Center received around 60,000 total contacts in each of the fiscal years 2021 and 2022.)[38] Four of these contacts involve the same customer and incident and the total includes Ms. Bossart's complaint file. Of the 20 remaining "contacts," all but one involved door-to-door solicitations. Half of these did not result in enrollments, and those that did were resolved by cancelling the enrollment and issuing refunds.[39]

The Staff Report allegations are arranged under three general headings: (1) "deceptive and misleading practices," (2) "third-party verifications" and (3) "managerial capability." These categorizations do not correspond in any meaningful way to the list of 22 rules (and 1 statute) the Company stands accused of violating. Like the PNC, the Staff Report does not explain how any of the rules listed under the "findings of violations" section were allegedly violated, how many violations were allegedly committed, or the qualitative or quantitative basis for a $1.5 million forfeiture.

To the extent the Staff Report attempts to explain the basis for any alleged violation at all, it does so in the most conclusory way possible. Under the "deceptive and misleading practices" heading, for example, Staff presents a bulleted summary of a handful of call center "contact" reports and its interpretation of several items produced in discovery (again, out of thousands of enrollments) and blanketly asserts that each incident reflects "misleading and deceptive practices" that collectively reflect a "pattern" and a "systematic issue under management oversight and possible direction."[40] Precious few facts are disclosed in these bullets and if the underlying records Staff cites for its assertions are accurate, there is quite a large gap between what Staff says these records say and what the records actually say. Moreover, most of the "contacts" pertain to enrollments that occurred *outside* the January 1 to July 2021 review period of the investigation.

The "third-party verifications" section provides the service of at least citing the applicable rules, but again the factual details are sparse. "Numerous TPV recordings" allegedly show "several issues" with verifications, but the actual recordings and the "issues" Staff has with them remain a mystery.[41] To the extent any details are provided at all, they are accompanied by gross mischaracterizations of the recordings (assuming the recordings alluded to in the Staff Report are the

[38] These annual reports are required by R.C. 149.01 and are publicly available on the Commission's website at https://puco.ohio.gov/about-us/resources/annual-reports
[39] Company Ex. 1 at 8:1-8.
[40] Staff Ex. 7, Staff Report at 3, 6.
[41] *Id.* at 5.

same ones played at hearing) and the requirements of the applicable rules.

The "managerial capability" section of the Staff Report is a catch-all, and reflective of Staff's kitchen sink approach. Apart from the Company's acknowledged failure to notify Staff before resuming door-to-door marketing in 2021, the assertions lodged against the Company here are legally and factually baseless. Staff's testimony does not alter this conclusion in the least.

F. Staff's Testimony

On September 30, 2022, Samantha Boersler and Nedra Ramsey filed testimony to "provide support for the 'Staff's Investigation and Analysis' section in the Staff Report [.]"[42] Barbara Bossart submitted testimony "to describe my experience when [the Company] contacted me to market is competitive retail electric service (CRES) and enroll my account."[43] Staff also submitted testimony from a forensic audio expert, Jennifer Owen.[44]

Staff's testimony discloses the details of the investigation for the first time and offers numerous anecdotes of interactions between the Company (or its vendors) and customers that purportedly mirror incidences described in the Staff Report. It remains to be seen whether Staff intends to rely on these anecdotes as additional non-compliances; if it does, the Company will address them in its Reply Brief.

Staff's attempt to impute any alleged noncompliance to all enrollments is based on a sample of something, but it is unclear exactly what was sampled. During the week of June 6, 2021, the Company enrolled 699 customers.[45] Staff requested, and the Company provided, phone recordings of 103 of these solicitations. Ms. Boertsler reviewed 30 of them, purportedly selected at random, but could not say whether these recordings were sales calls, TPVs, or some combination thereof.[46] In any event, two of the solicitations led to a call center contact, both of which were quickly resolved. None resulted in formal complaints. For comparative purposes, the Company enrolled over 14,000 customers in the one-year period from June 2020 and June 2021.[47]

Remarkably, despite Staff's reliance on the Company's vendor's audio

[42] Staff Ex. 9 at 2; Staff Ex. 4 (Direct Testimony of Samantha Boerstler) at 2.
[43] Staff Ex. 6 (Direct Testimony of Barbara Bossart) at 2.
[44] Staff Ex. 12 (Direct Testimony of Jennifer Owen).
[45] Tr. I at 84:19-23.
[46] Staff Ex. 4 (Direct Testimony of Samantha Boerstler) at 8; Tr. I at 86-87.
[47] Staff Ex. 4 at 6.

recordings, Staff did not disclose until hearing that the Commission call center records its interactions with consumers, too.[48] None of those call center recordings were produced or made available to the Company.

III. LAW AND ARGUMENT

R.C. Chapters 4928 and 4929 govern CRES and CRNG service, respectively, including the Commission's enforcement jurisdiction and authority. This proceeding primarily involves the Company's CRES service, so the Company will focus on the statutes and rules that apply to that service. Commission rules applicable to CRNG service are largely identical.

"The PUCO, as a creature of statute, has no authority to act beyond its statutory powers."[49] "[T]he commission may not legislate in its own right"[50] and "must base its decision in each case upon the record before it."[51] "In determining whether any order of the commission is unlawful and unreasonable, inquiry should therefore be made, not only into the evidence, to determine whether the order is properly supported by the evidence, but also into the proceedings during the course of the hearing, to determine whether the statutes relative to procedure have been followed and whether the law applicable to the proceeding has been properly applied."[52] "PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded."[53]

The Commission may delegate its investigatory powers to Staff but it may not delegate its adjudicative authority. "It is an elementary principle, even in sand-lot competition, that the umpire cannot take a turn at bat and call his own strikes and balls."[54] In other words, Staff's allegations are not entitled to any presumptions or deference. In administrative proceedings where "substantial penalties" could be imposed, "the combination of investigatory and adjudicative powers within this particular agency" would violate due process.[55]

A. Supplier certification and minimum service standards

[48] Tr. I at 79:9-22.
[49] *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 51.
[50] *Office of Consumers' Counsel v. Pub. Utilities Comm'n*, 67 Ohio St. 2d 153, 166, 423 (1981).
[51] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 91.
[52] *Vill. of St. Clairsville v. Pub. Utilities Comm'n*, 102 Ohio St. 574, 579 (1921).
[53] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 34, 111 Ohio St. 3d 300, 309.
[54] *Burke v. Fought*, 64 Ohio App. 2d 50, 54–55 (1978).
[55] *Id*. at 57–58.

R.C. 4928.08 requires CRES suppliers to demonstrate to the Commission's satisfaction the financial, managerial, and technical capability to provide service. Certified CRES suppliers have an ongoing obligation to comply with rules governing marketing, enrollment, and contract administration, which include prohibitions against "anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state."[56] The adjectives used to describe these prohibited acts and practices are borrowed from the Ohio Consumer Sales Practices Act, R.C. Chapter 1345 (CSPA), which the Commission deems "instructive" in interpreting and enforcing its rules.[57]

The CSPA is not a strict liability statute. "Rather than applying strict liability, courts have held that whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it. Instead of considering a supplier's acts or practices as 'deceptive per se,' the test is whether the alleged act or practice 'has the likelihood of inducing a state of mind in the consumer that is not in accord with the facts.'"[58] "[I]n order to be "deceptive" under the CSPA, the act or practice in question must be both false and material to the consumer transaction."[59]

R.C. 4928.10, which incorporates language from the CSPA into the Commission's rulemaking authority, does not impose strict liability for noncompliance with such rules.[60] "[T]he Ohio Supreme Court has repeatedly held that the drafter of a statute or ordinance must plainly indicate in the language an intent to impose strict liability. Public-policy arguments or the fact that the statute or ordinance contains mandatory language does not factor into the determination whether strict liability is imposed."[61]

B. Enforcement Process

The Commission may review CRES supplier compliance "upon complaint of any person or upon complaint or initiative of the Commission."[62] "[A]fter reasonable notice and opportunity for hearing," the Commission may order one or

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[56] R.C. 4929.08(D).
[57] *Investigation of PALMco Power Ohio, LLC, et al.,* Opinion and Order (Jan. 29, 2020) ("Palmco Order") ¶ 42.
[58] *Crull v. Maple Park Body Shop*, 36 Ohio App. 3d 153, 158 (1987).
[59] *Grgat v. Giant Eagle, Inc.,* 2019-Ohio-4582, ¶ 16, 135 N.E.3d 846, 851.
[60] For CRNG service, the CSPA is directly applicable. R.C. 4929.14. This raises the question of whether the CRNG rules prohibiting unfair and deceptive practices are valid or enforceable. The Attorney General promulgates and enforces rules under the CSPA, not the Commission. *See* R.C. 1345.05.
[61] *State v. Shugars*, 2006-Ohio-718, ¶ 9, 165 Ohio App. 3d 379, 381.
[62] R.C. 4928.16(A)(1).

any combination of three basic remedies: (1) suspension or rescission of the suppliers' certification; (2)"[o]rder rescission of a contract, or restitution to customers;" and (3) "[o]rder any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code [.]"[63]

"Due process rights guaranteed by the United States and Ohio Constitutions apply in administrative proceedings."[64] "[A]lleged violations must be proven by a preponderance of the evidence in the record,"[65] and this burden falls on Staff. To establish a violation, Staff must "specif[y] the rule which was allegedly broken" and "provide[] a description of the evidence supporting the violation [.]"[66] Where multiple violations are alleged, [i]t is critical to establish whether and how many violations of Ohio Adm.Code Chapters 4901:1-21 and 4901:1-29 were actually proven according to the evidence presented in the record [.]"[67]

O.A.C. Chapter 4901:1-23 ensures due process in enforcement actions by mandating prior notice of alleged noncompliance in a staff report of investigation, or Staff Report. The Staff Report "shall present: (1) the findings on any alleged noncompliance specified in any staff notice or amended staff notice" and "(2) Staff's recommendations for commission action."[68] A Staff Report may contain additional alleged non-compliances not included in a PNC, but the rules do not allow Staff to supplement the Staff Report by alleging additional non-compliances in testimony—regardless of whether the additional, testimonial allegations "relate to the same incident, investigation or safety audit(s) referenced in the initial or amended staff notice."[69] As discussed later, the rules also do not contemplate "amendments" to Staff Reports.

Full and complete disclosure of a Staff investigation and findings are critical because Staff is not subject to discovery.[70] "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of

[63] R.C. 4928.16(B)(1)-(3).
[64] *LTV Steel Co. v. Indus. Comm.* (2000), 140 Ohio App.3d 680, 688.
[65] *PALMco* Order ¶ 43. *See also Investigation of Verde Energy USA Ohio, LLC*, Case No. 19-958 GE-COI, Opinion and Order (Feb. 26, 2020) ("*Verde* Order") ¶ 64.
[66] *PALMco* Order ¶ 43.
[67] *Id*.
[68] O.A.C. 4901:1-23-05(C)
[69] O.A.C. 4901:1-23-05(C)(1).
[70] O.A.C. 4901-1-16(I).

evidence which he disclosed to the State."[71] "[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[72]

Following issuance of the Staff Report, the Commission "shall hold an evidentiary hearing on all proceedings initiated under this rule. The hearing may include evidence on the issues of proposed corrective action, compliance orders issued by the commission, forfeitures, enforcement of a commission order, and other remedies."[73] The Commission may consider hearsay or other incompetent evidence *along with* competent and reliable evidence, but the Commission *may not* base its decisions entirely on evidence that is "clearly hearsay" and therefore "incompetent."[74] "Although we recognize that the Public Utilities Commission, being an administrative body, is not and should not be inhibited by the strict rules as to the admissibility of evidence which prevail in courts, yet such freedom from inhibition may not be distorted into a complete disregard for the essential rules of evidence by which rights are asserted or defended."[75]

In rendering a decision in this case, the Commission is "not obligated to search the record or formulate legal arguments on behalf of the parties."[76] Nor may the Commission "ma[k]e summary rulings and conclusions without developing the supporting rationale or record."[77] In rendering a decision, the Commission must "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence."[78]

IV. ARGUMENT

Staff's case relies on the *appearance* of evidence rather than actual evidence. Conclusory allegations and assertions drawn from thousands of pages of documents and who knows how many hours of call recordings—little of which has been meaningfully explained, summarized, analyzed, or verified—is not a substitute for specific, identifiable violations supported by specific, reliable, and

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[71] *Weatherford v. Bursey*, 429 U.S. 545, 562, (1977).
[72] *Hannah v. Larche*, 363 U.S. 420, 502–03 (1960).
[73] O.A.C. 4901:1-23-05(D).
[74] *Chesapeake & O. Ry. Co. v. Pub. Utilities Comm'n,* 163 Ohio St. 252, 263 (1955).
[75] *Id.*
[76] *In re Application of Ohio Power Co.,* 2020-Ohio-143, 159 Ohio St. 3d 130, 137 (quotation omitted).
[77] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 34, 111 Ohio St. 3d 300, 309.
[78] *In re Application of Columbus S. Power Co*., 2011-Ohio-1788, ¶ 30, 128 Ohio St. 3d 512, 519.

credible evidence.

This case does *not* involve a massive consumer outcry over allegedly unfair practices, as alleged in the *PALMCO* and *Verde* enforcement proceedings. Those proceedings arose from 517 Commission Call Center "contacts" by Verde's customers and 486 contacts by PALMco customers over relatively short periods.[79] Staff's investigations followed the consumer contacts. Here, Staff began its "investigation" first, and then backfilled its assertions by drudging up just 20 "contacts" involving enrollments as far back as 2019.[80] Recent Commission precedent is clear: "[E]very contact or complaint does not give rise to an alleged violation of the Commission's rules. Moreover, every alleged violation is not a proven violation of the rules."[81]

Most of the Call Center records summarized in the Staff Report simply do not say what Staff's says they say; in many instances these records flatly contradict Staff's characterizations. Staff also habitually conflates and confuses "sales calls" with TPV recordings, which serve different purposes and are subject to different rules. Many of the anecdotes of alleged violations pass off unsupported inferences and conclusions as "facts," and they are not. Chief among these unsupported inferences and conclusions is Staff's claim that scattered incidents of vendor misconduct (representing a tiny fraction of enrollments) are indicative of a "systematic issue under management oversight and possible direction."[82] Needless to say, Staff's opinions are not a substitute for actual evidence.

Relatedly, the Staff Report and testimony show a persistent habit of reading certain requirements into the rules that are simply not supported by the text. Different rules govern different stages of marketing, enrollment, and contract administration, and rules applicable to one stage of the enrollment process, do not necessary apply to others. Certain compliance obligations also differ by sales channel (*i.e.*, whether the enrollment is by telephone or door-to-door). Staff's mash-up of the enrollment process and applicable rules makes it incredibly difficult to understand the basis for many of the alleged violations.

Staff's allegations and its recommendations to the Commission are not supported by the record.

[79] *PALMco* Order ¶ 8; *Verde* Order ¶ 33.
[80] See Staff Report 0517 (Company bates numbering).
[81] *PALMco* Order ¶ 44; *Verde* Order ¶ 60.
[82] Staff Ex. 7, Staff Report at 6.

A. Staff has not identified alleged noncompliances with sufficient specificity.

"[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[83]

Having initiated a formal enforcement proceeding, Staff was required to issue an investigative report disclosing, among other things, "[t]he findings on any alleged noncompliance specified in any staff notice or amended staff notice."[84] The Staff Report lists the rules allegedly violated but it does *not* specify how many alleged violations occurred or which violations it alleges are "continuing" within the meaning of R.C. 4905.54. Staff's testimony alleges or implies numerous alleged non-compliances *not* mentioned in the Staff Report, in violation of the rules mandating this disclosure.

The closest Staff comes to cataloguing a list of specific violations based on specific factual allegations is the summary of 25 Call Center contacts under the "Unfair and Deceptive Practices" heading of the Staff Report. But just like OCC in the *Palmco* and *Verde* cases, Staff "has not even completed the rudimentary task of describing, based upon the Staff's complaint files, which specific rules were violated, how many counts of each violation allegedly occurred, or what evidence supports each alleged violation."[85]

Likewise, the alleged violations described in the "third-party verifications" and "managerial capability" sections of the Staff Report allege patterns of improper conduct but provide precious few special examples or specifics. For example, "[a]fter review of numerous TPV recordings" Staff claims to have identified "several issues with RPA Energy's TPVs" but this claim cannot be verified or challenged without disclosure of which TPV recordings were reviewed and what the "issues" were. [86] Staff's claims regarding the Company's TPVs are also contradicted by Ms. Bossart case report and related testimony in which she admits that "the TPV is good, very clear that I'm signing up with RPA, dba Green Choice Energy on a variable rate with a $5 monthly fee."[87] "In some sales calls" agents allegedly "did not follow the required script" but no indication is given as to

[83] *Hannah v. Larche,* 363 U.S. 420, 502–03 (1960).
[84] O.A..C. 4901:1-23-05(C)(1)(a).
[85] *PALMco* Order ¶ 44; *Verde* Order ¶ 64.
[86] Staff Ex. 7, Staff Report at 5.
[87] Tr. I at 144:1-12.

which sales calls, how the conversations deviated from the script, or why this even matters since no rule requires sales agents to read from scripts.[88] Elsewhere, Staff reports that "based on data reviewed, on many occasions" the Company purportedly "did not send the written contract to the customers within the timeline required in the rules," but this too is hopelessly vague and unsupported.

The Commission has recognized that "due process requires notice and an opportunity to be heard."[89] Just as "OCC's failure to specifically identify which rules were allegedly violated, how many times each rule was allegedly violated, and what evidence in the complaint files support each alleged violation preclude[d] PALMco from the opportunity to respond to those allegations," Staff's failures have the same implications here.[90] Vague, anecdotal commentary of "examples" of alleged violations is not a substitute for specific evidence of specific violations.

Staff's case presentation makes it impossible to catalogue and respond to a comprehensive list of violations or, in many instances, even understand the legal or factual basis for violations. The Company will focus its response to the Staff Report, which groups the alleged violations into three categories: (1) "deceptive and misleading practices," (2) alleged deficiencies in third party verifications; and (3) alleged deficiencies in the Company's managerial capability. In addressing each category, the Company will respond to the Staff Report and, where applicable and identifiable, Staff testimony that also addresses alleged violations falling under that general category.

B. The Company did not engage in deceptive or misleading practices.

The Staff Report alleges a "pattern of misleading and deceptive practices" based on Call Center records of 25 customer "contacts."[91] Staff's reliance on these records for the purpose in which it is relying on them is wholly improper.

The Commission has recognized that Call Center complaint files inherently contain "multiple levels of hearsay statements."[92] Given the basic function of the Call Center, these records also "include offers to settle an individual complaint, which should not be relied upon as evidence of a violation."[93] The established policy against allowing settlement statements into evidence is particularly

[88] Staff Ex. 7, Staff Report at 6.
[89] *PALMco* Order ¶ 47; *see also* Verde Order ¶ 64.
[90] *Id*.
[91] Staff Ex. 7, Staff Report at 3; Staff Ex. 4 at 3.
[92] *PALMco* Order ¶ 45.
[93] *Id*. *See also Verde* Order ¶ 62.

important here; retail suppliers are *required* to cooperate with Staff in its investigation of complaints and "shall make good faith efforts to resolve disputes."[94] It would be fundamentally unjust to rely on evidence of compliance with one rule (*i.e.,* the rule requiring good faith efforts to resolve disputes) as evidence of non-compliance with other rules (*i.e.,* the rules implicated in the previously-settled dispute). If suppliers cannot have a reasonable expectation that settled disputes will remain settled—and not resurrected by Staff in a subsequent enforcement action as a form of character evidence or evidence of "prior bad acts"—then the Commission should expect fewer settlements going forward.

Given the Company's inability to cross-examine either the consumers or call center agents, combined with the inability to obtain discovery from Staff, any adverse findings against the Company based on these records would undoubtably constitute reversible error. If the Commission is going to consider the Call Center records, it must do so for proper purposes. Staff's characterization of an incident at face value and ignoring the record of the incident would be highly improper.

Each of the incidents summarized in the Staff Report are discussed below.

1. Ms. Bossart Solicitation

In accusing the Company of "[s]ubmitting sales calls that appeared to be altered from their original recording to the PUCO in response to Call Center investigations," Staff is referring to the call involving Ms. Bossart.[95] The Company's *overcompliance* with the rules gave Staff the information it needed to determine that someone was playing games with call recordings, and the Company acted on this information immediately when it was brought to its attention. The incident involving Ms. Bossart shows not just what a former vendor did wrong during the enrollment process, but what the Company did right.

The rules do not require door-to-door solicitors to record their interactions with consumers. After making their pitch, the salesperson must initiate the process for "independent third-party verification" and leave the premises.[96] The completed TPV is the only recorded interaction with a door-to-door customer.

For telemarketing enrollments, the Company's vendors create *two* audio recordings, each for different purposes. The sales vendor records the "sales" portion of the call—the first part of the customer interaction where the vendor

[94] O.A.C. 4901:1-21-08(B)(6).
[95] Staff Report at 4 n.16.
[96] O.A.C. 4901:1-21-06(D)(1)(h).

announces who they are and what they're selling. If the customer says "Yes," the sales vendor transfers the customer to a different vendor to perform an independent TPV, which is also recorded. The TPV is required to be recorded under the rules and serves as evidence of consent to the enrollment.[97] The sales call is *not* required to be recorded under the rules;[98] these recordings are used for quality assurance purposes to monitor vendors' performance, retrain agents where necessary, and deter bad behavior.[99] The Company routinely turns over sales calls when requested by Staff, even though the Company is not required to record these calls in the first instance, let alone maintain them.

The Call Center records describe the TPV recording of Ms. Bossart's enrollment as follows: "The TPV is good, very clear that I'm signing up with [the Company] on a variable rate with a $5 monthly fee."[100] The required disclosures were made and required consents obtained. The records also confirm that Ms. Bossart not only received a welcome call; she actually spoke to one of the Company's quality assurance representatives, who asked her, among other things, whether she had any questions or concerns about the enrollment. After listening to Ms. Bossart's concerns about some of the things said to her by the sales agent, the quality assurance representative extended his apologies and reminded Ms. Bossart of her right to cancel.[101] Ms. Bossart proceeded through the enrollment process to see if her call would be reviewed and she would be contacted by RPA's quality assurance department (which she was), and she acknowledges that such a follow-up call is not required by the Commission's rules.[102]

The Company has never disputed Staff's claim that the sales call recording was altered. The existence of an altered recording is not the end of the story, however. Staff has not disputed that the Company promptly fired the vendor and rescinded all enrollments associated with the vendor's agent. Nor has Staff explained how the Company could have benefitted from a scheme of misleading customers and covering it up—while also placing welcome calls to those very same customers to ensure their satisfaction and providing sales and TPV call recordings to Staff upon request. The only party that stood to benefit from altering

[97] O.A.C. 4901:1-21-06(D)(2)(a).
[98] The rules mandate that the "CRES provider *or* independent third-party verifier" record a list of disclosures and verbal consents contained in Rule 4901:1-21-06(D)(2) "before the completion of the telephone call." 4901:1-21-06(D)(2)(a)(i) This would permit a sales agent to not press the "record" button on a recording system until *after* the agent has made his or pitch and the customer is ready to proceed to the verification process.
[99] Tr. II at 327:18-329:17.
[100] Staff Report 0896 (company bates numbering); Staff Ex. 6 at Case File pg 3.
[101] *Id.*
[102] Tr. I at 143:16-25; 151:10-12.

sales calls was the vendor, and the ultimate victim of the vendor's fraud was the Company.

There is simply no evidence the vendor's apparent misconduct reflects "a systematic issue under management oversight and possible direction."[103] To the contrary, Mr. Trombino was emphatic in testifying at the hearing that "we don't condone that behavior, nor do we direct any of that behavior. We're here to follow the rules."[104] Indeed, if consumers were routinely being tricked by telemarketing agents into enrolling in products they knew nothing about, one would expect the Call Center phones to be ringing off the hook, but that has not happened. Ms. Bossart is the *only* telephone enrollment complaint during the period of Staff's review

2. No salespeople impersonated a utility or claimed PUCO "endorsement."

The CRES rules provide examples of "unfair, misleading, deceptive, or unconscionable acts or practices" that include "[l]eading the customer to believe that the CRES provider is soliciting on behalf of or is an agent of an Ohio electric utility when no such relationship exists,"[105] and engaging in solicitations "that will lead the customer to believe that the CRES provider is soliciting on behalf of or is an agent of any entity other than the CRES provider."[106] Staff accuses the Company of violating these rules on three specific occasions, but in some cases the evidence cited as support for these claims actually refutes them.

The Staff Report cites two incidents where "door-to-door agents informed customers that they were with or working on behalf of the local utility company."[107] In the case ending in -073, the Call Center records indicate that a consumer called on April 7, 2021 to report that a solicitor came to his door the previous day "who posed to be [DPL]," but "the rep then said he is not with [DP&L] but green choice energy [.]"[108] The absence of testimony from the customer or call center agent makes it impossible to know what words were exchanged or why the customer believed the agent was posing as a utility representative, but the record of this interaction affirmatively disputes Staff's

[103] Staff Ex. 7, Staff Report at 6.
[104] Tr. II at 313:5-7.
[105] O.A.C. 4901:1-21-05-(C)(8)(h).
[106] *Id.* at (10)
[107] Staff Report 0002 (company bates numbering).
[108] Staff Report 0748 (company bates numbering).

claim. As some point during the interaction, the salesperson made clear he or she did *not* work for the utility. In any event, the customer did not sign a contract and was not enrolled.

In the case ending in -929, Call Center records indicate that the customer enrolled with the Company on March 31, 2021 but then called the Company on April 21 to cancel the enrollment, which the Company did the same day. Again, it would make no sense for the Company to fraudulently enroll customers and turn right around and drop them.

The Staff Report also accuses the Company's agents as holding themselves out as being "endorsed" by the Commission, but this too is a stretch. The records for the case ending -405 describe a March 2021 door-to-door solicitation by an agent who allegedly "name-dropped PUCO several times and convinced me they were a vetted company."[109] Again, the absence of testimony from either participant to the conversation memorialized by this record makes it impossible to verify Staff's characterization, but it seems far more likely the consumer was referring to a statement by the agent that he or she worked for a company certified by the Commission—which was and is true. The consumer did not enroll and did not respond to Staff's requests for additional information, and the incident does not appear to have been reported to the Company.

Staff's allegations are factually unsupportable.

3. No violations occurred during the solicitation of Mr. Tokar.

Without referring to specific conduct or a specific rule, the Staff Report alleges that "[a]consumer provided a video of his and his son's interaction with a door-to-door sales agent that was misleading and deceptive."[110] Staff called this consumer to testify at hearing, but his testimony does not support Staff's characterizations, and demonstrates that staff's notes of conversations with customers in Call Center records can be unreliable.

Mr. Tokar narrated a video of his and his son's interaction with a sales agent who canvassed the witness's neighborhood in late May or early June 2021. Contrary to the statement in Mr. Tokar's case report that the representative "claim[ed] to be CGO,"[111] a lanyard holding an ID badge is clearly visible around

[109] Staff Report 0003 (company bates numbering).
[110] Staff Ex. 7, Staff Report at 4.
[111] Staff Report 0862 (company bates numbering).

the agent's neck, as Ms. Boerstler conceded on cross examination.[112] She knocked on the door, introduced herself and who she worked for, and began her pitch of the Company's gas and electricity offerings. This interaction began with Mr. Tokar's son but a few moments later, Mr. Tokar came to the door. A debate ensued over who Mr. Tokar's current supplier was: NOPEC, Columbia Gas, or "other companies" that "work[] through Columbia Gas."[113] Mr. Tokar acknowledged he "didn't rely on anything this person said to alter who [his] gas or electricity supplier was" and declined the agent's offer of enrollment.[114] Mr. Tokar later called the PUCO. "My goal was to have people stop coming to my door and bothering me."[115] Mr. Tokar told the CSD representative that the agent told Mr. Tokar she was going to "report him to her corporate office for failure to comply" but this comment is not reflected in the video played at hearing.[116]

The CSD records (the case ending -258) show that the Company responded to Mr. Tokar's complaint appropriately. On June 3, 2021, the CSD agent informed the Company, "the customer would like to be added to your do not contact list."[117] Not only did the Company do so, over the next five days the Company informed the vendor who employed the agent that she was "no longer permitted to solicit customers on behalf of [the Company]," that the vendor must re-train *all* of its agents, and that any further incidents by *any* agents would result in termination of the vendor's contract.[118] The Company also contacted each of the 21 customers enrolled by the agent to confirm their enrollment; those who could not be contacted were dropped and returned to the utility, and their accounts re-rated.[119]

A substantial portion of the 20 other "contacts" referenced in the Staff Report are very similar to the Tokar incident, and are clustered in the late April to mid-June, 2021 timeframe. Most of these solicitations never resulted in enrollments. In at least 8 of these incidents, the CSD agent never even contacted the Company. When the Company was contacted, it responded timely and appropriately, always giving the consumer and CSD agents the benefit of the doubt.

[112] Tr. 1 at 100:10-13.
[113] *See* Tr. I at 22.
[114] Tr. I at 17.
[115] Tr. I at 16.
[116] Tr. I at 15; Staff Report 0868 (company bates numbering).
[117] Staff Report 0868 (company bates numbering).
[118] Staff Report 0869 (company bates numbering).
[119] Staff Report at 0869 (company bates numbering).

4. Unauthorized door-to-door enrollments

The Staff Report cites two instances of customers allegedly being enrolled without their consent. Both instances involve door-to-door enrollments that are substantiated by a TPV but the voice on the TPV is not the customer's. Both consumers testified at hearing. The evidence reflects that these incidents apparently involved misconduct by vendor sales agents, misconduct that the Company could not possibly have detected prior to being informed during informal investigation of customer complaints, and to which the Company responded with appropriate remedial measures.

During the investigation of Tyler Beauregard's informal complaint, the consumer "reviewed the contract and listened to the TPV. The consumer executed an affidavit stating that he never signed the contract and the voice on the TPV was clearly not his."[120] When the TPV was played at hearing, the Company was able to confirm that the voice on the recording was not Mr. Beauregard's.[121]

Ms. Johnson's disputed enrollment is more complicated. The Company's investigation determined that Ms. Johnson accepted a door-to-door enrollment on December 29, 2019 for a variable rate gas and electricity product. The Company produced a TPV recording of a person who claimed he was Ms. Johnson's spouse. According to CSD records, "[t]he consumer stated that she lives alone, her husband is deceased, and his name was 'Donald.' She did not know the person on the TPV recording."[122] (At the hearing, Ms. Johnson expressed her belief that the switch was an "inside job" by someone at Duke Energy because she would never give out her information.).[123] The Company agreed to re-rate the accounts (approximately $650) and Ms. Johnson is no longer an RPA customer as of April 2021.[124]

In both of these instances, it is not entirely clear what sanctionable misconduct by *the Company* that Staff is alleging. Staff has not flagged any issues with the contents of the TPVs, so it may fairly assumed that the proper questions were asked and answered—including the question and acknowledgment that the person the verifier spoke to was "the customer of record" or "authorized to switch providers by the customer of record."[125] "James Johnson" responded that he was

[120] Staff Ex. 7, Staff Report at 4.
[121] Tr. I at 52:13-53:2.
[122] Staff Ex. 7, Staff Report at 4.
[123] Tr. I at 38:11-17.
[124] Staff Report 0517-0518 (company bates numbering).
[125] O.A.C. 4901:1-21-06(C)(2)(a)(v).

Ms. Johnson's spouse and the Company relied on that representation to process the enrollment. When Ms. Johnson spoke up and said that "James" was dead and that she did not recognize the voice on the TPV as his, the Company relied on *that* representation as well to rescind the contract and issue a refund.[126]

In the case of Mr. Beauregard, the record shows that the consumer protection measures required by the rules worked as intended. The confirmation letter got the consumer's attention, and the electric enrollment was cancelled before a switch was made.[127] The gas enrollment would have been cancelled had Columbia sent a confirmation letter, and it is not clear why this was not done. Nonetheless, the Company reversed the switch on the gas account and issued a refund.[128]

The Company unequivocally denies any knowledge of or participation in a scheme to use stand-ins to complete TPVs. When the Company listens to call recordings, it has no way of verifying whether the people on the recordings are who they claim to be. (For that matter, neither do third-party verifiers or Staff.). As Staff's own expert witness explained during cross examination, it is not possible to determine the identity of a person speaking in an audio recording without having a reference point, which the Company did not have in either of these cases.[129] What else could the Company have done other than the remedial measures it took to make things right with those customers?

To the extent Staff is suggesting the Company should be strictly liable for what amounts to identity fraud, there is no legal basis or thought-out policy rationale for doing so. The rules strike a reasonable balance between "trust" and "verify" by recognizing the potential for underhanded behavior and mitigating it with a series of checks and balances, such as TPVs, the 7-day recission period, and confirmation notices. These checks and balances worked, and the Company did its part.

5. Marketing "competitive" variable rates

Every new enrollment is subject to, and governed by, written terms and

[126] At hearing, Ms. Johnson expressed uncertainty about when her husband died and acknowledged he "could have been" alive in 2019 when the enrollment was processed. Tr. I at 34, 37. She also acknowledged the regular presence in her household of "Donald," who would "come to my house like a week and go home for three days and come back." *Id*. at 38.
[127] Tr. I at 57.
[128] *Id.* at 58.
[129] Tr. II at 235:25-236:20.

conditions that constitute a contract between the Company and the customer.[130] Vendors and sales agents are not authorized or permitted to offer terms and conditions that vary from these written agreements.[131]Nonetheless, the Staff Report and Staff witness describe numerous telephone solicitations where prospective customers were told that the Company offered a "competitive variable rate" at a "great price," [132] or words of similar import, which Staff characterizes as "untruthful promises of lower rates,"[133] and therefore unfair and deceptive. Staff has not identified what rule these alleged statements allegedly violate, but the most likely candidate seems to be Rule 4901:1-21-05(C)(8)(a), which forbids advertising and marketing "offers" that "[c]laim that a specific price advantage, savings, or guarantee exists if it does not."[134]

a. Staff misreads the applicable rules and ignores key facts.

Consumers may obtain competitive retail service "from any supplier or suppliers"[135] at the "price, terms, conditions, and quality options [consumers] elect to meet their respective needs."[136] Charging more than the utility for the *same* product violates no Commission rule, nor does charging more for a *different* product, as Staff witness Boertsler admitted under cross examination.[137] The Company provides a 100% renewable product, which is understood and accepted to be different and more costly to provide than standard service offer electricity. Staff's benchmarking of the Company's monthly variable rate for a 100% renewable product to the utilities' standard service offer product proves nothing.

Rule 4901:1-21-05(A) lists several pieces of information and disclosures that "[o]ffers shall at a minimum include," such as the rate, whether it is fixed or variable, and any other applicable fees and charges. Under subdivision (C)(8) of the rule, "[a]dvertising or marketing offers that" make certain prohibited claims, such as the existence of a price advantage, are deemed unfair and deceptive. The rules do not define the term "offer," but given its use as a noun rather than a verb in both subdivisions (A) and (C), the only sensible interpretation is that "offer" is synonymous with "contract." The rule thus prohibits false savings claims in *written contracts.* The rule does not address *verbal* claims of savings, as Staff mistakenly

[130] Company Ex. 1 at 3.
[131] *Id.*
[132] Staff Ex. 7, Staff Report at 4.
[133] Staff Ex. 9 at Q41.
[134] O.A.C. 4901:1-21-05(C)(8)(a).
[135] R.C. 4928.03.
[136] R.C. 4928.02(B) and (C); R.C. 4928.06(A) ("[T]he public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.")
[137] Tr. I at 111:22-112:1.

assumes.

Throughout the applicable period, the Company's variable rate contracts—its "offers"—expressly disclose the variable rate factors and disclaim savings:

> 5. PRICE. This is a variable price agreement. The price you are charged for electricity supply will reflect the following factors: the cost of electricity obtained from the PJM Interconnection (including energy, capacity, prior period balancing, settlement, ancillaries), related transmission and distribution charges plus all applicable taxes, fees, charges or other assessments and Green Choice Energy's costs, expenses and margins. The price that you will be charged for natural gas will vary from month to month and be based on the wholesale cost of natural gas from the NYMEX exchange (including commodity, capacity, storage and balancing), transportation to the Delivery Point, plus all applicable taxes, fees, charges or other assessments and Green Choice Energy's costs, expenses and margins. In addition to the volumetric rate for electricity or natural gas, the Customer will be charged a monthly administrative service fee of $5.00 per month. Our price does not include EDU or LDC charges. There is no cap on your variable prices for electricity or natural gas, and there is no limit on how much the prices may increase or decrease from one billing cycle to the next.[138]

Additionally, the cover page of every contract has a summary that prominently displays this disclaimer: ***Statement Regarding Savings: The supply price may not provide a savings relative to the EDU or LDC supply price.***[139]

Thus, rather than making "untruthful promises of lower rates," the Company's contracts repeatedly and expressly disclaim such a promise. Moreover, the contracts provide "[a] clear and understandable explanation of the factors that will cause the price to vary including any related indices and how often the price can change," as required under O.A.C. 4901:1-21-12(B)(7)(c)(ii). The Company has complied with Rule 4901:1-21-05.

b. There is no evidence of deception

Notably, not a single customer has testified that they relied on or were misled by any alleged, verbal claims of savings. Staff has offered its interpretation,

[138] Company Ex. 1, BT-13 at 6.
[139] *Id*. at 4.

not that of any customer. Even if a customer brought such a complaint, the Commission would have no choice but to dismiss it, for two reasons.

First, the law presumes that consumers know and understand that "statements of mere puffing or opinion" are not legally enforceable and therefore "not actionable under the [CSPA]."[140] An energy supplier's "generalized statements that its energy is competitively priced and often costs less than the utility's rates amount to nothing more than vague generalities and puffery, particularly because the statements are qualified by [the supplier] explicitly stating its rates may be higher than the utility's rates."[141] The statements Staff attributes to Company sales agents fall squarely in the realm of puffery.

Second, Staff's attempt to prove a violation through parol evidence is not permitted under Ohio law. "The parol evidence rule applies to actions brought pursuant to the Consumer Sales Practices Act, and absent proof of fraud, mistake, or other invalidating cause, a consumer may not present extrinsic evidence contradicting the parties' final written contract to prove a violation of that act."[142] Administrative rules that purport to alter the parol evidence rule "constitute[] an unconstitutional usurpation of the General Assembly's legislative function and [are] therefore invalid."[143]

6. Altered recordings/documents

In addition to the allegation that the recording of Ms. Bossart's sales call was altered, the last two bullets on page 4 of the Staff Report offer two final examples of allegedly deceptive behavior. The first involves a sales call where the agent "appeared to have followed the script" but "the call did not sound like a natural conversation."[144] It is more likely that Staff is describing a recorded TPV, not a "sales call," but in any event, this allegation is so hopelessly vague that a meaningful response is not possible.

Staff then accuses the company of "forging" customers' initials on signed contracts, which is not an accurate characterization.[145] Upon completion of a TPV, the system generates a contract with the customers initials and this initialed version

[140] *Davis v. Byers Volvo*, 2012-Ohio-882, ¶ 31 (quotation omitted).
[141] *Daniyan v. Viridian Energy LLC*, 2015 WL 4031752, at *2 (D. Md. June 30, 2015).
[142] *Williams v. Spitzer Autoworld Canton, L.L.C.,* 2009-Ohio-3554, 122 Ohio St. 3d 546, 546.
[143] *Id*.
[144] Staff Ex. 7, Staff Report at 4.
[145] Staff Ex. 9 at Q15.

is sent to the customer and retained by the Company in its enrollment file.[146] Staff has not, and cannot, identify any instance where the Company has relied on a contract with the customer's auto-generated initials as proof of consent. The Company relies on the TPV recordings as proof of consent, as does Staff.

The rules state that proof of consent must be obtained by a signature on a contract *or* a completed TPV.[147] As a matter of course and as reflected in every single call center record reviewed in this proceeding, the Company routinely and as a matter of course produces TPV recordings as proof of consent. The Company also produces contracts bearing auto-generated initials because Staff asks for them—not because the Company relies on these auto-generated initials as proof of consent.

C. The Company's verifications comply with Commission rules.

In the section of the Staff Report under the heading "Third-Party verifications," Staff alleges violations of rules applicable to the third-party verification process.[148] These allegations have no legal or factual support.

7. <u>There is no evidence of salespeople remaining on-site during verification</u>

Under Rule 4901:1-21-06(D)(1)(h)(i) and (ii), for door-to-door enrollments, "the sales agent shall contact the party responsible for the TPV and the conclusion of the sales transaction," leave the customer's premises, and "not return before, during, or after the TPV process." Staff claims that "In at least one door-to-door enrollment case, the sales agent appeared to have remained at the premise for part of, if not all, the verification process."[149] The referenced Call Center record does not support Staff's claim.

According to the records for the case ending -929, "D2D rep came and told cust that they needed to read meter/update+change gas bill. Sales rep had her make a phone call to verify info."[150] There is no indication of who the customer was asked to call or what information needed to be verified. It seems much more likely the customer called the *utility* to obtain account information, and that the call had nothing to do with a TPV. This is the problem with hearsay Call Center records—

[146] Staff Ex. 7, Staff Report at 4-5; *see also* Company Ex. 1 at BT-3 pg 3 of 7.
[147] O.A.C. 4901:1-21-06(C).
[148] Staff Ex. 7, Staff Report at 5.
[149] *Id.*
[150] Staff Report 0787 (company bates numbering).

they are incomplete and unreliable and cannot be relied on to prove the truth of matters asserted. The inference Staff is attempting to draw here is not even supported, let alone Staff's conclusion.

8. The Company's verifications contain all required disclosures

Staff also claims the Company's "TPV recordings are not fully compliant with the Ohio Administrative Code" because the Company "informs the consumers that a contract will be emailed or texted to them within five business days," and does not inform customers of a $5 administrative fee or the "factors which impact the monthly variable rate."[151] Staff refers generally to Rules 4901:1-21-06 and 4901:1-29-06 but does not identify which specific provisions it believes are at issue. Because it cannot; the TPVs are compliant.

The "Price" provision of the Company's contracts, discussed earlier, clearly discloses the $5 fee.[152] The contract summary provided with every contract also discloses the fee.[153] And Ms. Bossart confirmed that this fee was clearly disclosed during her enrollment.[154] Staff has not produced any contracts that do not disclose this fee. To the extent Staff is complaining that the fee is not disclosed during the *sales call*, no rule requires this.

As for when customer's received a copy of the contract, Staff has not identified any instance where a door-to-door customer did not receive a copy of the contract at the time of sale or very shortly thereafter. (To the contrary, as discussed below, Staff insinuates violations for providing the contract at the time of sale electronically instead of a printed version.) There is no issue with door-to-door customers not receiving the contract.

As for customers enrolled telephonically, at hearing Staff asserted that the rules require customers to "receive" the contract within one business day.[155] That is *not* what the rule requires.

Rule 4901:1-21-06(D)(2)(a)(vii) requires "[a] verbal statement and the customer's acknowledgement that the provider will, within one business day, *send* the customer a written contract that details the terms and conditions that were

[151] Staff Ex. 7, Staff Report at 5.
[152] Company Ex. 1, BT-13 at 6, paragraph 5.
[153] Company Ex. 1, BT-13 at 1.
[154] Staff Ex. 6 at Case Report pg 3 ("The TPV is good, very clear that I'm signing up with RPA dba Green Choice Energy on a variable rate with a $5.00 monthly fee.").
[155] *See* Tr. I at 123:11-17; 124:10-13; Tr. II at 294:5-13.

summarized in the telephone call." (Emphasis added.) There is nothing dishonest or deceitful about sending a contract within one business day but telling the consumer they will "receive" the contract within five days. In any case, when the nuance between "send" and "receive" was brought to the Company's attention, the relevant TPV script was corrected immediately.[156] More importantly, the customers who testified at hearing (including Ms. Bossart) acknowledged they received a copy of the contract either the day of the call or the next day.[157]

Every TPV contains every required disclosure, and the written contracts that soon follow disclose all contract terms in detail, including the variable rate factors. The contracts and TPVs comply with applicable rules.

9. Alleged discrepancies in scripts do not demonstrate violations

Staff claims the Company's "TPV scripts" (which version of which script is not disclosed) somehow fail to comply with Rules 4901:1-21-06 and 4901:1-29-06[158] but these rules do not apply to "scripts." Nor do any other rules. The rules governing marketing materials apply to "marketing materials *that include or accompany a service contract,*"[159] which plainly means the written service agreement and anything else given to the customer. The Company prepares and uses scripts for internal training purposes, not for marketing.

The only rule applicable to "scripts" and other promotional material is the rule requiring this material to be produced to Staff "within three business days of a request," which the Company did when requested.[160]

D. The Company has demonstrated its managerial capability.

The section of the Staff Report labelled "Managerial Capability" lodges several unsupportable criticisms of the Company's managerial capability. The Company is not disputing Staff's claim about resuming door-to-door marketing without notifying Staff, but everything else charged here is baseless.

[156] Staff Ex. 6 (Direct Testimony of Barbara Bossart) at Case File page 68.
[157] *See, e.g.,* Staff Ex. 6 (Direct Testimony of Barbara Bossart) at Case File page 68 ("A Welcome Packet with contract terms was texted [] on June 10.")
[158] Staff Ex. 7, Staff Report at 5.
[159] O.A.C. 4901:1-21-05(A).
[160] O.A.C. 4901:1-21-05(B); Company Ex. 1 at BT-3 pg 1.

10. Marketing without prior notice

The June 17, 2020 Entry in Case 20-591-AU-ORD directed suppliers to inform Staff in writing before resuming door-to-door marketing, which had been suspended because of the pandemic. The Company forwarded this directive to its vendors with instructions to comply.[161]

The Company had no reason to suspect vendors were *not* complying; when contacted in early 2021 about informal complaints involving door-to-door solicitations, no violation of this order was ever mentioned. Additional complaints began to trickle in during late Spring and early Summer, yet still no mention of any violations of the order issued a year earlier. This issue was not brought to the Company's attention until the PNC issued in October 2021, well *after* the Company voluntarily stopped marketing.

The Company recognizes that if the vendors did not comply with the June 17, 2020 directive, the Company is responsible. If it is Staff's position that none of the Company's vendor's gave written notice of their marketing plans, the Company is not positioned to dispute this. A heads up would have been appreciated, however, so the Company could brought itself into compliance. Staff does not have clean hands here and its tactics smack of selective and vindictive enforcement. Given everything the Company has endured in this investigation, it does not deserve to be punished for non-compliance with an Order that Staff itself expressed no interest in enforcing.

11. There is no "pattern" of non-compliance

Staff also complains that "[i]n some sales calls, which resulted in enrollments, agents did not follow the required script [the Company] provided."[162] As mentioned earlier, the rules do not govern scripts. The validity of an enrollment is measured by compliance with Commission rules, not conformance to an internal, Company-developed script. Likewise, pointing out that "[s]everal sales calls and TPVs passed the quality assurances process and resulted in consumers being enrolled"[163] merely begs the question of why these enrollments should *not* have passed quality assurance. The conclusory allegations thrown about here do not support any findings of violations.

[161] Company Ex. 1 at BT-3 pg 5.
[162] Staff Ex. 7, Staff Report at 6.
[163] *Id.*

Staff also takes issue with the Company providing door-to-door customers with electronic versions of the contacts instead of paper copies, claiming that a waiver "seek[ing] to send consumers the terms and conditions via email or text message when enrollment occurs via door-to-door solicitation" was requested in Case No. 21-157-GE-WVR but never granted.[164] Staff is utterly mischaracterizing the waiver request. The waiver requested authority to change from telephone third-party verification to an electronic process, which would enable customers to complete the TPV process by text rather than phone.[165] The Company did *not* implement digital TPV; all TPVs during the relevant period were conducted telephonically. The Company *did* implement the geolocation feature described in the waiver request but no rule prohibits this, and the ability to track agents' physical location is an enhancement to compliance, not a detriment.

The rules do not prohibit furnishing documents electronically, and the June 17, 2020 Entry discussed above effectively required the transition to this method of delivery.[166] Staff's criticism here is seriously misguided. Contrary to establishing any legitimate basis to question the Company's managerial capability, the record reflects the actions of a Company that views the Commission's rules as the floor for regulatory compliance, not the ceiling, and diligently works to comply with those rules.

E. The violation alleged in the Amended Staff Report is baseless.

Staff "amended" the original Staff Report to add two more rules to this list of alleged violations, Rules 4901:1-21-03(C) and 4901:1-21-04(A). These rules state that CRES and CRNG suppliers" shall establish and maintain records and data sufficient to: (1) Verify its compliance with the requirements of any applicable commission rules. (2) Support any investigation of customer complaints." Staff claims the Company's "refusal to provide critical information about the recordings"—referring to certain recorded sales calls—violated these rules.[167] Staff is wildly off base here.

For starters, the Staff Report's description of what Staff asked for is highly

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[164] *Id.*
[165] Case No. 21157-GE-WVR, Application (Feb. 18, 2021) at 1.
[166] *See* O.A.C. 4901:1-21-06(D)(2)(b); *See also In Re: Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency*, Entry (June 17, 2020) ¶15 (permitting door-to-door marketing "subject to all relevant requirements and best practices issued by the Ohio Department of Health and any relevant local health authority."); ¶16 (mandating "strict adherence to the relevant requirements and best practices issued by the Ohio Department of Health" to protect elderly and at-risk populations).
[167] Staff Ex. 7, Staff Report at 3, 7.

misleading. In February 2022 and again in June 2022 (after the original Staff Report), Staff did not simply ask for "information about the recordings" or "how recordings or stored, exported and saved."[168] That was part of what Staff asked for, and the Company provided this information.[169] These requests also asked for a highly detailed information about a former vendor's call recording equipment and procedures ("former" because the Company fired that vendor in June 2021 after learning about the call to Ms. Bossart.) Staff requested information about the file format in which the vendor archives recordings on its server; the format used to export files; the existence and availability of other file formats for these purposes; "[w]hat kind of access do the employees have to these recordings," copies of call logs verifying the length of calls, and "the make, model, and manual for the system that was used to record the calls."[170]

Contrary to ignoring or "refusing" Staff's February 2022 request, the record reveals substantial correspondence on this topic. The Company took great pains to understand what Staff was looking for and explained in detail what it could provide, and what it could not.[171] As explained to Staff repeatedly, the Company does not have custody or control of the vendor's information, and even if the former vendor were inclined to provide it, the Company had no way to verify it—an issues of particular concern given the motive for seeking this information in the first place.[172] As the Company's counsel explained to Staff:

> The company is [] unable to provide the technical specifications for the vendors' recording and storage systems. The contracts with these vendors did not disclose these specifications, and even if the company asked the vendors to provide this information voluntarily, the company would not be in a position to verify the information without performing a physical site inspection. Even then, the company would be unable to verify that systems in use currently are the same systems (or versions) in use during the relevant time period.[173]

A few months later, Staff asked the Commission to commence this proceeding, filed the Staff Report, and requested all this information again. Nothing had changed since February-March 2022, so the Company still had

[168] *Id.* at 3.
[169] *See* Staff Ex. 9 at Q12.
[170] *See* Company Ex. 1, BT-12 at 2; Staff DR 5, #1.
[171] *See, e.g.,* Company Ex. 1, BT-10, BT-11 and BT-12.
[172] Company Ex. 1 at BT-11 pgs 4, 7.
[173] *Id.* at BT-11 pg 4.

nothing to provide. The timing of this request justified the Company's "refusal" even if it had something to produce—which it doesn't and didn't.

The rules cited by Staff require the Company to establish and maintain records and data for two specific purposes, the first being to "verify its compliance with the requirements of any applicable commission rules." Applicable rules require the Company to record and maintain TPVs, archive customer contracts for certain periods, keep records of customer complaints, and things of this nature.[174] Compliance with these rules is demonstrated by producing the record required under the rule. No rule requires the Company to create, maintain, or produce records about the back-office operations of its vendors. Every record required under the rules has been maintained and produced to Staff on request.

The second part of the rule requires that records be maintained to "support any investigation of customer complaints." Staff requested this information to support its own investigation, not that of any customer. Nonetheless, call recordings involving specific customers were provided to Staff. Hundreds of recordings, in fact. Staff apparently reads the phrase "support any investigation of customer complaints" as a standing, general directive to not only produce any record of anything on demand, but to act on Staff's behalf to request information from third parties. The primary obligation under the rule is to "establish and maintain records," and language describing the purpose of this obligation ("support any investigation of consumer complaints") does not require the Company to "support" Staff investigations by doing whatever Staff says.

Regardless of the scope of any recordkeeping or production obligation these rules impose, suppliers cannot produce that which is not in their possession, custody, or control. Simply put, the Company does not have the information Staff is requesting and there is no evidence in the record to the contrary. Staff's framing of this issue as the Company "refusing" to provide the requested information about the vendor's recording system ignores this explanation and assumes, without any basis, that the Company had possession, custody, or control of the information. The same baseless assumption was also found in the testimony of Staff's expert, Jennifer Owen, who asserted that "[i]t is extremely problematic for this Forensic examiner to reach a definitive position on whether modifications, alterations, additions, and deletions occurred in the recording if the opposing party *withholds information* that can help identify the acoustic anomalies as such."[175] On cross

[174] *See e.g.,* O.A.C. 4901:1-21-6(D)(2)(b)(ii) (retention of TPV recordings); 4901:1-21-11(C) (retention of contracts).
[175] Staff Ex. 12 (Direct Testimony of Jennifer Owen) at page 17 (emphasis added).

examination, Ms. Owen was forced to concede that she merely *assumed* the Company had the information requested, and confirmed that she did not speak directly to anyone at the Company and received all of the information she relied on from Staff.[176]

Neither subdivision in the rules can reasonably be interpreted to require the Company to have possession, custody, or control of the specific information Staff requested. Staff is attempting to convert the rules into a general discovery obligation, but this would violate the express provisions of other rules. Specifically, enforcement actions are conducted "in accordance with Chapter 4901-1 of the Administrative Code,"[177] which states that Staff is not a "party" for purposes of the discovery rules.[178] An email request for information does not remotely satisfy formal discovery requirements in any event.

The record also clearly shows that the Company's response to Staff's request was formulated and communicated by its counsel. Counsel explained why the information could not be produced and why the Company would not attempt to obtain the information on Staff's behalf. Staff is represented by the Ohio Attorney General of the State of Ohio, whose powers to compel the production of information far exceed those of the Company or its counsel.[179] Stated simply, if Staff truly wanted the information it claims has been "withheld," there were other ways to get it.

F. Staff's recommendations are unsupported and should be rejected.

Staff's recommendations are punitive for the sake of being punitive and confuse legal responsibility for the vendor's actions with moral blame for those actions. The Company has not disputed certain limited, isolated non-compliances but there is no basis for additional violations or the remedies Staff seeks here.

12. Recommendation No. 1

[176] Tr. II at 234:7-16, 235:3-12.
[177] O.A.C. 4901:1-23-05(B).
[178] *See* O.A.C. 4901-1-10(C)("Except for purposes of rules [not applicable here}, the commission staff shall not be considered a party to *any* proceeding.") (emphasis added); O.A.C. 4901-1-16(I) (Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff.").

[179] *See, e.g.,* R.C. 4903.06 ("In an investigation, the public utilities commission or any party to the investigation may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed for depositions in civil actions in the court of common pleas.").

Staff's first recommendation seeks a finding that the Company "has violated the provisions identified above." Staff has not explained the evidentiary basis for any violation of any of the rules cited. Staff apparently expects the Commission to do this for them, but that is not the Commission's job. To the extent the record supports a finding of *any* violations, they have been corrected.

The Company has not disputed Staff's claim that the sales call recording involving Ms. Bossart was altered or edited and conceded at hearing that the TPV recording for Mr. Beauregard's enrollment did not reflect the witness's voice. The Company does not condone or defend playing games with recordings in the least, and while there is surely *something* Revised Code Title 49 or the Commission's rules that make these actions a sanctionable violation, the unknowing and unwitting production of these recordings to Staff does not violate the CRES or CRNG rules prohibiting unfair or deceptive practices against *consumers*.

The Company also has not disputed Staff's claim that it was not notified by vendors before resuming door-to-door marketing on the Company's behalf. Given Staff's knowledge of the Companies activities and apparent disinterest in monitoring or enforcing the June 2020 Entry, enforcing it retroactively would be fundamentally unfair.

The Company regrets the occurrence of *any* noncompliances but the record shows that Staff has grossly overstated their number and severity.

13. Recommendation No. 2

Recommendation No. 2 is that the Commission "rescind, conditionally rescind, or suspend" the Company's certificates "after all customers are notified and credited." This recommendation is simply too vague to act upon, and the record too undeveloped to justify it.

Once the Commission issues a certificate to serve, the certificate is a property right that may not be revoked without due process.
"Due process mandates that prior to an administrative action which results in a deprivation of an individual's liberty or property, the governmental agency must afford that individual reasonable notice and opportunity to be heard."[180]

The problem here isn't that the Commission lacks authority to suspend or revoke the Company's license. The problem is that Staff has not given due notice

[180] *Chirila v. Ohio State Chiropractic Bd.,* 145 Ohio App. 3d 589, 593 (2001) quoting *Alcover v. Ohio State Med. Bd.* (Dec. 10, 1987), Cuyahoga App. No. 54292, 1987 WL 27517.

of what specifically it wants the Commission to do. A "recission" of the Company's certificate is an entirely different sanction than "suspending" the certificate. One is permanent and the other temporary, and a temporary suspension could mean 10 days or 10 years. Staff has the burden of developing a recommendation and supporting it with evidence. The Company does not have the burden of addressing each and every possible sanction and refuting them.

14. Recommendation No. 3

Recommendation No. 3 is that the Company be ordered to "pay a forfeiture of $1,500,000." There is no explanation for the 5X multiplier from the forfeiture proposed in the PNC but this is no surprise; the $300,000 forfeiture was not supported, either.

Under R.C. 4928.16 and 4905.54, the Commission "may assess a forfeiture of not more than ten thousand dollars for each violation or failure" to comply with applicable statutes or rules." "May" indicates discretion, giving the Commission latitude to impose a forfeiture ranging from $0 to $10,000 for "each" violation. These statutory requirements are why "[i]t is critical to establish whether and how many violations of Ohio Adm.Code Chapters 4901:1-21 and 4901:1-29 were actually proven according to the evidence presented in the record [.]"[181] Staff has not identified "how many" violations occurred and again, it is not the Commission's responsibility to attempt to comb through the record and count them.

In the recent *Verde* proceeding, the Commission noted "that $675,000 is the largest civil forfeiture ever assessed by the Commission against a competitive retail service provider."[182] Whatever math underlies Staff's proposed forfeiture here (if any) apparently incorporates an assumption that one or more alleged non-compliances is continuing in nature, but this has not been alleged and certainly has not been proven. The Commission's statutory forfeiture authority allows the Commission to treat "[e]ach day's continuance of [a] violation or failure [as] a separate offense."[183] One-off incidences of non-compliance are not "continuing" violations under any sensible definition of the term

15. Recommendation No. 4

Recommendation No. 4 is that the Company provide notices to "each

[181] *PALMco* Order ¶ 43.
[182] *Verde* Order ¶ 70.
[183] R.C. 4905.64.

customer enrolled from February 1, 2021 to May 1, 2021" about the details of their contract and offer these customers the right to terminate. There are two problems with this recommendation.

First, Staff has not alleged, let alone proven, that the Company's contracts fail to include any disclosures mandated by the rules. The contracts already adequately apprise customers of their rights and responsibilities. Forcing the Company to send a duplicative or conflicting notice would do nothing but confuse customers. Second, to the extent any customer believes the Company has not honored its contracts or has violated a Commission rule, the customer is free to bring a complaint. Customers have this right regardless of whether any additional notices or disclosures are sent.

16. Recommendation No. 5

Recommendation No. 5 is that the Company be ordered to rerate customers enrolled during the months of May and June, 2021. This recommendation must be rejected for several reasons.

First, there is an implicit assumption in this recommendation that any enrollment involving any non-compliance with any rule is automatically deemed unlawful and void. This is not so. "It has been held that a contract in violation of a statute, which does not expressly declare such contract to be void, will be enforced unless there is some other indication within the statute of legislative intent to invalidate such contract."[184] This rule of law recognizes the distinction between the government's right to regulate commerce and private parties' contract rights. Think about a mortgage lender, for example, found by the FHA to have used form documents that did not contain required disclosures. The lender might be required to pay a fine and revise its documents, but it would not be required to release its customers from their loan obligations. That would be inequitable and serve no legitimate regulatory purpose. The same can be said here. Whether or not the Company's vendors notified Staff before resuming door-to-door marketing, or whether customers received copies of their contracts electronically or in writing, implicate administrative rules that have no bearing on the validity of enforceability of private contracts. Nothing in R.C. Chapter 4928 or 4929 suggests otherwise.

The violations alleged here are even further removed from any consistent, systemic non-compliance with Commission rules. The record discloses, at best,

[184] *Gries Inv. Co. v. Shaker Square Beverages, Inc.,* No. 34579, 1976 WL 190819, at *2–3 (Ohio Ct. App. May 20, 1976) (citations omitted).

isolated instances of rogue sales agents attempting to skirt the Company's quality assurance process. *The existence of this process ensured that they were caught.* If there were similar examples of misbehavior, such as that evident in the Beauregard incident, it would be reasonable to expect the phones in the Call Center to be ringing off the hook. That has not happened. The record simply doesn't not justify releasing customers from lawful contracts *en masse.*

This leads to the second problem with Staff's recommendation: the Commission lacks authority to order this remedy *in this specific case* because it impacts the contractual rights and responsibilities of absent third parties—namely, the very customers Staff believes should get refunds. Any customer who believes they are entitled to a refund is free to file a complaint and ask for one, but this right belongs to the customer, not Staff.[185]

R.C. 4928.16(B) allows the Commission to "[o]rder rescission of a contract, *or* restitution to customers including damages due to electric power fluctuations, in any complaint brought pursuant to division (A)(1) or (2) of this section[.]"A consumer may rescind a contract or recover damages, but not both. "An election must be made because it is inconsistent to rescind the contract yet retain the benefits of it."[186]

Staff's re-rate recommendation proposes the practical equivalent of rescission. The Company would be required to treat customers as if they never enrolled and return amounts paid above the price to compare. But one of the fundamental principles of contract law is that contracts are only enforceable by and against the parties to the contract and their intended beneficiaries.[187] No legal authority confers standing upon Staff to assert rights or elect remedies on behalf of absent customers.

Recission would also be inappropriate because customers have already received the benefit of their bargain. Regardless of whether they paid more than the price to compare, they received 100% renewable energy, which they would not have received from the utility *at all*, let alone at the price to compare. "[I] is inconsistent to allow the consumer to rescind the contract while at the same time

[185] R.C. 4928.16(A)(1).
[186] *Jeffrey Mining Prod., L.P. v. Left Fork Mining Co.,* 143 Ohio App. 3d 708, 716 (2001).
[187] *See Grant Thornton v. Windsor House, Inc.,* 57 Ohio St. 3d 158, 160 (1991) ("Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio.").

retaining rights in that contract and suing for damages."[188]

The remedies here *could* be appropriate in cases brought by individual consumers but they are not appropriate here.

17. Recommendation No. 6

Recommendation No. 6 is that the Company be ordered to "rerate all customers back to the utilities' default service rate who filed a complaint with the Commission, RPA Energy, or any other entity (ex. Better Business Bureau or local utility) disputing their enrollment from the time period starting after February 1, 2022." The Company does not object to refunding or re-rating consumers on a case-by-case basis and the Call Center records disclose numerous instances where the Company has done so. But it would not be appropriate to pre-emptively order this remedy for each and every consumer who demands it.

V. CONCLUSION

The record of this proceeding reflects the actions of a company that takes its compliance obligation seriously. The Company, like the Commission, recognizes that there is no way to prevent those intent on bending or breaking the rules from doing so. The best the Company can do is institute measures to deter and detect such behavior, and its Quality Assurance program does that. When Staff contacted the Company in June 2021, these measures allowed shady behavior to be confirmed and dealt with. And in the investigation that followed, the Company fully cooperated with Staff. Everything Staff asked for that could be provided was provided. To the extent isolated noncompliances have been identified, the Company has been punished enough by the virtual destruction of its Ohio business.

The Company is not the villain Staff has attempted to portray.

Dated: January 6, 2023

Respectfully submitted,

/s/ Mark A. Whitt
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[188] *Mid–America Acceptance Co. v. Lightle* (1989), 63 Ohio App.3d 590, 599.

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on January 6, 2023:

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