

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 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.: 19-0958-GE-COI

**VERDE ENERGY USA OHIO, LLC'S MOTION TO QUASH SUBPOENAS  
FROM THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Rule 4901-1-25(C), Verde Energy USA Ohio, LLC ("Verde Energy") respectfully moves the Public Utilities Commission of Ohio (the "Commission") to quash three subpoenas sought by the Office of the Ohio Consumers' Counsel (the "OCC") on October 4, 2019. A memorandum in support of this motion follows. A copy of the OCC's subpoenas accompanies the memorandum in support as **Exhibit 1**.

Dated: October 10, 2019

Respectfully submitted,

/s/ David F. Proaño

David F. Proaño (0078838)

(Counsel of Record)

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 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.: 19-0958-GE-COI

**MEMORANDUM IN SUPPORT OF VERDE ENERGY USA OHIO, LLC'S MOTION TO  
QUASH SUBPOENAS FROM THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Verde Energy seeks relief from three unenforceable out-of-state subpoenas sought by OCC and issued on October 4, 2019, that seek to compel the personal attendance at the October 16, 2019 hearing in this matter of three out-of-state witnesses:

- 1) Kira Jordan, VP, Senior Director, Portfolio Management, Verde Energy USA Ohio, LLC.
- 2) All persons who have knowledge or expertise regarding the information sought by OCC in its sixth set of discovery served on Verde on September 25, 2019.
- 3) All persons who have knowledge or expertise regarding the specific spoofing complaints identified on page 11 of the May 29, 2019 Staff Report in this proceeding.

*(See Motion for Subpoena Duces Tecum by the Office of the Ohio Consumers' Counsel, filed Oct. 4, 2019.)* Verde Energy produced Kira Jordan ("Jordan") for a day-long deposition by OCC on October 10, 2019, in both her personal capacity and as a corporate representative of Verde Energy on certain topics noticed by OCC. While reserving all rights and any objections with regard to that deposition, Verde Energy notes that in general "[d]epositions may be used in commission hearings to the same extent permitted in civil actions in courts of record," provided that the deposition is filed three days in advance of the hearing. Ohio Adm.Code 4901-1-21(N). OCC has a clear procedure to move to admit Ms. Jordan's testimony into the record in this case.

The OCC cannot, however, compel Ms. Jordan or other out-of-state witnesses to appear in Ohio at the hearing in this matter scheduled to begin on October 16, 2019, at PUCO's offices in Columbus, Ohio. Ms. Jordan and the other witnesses that would be purportedly compelled to attend the hearing in person pursuant to the three the OCC's subpoenas all reside outside of the State of Ohio. For these reasons, the Commission should quash the OCC's three out-of-state subpoenas.

## **I. BACKGROUND.**

On September 6, 2019, Verde Energy and the Commission Staff ("Staff") filed a joint settlement stipulation and recommendation (the "Joint Stipulation") in this investigation for the Commission's review and approval. As detailed in Verde Energy's prior motions for protective orders and its opposition to the OCC's motion to compel, Verde Energy has spent much of the last several weeks responding to discovery requests from OCC. On September 23, 2019, the OCC noticed the deposition of Ms. Jordan for October 1, 2019. (*See* September 23, 2019 Notice of Deposition, filed on docket.) On September 26, 2019, the OCC noticed a second deposition for all persons with knowledge of five topics listed in the notice. (*See* September 26, 2019 Notice of Deposition, filed on docket.) On September 30, 2019, due to the unavailability of the court reporter retained by the OCC, the parties agreed to reschedule Ms. Jordan's deposition for October 10, 2019, beginning at 10:30 AM EST.

On October 7, 2019, following a hearing on pending discovery motions and a finding by the Attorney Examiners that OCC's second deposition notice was improper, OCC served a third notice of deposition. (*See* October 7, 2019 Notice of Deposition, filed on docket.) This third notice of deposition lists five topics for testimony from a Verde Energy corporate designee. (*See id.* at 2.) By agreement, Ms. Jordan has been designated to testify for Verde Energy on the five topics listed on this third OCC notice of deposition, with Ms. Jordan to sit for that deposition on

the same date as her individual deposition, October 10, 2019. Ms. Jordan’s deposition is ongoing as of the filing of this motion and is expected to last the entire day.

On October 4, 2019, the OCC filed its motion for three subpoenas to compel the attendance at the October 16, 2019 hearing in Columbus, Ohio, of Ms. Jordan and “[a]ll persons who have knowledge or expertise” regarding (1) the OCC’s sixth set of discovery requests and (2) certain spoofing complaints referenced in the Staff Report. (See **Exhibit 1**, *Subpoenas*.) The OCC did so despite having previously noticed Ms. Jordan for deposition. Ms. Jordan and the other witnesses that would be purportedly compelled to attend the hearing pursuant to three OCC subpoenas all reside outside of the State of Ohio. For these reasons, as discussed further below, the Commission should quash the OCC’s out-of-state subpoenas.

## **II. LAW AND ARGUMENT.**

The Commission’s rules make clear why these subpoenas should be quashed: “Depositions may be used in commission hearings to the same extent permitted in civil actions in courts of record,” provided that the deposition is filed three days in advance of the hearing. Ohio Adm.Code 4901-1-21(N). Yet as in the recent *PALMco* investigation,<sup>1</sup> in which the OCC sought to compel out-of-state company witnesses to attend the Commission’s hearing, the OCC has chosen not to follow the clear and established path for obtaining the testimony of out-of-state Verde Energy witnesses—via deposition. (See *PALMco* Hearing Tr. Volume I (“*PALMco* Hearing Tr.”) at p. 99:13-18, filed in 19-0957-GE-COI on Oct. 4, 2019.) For the same reasons as in *PALMco*, the Commission should grant the motion to quash and permit the OCC to file the

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<sup>1</sup> *In the Matter of the 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*, 19-0957-GE-COI.

deposition testimony it obtains in accordance with Rule 4901-1-21(N). (*PALMco* Hearing Tr. at 99:8–100:5.)

While Verde Energy reserves all rights and waives no objections regarding the OCC’s deposition of Ms. Jordan, the OCC will obtain all relevant and admissible testimony Ms. Jordan has to offer without compelling her attendance at a hearing more than 1,000 miles from her state of residence, Texas. The OCC’s motion for subpoenas fails to explain why the Attorney Examiners’ reasoning in *PALMco* is not equally applicable here. Specifically, all three of the OCC’s subpoenas should be quashed as improper under Rule 4901-1-25(C). The Commission’s rules provide that “[a] subpoena may be served at any place *within this state*.” Ohio Adm.Code 4901-1-25(B) (emphasis added). Retail electric and natural gas suppliers like Verde Energy consent to jurisdiction and appoint a statutory agent to receive service of process in this state. *See* R.C. 4928.09; 4929.21. Analogous statutes impose similar requirements on other regulated entities. *See* R.C. 3909.05 (“any life insurance company organized by act of congress or under the laws of another state”); R.C. 3927.03 (“any foreign insurance company”). But consistent with the requirements of Ohio Civ.R. 45, Ohio courts have concluded that these statutes do not render service upon a corporation’s in-state agent effective as to that corporation’s individual, out-of-state employees. *See, e.g., Burgess v. Prudential Ins. Co. of America*, 1st Dist. Hamilton No. C-870225, 1988 WL 68686, \*5 (rejecting the position that R.C. 3909.05 “gives a party the ability to call individual employees of the out-of-state corporation into the state for depositions or testimony at trial. The statute does not waive the requirement of Civ.R. 45 which requires personal service upon an individual before he can be hailed into court in this state.”); *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.*, 4th Dist. Highland No. 01CA21, 2002-Ohio-6170, ¶ 106 (“We also disagree with appellant that the trial court erred by determining that service of a

subpoena under R.C. 3827.03 was not proper to depose Zurich's out-of-state non-party witness.").

As applied to these subpoenas, Ohio law renders these subpoenas facially defective and unenforceable. As to the subpoena of Ms. Jordan, the OCC purports to serve Ms. Jordan in Texas, but such out-of-state service is inconsistent with Rule 4901-1-25(B), which requires that a Commission subpoena be served "within this state." As to the other two subpoenas, which do not identify a particular witness and which purport to serve the witnesses' employer's statutory agent, the OCC has repeated the mistakes of the subpoena proponents in *Burgess* and *McGuire*—Commission subpoenas served upon Verde Energy's Ohio statutory agent are ineffective as to the individual employees of Verde Energy.

Even if the OCC had followed Ohio law in obtaining these subpoenas, it likely could not enforce them. If the OCC could somehow obtain an order from an Ohio Court of Common Pleas compelling the attendance of these witnesses under R.C. 4903.04—an unlikely occurrence, for all of the reasons explained above—it would still need to enforce that order against Ms. Jordan,<sup>2</sup> who is domiciled in Texas. Texas has not adopted the Uniform Interstate Depositions and Discovery Act (UIDDA). To compel a Texas citizen to attend *depositions* in connection with civil proceedings pending in an out-of-state forum, Texas requires a mandate, writ, or commission from the foreign court. Tex. Civ. Prac. & Rem. Code § 20.002; Tex. R. Civ. P. 201.2 ("If a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's oral or written deposition testimony in this State, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in this State."). Compelling out-of-state

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<sup>2</sup> Any other putative Verde Energy witnesses also reside outside of the State of Ohio.

attendance at a hearing is not even contemplated, in contrast with criminal proceedings. *See* Tex. Crim. P. Code § 24.28. In other words, there does not appear to be any procedure for a Texas court to compel a Texas witness's appearance in an out-of-state civil or administrative forum. Given that the Texas legislature was explicit when it created a process for compelling Texas witnesses to attend (1) civil depositions in pending foreign cases, and (2) out-of-state criminal proceedings, it is exceedingly unlikely a process even exists under Texas law to enforce the OCC's Ohio subpoenas.

In sum, OCC's subpoenas are facially defective and unenforceable under Ohio law. They are likely unenforceable under Texas law, as well. The OCC's subpoenas represent an unfounded attempt to circumvent the process of securing the testimony from out-of-state witnesses for a Commission hearing, as the OCC already well knows. Further, OCC will have the opportunity to move for admission into the record of the transcript of the deposition of Kira Jordan, currently underway in Houston, Texas, in both her personal capacity and as a corporate designee on the five topics noticed by OCC on October 7, 2019.

### **III. CONCLUSION.**

The OCC's subpoenas seek to compel Verde Energy's out-of-state witness to appear at a Commission hearing in Ohio. These subpoenas are facially defective and unenforceable. The Commission should quash the three subpoenas requested by the OCC on October 4, 2019.

Dated: October 10, 2019

Respectfully submitted,

/s/ David F. Proaño

David F. Proaño (0078838)

(Counsel of Record)

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Cleveland, Ohio 44114

Phone: 216-861-7834

Fax: 216-696-0740

*Counsel for Verde Energy USA Ohio, LLC*



## **CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing document was served by e-mail upon the persons listed below this 10<sup>th</sup> day of October, 2019.

### **SERVICE LIST**

Alexis Keene  
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Bethany Allen  
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Dated: October 10, 2019

/s/ David F. Proaño  
David F. Proaño (0078838)  
Counsel for Verde Energy USA Ohio, LLC

## **EXHIBIT 1 – OCC SUBPOENAS**

**STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573**

Michael DeWine  
GOVERNOR



**THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM**

To: Kira Jordan  
12140 Wickchester Ln., Suite 100  
Houston, TX 77079

Upon application of the Ohio Consumers' Counsel, and consistent with R.C. 4928.09(A)(1)(a)(b), Kira Jordan, VP, Senior Director, Portfolio Management, Verde Energy USA Ohio, LLC, shall appear before the Public Utilities Commission of Ohio as a witness in the following proceeding:

Case No. 19-0958-GE-COI

Case Title: In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance.


Ms. Jordan is to appear at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio, on Wednesday, October 16th, at 10:00 a.m. in the hearing room designated for this proceeding, and be available to testify at the hearing from day to day thereafter until called by the Office of the Ohio Consumers' Counsel and completing her testimony.

Ms. Jordan shall bring with her to the hearing all workpapers and documents utilized in preparing responses to discovery that were authored by the witness and/or documents that were provided to OCC by the witness or in consultation with the witness.

**STATE OF OHIO**  
**PUBLIC UTILITIES COMMISSION**  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573

Michael DeWine  
GOVERNOR

Dated at Columbus, Ohio, this 4th day of October 2019.

BY:   
TITLE: Attorney General

**NOTICE:** If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

**STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573**

Michael DeWine  
GOVERNOR

**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.		

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**RETURN OF SERVICE**

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State of Ohio	)	
	)	ss.
County of Franklin	)	

\_\_\_\_\_, being duly sworn, states that he/she is over eighteen (18) years of age, and that on October \_\_\_\_, 2019, at approximately \_\_\_\_ p.m., he/she served the within subpoena on \_\_\_\_\_ by delivering a copy thereof to \_\_\_\_\_ at \_\_\_\_\_.

Subscribed and sworn to before me this \_\_\_\_ day of October 2019.

---

Notary Public

**STATE OF OHIO  
PUBLIC UTILITIES COMMISSION  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573**

Michael DeWine  
GOVERNOR



**THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM**

To: Verde Statutory Agent  
440 Easton Commons Way, Suite 125  
Columbus, OH 43219-6223

Upon application of the Ohio Consumers' Counsel, and consistent with R.C. 4928.09(A)(1)(a)(b), Verde shall designate and produce a person(s) who have/has knowledge or expertise regarding the information sought by OCC in its sixth set of discovery served on Verde on September 25, 2019, to appear before the Public Utilities Commission of Ohio as a witness in the following proceeding:

Case No. 19-0958-GE-COI

Case Title: In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance.

The witness(es) are to appear at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio, on Wednesday, October 16, at 10:00 a.m. in the hearing room designated for this proceeding, and be available to testify at the hearing from day to day thereafter until called by the Office of the Ohio Consumers' Counsel and completing his testimony.

The witness(es) shall bring to the hearing all workpapers and documents utilized in preparing responses to discovery that were authored by the witness and/or documents that were provided to OCC by the witness or in consultation with the witness.

**STATE OF OHIO**  
**PUBLIC UTILITIES COMMISSION**  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573

Michael DeWine  
GOVERNOR

Dated at Columbus, Ohio, this 4th day of October 2019.

BY: 

TITLE: Attorney Examiner

**NOTICE:** If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

**STATE OF OHIO**  
**PUBLIC UTILITIES COMMISSION**  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573

Michael DeWine  
GOVERNOR

**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.		

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**RETURN OF SERVICE**

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State of Ohio	)	
	)	ss.
County of Franklin	)	

\_\_\_\_\_, being duly sworn, states that he/she is over eighteen (18) years of age, and that on October \_\_\_\_, 2019, at approximately \_\_\_\_ p.m., he/she served the within subpoena on \_\_\_\_\_ by delivering a copy thereof to \_\_\_\_\_ at \_\_\_\_\_.

\_\_\_\_\_  
Subscribed and sworn to before me this \_\_\_\_ day of October 2019.

\_\_\_\_\_  
Notary Public



**STATE OF OHIO**  
**PUBLIC UTILITIES COMMISSION**  
180 EAST BROAD STREET  
COLUMBUS, OHIO 43266-0573

Michael DeWine  
GOVERNOR



THE PUBLIC UTILITIES COMMISSION OF OHIO  
SUBPOENA DUCES TECUM

To: Verde Statutory Agent  
440 Easton Commons Way, Suite 125  
Columbus, OH 43219-6223

Upon application of the Ohio Consumers' Counsel, and consistent with R.C. 4928.09(A)(1)(a)(b), Verde shall designate and produce a person(s) who have/has knowledge or expertise regarding the specific spoofing activities Verde was reported to have engage in, identified on page 11 of the May 29, 2019 Staff Report in this proceeding, shall appear before the Public Utilities Commission of Ohio as a witness in the following proceeding:

Case No. 19-0958-GE-COI

Case Title: In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance.

The witness(es) are to appear at the offices of the Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio, on Wednesday, October 16, at 10:00 a.m. in the hearing room designated for this proceeding, and be available to testify at the hearing from day to day thereafter until called by the Office of the Ohio Consumers' Counsel and completing his testimony.

The witness(es) shall bring to the hearing all workpapers and documents utilized in preparing responses to discovery that were authored by the witness and/or documents that were provided to OCC by the witness or in consultation with the witness.

Dated at Columbus, Ohio, this 4th day of October 2019.

BY: 

TITLE: Attorney Examiner

**NOTICE:** If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

**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	)	
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Potential Remedial Actions for	)	
Non-Compliance.		

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**RETURN OF SERVICE**

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	)	ss.
County of Franklin	)	

\_\_\_\_\_, being duly sworn, states that he/she is over eighteen (18) years of age, and that on October \_\_\_\_, 2019, at approximately \_\_\_\_ p.m., he/she served the within subpoena on \_\_\_\_\_ by delivering a copy thereof to \_\_\_\_\_ at \_\_\_\_\_.

Subscribed and sworn to before me this \_\_\_\_ day of October 2019.

\_\_\_\_\_  
Notary Public

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**10/10/2019 3:28:09 PM**

**in**

**Case No(s). 19-0958-GE-COI**

Summary: Motion to Quash Subpoenas from the Office of the Ohio Consumers' Counsel electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC