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

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

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I. INTRODUCTION

Implicit in Staff's charge to "administer and enforce" the CRES and CRNG minimum service standards is the responsibility to do so fairly and in accordance with law. "No matter how broad the statutory language conferring power upon an administrative officer may be . . . there is an implied term in all such legislative enactments that such discretion will be exercised in a judicious manner, and not arbitrarily or capriciously."[1] Staff's approach throughout this case has been arbitrary and capricious and its Initial Brief reflects more of the same.

RPA Energy, Inc. d/b/a Green Choice Energy's (Company) Initial Brief exposed Staff's pattern of misrepresenting facts and mischaracterizing evidence. This improper approach is again illustrated by Staff's invention of new theories to attempt to support its recommended forfeiture, including one based on yet another misrepresentation—that the Company allegedly withheld most of the 699 "sales calls" allegedly made during the week of June 4, 2021. Staff breathlessly characterizes this as a business decision by the Company to deliberately "thwart" Staff's investigation and insists that the Company should pay a "stiff forfeiture," of up to $10,000 for every withheld recording (adding up to millions of dollars), to send a message to other providers that such tactics will not be tolerated. Staff knows, or should know, however, that the 699 figure pertains to *total enrollments*, and not total *telephonic* enrollments during this period. Fully 90% of the "699" enrollments have no associated "sales call" because they involved door-to-door solicitations. Even the "699" figure is wrong and reflects Staff's sloppy approach to evidence. It comes from Staff counting the total rows in a spreadsheet with enrollment details that the Company provided in discovery, including the header row that describes each column. The actual number of enrollments is 698. In other words, Staff got the discovery it asked for and its demands are contrary to its own evidence; the Company should not be penalized because of Staff's failure to understand that evidence. And this misrepresentation is part-and-parcel of a case based on the appearance of evidence, and extrapolated and imagined evidence, rather than actual evidence, and eliminates any doubt that the proposed $1.5 million forfeiture is a made-up number based on non-existent violations.

The Company's Initial Brief also exposed Staff's propensity to invent legal standards and requirements that are not supported by, or directly contradict, a governing statute or rule. This propensity is on full display in Staff's Initial Brief.

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[1] *Mowery v. Ohio State Bd. of Pharmacy*, 1997 WL 663505, at *4 (Ohio Ct. App. Sept. 30, 1997), quoting *State ex rel. Squire v. Natl. City Bank of Cleveland* (1936), 56 Ohio App. 401, 414, 11 N.E.2d 93.

For example, Staff claims that the Company's supposed failure to "even try to establish and maintain any records of compliance for its door-to-door marketing"[2] supports Staff's recommended $1.5 million forfeiture. But Staff: (1) doesn't identify what records the Company should have maintained; (2) ignores the Company's unrebutted evidence that it uses geolocation to ensure door-to-door sales agents are where they should be and makes a call to every new customer to welcome them and confirm they were satisfied with their enrollment process; and (3) admits the applicable third party verification (TPV) requirements "have no questions that are designed to verify whether door-to-door agents are using lawful marketing tactics."[3]

Thus, Staff insists that *millions of dollars* in penalties, which would amount to the largest penalty ever assessed against a CRES or CRNG supplier in Ohio, are warranted for failure to maintain records that Staff can't even define. The same improper approach to enforcement is reflected in Staff's claims that the Company should have retained technical information regarding the recording systems used by terminated sales vendors, and recordings of every unsuccessful sales call—not because retention of those records is required by any rule, but merely because Staff now deems them relevant to an investigation. Staff's "ad hoc, post hoc" enforcement philosophy, illustrated by these examples, does not conform either to due process, or common sense.

The Company respects the Commission's rules and Staff's authority to administer them, but Staff has simply gone too far. Oversight and supervision of the Commission's enforcement Staff is badly needed. Staff has not only failed to support its case, but has squandered public resources and effectively destroyed the Company's business in Ohio in the process. Enough is enough.

II. ARGUMENT

"In proceedings brought under R.C. 4905.26, the complaining party bears the burden of proof."[4] Staff initiated this proceeding and it is subject to R.C. 4905.26.[5] Staff has the burden of proving violations; the Company does not have the burden of proving compliance, as Commission precedent makes clear. "[A]lleged violations must be proven by a preponderance of the evidence in the

[2] Staff Br. at 26.
[3] *Id.*
[4] *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190 (1966).
[5] R.C. 4928.16(A)(1) and (2).

record,"[6] 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 [.]"[7] 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 [.]"[8]

Staff attempts to justify the $1.5 million forfeiture with a laundry list of alternative scenarios. In Staff's view, "the Commission's discretion to impose more severe sanctions" makes the $1.5 million recommendation "reasonable."[9] Staff is apparently attempting to set the stage for the Commission to pick a forfeiture amount between $300,000 and $1.5 million, but there is no evidence to support either figure. Staff has not proven violations that justify even a six-figure forfeiture, let alone seven figures.

Most of Staff's factual claims have no reliable, credible evidentiary support; the few that do fail to establish a violation of the applicable rule. The Company will first address the evidentiary deficiencies infecting Staff's entire case and then address each claimed violation.

A. Staff has not met its evidentiary burden.

The Commission is not strictly bound by the Rules of Evidence, but its decisions must comport with evidentiary standards consistent with due process. "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."[10] Thus, although the Commission's discretion to admit evidence is broad, it must still base its decisions on evidence. "Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the commission's opinion and order were based,

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[6] *Investigation of PALMco Power Ohio, LLC, et al.,* Opinion and Order (Jan. 29, 2020) ("*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.
[7] *PALMco* Order ¶ 43.
[8] *Id.*
[9] Staff Initial Brief at 2.
[10] *Chesapeake & O. Ry. Co. v. Pub. Utilities Comm'n*, 163 Ohio St. 252, 263 (1955).

such order fails to comply with the requirements of R.C. 4903.09, and is, therefore, unlawful."[11]

The Commission is the fact finder in this case, not Staff, and the Commission's findings of fact must be supported by reliable, credible evidence. Much of Staff's testimony and nearly all of its briefing merely *characterizes* the evidence rather than actually present and explain the evidence. Staff has argued its case but it has made little effort to prove it.

1. Staff ignores the "best evidence rule."

Under the "best evidence rule," "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio."[12] The notion that a fact finder may not merely take a litigant's word for the contents of a document or recording is surely one of the "essential rules of evidence by which rights are asserted or defended."[13]

Most of Staff's factual assertions are sourced to a "confidential flash drive" or testimony that references a flash drive, a Call Center complaint file, or other document or recording.[14] Getting these materials admitted into evidence is only the first step. The only way the fact finder can know what is on an audio recording is to listen to it or review a reliable transcript.[15] Apart from a few scattered examples at hearing, that has not been done here.

Staff's charts and summaries also are not a substitute for actual evidence.[16] Evid. R. 1006 provides that "[t]he contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." "Under Evid.R. 1006, a distinction must be made between summaries admitted as evidence and those used merely as "pedagogical devices which organize or aid the jury's examination of testimony or

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[11] *Ideal Transp. Co. v. Pub. Utilities Comm'n*, 42 Ohio St. 2d 195, 199 (1975).
[12] Ohio Evid.R. 1002.
[13] *Ideal Transport*, 42 Ohio St.2d at 199.
[14] *See, e.g.,* Staff Br. at pg 11, fn. 49 (citing a video on the "Confidential Flash Drive" and various call center case files).
[15] *See United States v. Robinson*, 707 F.2d 872, 878–79 (6th Cir. 1983) (describing proper procedure for authentication and use of audio recordings and transcripts).
[16] *See, e.g.,* summaries of various recordings and case files on Staff Br. pgs 35-38; *see also* pg 44 fn 156 (Staff reference to a purported "Complete Spreadsheet of violations").

documents which are themselves admitted into evidence." [17] Pedagogical devices "are more akin to argument than evidence" and are not admissible.[18] Thus, Staff summaries and charts that argue evidence rather than merely present it cannot be relied on as the basis for the Commission's decision.[19]

Staff has indeed accumulated a mountain of documents and recordings, but Staff does not meet its burden of proof based only on the sheer volume of material it reviewed. Staff must specifically disclose the content of these materials and explain how the actual words spoken during a call, or actual words written in a document, support a claimed violation or other matter Staff has the burden of proving. The Commission is "not obligated to search the record or formulate legal arguments on behalf of the parties" but Staff's case presentation forces the Commission to do just that.[20] The Commission may not rely on Staff testimony that merely *characterizes* supposed facts as proof of the very facts Staff purports to characterize.[21]

Even if the Commission *could* lawfully accept Staff's characterizations in lieu of actual evidence, Staff has given the Commission every reason not to. Staff's characterizations cannot be trusted as they persistently misrepresent and embellish. As the Company learned for the first time at the hearing, Staff records every call center contact, but those recordings were never made available to either the Company, or the hearing examiners.[22] This makes it impossible to confirm whether the notes that summarize calls in complaint case reports accurately reflect those calls, or the underlying facts of the related incident. And the record reflects that those reports are not always accurate. The clearest example of this was the case of Mr. Tokar, who testified at the hearing and whose doorbell video was played at the hearing. Mr. Tokar's case file states that a representative "came by his home today

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[17] *Kinn v. HCR ManorCare*, 2013-Ohio-4086, ¶ 79-83, 998 N.E.2d 852, 870 (internal quotations, citations omitted).
[18] *Id*. at ¶ 78.
[19] *See In re Est. of Lucitte*, 2012-Ohio-390, ¶ 74 (finding error in admission of summary where "the summary in this case summarized documentary and testimonial evidence, contained a prejudicial argument, and made a misleading factual statement.")
[20] *In re Application of Ohio Power Co.,* 2020-Ohio-143, 159 Ohio St. 3d 130, 137 (quotation omitted).
[21] *See State v. Salaam*, 2015-Ohio-4552, ¶¶ 8-9, 47 N.E.3d 495, 497–98 ("Because the original recordings were necessary to prove the content of the calls pursuant to Evid.R. 1002, the trial court erred in allowing Officer Kowalski to testify about the content of Salaam's jail telephone calls.")
[22] Tr. I at 79:9-22.

claiming to be CGO."[23] But at the hearing, after the doorbell video was played, Mr. Tokar admitted on cross examination that the Company's sales representative presented her badge, clearly showing her affiliation with the Company, to Mr. Tokar right at the beginning of their interaction.[24]

In rendering a decision in this case, the Commission must "explain its rationale" and "support its decision with appropriate evidence."[25] Reliance on Staff testimony characterizing the contents of a "confidential flash drive," for example, is not "appropriate evidence" proving the content of statements buried in documents on that flash drive. In short, Staff has not given the Commission what it needs to render a decision that complies with R.C. 4903.09.

2. Staff has not supported its claim of "continuing" violations.

Under R.C. 4905.54, "[e]ach day's continuance of [a] violation or failure is a separate offense." The statute does not explain the circumstances under which a violation is deemed "continuing" and Staff's brief offers no explanation either. Staff's forfeiture calculations merely assume that every day following a violation is a separate violation, but offers no support.

R.C. 4905.54 does *not* say that any violation of any Commission rule is automatically sanctionable by forfeiture. The Commission "may" assess a forfeiture against an offender that "violates a provision of" certain enumerated Revised Code Chapters that *do not* include Chapters 4928 or 4929, "or that after due notice fails to comply with an order, direction, or requirement of the commission that was officially promulgated." The CRES and CRNG rules have been "officially promulgated" but forfeiture authority is limited to the failure to perform certain "requirements." In many cases Staff has not explained what "requirements" of which rules have allegedly been violated in the first instance, let alone in a "continuing" fashion.

When applied to the facts of this case, the concept of "continuing" violations is largely inapplicable. Every alleged violation regarding Ms. Bossart's solicitation, for example, occurred on a specific day. Any false statements made during the solicitations did not "continue" for successive days under any reasonable definition of the term. Separate violations of different rules could certainly arise from the same solicitations, but this does not make any or all the

[23] Staff Report 0862 (company bates numbering).
[24] Tr. I at 24,
[25] *In re Application of Columbus S. Power Co*., 2011-Ohio-1788, ¶ 30, 128 Ohio St. 3d 512, 519.

alleged violations "continuing."

The forfeiture statute functions primarily as an aid to enforcement, not a statute of first resort, much the same way municipal ordinances designating the failure to remediate nuisance property a "continuing" violation. Civil penalties for "continuing" violations have been litigated in that context and Courts have held that where a property owner is charged with violating a housing ordinance "on or about" a certain date, the charging document provides notice of one violation, not successive violations."[26] To the extent the Staff Report can be analogized to a "charging document," Staff has not identified which, if any, alleged violations "continued" beyond the date of the initial violation.

There is no conceivable scenario in which most of the violations alleged here could be deemed "continuing" based on the mere passage of time. To apply the statute this way would merely encourage delay and punish parties for reasonable and necessary extensions. The issue regarding the alleged failure to notify Staff of the resumption of in-person marketing is an exception, and this is discussed in the next section.

B. Staff's forfeiture recommendation is unsupported and unwarranted.

In an attempt to justify its vastly overinflated, overreaching recommendation to impose a $1.5 million forfeiture, Staff asserts that various supposed violations "easily" justify millions of dollars of forfeitures, which therefore makes the lesser amount "reasonable."[27] But as discussed below, each of the alleged violations is grossly overstated, and Staff's individual examples add up to a house of cards.

1. The alleged failure to notify Staff of in-person marketing does not justify a $1.18 million forfeiture.

The first alleged violation that Staff points to is the Company's "wanton" failure to notify Staff that it had commenced in-person marketing.[28] As with the rest of Staff's arguments, the evidence just doesn't support Staff's claims.

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[26] *See City of Twinsburg v. Corp. Sec., Inc.*, No. 17265, 1996 WL 73370, at *6 (Ohio Ct. App. Feb. 21, 1996)(defendant liable for one violation, not 240 violations, despite language in citation indicating "each day is a separate offense.")

[27] Staff Br. at i.

[28] Staff Br. at 10, 12.

Staff explains that in June 17, 2020, the Commission lifted the suspension on door-to-door marketing that it had imposed three months earlier due to the COVID-19 pandemic, but required CRES and CRNGS to notify the director of SMED at least 48 hours prior to commencing in-person marketing, among other requirements.[29] Staff claims that the Company failed to comply with the notice requirement and that these were continuing "unmitigated" violations that lasted 118 days.[30]

This hyperbolic characterization of the Company's actions stands in stark contrast to Staff's own inaction when it learned the Company had resumed in-person marketing. Staff learned that the Company was marketing door-to-door in February of 2021[31] but took no action to remind the Company of its obligations or otherwise enforce the notice or other COVID-related requirements. Staff's contemporaneous actions on this issue speak louder than its words now, suggesting that Staff's actual assessment of the threat to the health and safety of Ohioans is far less dire than it now presents in its brief.

This is not a situation where the Commission issued an order and non-compliance occurred a day, a week, or even a month later. Restrictions on commerce and movement in public were a constant on-gain, off-again affair throughout the pandemic, and it is not a stretch to believe that neither the Company's vendors nor Staff were as mindful of the Commission's order in February 2021 as they were when the order issued in June 2020. It takes a very short memory to forget that the pandemic was (and remains) an unprecedent event, and neither the shut-down nor resumption of retail supplier marketing on a state-wide basis had occurred before or since. And with people largely working from home in 2020 and 2021, it is not clear whether a notice mailed to the Commission's offices would have been read or received in any event; miscommunication by vendors also working from home would also be understandable. None of these circumstances are excuses, but it is not fair to judge the Company by pretending these external circumstances did not exist.

Staff's claims here are also characteristic of its approach generally – dramatic declarations and demands based on scant evidence. Specifically, there is no evidence the Company marketed in person each of the 118 days on which Staff bases its claim that the Company could be assessed a $1.18 million forfeiture, including holidays and weekends. Nor is there any evidence to support Staff's

[29] Staff Br. at 11.
[30] *Id*. at 12.
[31] *Id*. at 11.

assertion that "other CRES/CRNGS complied with the Commission Order."[32] The evidence is that, to the extent Staff monitored compliance, it took no action when it discovered the Company had not complied.

The claimed degree of noncompliance is also overstated. Staff cites the case of Mr. Tokar, stating that "videos of witness, Tokar's door-to-door experience shows RPA's door-to-door rep canvassing *with a face mask* and without social distancing."[33] In other words, the agent was at least partially complying in that she was wearing a mask, meaning the only evidence of an alleged violation is Staff's subjective interpretation of the interaction as "without social distancing." The remainder of Staff's evidence is a string cite purporting to establish that the Company marketed on various days from February through June 2021, and that in a single instance the agent allegedly did not wear a mask.[34]

Based on this scattered, inconclusive evidence, Staff insists that the Company "wantonly" violated the Commission's public health order, and insists on the maximum allowable forfeiture, assuming (again without evidence) that the Company marketed in-person every single one of the 118 days between February 27 and June 25, 2021, including holidays and weekends. Staff then goes further and argues that in addition to a forfeiture, the Company should have "returned to the SSO, all customers it obtained through door-to-door marketing after March 17, 2020," and "refunded the difference between what those customers paid and what they would have paid with their previous supplier, and similarly refund any other customer that enrolled due to door-to-door marketing that has already left the Company."[35] Serious, draconian demands require substantial evidence, and as established above, Staff falls far short of carrying its burden here.

Furthermore, Staff's theory is rather transparently a post-hoc rationalization. It was not presented either in the Staff Report or at the hearing, and accordingly, the Company was not given an opportunity to present rebuttal evidence, such as evidence establishing which days the Company's agents *actually* conducted in-person marketing to rebut Staff's bald assumption that it was every single day.

In any event, as should be clear from the discussion above, Staff's draconian recommendations are simply unwarranted given the evidence in the record. Far from making Staff's case, this section exemplifies the holes in it.

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[32] Staff Br. at 14.
[33] *Id*. at 11 (emphasis added).
[34] *Id.*
[35] *Id.* at 14-15.

2. The Company's alleged failure to assist Staff in its investigation does not support a $1.5 million forfeiture.

Staff next points to the Company's supposed "thwarting" of its investigation, which "thwarting" is supposedly ongoing, amounting to 322 days of continuous violation from February 18, 2022 through January 6, 2023.[36] Even a cursory examination of this argument shows that it is plagued by the same flaws as the first. Here again, Staff argues for the maximum possible penalty based on a record that simply doesn't justify any penalty at all.

To begin with, as the Company discussed in its Initial Brief,[37] the entire argument is premised on the facially absurd idea that every supplier is required to obtain and maintain any information that Staff may later deem relevant to an investigation – in this case, technical details about the system(s) vendors used to record the calls provided to Staff. That information is not covered by the record retention rules Staff cites under any reasonable interpretation of those rules, which are expressly focused on "the protection of *consumers* in this state."[38] Rather, read reasonably, those rules require companies to maintain normal business records relating to customers such as TPV recordings, contracts, billing records, etc. The Company does maintain those records, and promptly provided them to Staff upon request.[39] The rule also cannot be reasonably read, as Staff reads it, as creating a presumption of noncompliance for all enrollments, unless the company provides documentation of compliance. The burden is on Staff to prove noncompliance.

Staff's arguments also defy common sense and ignore the reality of the Company's position reflected in the correspondence cited by both Staff and the Company in their briefs. That correspondence reflects that the Company unequivocally told Staff it did not have the requested information, nor did it have the contractual right to demand it from the vendors.[40] Staff had, and has, no basis to dispute that explanation.

Furthermore, by the time Staff requested the information in February 2022, the Company had long since terminated the vendor at issue in response to allegations that call recordings had been altered *in an attempt to defraud the*

[36] *Id.* at 20.
[37] Company Br. at 33-36.
[38] R.C. 4928.10 (emphasis added).
[39] *See, e.g.*, BT-3, BT-4 (reflecting Company responses to Staff's discovery requests).
[40] Company Ex. 1 at BT-11 pgs 4, 7.

Company. Staff's use of phrases like "retrieve from its vendors" that ignore that reality is misleading at best.

Nor does Staff make any effort to grapple with the Company's Counsel's explanation of why it would be inappropriate for the Company to provide information even if were somehow able it to obtain it from the vendor. The vendor had been terminated for altering records. Why should any information that vendor might provide be trusted, or in other words, why should the Company be expected to provide such information (if somehow obtained) and thus associate itself with, and grant credibility to, the vendor and that information?

Under these circumstances, it also makes no sense to treat the Company's inability to provide information, much less trustworthy information, as a "calculated," continuing violation, running for 322 days, warranting the maximum possible penalty.[41] Rather, the record reflects that the Company engaged with Staff's discovery requests in good faith up to the point that they became both impossible and unreasonable.

And there are other issues with Staff's argument. Staff points to R.C. 4903.03 as somehow applying.[42] But that statute on its face does not apply here, since it expressly applies to any "public utility."[43] Instead, authority regarding CRES/CRNG providers is provided by R.C. Chapters 4928 and 4929. Staff also mentions R.C. 4903.06, which authorizes depositions of "witnesses residing within or without the state," an authority which Staff never invoked.[44] Staff claims that they were "forced to file" the Staff Report without the information they requested,[45] but of course it was Staff's choice when and how to request a formal investigation.

Staff is also wrong to insist that it was the Company's responsibility to provide the requested information and then seek a ruling from the Commission concerning the admissibility of the evidence. Once the PNC issued in October 2021, nothing in O.A.C. Chapter 4901:1-23 required the Company to respond to *any* Staff data requests; the Company responded to Staff's requests voluntarily to hopefully resolve Staff's concerns. The Company would have been well within its

[41] Staff Br. at 22.
[42] *Id.* at 15.
[43] R.C. 4903.03.
[44] Staff Br. 16; R.C. 4903.06
[45] *Id.* at 19.

rights to not provide information about the vendor's recording systems *even if the Company had the information* (which it did not).

3. The Company's alleged failure to provide hundreds of call recordings is based on Staffs' mistaken assumption that all of the enrollments at issue were telephonic.

Staff's third argument is yet another example, possibly the clearest, of Staff's faulty assumptions and failure to ground its claims in competent evidence. Staff asserts that the Company could be assessed a forfeiture of up to $10,000 for each of 596 recordings of sales calls that the Company supposedly failed to produce. "Staff believes that this violation alone would support Staff's recommended $1.5 million forfeiture."[46]

But, as should have been clear from even a cursory review of the evidence Staff relies on for this claim, Staff's count is based on the *faulty assumption* that *every single one* of the "699" customers the Company enrolled during the week of June 6, 2021 was a *telephonic enrollment*.

To support the 699 number, Staff cites the testimony of Ms. Boertsler and the Company's responses to data requests 10a and 10e.[47] The response to 10e, a spreadsheet with details of the Company's enrollments for June 6, 2021, clearly establishes Staff's error. While there are 699 *rows* in the spreadsheet, there are only 698 enrollments reflected in the spreadsheet, with one header row that describes what each column contains. The spreadsheet clearly reflects, in Column N, that there were *653 door to door enrollments*, and only *45* telephonic enrollments.[48] The Company obviously cannot provide recordings of "sales calls" that never occurred because the enrollments at issue were door-to-door.

In other words, here again the truth is far different than what Staff presents. The 103 recordings Staff received were all (indeed more than) Staff had asked for, and Staff's assertions to the contrary, that the company "thwarted Staff's investigation and should have to pay a stiff forfeiture" are totally baseless.

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[46] Staff Br. at 23.

[47] *Id.*; *see also* Confidential Attachment 10E Enrollment Report.

[48] Confidential Attachment 10E Enrollment Report; *see also* Company Ex. 1, BT-4 at 7 (reflecting that Nedra Ramsey appeared to understand that there were 44 telephonic enrollments, inconsistent with Staff's apparent position now that all "699" enrollments were telephonic). Furthermore, the spreadsheet reflects that many customers signed up for both gas and electric service, meaning the number of *customers* affected is even lower.

And once again, had Staff presented this theory in the Staff Report or testimony, the Company would have had the opportunity to respond and clear up Staff's confusion rather than being forced to respond for the first time on reply by referring to discovery responses that Staff relies on, but which it's not clear are in evidence.[49]

4. Staff's interpretation of 4901:1-29-04 is overreaching and nonsensical.

Next, Staff asserts that the Company should again pay "the maximum penalties allowed" for not retaining recordings of every single sales call, including calls that did not result in enrollment.[50] The maximum penalty allowed is $0, because the rules contain no such requirement.

As the Company explained in its Initial Brief, the rules do not require suppliers to record sales calls.[51] They just don't. The Company retains calls that result in enrollment for quality assurance purposes. The Company's overcompliance is what ultimately exposed vendor fraud, and the Company dealt with the matter promptly and decisively.

As with the recording system information addressed above, it simply cannot be the case that Staff can decide what information a supplier must retain in a post hoc manner, holding a supplier to a standard that until then, had never been communicated to the industry, much less formally established by the Commission. Obviously if the Commission finds it appropriate to issue rules or enter an order requiring suppliers to retain that information, it would be appropriate, from that day forward, to expect suppliers to comply. But not before that day, and certainly not in the ad hoc manner Staff advocates as part of a transparent effort to backfill justification for unreasonable, overreaching punitive recommendations.

No forfeiture is warranted for this issue, much less the "maximum penalties" supposedly "commensurate with the egregious nature of RPA's conduct."[52]

[49] If not already in the record, a copy of Confidential Attachment 10E Enrollment Report can be provided upon request.
[50] Staff Br. at 24-25.
[51] Company Br. at 20.
[52] Staff Br. at 25

5. Staff's argument that the Company should have retained unspecified records relating to door-to-door enrollments is similarly overreaching and nonsensical.

Staff asserts that the Company should have "maintain[ed] and establish[ed] records of compliance for its door-to-door marketing over the past two years," and that like the preceding purported violations "this violation, alone, could support Staff's recommended forfeiture amount."[53]

Staff is again ignoring the express requirements of the *minimum* service standards and asking the Commission to sanction the Company for noncompliance with a *maximum* standard invented by Staff after the fact. It is emblematic of Staff's flawed enforcement philosophy that Staff asserts that *millions of dollars* in penalties, which would amount to the largest penalty ever assessed against a CRES or CRNG supplier in Ohio, are warranted for failure to maintain records that it can't even define. Staff's argument also illustrates an utterly flawed enforcement philosophy where every solicitation and enrollment is presumptively bad unless the company proves otherwise.

If anything, Staff's argument makes clear that whatever they are talking about is *not* required, since Staff notes that "TPVs have no questions that are designed to verify whether door-to-door agents are using lawful marketing tactics."[54] How can the Company be faulted for not retaining information of a type that Staff essentially admits is not required by the rules?

Moreover, Staff's argument also highlights how the Company actually goes above and beyond the rules by calling each and every newly-enrolled customer, including door-to-door enrollments, to welcome them and confirm they were satisfied with their enrollment process.[55] On cross examination at the hearing, Staff conceded that these follow-up welcome calls are not required by the rules.[56] Additionally, Staff fails to mention, much less rebut, that the Company uses a geolocation service to ensure agents are at the specific address of the enrolled customer, another compliance measure not required by the rules.[57]

[53] Staff Br. at 26.
[54] *Id.* at 26.
[55] *Id.* at 25-26.
[56] Tr. I at 151:10-12.
[57] Tr. II, at 296:9-16.

Like Staff's other arguments, this one also falls far short of establishing that any forfeiture is warranted, or much less, "suspension or rescission of RPA's CRES and CRNGS certificates."[58]

6. The Company did not modify any recordings, and took swift remedial action when Staff raised the issue.

Staff next asserts that "RPA modified sales call recordings before providing them to Staff" and that, together with speculation about other imagined violations relating to altered recordings, this justifies a forfeiture and suspension or recission of the Company's certificates. This too amounts to a baseless overreach.

As the Company explained in its Initial Brief,[59] the only party that stood to benefit from altering sales calls was the vendor, and the ultimate victim of the vendor's fraud was the Company. There is *zero evidence* suggesting that it was the *Company* that altered any recordings prior to providing them to Staff. "[W]e don't condone that behavior, nor do we direct any of that behavior. We're here to follow the rules."[60] Furthermore, Staff has not, and cannot dispute that the Company promptly fired the vendor that conducted Ms. Bossart's sales call 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. Far from establishing any pattern of misconduct, the incidents that Staff highlights only illustrate that the Company is quick to take remedial action when issues are brought to its attention, canceling enrollments and issuing refunds.[61]

Against that evidence, Staff merely has rank speculation and innuendo. Staff claims that certain recordings were "peculiar," but asserts that calls could not be properly analyzed because the Company "refused" to provide sufficient information to complete a forensic analysis (information that the Company did not and does not have, as explained above). Staff then concludes that "RPA, more likely than not, modified the sales calls" in various identified recordings, repeats its baseless claims that the Company withheld "hundreds of recording and crucial information for forensic analysis," and "imagine[s]" that RPA "modified hundreds of calls" over the course of a year.[62] Of course, if consumers were routinely being

[58] Staff Br. at 27.
[59] Company Br. at 19-21.
[60] Tr. II at 313:5-7.
[61] Staff Br. at 27-28.
[62] *Id.* at 29.

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. Of the 25 Call Center contacts, Staff only investigated 20, the majority of which involved in-person enrollments, not telephone solicitations.[63]

Obviously, things that Staff "imagines" are not competent evidence, and its claims of withheld recordings and recording system information are baseless as discussed above. Here too, the Commission should wholly reject Staff's arguments and recommendations.

7. The Company did not direct or condone slamming and did not "forge" initials on contracts.

Staff next accuses the Company of "forg[ing] Ohio consumer's signatures on contracts and complet[ing] TPVs with imposters posing as the customer," and recommends that RPA be "assessed a forfeiture for forging customer's signatures on contracts."[64] Both claims were refuted in the Company's Initial Brief.

As the Company previously explained, upon completion of a TPV, the system generates a contract with the customer's initials and this initialed version is sent to the customer and retained by the Company in its enrollment file. 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.

As for the incidents where it appears someone impersonated a customer to complete a TPV recording, these incidents, like any altered sales call recordings, amount to an effort to defraud the Company, in response to which the Company took immediate remedial action when informed. When the Company listens to TPV 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.[65]

The Company would never dispute that "slamming" is improper, but the Company emphatically denies that it had any knowledge of, much less approved

[63] Staff Ex. 4 (Boerstler testimony) at 3.
[64] Staff Br. at 30-31.
[65] Tr. II at 235:25-236:20.

of, these limited incidents of what amounts to identity fraud by vendor sales agents. Staff does not dispute that the customers involved in these incidents were made whole – additional harsh penalties like those Staff recommends are unwarranted in the absence of any evidence the Company directed or condoned that behavior.

8. Call center records affirmatively disprove Staff's claim that agents posed as other entities or utilities.

Staff claims that Company agents "pos[ed] to consumers as other entities or utilities or agents of the same.[66] As set forth in the Company's Initial Brief, either the call center records for these incidents themselves, or additional evidence presented at the hearing, disprove these claims.

For example, Staff points to a case where "a consumer reported that a sales representative claimed to be from Columbia Gas of Ohio."[67] This is the case of Mr. Tokar, who testified at the hearing, and his doorbell camera video conclusively disproves Staff's claim. After the doorbell video was played, Mr. Tokar admitted that the Company's sales representative presented her badge identifying her as an agent of the Company to Mr. Tokar promptly at the beginning of the interaction.[68]

As another example, discussed in the Company's Initial Brief, 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 [.]"[69] 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 claim. As some point during the interaction, the salesperson made clear he or she did *not* work for the utility.

Staff also points to other supposed examples of impersonation including "consumers reporting that sales representatives claimed to be with Dayton Power & Light, claimed to be their current energy supplier, and claimed that they were there (at the consumer's home) to read their meter and update/change their gas

[66] Staff Br. at 31.
[67] *Id.* at 32.
[68] Tr. I at 24,
[69] Staff Report 0748 (company bates numbering).

bill."[70] But Staff cites no evidence for this claim, improperly requiring the Company, and the Commission to "to search the record or formulate legal arguments"[71] on Staff's behalf, in violation of Staff's obligation to "provide[] a description of the evidence supporting the violation [.]"[72]

Finally, Staff makes a passing reference to solicitation of consumers by telephone using "spoofed" numbers to disguise who is calling.[73] This claim is discussed below in Section II.B.12.

9. Allegations the Company promised or misrepresented savings are unfounded.

Staff asserts that "The scripts trained RPA reps to market to consumers an offer of 'competitive variable rates' when, in fact, RPA did not provide its customers competitive variable rates."[74] As explained in the Company's Initial Brief, these claims are unfounded.

The Company's obligations to customers are defined in written contracts. The Company's variable rate contracts—its "offers"—expressly disclose the variable rate factors and disclaim savings.[75] 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.***[76] 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.

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

[70] Staff Br. at 32.
[71] *In re Application of Ohio Power Co.,* 2020-Ohio-143, 159 Ohio St. 3d 130, 137 (quotation omitted).
[72] *PALMco* Order ¶ 43.
[73] Staff Br. at 32.
[74] *Id.*
[75] Company Ex. 1, BT-13 at 6. *See also* Company Initial Br. at 27.
[76] Company Ex. 1, BT-13 at 4.

the parties' final written contract to prove a violation of that act."[77] 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."[78]

Even if alleged statements about "competitive" rates could be considered, "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."[79] The statements Staff attributes to Company sales agents fall squarely in the realm of puffery. 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]."[80]

In all the examples and arguments Staff makes in this section, Staff is interposing its subjective interpretation of what "competitive" means for the consumer's. Staff's speculation that consumers could be misled by various marketing statements stands in stark contrast to actual experience. The Company enrolled *over 14,000 customers in the one-year period from June 2020 to June 2021*.[81] The Call Center phones were not ringing off the hook with complaints that the Company promised but failed to deliver "competitive" rates. 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 proves nothing.

Staff fails to grapple with the simple fact that charging more than the utility for the *same* product violates no Commission rule, nor does charging more for a *different* product.[82] The Commission does not regulate CRES or CRNG supplier rates. Commission rules require various disclosures and consents regarding the rates charged and other contract terms, and those rules have been complied with. Scattered incidents of puffery and Staff's subjective opinions do not a pattern of misconduct make. Staff's recommendation of a forfeiture in this section of its brief should be rejected.

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[77] *Williams v. Spitzer Autoworld Canton, L.L.C.*, 2009-Ohio-3554, 122 Ohio St. 3d 546, 546.
[78] *Id*.
[79] *Daniyan v. Viridian Energy LLC*, 2015 WL 4031752, at *2 (D. Md. June 30, 2015).
[80] *Davis v. Byers Volvo*, 2012-Ohio-882, ¶ 31 (quotation omitted).
[81] Staff Ex. 4 at 6.
[82] Tr. I at 111:22-112:1.

10. Staff's claims about MBM improperly invite the Commission to "extrapolate to the thousands" and ignore that the Company immediately terminated this vendor when concerns were brought to its attention.

In Section III.J of its brief, Staff cobbles together various out-of-context snippets from call recordings that supposedly reflect "several issues."[83] Staff does not bother to connect any of these "issues" to any actual rule or regulation that they supposedly violate, improperly leaving the Commission and the Company to guess at what violations Staff has in mind.

Staff also carries through its mistaken conclusion that the Company failed to provide hundreds of sales recordings in claiming that "Staff was only supplied with 1/7 of the sale recordings it requested for the week of June 6, 2021."[84] As previously explained, this is not true. Telemarketing sales calls were provided and for door-to-door enrollments, TPVs provided.

Inviting the Commission to dramatically expand the scale of Staff's evidentiary house of cards, Staff concludes by suggesting that "at the very least, RPA should have to pay" a $1.5 million forfeiture since "[i]f Staff were supplied with all the sales calls of MBM from January 1, 2021 to July 30, 2021, the number of violations would more likely than not extrapolate to the thousands."[85] Needless to say, extrapolation is not evidence, and Staff's scattershot collection of "issues" does not justify Staff's forfeiture recommendation.

11. The Company did not authorize the use of automated messages.

The section of Staff's brief regarding automated messages continues the theme of supposed violations divorced from competent evidence or applicable rules.

Based exclusively on the call to Ms. Bossart, Staff concludes that multiple calls "more likely than not contained automated messages" which Staff, again without evidence, concludes are "unlawful," "unfair, misleading, deceptive, and/or unconscionable."[86] Notably, Staff cites rules relating to record retention, but does not cite any rule that prohibits automated calls.

[83] Staff Br. at 39.
[84] *Id.* at 40.
[85] *Id.*
[86] *Id.* at 41-42.

Whether permitted under the rules or not, the Company's contracts with its vendors expressly prohibit the use of automated messages or "robo-dialing." The contract with vendors states: "Telemarketer shall not use 'robo-dialing,''robo-calling,' or automated messages for any Outbound Telemarketing Calls."[87] If automated calls were made then the Company's contracts were breached, but a vendor's breach of contract does not constitute the Company's violation of any rule.

Staff also fails to acknowledge that the Company *immediately* terminated the vendor responsible for the incident 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, consistent with its commitment to compliance and enforcement of standards for its vendors.[88]

12. The Company takes reasonable steps to prevent spoofing, which it does not condone.

Nearing the end of Staff's attempt to backfill justifications for its inflated forfeiture recommendation (really, a landfill of garbage evidence and speculation), Staff cites Ms. Bossart's incident, in which the call appeared to be coming from a local number, and an incident from January 2019 involving numbers that appeared to be associated with Duke Energy.[89] On these two thin reeds, Staff builds the conclusion that "RPA regularly spoofed consumers."[90]

The rules do not define or prohibit "spoofing." The rules prohibit "solicitation 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."[91] It is not clear how the use of a local number in Ms. Bossart's case violates this rule, as the use of a local number alone would not lead a customer to believe a supplier is an agent of another entity like the local utility. It is not clear how consumers would know who *anyone* is when called from a number not already in their phone.

Whether permitted under the rules or not, the Company does not condone "spoofing" and takes reasonable steps to prevent it. Mr. Trombino explained that to help prevent vendors from "spoofing" local phone numbers for outgoing sales calls, the company requires its vendors to submit a list of numbers for

[87] Company Ex. 1.0, BT-3, pg 4.
[88] Company Ex. 1.0, BT-2.
[89] Staff Br. at 42.
[90] *Id*.
[91] O.A.C. 4901:1-21-05(C)(1).

preapproval.[92] A report from 2019 and Ms Bossart's experience do not support Staff's conclusion that the Company "regularly spoofed customers." Staff's arguments here do not establish violations that "warrant the Staff-recommended forfeiture."

13. Staff's last argument in support of forfeiture, supposedly non-compliant TPV scripts, fails like all the rest.

Finally, Staff claims that supposed violations of TPV rules "prevented customers from being provided with clear and understanding price, terms, and conditions for their CRES/CRNGS service at the time of sale."[93] This is not true.

As an initial matter, Staff's claims here stand in stark contrast to the contemporaneous assessment of Ms. Bossart, who concluded that the TPV she experienced was "good, very clear that I'm signing up with RPA, dba Green Choice Energy on a variable rate with a $5 monthly fee."[94]

Additionally, contrary to Staff's assertion that the "price per kWh" was not disclosed, the TPV script they reference is for a variable rate enrollment, and includes language (1) disclosing the initial price, and (2) disclosing that "at the end of the initial term, this contract will automatically renew for an additional 24 months at a variable market based rate that may be higher or lower than your utility's rate, unless you choose to enroll in a different product offering."[95] The script is thus consistent with Ms. Bossart's assessment of her TPV call that she was clearly informed that she was signing up for a "variable rate."[96]

Furthermore, as Staff conceded on cross examination: (1) variable rate products are allowed under the rules, (2) suppliers aren't required to provide a schedule of exactly what future variable rates may be, and indeed suppliers *can't* provide such a schedule, and (3) customers were informed that the variable rate would vary based on market conditions.[97]

In the face of all that evidence, it is not clear how the TPVs were noncompliant with respect to disclosure of prices. To the extent Staff is referring to

[92] *Id.* at 369:15-22.
[93] Staff Br. at 43-44.
[94] Tr. I at 144:1-12.
[95] TPV Script, Attachment 6A CONFIDENTIAL, cited by Staff as Confidential flash drive, Footnote 55 folder, Confidential Attachment 6A.
[96] Tr. I at 144:1-12.
[97] *Id.* at 117.

the $5 dollar fee (and it is not clear that they are), Ms. Bossart confirmed that this fee was clearly disclosed during her TPV.[98] (It is also disclosed in the Company's contracts.[99])

As for the required statement that customers be informed that providers will, within a business day, send a written contract, there was considerable confusion about this requirement at the hearing, where Staff asserted that the rules require customers to "receive" the contract within one business day.[100] Staff's claim here was addressed and rebutted in the Company's Initial Brief. Moreover, 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.[101]

In sum, none of these supposed violations "prevented customers from being provided with clear and understanding price, terms, and conditions for their CRES/CRNGS service at the time of sale," nor do they support Staff's recommended forfeiture.[102]

C. Staff's recommendation that the Company's customers be rerated and the Company's certificates be suspended or revoked are similarly unsupported and unwarranted.

After 44 pages of attempting to support a baseless forfeiture recommendation, Staff moves to additional recommendations that the Company: (1) "provide rerates to all customers enrolled by RPA from May 1, 2021 to June 30, 2021;" (2) "rerate all customers back to the utilities' default service rate who filed a complaint with the Commission, RPA, or any other entity;" and (3) "that the Commission rescind RPA's CRES and CRNGS certificates after all customers are appropriately compensated."[103] Just like the forfeiture recommendation, these recommendations also lack any sense of proportionality or reason, utterly disregard the Company's efforts to prevent violations, and pretend the Company sat by and did nothing when it discovered potential violations. None of these recommendations are warranted under the law or the evidence.

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[98] 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.").
[99] Company Ex. 1, BT-13 at 6, paragraph 5.
[100] *See* Tr. I at 123:11-17; 124:10-13; Tr. II at 294:5-13.
[101] *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.")
[102] Staff Br. at 44.
[103] *Id.* at 43-44.

1. Staff does not have standing to demand re-rates.

Just as the CSPA is "publicly" enforceable by the Attorney General and privately enforceable by individuals, the minimum service standards are also subject to dual enforcement. Complaints may be brought by "any person" or "upon complaint or initiative of the commission."[104] The CSPA authorizes different remedies depending on whether the action is brought by the AG or individuals, and the reasons for this distinction are important.

The CSPA specifies three forms of relief the AG is entitled to pursue on behalf of consumers: (1) declaratory judgment; (2) injunction/ temporary restraining order; and (3) a class action, subject to Civil Rule 23.[105] The first two forms of relief do not require notice to potentially affected consumers because the outcome of the case cannot bind consumers (although a consumer-favorable outcome would bind the supplier) and consumers remain free to pursue individual actions. But actions seeking damages on behalf of all affected consumers *do* implicate the rights of absent parties, hence the reason for ensuring that the notice and other requirements of Rule 23 are followed.

In asking the Commission to order re-rates, Staff is effectively asking the Commission to invalidate the Company's contracts and award damages to the counterparties to these contracts. In other words, Staff is effectively appointing itself as class representative in a contract suit seeking damages. This is improper, for at least two reasons.

First, "[a] party must have standing to be entitled to have a court decide the merits of a dispute. To have standing, the general rule is that a litigant must assert its own rights, not the claims of third parties."[106] R.C. 4928.16(B)(1) authorizes complaints for "rescission of a contract, or restitution to customers," and nothing in the statute suggests that this right belongs to anyone but the consumer.

Second, the Commission does not authorize class actions.[107] Commission rules have no counterpart to Rule 23 and no mechanism to protect consumers

[104] R.C. 4928.16(A)(1) and (2).
[105] R.C. 1345.07(A)(1-3).
[106] *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 2009-Ohio-6764, ¶ 49, 124 Ohio St. 3d 284, 294 (internal quotations omitted).
[107] *S.G. Foods, Inc*., Case No. 04-28-EL-CSS, at *1 (Aug. 12, 2004) ("The Commission's rules of practice do not provide for class action complaints.").

who's rights may be impacted by actions purportedly taken on their behalf by Commission Staff.

Thus, while Staff certainly has standing to request the practical equivalent of a declaratory judgment or injunction, it does not have standing to invalidate contracts to which it is not a party, or recover damages on behalf of individuals who are parties. To the extent the re-rate remedy is available at all, it is available to consumers, not Staff. The Commission cannot grant remedies to customers who have not asked for them.

2. Revoking the Company's certificate would be excessive and unjustified.

Staff offers no reasoned explanation why the Commission should impose the regulatory death penalty here and revoke the Company's certificates. Contrary to revoking the certificates, the Commission should grant the pending renewal applications.[108]

The request to revoke the company's certificates is so utterly off-base and unsupported by the facts that the Company will not dwell on the topic for long. Suffice it to say, the record does not support a claim that the Company engaged in systemic or long-standing violations, as reflected in the discussion above regarding Staff's failure to justify its forfeiture recommendation. Characterizing isolated incidences as "wanton" or "egregious" does not make them so, nor do these labels justify ignoring the abundant record evidence of *over* compliance by the Company and remedial actions taken against vendors.

Staff insists on conflating the Company's knowledge with that of its vendors, but culpability and responsibility are not one in the same. CSPA rules recognize the concept of culpability by defining "knowledge," "knowingly," "knowing," or "known" to mean "that there is actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual acted with such awareness."[109] The Company did not *knowingly* violate any rules, nor has it disclaimed legal responsibility for any vendor that did.

Staff is utterly disregarding mitigating circumstances that courts and the Attorney General are *required* to consider in CSPA actions. "[I]f a supplier shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the

[108] *See* Case Nos. 16-892-EL-CRS; 16-893-GA-CRS.
[109] O.A.C. 109:4-3-01(A)(6).

error, no civil penalties shall be imposed against the supplier under division (D) of section 1345.07 of the Revised Code, no party shall be awarded attorney's fees, and monetary recovery shall not exceed the amount of actual damages resulting from the violation."[110] As already discussed at length, the Company had numerous measures in place to prevent and detect vendor fraud, and they *worked*.

In short, as is clear from the discussion above and in the Company's Initial Brief, Staff has not carried its burden. Given the facts that are *actually* reflected in the record – namely that the Company takes compliance seriously and goes above and beyond the rules' requirements – suspension or revocation of the Company's certificates would be unwarranted and unjust.

III. OCC'S ARGUMENTS CAN BE DISREGARDED AS ENTIRELY DUPLICATIVE OF STAFF'S

OCC's Initial Brief confirms everything said in opposition to its intervention—that OCC has no unique evidence or argument to offer in this proceeding.[111]

Rather, OCC uncritically adopts Staff's so-called "evidence" and extends Staff's arguments far past the breaking point in concluding that the Company's certificates should be "permanently" rescinded, and that a forfeiture of "a minimum of $1.5 million" is warranted.[112]

For example, OCC joins Staff in arguing that the Company "refused to cooperate and provide information" by not providing information concerning its terminated vendors' recording systems—information that the Company did not and does not have as the Company has consistently explained.[113] Similarly, OCC echoes Staff's claims that the Company "manipulated recordings to make it appear that sales calls were legitimate," ignoring the Company's evidence establishing that: (1) the scattered examples of allegedly altered call recordings reflect vendors attempting to defraud the Company, and (2) the Company took swift remedial action as soon as the issue was brought to the Company's attention (months after Staff initially had concerns), terminating the vendor at issue and making customers

[110] R.C. 1345.11
[111] *See generally*, Memorandum Contra OCC Motion to Intervene (filed May 10, 2022).
[112] OCC Br. at 1-2
[113] OCC Br. at OCC Br. at 2; *See supra* Section II.B.2.

whole.[114] The same is true of every other claim OCC makes, each of which fails for the reasons explained above in connection with each of Staff's related claims.

In short, OCC's arguments are like a house of cards built entirely on top of Staff's house of cards—like an apartment building of cards. As set forth above and in the Company's Initial Brief, these buildings are not up to code. Staff's evidence falls far short of bearing the weight of its own claims. Staff's "evidence" thus also fails to support OCC's even more dramatic arguments that demand the Commission severely punish the Company to "stand up to energy marketers that knowingly deceive consumers to enrich their bottom line."[115] The Commission would be better served by standing up to OCC and denying intervention in cases OCC has not statutory right of participation in the first instance.

OCC's arguments, like Staff's arguments on which they are based, can and should be disregarded.

IV. CONCLUSION

Suppliers that operate above and beyond the minimum service standards, react appropriately to vendor misconduct, and *reasonably* cooperate with Staff should not be treated the way the Company was treated here. Staff was unable to prove its case because it had no case to begin with. The record on this is clear, and the final order should issue accordingly.

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Respectfully submitted,

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[114] OCC Br. at 4; *See supra* Section II.B.6.
[115] OCC Br. at 2.

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CERTIFICATE OF SERVICE

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Summary: Reply Brief electronically filed by Ms. Valerie A. Cahill on behalf of RPA Energy Inc., d/b/a Green Choice Energy