

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'S REPLY MEMORANDUM IN SUPPORT OF THE MOTION FOR
PROTECTIVE ORDER

I. PROCEDURAL HISTORY

On December 2, 2019, the Ohio Consumers' Counsel ("OCC") challenged the confidential designation by counsel for Verde Energy USA Ohio LLC ("Verde Energy") of (1) OCC Ex. 19C Williams Direct (Confidential): Table 3, Comparison of Gas Rates (p. 19) and (2) OCC Ex. 19C Williams Direct (Confidential): Table 3, Number of Verde Customers (p. 19) (hereinafter, collectively, the "Confidential Information"). The Confidential Information is a compilation of nonpublic and proprietary information about (i) Verde Energy's rates for gas service for various products over a one-year period of time and (ii) the number of Verde Energy customers enrolled in the Dominion MVR program.

On December 9, 2019, Verde Energy filed a Motion for Protective Order ("Motion"). Verde Energy seeks to protect the Confidential Information because it contains competitively sensitive, confidential, and highly proprietary business information. OCC served a Memorandum Contra the Motion on December 16, 2019 ("Memorandum Contra").

In accordance with O.A.C. 4901-1-12(A)(2), Verde Energy files this reply memorandum.

II. OCC'S CONTINUED USE OF HYPERBOLIC LANGUAGE RATHER THAN
ESTABLISHED, PROVEN FACTS AS EVIDENCE IS IMPROPER

Instead of focusing on legal and factual disputes, OCC continues to inject flamboyant and emotionally charged language. For example, OCC continues to accuse Verde Energy of being

“unscrupulous and predatory,” (OCC Br. at 1), and blithely remarks that “the phrase ‘competitive business plans’ can only be used loosely when it comes to Verde’s business plan” (OCC Br. at 4). These comments are as unsupported as they are unnecessary, and Verde Energy continues to object to OCC’s characterizations.

III. THE CONFIDENTIAL INFORMATION IS TRADE SECRET INFORMATION AND SHOULD BE PROTECTED FROM DISCLOSURE

Under R.C. 4905.07, “all facts and information in the possession of the [Commission] shall be public *** [and] open to inspection by interested parties or their attorneys,” except as provided in R.C. 149.43. In turn, R.C. 149.43 specifies that a record prohibited from release under state or federal law is not a “public record.” R.C. 149.43(A)(1)(v). This exemption includes trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 737 (2000) (“Trade secrets are exempt from disclosure under the ‘state or federal law’ exemption of R.C. 149.43.”).

Ohio law defines a “trade secret” as information that both “derives independent economic value *** from not being generally known to, and not being readily ascertainable by *** other persons who can obtain economic value from its disclosure or use” and “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” R.C. 1333.61(D). In analyzing whether a trade secret claim meets the statutory definition codified in R.C. 1333.61(D), one must consider: (1) the extent to which the information is known outside the business; (2) the extent to which it is known within the business; (3) the precautions taken by its holder to guard the secrecy of the information; (4) the savings effected and value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate it. *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

Similarly, Ohio Adm. Code 4901-1-24 allows the Commission to issue an order to protect the confidentiality of information contained in a filed document, “to the extent that state or federal law prohibits release of the information, including where the information is deemed *** to constitute a trade secret under Ohio law, and where nondisclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”

A. The Confidential Information constitutes trade secret information under the Plain Dealer test

Applying the *Plain Dealer* six-factor test demonstrates that the Confidential Information should be protected from disclosure. In Ms. Jordan’s affidavit in support of the Motion, she states that the Confidential Information

- was produced in this litigation under the cover of a protective order because this data would provide Verde Energy’s competitors with valuable insight into Verde Energy’s business without requiring its competitors to expend any time and/or resources to gain such information;
- contains competitively sensitive, highly confidential, and proprietary business information;
- is treated as confidential and proprietary;
- is not publicly disseminated;
- is produced only to those employees with the business need for access to the information; and
- is housed in a separate database.

See Jordan Affidavit.

B. The Confidential Information is not publicly available

OCC wants to publish (a) Verde Energy’s natural gas fixed rates; (b) Verde Energy’s natural gas variable rates; (c) Verde Energy’s natural gas rate that a “majority of Verde customers

are paying”; and (d) the number of Verde Energy customers from July 2018-September 2019. OCC claims that the Confidential Information cannot be a trade secret because it is already publicly available in OCC Exhibit 7, which is a compilation of consumer contacts made to Staff. But OCC Exhibit 7 contains, at best, a partial disclosure of the Confidential Information in a dispersed and unverified format, and therefore does not make the Confidential Information “publicly available” under Ohio law.

Contrary to OCC’s argument, Verde Energy did object to the admission of OCC Exhibit 7, (Hearing, Vol. II, at 371:8-24), and continues to raise concerns about the multiple levels of hearsay contained therein. But even with the (inadmissible hearsay) rate information in those contacts now available on the public docket, OCC’s argument is wrong on the law.

“A partial disclosure of confidential information does not foreclose the possibility of a trade secret.” *In re Review of Alternative Energy Rider Contained in Tariffs of Ohio Edison Company*, 153 Ohio St.3d 289 (2018) (citing *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410 (2009)). *See also* Ohio Rev. Code Ann. § 1333.61(D)(2). A thorough review of OCC Exhibit 7 would reveal some rates paid by some Verde Energy customers. It would not reveal all rates paid by all Verde Energy customers, nor would it reveal the number of Verde Energy customers paying those rates. But that is exactly what OCC now wishes to publish. Therefore, contrary to OCC’s argument, the information it seeks to publish is *not* available in OCC Exhibit 7, and cannot therefore be deprived of trade secret status.

Furthermore, even if the Confidential Information were theoretically ascertainable from OCC Exhibit 7 (and it is not), that would not negate its trade secret status. “When documents already in the public domain are combined to form a larger document, a trade secret may exist if the unified result would afford a party a competitive advantage.” *Poseidon Environ. Servs., Inc.*

v. Nu Way Indust. Waste Management, LLC, 102 N.E.3d 1145, 2017-Ohio-9407, ¶ 39 (7th Dist.) (finding that customer list based on publicly available documents was a trade secret). While OCC Exhibit 7 does contain limited rate information, ascertaining that rate information for any meaningful number of customers would require an exhaustive review of thousands of pages of consumer contacts. Having the information readily available and summarized would afford a competitive advantage to Verde Energy's competitors, and the information OCC seeks to publish would therefore remain a trade secret even if it were theoretically ascertainable from OCC Exhibit 7, which it is not.

IV. CONCLUSION

For the foregoing reasons, the Commission should maintain the confidential nature of the Confidential Information.

Dated: December 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by email upon the persons listed below this 23rd day of December, 2019.

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Summary: Reply Memorandum in Support of the Motion for a Protective Order electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC