

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into Verde Energy)	Case No. 19-958-GE-COI
USA Ohio, LLC's Compliance with)	
the Ohio Administrative Code and)	
Potential Remedial Actions for)	
Non-Compliance.)	

**MEMORANDUM CONTRA VERDE ENERGY'S SECOND
MOTION FOR AN ORDER TO PROTECT IT FROM OCC'S DISCOVERY
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

So-called Verde Energy USA Ohio, LLC ("Verde") has used the names of our country and state for its energy marketing, but it does not reflect the values of either. The PUCO Staff chronicled Verde's "pattern of misleading and deceptive practices used to enroll customers" across our state. And now Verde's suspect business practices extend to evading the rules of pre-hearing discovery that the state's voice of consumers, the Ohio Consumers' Counsel, is using to document Verde's abuses of Bob and Betty Buckeye. The PUCO cannot let this stand.

From the outset of this proceeding, Verde has been obstructionist regarding discovery served by the Office of the Ohio Consumers' Counsel ("OCC"). Now Verde, once again, seeks to obstruct OCC's lawful and reasonable attempts at discovery and delay OCC from preparing for the upcoming October 16 hearing. But, as a condition of operating in this state, Verde has submitted itself to the jurisdiction of the PUCO (per R.C. 4928.09) and that includes the discovery rules that apply to any party in a PUCO case.

Just like its first misplaced Motion for Protective Order filed on September 19, 2019, Verde's Second Motion for Protective Order is utterly bereft of legal authority to support its position that it should be "protected" from OCC's lawful and appropriate discovery in this case. In reality, it is consumers and OCC that need protection from Verde's ways of doing business. Once again, Verde makes a superficial claim that OCC's consumer protection discovery is irrelevant and burdensome, to delay OCC's use of its discovery rights that are guaranteed by law, rule and Supreme Court precedent. For the reasons explained in OCC's Memorandum Contra to Verde's first Motion¹, and in OCC's Motion to Compel Verde's Responses to Discovery,² and below, the PUCO should reject Verde's unsupported attempts to thwart the discovery process.

The discovery disputes in this case are well-documented. Verde has objected to much of OCC's discovery on its claims of relevance and undue burden. OCC has responded by pointing out that Ohio law and PUCO rules give OCC ample rights to discovery. And because these disputes are well-documented, for administrative ease OCC incorporates the arguments already raised in its Motion to Compel and the Memorandum Contra to Verde's first Motion for Protective Order.

But Verde continues to object that OCC's discovery is oppressive and burdensome. For the reasons set forth below, Verde's objections lack merit and should be rejected.

¹ See *Memorandum Contra Verde Energy's Motion for an Order to Protect it from OCC's Discovery*, September 25, 2019 ("OCC Memo Contra"). The arguments in OCC's Memo Contra are incorporated fully herein by reference.

² See *Motion to Compel Responses to Discovery by the Office of the Ohio Consumers' Counsel*, September 27, 2019 ("OCC Motion to Compel"). The arguments in OCC's Motion to Compel are incorporated fully herein by reference.

II. ARGUMENT

A. **Verde has not demonstrated with any specificity or particularity how or why OCC's consumer protection discovery is oppressive or burdensome.**

Verde fails in its Second Motion for Protection to specifically identify *how* OCC's discovery is oppressive or burdensome. Verde just claims that it *is*, and that it should not have to answer. But that is not enough. As OCC explained in its Memo Contra, federal case law³ holds that, when a party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded by discovery rules, each interrogatory is overly broad, burdensome, or oppressive.⁴ In objecting, the party must submit affidavits or offer evidence revealing the nature of the burden.⁵ General objections without specific support may (and should) result in waiver of the objection.⁶

Here, Verde has failed to specifically show how the interrogatories and requests for production are unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support,⁷ and Verde has failed to do so, the PUCO should overrule its objections. The PUCO Staff has been actively investigating Verde since the Fall of 2018, and Verde should already have at its

³ Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio's rule is similar to the federal rules. Ohio Admin. Code 4901-1-24 allows a protective order to limit discovery to protect against "undue burden and expense." C.R.26(c) similarly allows a protective order to limit discovery to protect against "undue burden and expense." *Cf. In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (March 17, 1987), where the Commission opined that a motion for protective order on discovery must be "specific and detailed as to the reasons why providing the responses to matters...will be unduly burdensome."

⁴ *Trabon Engineering Corp. v. Eaton Manufacturing Co.* (N.D. Ohio 1964), 37 F.R.D. 51, 54.

⁵ *Roesberg v. Johns-Manville* (D.Pa 1980), 85 F.R.D. 292, 297.

⁶ *Id.*, citing *In re Folding Carton Anti-Trust Litigation* (N.D. Ill. 1978), 83 F.R.D. 251, 264.

⁷ *Gulf Oil Corp. v. Schlesinger* (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

disposal the information that OCC seeks. Notably, nothing in Verde's Motions claim that it does not have access to the information sought by OCC. To the contrary, Verde's only argument is that it should not have to provide it. But that is not a legitimate reason to deny OCC's requests.

Further, Verde's objection that OCC's discovery was not timely is no longer ripe – it has become rotten. If Verde's tactic is to frustrate OCC's hearing preparation by stalling and not responding to OCC's discovery, then maybe Verde is succeeding. But now is time for the PUCO to put an end to Verde's practice of objecting to all of OCC's discovery.

B. The amount of discovery served by OCC is proportional to the number of violations of Ohio law and PUCO rules committed by Verde in its abuses of Ohio consumers.

Verde misled and deceived Ohio utility consumers through its marketing for electricity and natural gas in at least 231 instances between October 1, 2018 and April 12, 2019.⁸ The PUCO Staff found it had received 481 customer contacts regarding Verde, but 231 of those contacts were confirmed as complaints or violations related to enrollment disputes, misleading information, and false representations by Verde.⁹ Further the PUCO Staff noted that 18 percent of *all* supplier-related investigations open for review and resolution by the PUCO Staff were in reference to Verde.¹⁰ This is an unfair burden on Ohioans and on the use of the PUCO's state budget. The PUCO Staff's investigation was broad and far-reaching, as Verde's violations of Ohio law and PUCO

⁸ PUCO Entry (April 17, 2019) at ¶ 7; *In re Verde Energy USA Ohio, LLC*, Case No. 13-2164-GA-CRS, Staff Letter (April 16, 2019).

⁹ *Id.*

¹⁰ *Id.*

rules were numerous and diverse. The PUCO Staff found that Verde violated Ohio law and PUCO rules by:

- Engaging in unfair, misleading, deceptive, or unconscionable activities, including the “spoofing” of phone numbers for marketing calls to consumers (which the Staff said Verde continues to allow) – violations of Ohio Adm.Code 4901:1-21-03, 4901:1-21-05(C), 4901:1-21-06, 4901:1-21-11(A), 4901:1-29-03(A), 4901:1-29-05(D), 4901:1-29-06, and 4901:1-29-10(A);¹¹
- Failing to inform customers that they have the right, within seven calendar or seven business days, to rescind a CRES or CRNGS contract after it has been signed – violations of Ohio Adm.Code 4901:1-21-06(D), 4901:1-29-06(D)(5)(b), and 4901:1-29-06(E)(1)(h)(ii);¹²
- Failing to maintain required records and evidence of customer consent to contract for service – violations of Ohio Adm.Code 4901:1-21-04(A), 4901:1-21-06(D), 4901:1-21-11(C), 4901:1-29-04(A), 4901:1-29-06(D), and 4901:1-29-10(B);¹³
- Failing to include required elements in third party verification (“TPV”) calls for customer enrollment – violations of Ohio Adm.Code 4901:1-21-06(D)(1)(h), 4901:1-21-06(D)(2)(a), 4901:1-29-06(D)(6)(b), and 4901:1-29-06(E)(1);¹⁴ and
- Failing to provide customers with required contract and contract expiration notices – violations of Ohio Adm.Code 4901:1-21-06(D)(2)(b)(ii) and 4901:1-29-06(E)(2)(a).¹⁵

There is no doubt that Verde overcharged, misled, and deceived hundreds of Ohio utility consumers. The sheer number of complaints or customers contacts in seven-month period that were made regarding Verde speaks loudly in this regard. Unfortunately, the Settlement between Verde and the PUCO Staff does little to address and resolve Verde’s

¹¹ Staff Report, at pp. 5-13.

¹² *Id.* at pp. 13-15.

¹³ *Id.* at pp. 15-17.

¹⁴ *Id.* at pp. 17-21.

¹⁵ *Id.* at pp. 22-24.

bad acts. Despite the PUCO's Entry directing Verde to show cause why its certificates should not be suspended or rescinded, Verde now seeks the PUCO's protection from OCC's proper discovery regarding the findings in the Staff Report and other matters relevant to consumer protection in this case.¹⁶

OCC should be permitted to conduct discovery on Verde's numerous violations of Ohio law and PUCO rules. But if Verde gets its way, OCC will be deprived of that right.

Additionally, it is fundamental in the practice of law that a penalty must be proportional to the violation. The Settlement between Verde and the PUCO Staff should appropriately address the violations in the Staff Report. In this case, to determine if the Settlement is just and reasonable (and proportional to the violations), OCC must conduct discovery regarding the violations found by the PUCO Staff. For example, if Verde had committed just one violation of Ohio law and PUCO rules, or deceived just one customer, the settlement might be just and reasonable because it is proportional to the violation. But, on the other hand, if all 481 customer contacts with the PUCO contain meritorious complaints against Verde, then the settlement between Verde and the PUCO Staff is not proportional to the violations and therefore not just and reasonable. But the most direct way for OCC or the PUCO to determine if the settlement is just and reasonable or satisfies the three-prong test the PUCO uses to evaluate settlements, is to allow OCC the ample discovery rights it is entitled to under Ohio law and PUCO rules. Under both, OCC can request documents, admissions, pose questions and conduct depositions so long as

¹⁶*See e.g.* Verde First Motion for Protective Order (September 19, 2019) at 2-3; Verde Second Motion for Protective Order (September 30, 2019).

the information sought by these various methods of discovery is reasonably calculated to lead to the discovery of admissible information.

While Verde claims that the amount of discovery sought by OCC is unduly burdensome, Verde's questionable business model has left it no stranger to being questioned by authorities in states where it operates. Indeed, Ohio is certainly not the only state in which "Spark Companies"¹⁷ (Verde's sister companies) have been caught overcharging, misleading, and deceiving customers. In many states, customers have filed class-action lawsuits against Spark Companies, and Spark Companies are no stranger to the state regulatory agencies that have conducted in-depth investigations into their deceptive marketing practices. OCC's discovery is directly related to the PUCO Staff's investigation of Verde and the resulting Settlement between Verde and the PUCO Staff. Further, nothing in Ohio law or PUCO rules expressly limit how much discovery can be conducted. OCC's discovery is not burdensome or oppressive – much of the information OCC seeks has already been provided to the PUCO Staff, and Verde does not claim otherwise.

C. Discovery often accelerates when a settlement is filed in a PUCO proceeding.

Verde argues that OCC's discovery is oppressive and burdensome because it did not begin in earnest until the settlement was filed. But, as OCC pointed out in its Memorandum Contra to Verde's Motion for Protective Order, it is common practice in PUCO proceedings for parties to engage in discovery after a settlement has been filed. This makes sense, of course, because a party cannot conduct discovery related to the

¹⁷ Verde is a wholly owned subsidiary of Spark Holdco, LLC, which in turn is the parent company of multiple competitive retail energy suppliers operating in states throughout the U.S. These companies are referred to herein as "Spark companies".

PUCO's three-part test for evaluating a settlement until it knows whether that standard will be applied.

Take, for example, the most-recent demand-side management case by Columbia Gas of Ohio, Inc. ("Columbia").¹⁸ Columbia signed a settlement with the PUCO Staff and five other parties (not including OCC).¹⁹ After the settlement was filed, OCC served five sets of discovery over 15 days, including 46 interrogatories and 41 requests for the production of documents. Columbia did not object that OCC's discovery was oppressive or unduly burdensome, did not file a motion for protective order, and produced thousands of pages in response.²⁰

Further, in the most recent energy efficiency case with the FirstEnergy utilities, a settlement was filed between the FirstEnergy utilities and numerous parties to the proceeding.²¹ After the settlement was filed, OCC served 3 sets of discovery in less than a month, including 33 interrogatories and 20 requests for the production of documents. FirstEnergy did not object on grounds of undue burden or file a motion for protective order.²²

Or, consider the most-recent rate case by Suburban Natural Gas Company ("Suburban").²³ After the settlement was filed between Suburban and the PUCO Staff, OCC served 3 sets of discovery in 15 days, with a similar seven-day turnaround and

¹⁸ *In re Application of Columbia Gas of Ohio*, Case No. 16-1309-GA-UNC.

¹⁹ *Id.*, Stipulation (August 12, 2016).

²⁰ *In re Columbia Gas of Ohio*, Case No. 16-1309-GA-UNC.

²¹ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 16-743-EL-RDR.

²² *Id.*, Stipulation (December 9, 2016).

²³ *In re Suburban Natural Gas Co.*, Case No. 18-1205-GA-AIR.

overlapping deadlines. OCC's discovery to Suburban included 23 interrogatories and 14 requests to produce documents. And like the other cases noted above, Suburban did not object on grounds of undue burden or file a motion for a protective order.²⁴

Beyond the utility examples above, there is also the Ormet case, where OCC served six sets of discovery between July 29, 2013 and August 16, 2013.²⁵ OCC's discovery constituted 79 interrogatories and 16 requests to produce documents. OCC also served notices to take depositions in the weeks before hearing. But OCC's discovery and depositions did not delay that case – the hearing began on August 27, 2013, less than two weeks after OCC served its discovery. Ormet did not file a Motion for a Protective Order or take Verde's obstructionist approach to discovery.

It is not uncommon for discovery to ramp up after a settlement is filed. It is also not uncommon for discovery to be served upon parties that are not utilities or for discovery to take place in the months and weeks before hearing. The PUCO should reject Verde's arguments that OCC's discovery is unduly burdensome or oppressive and deny Verde's Motions for Protective Orders.

D. Granting Verde's Motions for Protective Orders would set bad precedent and have a chilling effect on future attempts to conduct discovery that Ohio law and the PUCO's rules allow.

The amount of discovery served by OCC to Verde is not significant – and the questions are not difficult. OCC's discovery requests are far from oppressive or unduly burdensome. But if the PUCO grants Verde's Motions for Protective Orders on the

²⁴ *Id.*, Stipulation (May 23, 2019).

²⁵ *In re Ormet Primary Aluminum Corporation*, Case No. 09-119-EL-AEC.

discovery served by OCC, it would have a chilling effect on parties' ability to conduct discovery in future cases.

Verde claims that allowing OCC's discovery would have a chilling effect on settlements.²⁶ That is simply not true. If anything, allowing OCC its ample discovery rights in accordance with Ohio law *protects* consumers from settlements that have no teeth and do little to protect customers from future harm. In this case, the Settlement between Verde and PUCO Staff is thin on substance, especially in light of the violations PUCO Staff identified in the Staff Report

The PUCO Staff regularly conducts investigations and files Staff Reports. Similarly, it is common for a utility, regulated company, or marketer to be required to respond to the PUCO Staff or appear before the PUCO – such is the nature of operating a company in a regulated industry. Under R.C. 4928.08 and 4928.09, marketers like Verde are subject to Ohio law and the PUCO's rules on discovery. Thus, Verde must produce documents in its possession that are responsive to OCC's requests. Ohio consumers deserve to be protected from misleading and deceptive sales practices by marketers.

In this case, Verde claims that it should be protected from OCC's discovery because it is unduly burdensome and oppressive.²⁷ Again, Verde has filed the appearances of five private attorneys (outside counsel) in this case, and it has the resources of a huge national law firm at its disposal. Verde has also been actively engaged in providing much of the information that OCC seeks in discovery to PUCO Staff since the Fall of 2018. Further, Spark Companies in other states have also been

²⁶ Verde Second Motion for Protection at 5.

²⁷ See Verde Motion First Motion for Protective Order at 2, 4; See also Verde's Second Motion for Protective Order.

involved in comprehensive investigations and lawsuits regarding deceptive marketing practices. Verde's contention that it been blind-sided by OCC's discovery is plainly disingenuous.

E. OCC's statutory right to conduct discovery trumps any notion Verde has for a quick resolution of this case (or that this is the "eleventh hour" of this proceeding).

Verde claims that it should be protected from OCC's discovery because, in Verde's view, it is "untimely" and served at the "eleventh hour".²⁸ Verde claims that OCC should have conducted its discovery earlier in the proceeding before the PUCO Staff and Verde filed a settlement. Again, Verde cites no legal authority for its position. The most it can muster is a baseless claim that OCC is purportedly "sitting on its discovery rights" or simply too late.²⁹

Ohio Admin. Code 4901-1-17(A) permits discovery in this case up until the commencement of the hearing. The hearing has yet to commence and OCC's discovery is timely. Nothing in the PUCO's rules requires OCC to conduct its discovery in this case in accordance with any particular schedule. Nor have the Attorney Examiners imposed any restrictions on when OCC must conduct its discovery (although the May 30, 2019 Entry does require a seven-day timeframe for responding to discovery).

III. CONCLUSION

Verde's Motions for Protective Orders – just like its anti-consumer business practices documented by the PUCO Staff – are bereft of a justification, legal or

²⁸ See e.g. Verde First Motion for Protective Order (September 19, 2019) at 1-3, Memorandum in Support at 2-3; Verde Second Motion for Protective Order (September 30, 2019) at 6-8.

²⁹ *Id.*

otherwise, to limit OCC's lawful and ample discovery rights, which it exercises on behalf of Ohio consumers. The PUCO should deny Verde's Motions that are thwarting Ohioans' state representative (OCC) from advocating on their behalf at the PUCO, and direct Verde to respond fully and expeditiously to OCC's outstanding discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra Verde Energy's Second Motion for an Order to Protect it from OCC's Discovery was served by electronic transmission upon the parties below this 3rd day of October 2019.

/s/ Angela D. O'Brien
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