

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of
Verde Energy USA Ohio, LLC as a
Competitive Retail Natural Gas
Supplier

CASE NO.: 13-2164-GA-CRS

**VERDE ENERGY'S MEMORANDUM IN OPPOSITION TO
OCC'S MOTION TO COMPEL**

OCC is seeking to compel discovery in a case that lacks a procedural schedule and in which the parties have already fully briefed Verde Energy's pending motion for an extension of time to respond to OCC's discovery. OCC accuses Verde Energy of failing to cooperate with OCC to resolve this discovery dispute, but OCC is wrong. Verde Energy's position is simply that there are unique circumstances that counsel in favor of granting Verde Energy an extension at this time to respond to OCC's voluminous discovery requests, particularly when at least some of the requested documents are already in OCC's possession. And even if OCC could not agree with that position, OCC should have addressed Verde Energy's request for a compromise proposal from OCC before starting another costly and duplicative round of briefing.

The Commission has inherent authority to manage its proceedings, including discovery. It should exercise that authority to deny OCC's motion to compel and grant Verde Energy's pending motion for an extension of time to respond to OCC's discovery requests. Even if the Commission decides to grant OCC's motion, it should deny OCC's request to compel responses within three days of the Commission's order and to shorten the time for future discovery responses from

twenty days to ten days—harsh and unnecessary measures for which OCC offers no justification.

ARGUMENT

I. OCC already possesses many of the documents it has requested and failed to respond to Verde Energy’s attempt at compromise.

An unfortunate aspect of this unnecessary discovery dispute is that OCC actually already possesses documents responsive to the majority of its requests for the production of documents.¹ Verde Energy already provided OCC with voluminous discovery over the course of the Commission-ordered investigation in Case No. 19-0958-GE-COI (the “Investigation”). Included in that discovery is a large number of documents and communications exchanged with Commission Staff that are “related to the Application,”² under what Verde Energy assumes to be OCC’s broad understanding of that term. Verde Energy also produced standard retail natural gas contracts back in May 2019, documents again requested by OCC.³ In addition, OCC has in its possession a voluminous evidentiary record developed in the Investigation regarding Verde Energy’s operations in Ohio.

Far from being prejudiced and unable to prepare to participate in this case, OCC already has a significant collection of documents and information related to Verde Energy’s retail natural gas business in Ohio. And more importantly, based on its initial filings in this case, it seems that OCC’s strategy, if it is allowed to intervene, will be to use every opportunity to rehash the same arguments it has

¹ See RPD-1-001–1-004; RPD-1-006–1-007.

² RPD-1-001–1-004.

³ RPD-1-006.

made in the Investigation. It hardly needs additional discovery to do that. Even granting that some of OCC's requests seek new information, OCC's cries of urgency ring hollow. As Verde Energy noted in its motion for an extension, there is no procedural schedule set in this case. And the Commission might well issue a ruling any day that effectively renders OCC's discovery requests or its motion to intervene moot.

Further underscoring OCC's needlessly contentious approach, Verde Energy made reasonable efforts to avoid a duplicative round of briefing on this discovery dispute and to seek a compromise proposal that would be acceptable to OCC. OCC ignored these efforts. First, counsel for Verde Energy repeatedly pointed out, to no avail, that Verde Energy's motion for extension was already pending and that further argument would do nothing to assist the Commission in resolving these issues. Judging from the briefing so far, that prediction turned out to be correct. Then, recognizing that a motion to compel was all but inevitable, but before OCC's motion was filed, counsel for Verde Energy asked for OCC to send a proposal to resolve this dispute.⁴ OCC's counsel simply repeated OCC's legal position, now fully briefed twice, and failed to even acknowledge Verde Energy's request.⁵ These facts belie OCC's argument that it made reasonable efforts to resolve this dispute.

The reality is that OCC appears determined to exhaustively litigate every issue on which it does not receive total submission. All that Verde Energy seeks is

⁴ Email from David F. Proaño to Angela O'Brien (Jan. 2, 2020, 4:00 PM) ("If you have a proposal from OCC for us to consider, please send it as soon as possible.").

⁵ Email from Angela O'Brien to David F. Proaño (Jan. 2, 2020, 4:44 PM).

a reasonable extension of time during which OCC's position in this litigation can be clarified and after which Verde Energy will provide OCC with the discovery to which it is legally entitled. OCC will suffer no prejudice from such an extension, and OCC does not meaningfully attempt to argue otherwise.

II. Contrary to OCC's position, Verde Energy is not refusing to comply with discovery—it has simply sought an extension which the Commission has undisputed power to grant.

Throughout the Investigation, and now in the present case, OCC has directed harsh and derogatory language toward Verde Energy in its public filings. It seems that no issue is too big or too small for OCC to resist throwing in yet another insult. This is unfortunate. While the line between zealous advocacy and overheated rhetoric can sometimes be elusive, OCC's latest accusation—that of obstructionism—clearly falls into the latter camp because it is baseless.

The Commission has both express and inherent authority to grant extensions in discovery. *See* Ohio Adm.Code 4901-1-19(A); 4901-1-20(C); *see also State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St. 3d 94, 95, 554 N.E.2d 1297, 1298 (1990) (“Trial courts have extensive jurisdiction and power over discovery.”). By pursuing an extension of time to respond to OCC's discovery requests, Verde Energy is not obstructing OCC's rights. It is exercising its own. Verde Energy is asking for a reasonable extension in light of the unique circumstances of this case, in which many of the issues OCC is seeking to raise are currently under active consideration by the Commission in the Investigation.

Verde Energy has shown good cause why OCC's discovery requests should wait until the parameters of this case—and the identities of the parties—are made

clear. OCC has pointed out that this is not the default procedure in Commission practice. But it has not disputed that the Commission has the power to grant Verde Energy the requested extension. And it can point to no reason why it will be prejudiced by a brief delay in receiving discovery in a case with no procedural schedule and whose subject matter, at least by OCC's lights, is already being contested in the Investigation.

Verde Energy is respectfully asking the Commission to handle OCC's discovery requests with a measure of common sense in light of the extensive and costly discovery already undertaken in the Investigation. For that, it has been met with accusations of bad faith. The Commission should reject OCC's overbearing tactics and deny OCC's motion to compel.

III. Even if the Commission grants OCC's motion to compel, it should deny OCC's baseless and unfair attempt to shorten the time for Verde Energy to respond to OCC's discovery requests.

Filing a motion to compel to secure discovery is one thing. But OCC is using its motion to try to punish Verde Energy for standing up to OCC's needlessly divisive tactics. It does so in two ways. First, OCC's motion asks for Verde Energy to be given only three days to respond to OCC's discovery requests, if OCC's motion to compel is granted. Neither OCC's motion nor its memorandum in support offer any concrete reason why such a compressed deadline is necessary. Despite OCC's complaint that it has lost "valuable time" while awaiting the Commission's ruling on Verde Energy's extension motion (OCC Br. 5), the fact remains that *there is no procedural schedule in this case*. And whatever "next steps" OCC has in mind for Verde Energy, (OCC Br. 6.), they do not require OCC to obtain discovery within

three days of the Commission’s ruling on the motion to compel. OCC can point to no Commission rule or impending deadline that explains why a discovery order in a case with no schedule needs such a tight turnaround. Verde Energy respectfully submits, if the motion is granted, that a response time of seven days is less burdensome without causing any meaningful prejudice to OCC.

Second, OCC accuses Verde Energy of trying to “suspend the Ohio Administrative Code” for seeking an extension. (OCC Br. 4.) Yet it sees no problem with asking the Commission to shorten the response time on OCC’s future discovery requests—and only OCC’s requests—from twenty days to ten days. Incredibly, OCC does not offer *any* justification whatsoever for amending discovery deadlines for only one party. Nor does it even purport to explain why accelerated discovery deadlines are necessary in a case that lacks a procedural schedule. At a bare minimum, OCC should not be permitted to impose one set of deadlines on Verde Energy while abiding by another. Verde Energy, for reasons it has already explained, believes that discovery should await resolution of OCC’s status in this case, which Verde Energy has contested. If discovery takes place, there should be one response time for all parties. And more importantly, because OCC has pointed to no reason for expedited discovery in this matter, that response time should be what the Commission’s rules prescribe—twenty days.

CONCLUSION

OCC already possesses a number of the documents it seeks, and for reasons explained in Verde Energy’s extension motion, OCC’s putative intervention is aimed

at re-litigating issues that are still pending before the Commission in the Investigation. Because of these special circumstances, much of OCC's discovery could become moot at any time. Verde Energy is not refusing to comply with OCC's discovery requests—it is simply asking the Commission to clarify OCC's place in this case before Verde Energy is forced to respond to extensive, and in some cases, duplicative, discovery. For these reasons, Verde Energy respectfully submits that OCC's motion to compel should be denied.

Dated: January 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by e-mail upon the persons listed below this 10th day of January, 2020.

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Summary: Memorandum In Opposition to OCC's Motion to Compel electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC