

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)
Santanna Natural Gas Corporation d/b/a)
Santanna Energy Services for Waivers of)
Certain Rules in Ohio Adm. Code) Case No. 23-171-GE-WVR
4901:1-21-06 and 4901:1-29-06 to)
Authorize Electronic Enrollment and)
Third-Party Verification by Digital)
Confirmation.)

**MEMORANDUM CONTRA SANTANNA’S MOTION FOR PROTECTIVE
ORDER TO DENY OCC’S CONSUMER PROTECTION DISCOVERY
BY
OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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I. INTRODUCTION

Marketer Santanna wants to be exempt from consumer protection rules¹ that the PUCO adopted to protect Ohioans from “slamming” in door-to-door sales by energy marketers. Slamming is when marketers illegally switch a consumer’s marketer without proper consent. Far from Santanna’s effort to weaken the rules, the PUCO’s rules are already inadequate for consumer protection because door-to-door energy sales by marketers should be banned.

OCC, the state advocate for residential utility consumers, has “ample rights of discovery” under Ohio law (R.C. 4903.082) to seek information about Santanna’s waiver request. The Supreme Court of Ohio has affirmed OCC’s right under Ohio law to “*broad discovery* on nonprivileged matters.”²

¹ Santanna filed its initial waiver application on March 1, 2023 and later filed an amended application on April 12, 2023.

² *In re Suvon, LLC*, 2021-Ohio-3630, ¶ 42.

The gist of Santanna's motion for protection is to deny OCC its consumer protection discovery regarding Santanna's anti-consumer efforts to weaken the rules. Santanna's motion to avoid discovery should be denied.³

On April 6, 2023, OCC served its first set of discovery requests regarding Santanna's waiver application.⁴ On April 26, 2023, Santanna objected to all of OCC's discovery and provided only limited information responsive to OCC's requests. Despite an impending May 15, 2023 due date for filing comments,⁵ OCC agreed to provide Santanna a one-week extension (until May 3, 2023) to provide additional responses to OCC's discovery.⁶ But Santanna did not provide supplemental responses to OCC on May 3. Instead, Santanna filed a motion for protective order on May 5, 2023.

Santanna's motion to avoid OCC's discovery regarding the waiver request comes as no surprise. It goes along with Santanna's attempt to silence the voice of residential consumers by opposing OCC's intervention in this case.⁷

After the PUCO Staff issued discovery regarding Santanna's waiver request, Santanna provided additional responses to some of OCC's discovery. Yet, Santanna still seeks to avoid discovery that is reasonably calculated to lead to the discovery of admissible evidence regarding the digital/electronic platform Santanna will use, the sales

³ O.A.C. 4901-1-12(B)(1) requires OCC to file this Memorandum Contra 15 days from the filing of Santanna's Motion for Protective Order. Day 15 was Saturday, May 20, 2023, when the PUCO is closed for business. Accordingly, OCC's Memorandum Contra is filed on Monday, May 22, 2023, in accordance with R.C. 1.14 and O.A.C. 4901-1-07(A).

⁴ See Santanna Motion for Protective Order, at Attachment A.

⁵ Per the PUCO's April 13, 2023 Entry, comments to Santanna's application were initially due to be filed on May 15, 2023. The Attorney Examiner subsequently extended the due date to June 8, 2023 at Santanna's request (which OCC opposed). See Entry (May 15, 2023).

⁶ See Santanna Motion for Protective Order, Attachment B (Affidavit of Kimberly W. Bojko) and attached e-mail communications.

⁷ Santanna's Memorandum Contra OCC's Motion to Intervene (April 13, 2023).

agents who will interact with consumers while using the platform, and unregulated third-party vendors that employ Santanna's sales agents and enrollment verifiers. Specifically, Santanna wants to avoid responding to OCC-INT-01-12 through 01-015, OCC-INT-01-018 through 01-020, OCC-INT-01-22, and OCC-RPD-01-05.⁸

Santanna's objections to providing information responsive to OCC's discovery have no merit. The PUCO should deny Santanna's motion to avoid discovery and direct Santanna to respond immediately.

II. ARGUMENT

A. **Santanna's motion should be denied because it asks the PUCO to violate OCC's discovery and case preparation rights in violation of Ohio law.**

Santanna's efforts to involve the PUCO in denying OCC its ample rights of discovery to prepare its case and comments should be rejected. It would require the PUCO to violate rights guaranteed by Ohio statute, Supreme Court of Ohio precedent, and the PUCO's rules.

OCC's discovery and case preparation rights are protected by R.C. 4903.082, which states that "[a]ll parties and intervenors *shall* be granted *ample rights* of discovery." (Emphasis added). It is long settled that parties, including OCC, have a right to engage in discovery without delay under the Ohio Administrative Code.⁹ The Supreme Court of Ohio has unequivocally held that R.C. 4903.082 and the PUCO's discovery

⁸ Santanna Motion for Protective Order, at 13.

⁹ O.A.C. 4901-1-16(H).

rules permit “*broad discovery* on nonprivileged matters” notwithstanding the PUCO’s “discretion to regulate its proceedings and manage its docket.”¹⁰

The PUCO has also adopted rules that broadly define the scope of discovery and case preparation. O.A.C. 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears reasonably calculated to lead to the discovery of admissible evidence.* (Emphasis added).

And, in accordance with O.A.C. 4901-1-16(H), OCC is permitted to conduct discovery regarding Santanna’s application even though Santanna has opposed OCC’s motion to intervene.

Santanna argues that the PUCO should deny OCC’s discovery because the PUCO has not determined that an evidentiary hearing is necessary in this case.¹¹ Santanna’s argument should be rejected. The PUCO cases (circa 2005-06) cited by Santanna¹² to support its argument are inapposite.

In 2021, the Supreme Court of Ohio addressed the issue in *In re Suvon, LLC*, 2021-Ohio-3630. In that case, the PUCO denied discovery to OCC and another intervenor regarding FirstEnergy Advisors’ application for approval for a certificate to provide power broker and aggregation services.¹³ The PUCO’s decision to deny

¹⁰ *In re Suvon, LLC*, 2021-Ohio-3630, ¶ 42. (Emphasis added.)

¹¹ Santanna Motion for Protective Order, at 6-9.

¹² *Id.* at 8-9, notes 18, 19.

¹³ *In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors for Certification as a Competitive Retail Electric Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Entry on Rehearing (June 17, 2020), at ¶¶ 23-24.

discovery was based in part on its finding that an evidentiary hearing was not necessary in the case.¹⁴ OCC appealed, and the Supreme Court of Ohio reversed and remanded the PUCO’s decision.¹⁵ In its opinion, the Court found that the PUCO erred in denying discovery, holding that while the PUCO “has broad discretion to regulate its proceedings and manage its docket,” intervening parties have “broad” rights of discovery into non-privileged matters under R.C. 4903.082.¹⁶ Thus, Santanna’s claims that it should be “protected” from OCC’s discovery because the Attorney Examiner has not set an evidentiary hearing in this case have little merit.

Santanna also claims that OCC’s discovery would cause Santanna an “unreasonable burden and expense.”¹⁷ That argument should be rejected too. Santanna chose to file an application for a waiver of the consumer protection rules even though there is a pending rulemaking proceeding considering marketers’ use of digital/electronic enrollments and verifications.¹⁸ Santanna has the burden to show good cause¹⁹ for its proposed waiver and Santanna’s application (even as amended) falls short. Santanna cannot reasonably expect the PUCO to just “rubber stamp” its approval for a waiver of consumer protection rules given the recent PUCO-initiated investigations of marketer

¹⁴ *Id.* at ¶ 24.

¹⁵ *In re Suvon, LLC*, 2021-Ohio-3630, at ¶ 45.

¹⁶ *In re Suvon, LLC*, 2021-Ohio-3630, at ¶ 42.

¹⁷ Santanna Motion for Protective Order, at 9.

¹⁸ *In the Matter of the Commission’s Review of Ohio Adm. Code Chapters 4901:1-21, 4901:1-23, 4901:1-24, 4901:1-27, 4901:1-28, 4901:1-29, 4901:1-30, 4901:1-31, 4901:1-32, 4901:1-33 and 4901:1-34 Regarding Rules Governing Competitive Retail Electric Service and Competitive Retail Natural Gas Service*, Case No. 17-1843-EL-ORD and Case No. 17-1845-GA-ORD.

¹⁹ O.A.C. 4901:1-21-02(C) and O.A.C. 4901:1-29-02(C).

misconduct.²⁰ Far from what Santanna calls a “flagrant misuse of the discovery process,”²¹ OCC’s discovery seeks limited information that Santanna should provide in support of its application.

Moreover, Santanna’s “undue expense” arguments are exaggerated considering that Santanna had no issue expending resources to oppose OCC’s intervention to provide residential utility consumers a voice in this case. Santanna’s claims that OCC is somehow “harassing” Santanna and causing it to incur “undue expense” through discovery²² have no merit.

In short, OCC’s rights to “ample discovery” are well-grounded in Ohio law, Supreme Court of Ohio precedent, and the PUCO’s rules. Santanna’s motion should be denied because it asks the PUCO to violate OCC’s discovery and case preparation rights.

²⁰ See e.g. *In the Matter of the Investigation of RPA Energy, Inc. d/b/a Green Choice Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-441-GE-COI; *In the Matter of the Commission’s Investigation into XOOM Energy Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 22-267-GE-COI; *In the Matter of the Commission’s Investigation Into SFE Energy Ohio, Inc. and Statewise Energy Ohio, LLC’s Compliance with the Ohio Revised Code and Ohio Administrative Code and Potential Remedial Action*, Case No. 20-1216-GE-COI; *In the Matter of Commission’s Investigation Into PALMco Power OH, LLC dba Indra Energy and PALMco Energy OH, LLC dba Indra Energy’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-957-GE-COI; and *In the Matter of Commission’s Investigation Into Verde Energy USA Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI.

²¹ Santanna Motion for Protective Order, at 4.

²² Santanna Motion for Protective Order, at 1, 2, 14, Attachment B (Affidavit of Kimberly W. Bojko), at ¶ 12.

B. OCC’s discovery is within the scope of this proceeding and reasonably calculated to lead to the discovery of admissible evidence regarding Santanna’s waiver request and proposed digital/electronic process for consumer enrollments and verifications. Santanna’s objections to OCC’s discovery are baseless and should be rejected.

Santanna accuses OCC of using its discovery to conduct a “fishing expedition” into Santanna’s operations to uncover evidence of wrongdoing.²³ That argument should be rejected. Indeed, the PUCO Staff itself issued discovery requests to Santanna regarding the application, including several requests similar to OCC’s. Because of that, Santanna has since supplemented some responses to OCC’s discovery with information provided to the PUCO Staff. Nonetheless, Santanna still seeks to avoid other OCC discovery that is within the scope of this proceeding and “reasonably calculated to lead to the discovery of admissible evidence”²⁴ regarding Santanna’s request to be exempt from consumer protection rules. The PUCO should deny Santanna’s motion.

Santanna seeks to avoid responding to OCC-INT-01-012 through 01-015.²⁵ Each of these requests seeks information regarding how (and how much) Santanna’s sales agents are compensated for enrolling consumers. This information is within the scope of this proceeding and reasonably calculated to lead to the discovery of admissible evidence. How Santanna’s sales agents are compensated is relevant to a culture of overly aggressive marketing and/or turning a blind eye toward the enrollment of consumers without proper consent (*i.e.*, slamming). Sales agents who are paid on a commission basis have more incentive to engage in aggressive sales tactics to enroll consumers, or they don’t get paid.

²³ Santanna Memorandum Contra OCC Motion to Intervene (April 13, 2023), at 6; *see also* Santanna Motion for Protective Order, at 4, 12.

²⁴ O.A.C. 4901-1-16(B).

²⁵ Santanna Motion for Protective Order, at 13.

Santanna’s waiver request would eliminate requirements for wet signatures, audio recordings, and verbal third-party verifications that help protect consumers from aggressive sales tactics and slamming. Santanna’s waiver request, if approved, would make it easier for sales agents to take advantage of consumers where the sales agents’ payment structure incentivizes aggressive sales.

Santanna also objects to these requests on the ground that the information sought contains “confidential, trade secret, and/or competitively sensitive information.”²⁶ However, OCC executed a protective agreement with Santanna for purpose of exchanging confidential information in discovery. In fact, OCC provided an executed protective agreement to Santanna’s counsel on April 13, 2023 well in advance of the April 26, 2023 discovery due date. The protective agreement OCC provided to Santanna is the same as that regularly used by OCC for discovery with other parties in nearly every case OCC participates in. But Santanna insisted on editing the protective agreement and didn’t provide edits to OCC until May 3, 2023. In the spirit of cooperation, OCC agreed to Santanna’s changes and even agreed to review competitively sensitive materials that Santanna deems “highly confidential” at the offices of Santanna’s counsel. Thus, there is no basis for Santanna’s confidentiality objections or for Santanna to continue withholding information from OCC on confidentiality grounds. *OCC is not even a marketer that competes with Santanna.* The PUCO should reject Santanna’s gamesmanship.

Santanna further claims that these requests are “overly broad and unduly burdensome.” However, Santanna should be able to easily access basic information about how (and how much) Santanna’s own sales agents are compensated for consumer

²⁶ See attached Santanna objections to OCC-INT-01-012 through 01-015.

enrollments. If Santanna cannot access this information, then the PUCO should seriously consider whether Santanna has the managerial capabilities to market energy to Ohio consumers in the first place. Santanna's objections that this information would be burdensome to produce should be rejected.

Santanna objects to responding to OCC-INT-01-018 and OCC-INT-01-022.²⁷ These requests seek information regarding Santanna's third-party vendors who employ the sales agents marketing Santanna's service and who conduct third-party verifications of enrollment. This request is also reasonably calculated to lead to the discovery of admissible evidence regarding Santanna's request for a waiver of consumer protection rules. When sales agents or verifiers work for a third-party vendor (instead of directly for Santanna) there is a disconnect between the direct managerial control of the PUCO regulated marketer (Santanna) and the sales agent or verifier interacting with the consumer. *The PUCO does not regulate the third-party vendors marketers use for sales and verification functions.* That puts consumers at risk, particularly in door-to-door sales. Consumers have the right to know who will come knocking at their doors especially where, as here, Santanna is seeking a waiver of consumer protection rules designed to prevent misleading and deceptive marketing practices.

Santanna also objects to these requests on the grounds that the information is confidential and would be unduly burdensome to produce.²⁸ Again, these objections are baseless for the reasons explained above.

²⁷ Santanna Motion for Protective Order, at 13.

²⁸ See attached Santanna objections to OCC-INT-01-018, 01-022.

Santanna seeks to be protected from OCC-INT-01-019, OCC-INT-01-020, and OCC-RPD-01-05.²⁹ The PUCO should deny Santanna’s request. These requests seek information regarding how Santanna trains its sales agents and monitors their compliance with the PUCO’s enrollment and verification rules. These requests are also reasonably calculated to lead to the discovery of admissible evidence regarding how Santanna will maintain managerial control of agents directly interacting with consumers to ensure that Santanna’s proposed digital/electronic enrollment and verification process does not harm consumers. While Santanna did provide more than objections to these requests, the information provided is largely non-responsive and unhelpful.³⁰ In addition, Santanna objects to these requests on the grounds that the information is confidential and would be unduly burdensome to produce.³¹ These objections are baseless for the reasons explained above. The PUCO should deny Santanna’s motion.

III. CONCLUSION

Ohio law, Supreme Court of Ohio precedent, and the PUCO’s discovery rules are clear. Intervenors in this case have “ample rights to discovery” (R.C. 4903.082) and are allowed to fully participate in discovery regardless of whether the PUCO schedules an evidentiary hearing.³²

Santanna is a marketer seeking a *waiver from consumer protection rules* and it has the burden to show good cause for its waiver request. OCC has broad rights to seek information through discovery about Santanna’s application and its proposal for

²⁹ Santanna Motion for Protective Order, at 13.

³⁰ See attached Santanna objections to OCC-INT-01-019, 01-020.

³¹ *Id.*

³² *In re Suvon, LLC*, 2021-Ohio-3630, ¶ 42.

digital/electronic enrollments and verifications of consumers in door-to-door sales.
Santanna's motion to avoid OCC's discovery should be denied and the PUCO should
direct Santanna to respond immediately to OCC's outstanding discovery requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Santanna’s Motion for Protective Order to Deny OCC’s Consumer Protection Discovery was served on the persons stated below via electronic transmission, this 22nd day of May 2023.

/s/ Angela D. O’Brien
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