

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. 19-958-GE-COI

OPINION AND ORDER

Entered in the Journal on February 26, 2020

I. SUMMARY

{¶ 1} The Commission adopts the joint stipulation and recommendation entered into by Staff and Verde Energy USA Ohio, LLC d/b/a Verde Energy.

II. PROCEDURAL BACKGROUND

{¶ 2} Verde Energy USA Ohio, LLC d/b/a Verde Energy (Verde or Company) is an electric services company as defined in R.C. 4928.01 and a retail natural gas supplier as defined in R.C. 4929.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08 and to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16 and R.C. 4929.24. Accordingly, Verde is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21, as well as the minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 3} R.C. 4928.08 states that no electric services company shall provide a CRES to a consumer in this state without first being certified by the Commission regarding its managerial, technical, and financial capability to provide such service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from default. Similarly, R.C. 4929.20 states that no retail natural gas supplier shall provide a CRNGS to a consumer without first being certified by the Commission regarding its managerial, technical, and financial capability to provide such service and providing reasonable financial assurances sufficient to protect customers and natural gas companies from default.

{¶ 4} On March 28, 2012, the Commission granted Verde's application for certification as a CRES provider in this state. *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Service Provider*, Case No. 11-5886-EL-CRS. Verde timely filed renewal applications for certification as a CRES provider every two years pursuant to Ohio Adm.Code 4901:1-24-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4928.08. Verde's most recent renewal application was filed on February 28, 2018; this renewal application also was automatically approved by the Commission pursuant to R.C. 4928.08.

{¶ 5} Additionally, on December 9, 2013, the Commission granted Verde's application for certification as a CRNGS supplier in this state. *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 13-2164-GA-CRS. Verde timely filed renewal applications for certification as a CRNGS provider every two years pursuant to Ohio Adm.Code 4901:1-27-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4929.20. Verde's most recent renewal application was filed on November 7, 2019, and was suspended on December 4, 2019, in order to permit the Commission to review the matter further.

{¶ 6} Both R.C. 4928.08 and 4929.20 allow the Commission to suspend, rescind, or conditionally rescind the certification of any electric services company or retail natural gas supplier issued under these sections if the Commission determines, after reasonable notice and opportunity for hearing, that the electric services company or retail natural gas supplier has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state. Additionally, R.C. 4928.16 and 4929.24 grant the Commission the authority to bring an action under R.C. 4905.26 and to order any remedy or forfeiture provided under R.C. 4905.54 to 4905.60 and 4905.64, and to order restitution to customers and rescission of customer contracts.

{¶ 7} On April 16, 2019, Staff of the Commission's Service Monitoring and Enforcement Department (Staff) filed a letter in Verde's certification dockets, stating that, after reviewing customer contacts from October 1, 2018, to April 12, 2019, as well as Verde's responses, Staff believed that Verde had engaged in misleading and deceptive practices to market and enroll customers, as well as violating several requirements of Ohio Adm.Code Chapter 4901:1-21 and 4901:1-29. Staff stated that it had received 481 customer contacts regarding Verde's provision of CRES and CRNGS. Of the 481 customer contacts, 231 customer contacts (approximately 57 percent) were related to enrollment disputes, misleading information, and false representations wherein Verde allegedly purported to be another utility. Further, as reported by Staff, 18 percent of supplier-related investigations open for review and resolution with Staff were in reference to Verde as of April 15, 2019.

{¶ 8} Staff concluded that: Verde used inaccurate caller identification information stating to customers that Verde's outgoing calls were instead originating from Duke Energy Ohio, AEP Ohio, or the Internal Revenue Service (a practice also known as spoofing); Verde used robo-calling with automated messages which included misleading and deceptive information to entice a customer to speak to a sales representative; Verde sales representatives provided misleading information during telemarketing efforts; Verde did not clearly make an offer for sale when marketing to a customer; Verde failed to provide signed contracts for customers who were enrolled through door to door enrollment; Verde's completed third-party verifications did not contain all of the elements required by rule; and Verde failed to send expiration notices to customers as required by rule. As a result of its conclusions indicating probable non-compliance with statutory and rule requirements, Staff recommended that the Commission open a case with case code "Commission Ordered Investigation" (COI) in order for Staff to file its Staff Report. Further, Staff recommended that the Commission consider suspending, conditionally rescinding, or rescinding Verde's certificate to provide CRES or CRNGS in this state.

{¶ 9} By Entry dated April 17, 2019, the Commission opened the above-captioned case and issued a procedural schedule for this matter.

{¶ 10} On April 24, 2019, the Ohio Consumers' Counsel (OCC) filed a motion to intervene in this case. Also, on May 1, 2019, Interstate Gas Supply, Inc. (IGS) filed a motion to intervene in this case. On May 16, 2019, the attorney examiner granted OCC's and IGS's motions for intervention, among other things.

{¶ 11} Staff issued a written report of its investigation on May 3, 2019, which it amended on May 29, 2019. Since the initial 481 customer reports received from October 1, 2018, to April 12, 2019, Staff indicated that it received an additional 36 customer complaints regarding Verde. Staff made four, main recommendations and requested the Commission to:

- (1) Suspend or conditionally rescind Verde's certification,
- (2) Order Verde to pay a forfeiture of \$1,500,000,
- (3) Order Verde to provide restitution to customers enrolled from October 1, 2018, to April 12, 2019, by refunding the difference between the electric distribution or natural gas utility's default rate, as applicable, and the rate Verde actually charged them, and
- (4) Prohibit Verde from transferring any customer contracts to another entity.

{¶ 12} Due to the parties' motions, the attorney examiner modified the procedural schedule several times. Ultimately, based on a joint motion from Verde and Staff, the attorney examiner suspended the procedural schedule on August 5, 2019, to allow the parties to continue negotiations and work towards a settlement.

{¶ 13} On September 6, 2019, Staff and Verde filed a joint stipulation and recommendation (Stipulation).

{¶ 14} By Entry dated September 10, 2019, the attorney examiner scheduled a hearing in this matter for October 16, 2019.

{¶ 15} On October 2, 2019, Nedra Ramsey filed testimony in support of the Stipulation on behalf of Staff (Staff Ex. 1). Barbara R. Alexander and James D. Williams filed testimony in opposition to the Stipulation on behalf of OCC (OCC Exs. 1, 19, 19B, 19C).¹

{¶ 16} A hearing on this matter was held on October 16 - 17, 2019. The parties submitted initial briefs on December 2, 2019, and reply briefs on December 17, 2019.

III. DISCUSSION

A. Summary of the Stipulation

{¶ 17} As previously stated, Staff and Verde (Signatory Parties) filed a Stipulation signed on September 6, 2019. The Stipulation was intended by the Signatory Parties to resolve all outstanding issues in this proceeding. Below is a summary of the major provisions agreed to by the Signatory Parties contained in Section III of the Stipulation. However, this summary is not intended to replace or supersede the Stipulation.

{¶ 18} Verde has voluntarily ceased all marketing and customer enrollment activities in Ohio, as represented to the Commission in the motion filed in this matter on May 3, 2019. Staff and Verde agree that this suspension by Verde of all marketing activities and customer enrollment in Ohio will continue until October 30, 2020, for a total of 18 months. (Jt. Ex. 1 at 3.)

{¶ 19} Verde will withdraw from Dominion Energy Ohio (Dominion)'s monthly variable rate (MVR) program for a period of one year, commencing as of the date Verde notified Dominion of its withdrawal from the MVR program. Verde may enroll retail customers through Dominion's MVR program at the conclusion of this one-year period. (Jt. Ex. 1 at 3.)²

¹ On December 9, 2019, Verde filed a motion for protective order, seeking to protect certain rate and customer count information in OCC's testimony. A number of related pleadings were subsequently filed by OCC and Verde. Verde's motion for protective order and the related pleadings will be addressed by the Commission in a later Entry.

² The Commission notes that today we are also approving a stipulation in Case No. 18-1419-GA-EXM,

{¶ 20} For all retail electric residential customers enrolled by Verde in Ohio from October 1, 2018, through April 30, 2019, Verde will re-rate those customers to the second lowest 12-month fixed 100 percent renewable price shown on the Commission's historic apples-to-apples chart for the week of December 17, 2018, adjusted for any rewards provided by Verde to re-rated customers as part of Verde's shopping rewards program. This will result in refunds of approximately \$1,068,000. (Jt. Ex. 1 at 4.)

{¶ 21} Verde will not transfer or sell customer contracts to another entity during the stayout period without the prior consent of Staff, except as necessary in connection with any settlement with intervenor, IGS (Jt. Ex. 1 at 4).

{¶ 22} Verde will submit an action plan for compliance at least 90 days prior to resuming marketing and customer enrollment in Ohio (Jt. Ex. 1 at 4).

{¶ 23} Verde will notify all customers enrolled in Ohio since June 1, 2018, that they may cancel contracts without penalty at the customer's election. The notice shall indicate that Staff has alleged that Verde may have misled customers in Ohio during marketing of its product. The notice shall be sent within 30 days of the Order approving the Stipulation. (Jt. Ex. 1 at 4.)

{¶ 24} Verde agrees to pay a forfeiture of \$675,000.00. Upon approval of the Stipulation by the Commission, Verde agrees to submit payment by certified check, money order, or wired funds. Payment shall be made within 30 days of the Order approving the Stipulation and shall note the docket number assigned to the matter. (Jt. Ex. 1 at 4.)

B. Consideration of the Stipulation

{¶ 25} Ohio Adm.Code 4901-1-30 authorizes two or more parties to Commission proceedings to enter into a written stipulation concerning the issues presented in the proceeding. Although not binding upon the Commission, the terms of such an agreement

which substantially modifies Dominion's MVR program. *In re The East Ohio Gas Company d/b/a Dominion Energy Ohio*, Case No. 18-1419-GA-EXM, Opinion and Order (Feb. 26, 2020) at ¶ 41.

are accorded substantial weight. *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 125, 592 N.E.2d 1370 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 157, 378 N.E.2d 480 (1978).

{¶ 26} The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. *See, e.g., In re Cincinnati Gas & Elec. Co.*, Case No. 91-410-EL-AIR, Order on Remand (Apr. 14, 1994); *In re Western Reserve Telephone Co.*, Case No. 93-230-TP-ALT, Opinion and Order (Mar. 30, 1994); *In re Ohio Edison Co.*, Case No. 91-698-EL-FOR, et al., Opinion and Order (Dec. 30, 1993); *In re Cleveland Elec. Illum. Co.*, Case No. 88-170-EL-AIR, Opinion and Order (Jan. 31, 1989); *In re Restatement of Accounts and Records*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

{¶ 27} The Supreme Court of Ohio has endorsed the Commission's analysis using these criteria to resolve cases in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St.3d 559, 629 N.E.2d 423 (1994). The Supreme Court of Ohio stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

{¶ 28} Verde and Staff urge the Commission to approve the Stipulation in its entirety. On the other hand, OCC argues that the Stipulation fails prongs two and three of the

Commission's three-part test and should be rejected. OCC urges the Commission to reject the Stipulation, permanently rescind Verde's certificates, and require Verde to pay a minimum forfeiture of \$1.5 million. IGS believes that the Stipulation, especially the action plan, lacks specificity and, consequently, the Commission should reject the current Stipulation and modify it accordingly. The Commission addresses the parties' specific arguments in the context of the three criteria for evaluating the reasonableness of the Stipulation below.³

1. IS THE STIPULATION THE PRODUCT OF SERIOUS BARGAINING AMONG CAPABLE, KNOWLEDGEABLE PARTIES?

{¶ 29} Staff represents that the Stipulation is a comprehensive settlement of issues raised by parties with diverse interests, all of whom participated in an open process while being represented by able counsel and technical experts experienced in regulatory matters before the Commission. Verde agrees with Staff and believes that OCC does not dispute that the Stipulation is the product of serious bargaining among capable and knowledgeable parties. Further, Verde highlights that neither of OCC's witnesses, Ms. Alexander or Mr. Williams, testified to the contrary (Tr. I at 64; OCC Ex. 17).

{¶ 30} We find that the first part of the three-part test is satisfied here. Staff witness Nedra Ramsey testified that the Stipulation is part of an open process during which all parties were given an opportunity to participate and represents a comprehensive, reasonable compromise of the issues raised by parties with diverse interests (Staff Ex. 1 at 3-4). Further, the evidence demonstrates that all parties, including OCC and IGS, were adequately represented by knowledgeable counsel, who have extensive experience practicing before the Commission in utility matters, during the settlement process (Tr. I at 64; Staff Ex. 1 at 3).

³ While the parties may not have explicitly organized their respective arguments under each prong of the Commission's three-part test for analyzing the reasonableness of a settlement agreement, we have discussed each argument raised within this framework.

2. DOES THE STIPULATION, AS A PACKAGE, BENEFIT RATEPAYERS AND THE PUBLIC INTEREST?

{¶ 31} Staff believes the Stipulation, viewed as a package, benefits customers and the public interest. Staff also urges the Commission to evaluate the Stipulation as a package, instead of critiquing each provision in isolation, as it argues OCC does. Staff believes that the seven relevant provisions in Section III of the Stipulation, measured together, benefit both ratepayers and the public interest, thereby fulfilling the second prong of the settlement test.

{¶ 32} Verde finds no requirement under Ohio law that a settlement should match, word-for-word, all the recommendations set forth in a Staff Report because this would undermine the very purpose of negotiations. Even so, Verde believes the terms of the Stipulation closely track the Staff Report recommendations. Further, Verde finds the Stipulation provides important benefits to customers and serves the public interest by ensuring Verde's future compliance, deterring potential violations, and benefiting customers through the \$1.068 million in restitution, a \$675,000 forfeiture, and the opportunity afforded to customers to cancel contracts without penalty. Moreover, Verde argues that the Stipulation advances Ohio statutory policy by promoting the diversity of electricity supplies as it provides a 100 percent renewable product and promotes consumer choice and market competition.

{¶ 33} On the other hand, OCC attempts to utilize the Staff Report and OCC Exhibit 7, which are the 517 customer complaint case reports which were submitted into evidence during the hearing, to establish Verde's various misdeeds. These include spoofing; misleading and deceptive sales practices; failure to notify customers about the expiration of their fixed rate contracts; charging customers variable rates more than three times higher than initial rates; and inadequate third-party verification to ensure that customers actually consented to renewing with Verde. While OCC concedes that customers who complain to the Commission about Verde's unfair billing may receive refunds, OCC believes that customers should not have to expend their time and that Verde should be required to

comply with the law as a condition of being allowed to provide service to Ohio customers. OCC argues that the Staff Report and OCC Exhibit 7 create an irreconcilable difference between Staff's recommendation in the Staff Report and the Stipulation. OCC questions the Stipulation's substance, comparing the Staff Report's 28 pages detailing Staff's investigation versus the six double spaced pages of the Stipulation, with only one and a half pages addressing potential reforms Verde will institute. As such, OCC finds the Stipulation inadequate and requests that the Commission reject it and rescind Verde's certificates immediately.

{¶ 34} IGS urges the Commission to find the Stipulation does not meet the second prong of the Commission's test and to modify it and accept the proposed modifications proposed by IGS. According to IGS, the Stipulation fails to include specific operational and managerial changes which would ensure that Verde does not repeat the alleged misconduct.

{¶ 35} We next outline the parties' arguments within the context of the seven relevant Conditions of Section III of the Stipulation.

a. Marketing

{¶ 36} Verde explains that Condition III(1) is a time-limited version of Staff's recommendation that Verde's certificates be suspended. According to Verde, the 18-month marketing prohibition ensures new customers will not suffer harm and deters Verde, and other companies, from violating Commission rules (Staff Ex. 1 at 5; Tr. I at 262). Verde believes that cancellation of its certificates would be extreme and unprecedented, because prior to October 2018, Staff received few, if any, complaints about Verde (Tr. I at 167). OCC, in its initial and reply briefs, counters Verde's argument by noting that the Stipulation focuses on future customers and fails to stop Verde from exploiting its existing electric and natural gas customers or protect them from further harm.

b. Dominion MVR

{¶ 37} With regard to Condition III(2), Verde states that the Staff Report does not identify any egregious conduct on Verde's part related to the MVR program. Verde explains

that Dominion randomly assigned customers to Verde under the program and, consequently, Verde could not have deceived customers into enrolling. Moreover, Verde does not believe OCC has identified any rules allegedly violated through participation in the MVR program.

c. Re-rates

{¶ 38} Verde argues that Condition III(3) of the Stipulation benefits consumers and the public interest in numerous ways. Initially, Verde explains that the refunds will likely exceed \$1,068,000 and will be directly paid to customers. Further, Verde believes the refunds are a deterrent and will prevent the Company and other competitive suppliers in the future from engaging in the type of conduct alleged in the Staff Report (Tr. I at 262). According to Verde, the re-rate price was specifically selected because Verde provides a 100 percent renewable product. Verde also claims OCC did not research renewable energy prices to understand why the specific re-rate price was selected (Tr. I at 129-131). With regard to its rewards program, Verde states it has provided the exact calculation for adjusting re-rates for customers who have received such rewards to OCC and Staff.

{¶ 39} Further, Verde takes issue with OCC's contention that the \$1.068 million is a limitation on settlement funds provided to customers. According to Verde, this is an estimate and certainly not a cap (Tr. I at 131). Verde also disputes OCC's contention that customers who fall outside the Staff Report's October 1, 2018 – April 30, 2019 timeframe will not receive refunds. Verde argues that the Staff Report timeframe was selected as it coincides with when Staff received customer complaints about Verde and that offering re-rates to customers not affected by the alleged conduct is not necessary (Tr. I at 166-167).

{¶ 40} OCC, in both its initial and reply briefs, argues that the Stipulation requires Verde to pay refunds to electric customers but ignores Verde's 4,835 active natural gas customers and 8,589 natural gas customers previously served by Verde, despite the Staff Report's recommendation otherwise (OCC Ex. 5 at 24; OCC Ex. 19B at 16). OCC alleges Verde's natural gas rates, both fixed and variable, are much higher than standard service offer rates offered by utilities (OCC Ex. 19C at 17). Further, OCC claims that the refunds

paid to electric customers under the Stipulation are unreasonably limited to the timeframe encompassing October 1, 2018 – April 30, 2019. According to OCC, other customers who enrolled with Verde before October 1, 2018, could have been harmed by the Company, especially since the Staff Report notes a spike in customer complaints against Verde when it was purchased by Spark Energy Holdco, LLC (Spark) in July 2017 (OCC Ex. 19B at 14; OCC Ex. 5 at 24). Further, OCC recommends the difference between the rate Verde charged customers and the utility’s “price to compare”⁴ as the appropriate benchmark for refunds. OCC challenges the decision to use the second lowest 12-month fixed 100 percent renewable price on the Commission’s historic apples-to-apples chart for the week of December 17, 2018.

{¶ 41} OCC questions Verde’s refund methodology for electric customers because Verde’s refund methodology apparently produces refunds exceeding \$1,068,000, which is confirmed by OCC witness Williams’ calculations, who estimates it around \$1,283,396 (OCC Ex. 19B at 13). However, OCC points to the Stipulation which indicates the refund amount as only \$1,068,000. According to OCC, the identified value in the Stipulation could be interpreted as a limitation on the amount of refunds Verde’s customers may receive, thereby allowing Verde to further profit from customers as a result of its deceptive practices. Further, by pegging the re-rate to the second lowest renewable benchmark, OCC argues that Verde’s electric customers are losing out on an additional \$1.6 million in refunds (OCC Ex. 19B at 12). OCC is also concerned about electric customers’ refunds being further reduced by an amount for Verde’s shopping rewards program. OCC explains that there is no cash equivalent for rewards points and, as such, it is unreasonable to reduce refunds based on these rewards.

{¶ 42} Verde, in its reply brief, addresses OCC’s claim that Ohio consumers might be harmed because the re-rate mechanism may provide Verde customers with more than \$1,068,000 in refunds. According to Verde, this fact supports approval of the Stipulation because the benefit to customers is greater than the amount estimated during settlement.

⁴ The price to compare is the electric generation or natural gas supply rate provided by a customer’s default natural gas or electric service provider. This is a benchmark to evaluate the rates provided by competitive retail electric or natural gas suppliers.

Further, Verde believes it is appropriate for rewards points to have a cash value. Though these points cannot be redeemed for cash, they do have a value as they are redeemable for items. Additionally, the adjustment only amounts to \$0.70 per customer, per month, which Verde deems a de minimis amount.

d. Transfer

{¶ 43} Verde characterizes Condition III(4) as clear, enforceable, and in the public interest because Verde's inability to transfer customers without Staff consent acts as both a deterrent for Verde to violate Commission rules and an incentive for it to actually comply with those rules. Further, Verde counters OCC's contention during the hearing that this term is vague because Verde believes Staff is capable of acting in the public interest when approving or rejecting proposed transfers. As such, Verde points to an apparent contradiction in OCC's arguments: while OCC believes Staff conducted an "excellent investigation and documentation of alleged violations and conduct," it also believes that Staff is unable to enforce certain Stipulation terms (Tr. I at 74, 87, 110, 113; Tr. II at 397).

e. Action Plan

{¶ 44} According to Verde, Condition III(5) is meant to advance the Stipulation's primary objective by limiting future harm to customers by ensuring Verde's compliance with Ohio law and Commission regulations in the future. Per Verde, OCC's main objection to this term is its lack of specifically identified reforms (Tr. I at 76, 85). However, Verde counters this claim by reiterating that it is incentivized to follow the Stipulation and adhere to laws and Commission rules to avoid future Staff investigations (Tr. I at 272, 281). Further, Verde points to the fact OCC witness Alexander may not have collaborated with Staff to identify how Staff would enforce this particular term (Tr. I at 85).

{¶ 45} Staff, in its reply brief, also contests OCC's contention that the action plan is vague and inadequate. According to Staff, Ms. Ramsey outlined, during hearing, the Staff's normal practice when reviewing action plans, including reading sales scripts, reviewing

contracts, and analyzing the supplier's customer complaint process. Staff states that it will apply this standard process when reviewing the action plan. (Tr. I at 281-282.)

{¶ 46} OCC continues to characterize the action plan provision as vague and inadequate because of its failure to provide specific assurances for both existing and future customers. Further, OCC urges the Commission to review the detailed business reforms, training programs, and restrictions on conduct adopted by other jurisdictions, such as Massachusetts, Pennsylvania, Maryland, New York, Connecticut, Illinois, and Maine, against other Spark companies (Verde's affiliates) and adopt them for Verde's action plan for Ohio. Further, OCC recommends that intervenors such as itself and IGS be allowed to review and comment on Verde's action plan. Additionally, OCC believes the Commission should also approve the action plan.

{¶ 47} IGS agrees with OCC and criticizes the scope and substance of the action plan as undefined. Because this provision does not identify specific terms, conditions, or corrective measures, IGS argues that the action plan is too open-ended, fails to provide stakeholders with assurances that Verde will address and resolve the alleged issues identified in the Staff Report, and lacks the specificity necessary to satisfy the second prong of the Commission's test. Further, IGS is concerned by the provision's failure to require Commission and Staff approval as a prerequisite to Verde's reinstatement in the marketplace. IGS, as a stakeholder, would also like to review the action plan and provide comments because the plan will not be filed publicly.

{¶ 48} To cure these deficiencies, IGS recommends the following changes: identification of the third-party vendors Verde plans to utilize to market its products and services in Ohio upon reinstatement; disclosure of third-party vendors who have violated the Commission's rules; a description of Verde's plan to train, monitor, and review the sales, marketing, and enrollment activities of the third-party vendors; Verde's plans to resolve potential vendor misconduct; and a description of how Verde plans to retain and collect consent documents from customers. Further, Verde recommends that the Stipulation be modified to ensure that the action plan be approved by the Commission before it goes into

effect and allow IGS and other interested parties to participate in the review of the action plan.

{¶ 49} In response to IGS and OCC, Verde identifies Staff's long-standing and well-established process for reviewing action plans. Per Verde, the point of submitting the action plan to Staff is to ensure compliance with Ohio laws and regulations and to address the allegations identified in the Staff Report. To emphasize this point, Verde points to Ms. Ramsey's testimony confirming that Staff will enforce Ohio laws and regulations against Verde, which Verde believes is an incentive for it to submit a thorough and effective compliance plan (Tr. I at 272, 280-282). Consequently, Verde concludes that the action plan requirement is not a vague penalty; instead, it is a de facto requirement before it can resume full operations in Ohio.

{¶ 50} Verde also believes that Staff's ongoing enforcement authority is sufficient to protect Ohio consumers and other competitive retail suppliers. A formal approval by the Commission, according to Verde, would only create delay and needless litigation. Further, Verde argues that IGS, a competitor, should not be placed in the position of a regulator, in addition to Staff. To the extent IGS would like to review the final terms of the action plan, Verde suggests that IGS file a public records request.

f. Notice

{¶ 51} Verde believes Condition III(6) maximizes consumer choice, thereby satisfying prong two. Moreover, Verde notes that this provision applies to customers who enrolled on June 1, 2018, or later, which is noteworthy because there is no evidence establishing any violations committed by Verde prior to October 1, 2018. Therefore, Verde characterizes this provision as a benefit to customers who were not misled by Verde. Though OCC objected to this provision during the hearing because the terms of the notice are not set forth, Verde once again counters this objection by pointing to its incentive to work with Staff to avoid further investigations. Further, Verde states that the express terms of this provision make it quite clear what Verde must include in the notice.

{¶ 52} OCC argues that, if Verde is to continue to provide service to its existing customers, the Stipulation should be modified to allow current customers to cancel their contracts without penalty, regardless of when they enrolled. OCC reminds the Commission that Verde's non-compliance issues began when it was purchased by Spark in July 2017 (OCC Ex. 5 at 24). In response, Verde states that Staff chose not to require notice for customers who enrolled prior to June 1, 2018, because there was no indication such customers suffered harm. Further, Verde points to Staff's continuing jurisdiction to protect Verde's natural gas and electric customers in countering OCC's claim that the Stipulation does not protect existing customers.

g. Forfeiture

{¶ 53} Verde claims that the \$675,000 forfeiture imposed on the Company in Condition III(7) benefits consumers and the public interest by deterring similar competitive providers from violating Commission rules, in addition to deterring Verde (Tr. I. at 206). Verde asserts that the \$1.5 million figure identified in the Staff Report was not based on objective criteria. Rather, Verde supports the Commission determining the forfeiture amount based on its history of assessing forfeitures and notes \$675,000 is the largest forfeiture amount ever assessed on a competitive retail service provider.

{¶ 54} OCC disagrees. According to OCC, a minimum forfeiture of at least \$1.5 million is necessary due to Verde's knowing violation of Ohio laws and regulations (OCC Ex. 19B at 30). OCC claims Verde refuses to take responsibility for its misconduct and instead places blame on its third-party vendors. As such, OCC argues that the public interest requires a forfeiture large enough to send a message to the marketplace that such conduct is not acceptable.

{¶ 55} Staff, in its reply brief, also questions OCC's strategy of comparing the Stipulation to the Staff Report, specifically with regard to the \$675,000 forfeiture. Per Staff, focusing on the Staff Report eliminates the efforts taken during the settlement process which led to a mutual agreement in this matter. Further, Staff believes that the reasonable

Stipulation in this matter will continue to help shape efforts to curb similar marketing and enrollment practices in the future.

{¶ 56} IGS urges the Commission to consider the corporate behavior of Spark's affiliates in Ohio and other markets when reviewing Verde's action plan and the fines Verde has received in Maryland and Illinois. IGS believes these parallel proceedings demonstrate that monetary penalties are insufficient to deter Spark affiliates from violating competitive retail marketplace rules in other markets. As such, IGS questions whether Verde is truly capable of complying with Ohio law and regulations upon reentering the Ohio competitive market.

{¶ 57} In its reply brief, Verde questions OCC's lack of explanation as to why a \$1.5 million forfeiture is necessary to deter future misconduct, even though \$675,000 is substantial considering the Commission's history of assessing penalties. Verde concludes that the Stipulation meets the second prong of the Commission's three-part test by providing over a million dollars in restitution to Ohio consumers; deterring bad conduct on Verde's part via the forfeiture, re-rates, cessation of marketing, and compliance plan; and permitting voluntary customer cancellations.

{¶ 58} Finally, with regard to IGS's contention that the Commission consider the corporate behavior of other Spark affiliates, Verde reminds the Commission that Staff has already considered these other investigations and decided to negotiate with Verde to arrive at the Stipulation. Further, Verde argues that the Stipulation encompasses additional safeguards other than just monetary penalties, as IGS suggests, including the action plan to ensure Verde's compliance with applicable laws and regulations.

h. Conclusion

{¶ 59} Initially, we note that the ultimate issue for our consideration is whether the Stipulation, as presented, is reasonable. The Staff Report issued on May 3, 2019, as corrected by the filing on May 29, 2019, contained serious allegations regarding Verde's conduct in the competitive retail electric and gas marketplace, which, to the extent such allegations are

supported by evidence in the record of this proceeding, warrant serious consequences. After extensive negotiations between the parties, the Stipulation was presented to the Commission. Staff represents that the Stipulation provides redress for all issues identified in the Staff Report (Jt. Ex. 1 at 2; Staff Ex. 1 at 4; Tr. I at 180). As we discuss fully below, we find that the Stipulation addresses the serious violations alleged by Staff and represents a reasonable resolution of the proceeding by expeditiously making customers who were harmed whole. Further, we find that the Stipulation minimizes the uncertainty that Verde customers would experience if this matter were fully litigated. We determine that the Stipulation provides an appropriate resolution of the alleged violations identified in the Staff Report and puts measures in place to mitigate any potential future harm to customers.

{¶ 60} Prior to addressing OCC's and IGS's arguments regarding whether the Stipulation is in the public interest, it is critical to establish whether and how many violations of Ohio Adm.Code Chapters 4901:1-21 and 4901:1-29 were actually proven according to the evidence presented in the record of this case. R.C. 4928.16 and 4929.24 authorize the Commission to bring this action under R.C. 4905.26. It is well-established that, in proceedings brought under R.C. 4905.26, the complaining party bears the burden of proof. *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189, 214 N.E.2d 666 (1966). Thus, in this proceeding, alleged violations must be proven by a preponderance of the evidence in the record of this proceeding. We find that the record in this case, including the Staff Report, contains sufficient evidence to establish a limited number of discrete violations, as alleged by Staff in the Staff Report, of which there were approximately 17. The Staff Report specifies the rule which was allegedly broken, provides information identifying which complaint the violations reference, and provides a description of the evidence supporting the violation (OCC Ex. 5 at 9-13, 15, 23, footnotes 4-8, 11-14, 17-21, 22-23, 27). Moreover, Verde did not dispute the violations set forth in the Staff Report. Thus, the evidence in the record demonstrates, by a preponderance of the evidence, that 17 violations occurred, as alleged in the Staff Report.

{¶ 61} Nonetheless, OCC attempts to prove, through the Staff Report and OCC Exhibit 7, that Verde committed many more violations than are identified in the Staff Report. Although there were 481 contacts or complaints received by Staff regarding Verde during the period between October 1, 2018, and April 15, 2019, every contact or complaint does not give rise to an alleged violation of the Commission's rules (OCC Ex. 5 at 9; Tr. II at 371-378).⁵ Moreover, every alleged violation is not a proven violation of the Commission's rules. OCC has not even completed the rudimentary task of describing, based upon the Staff's case reports, which specific rules were violated, how many counts of each violation allegedly occurred, or what evidence supports each alleged violation. We note that OCC's witness testified that he reviewed the 517 case reports that are the basis of the Staff Report; additional discovery responses from Verde with complaint information; and weekly spreadsheets from the Commission with complaint information, and that these documents contain evidence of harm to customers (Tr. II at 345, 359, 368-369). However, this testimony is vague and insubstantial. The witness does not identify which complaint files he reviewed, which customers he alleges were harmed, how the customers were harmed, or, crucially, which rule he claims was allegedly violated.

{¶ 62} We also note that OCC has submitted into evidence the 517 case reports, which were mainly compiled by Staff for the period of October 1, 2018, through April 12, 2019 (OCC Ex. 7). These files contain numerous hearsay statements; some of the files include multiple levels of hearsay statements (i.e., hearsay statements within hearsay statements) (Tr. II at 372-378). Although these complaint files have been admitted into evidence in this proceeding, over Verde's objections, the fact that these statements contain hearsay, or hearsay within hearsay, goes to the weight to be given to the evidence by the Commission. OCC identifies examples of Verde's admissions regarding potential violations of the Commission regulations in a footnote in its brief (OCC Br. at 10, footnote 45). Taking one of the case reports identified in its footnote, Case No. 00256087, OCC attempts to demonstrate that violations of the Commission's rules occurred. However, this case report includes

⁵ According to the Staff Report, 481 case reports were created from October 1, 2018, to April 12, 2019. After this matter was initiated, Staff received an additional 36 customer contacts. (OCC Ex. 5 at 9.)

offers made by Verde to settle this individual complaint, which should not be relied upon as evidence of a violation (OCC Ex. 7, Case No. 00256087). Although the Ohio Rules of Evidence are not binding upon the Commission, offers of compromise and statements made in compromise negotiations are not admissible. Evid.R. 408. Furthermore, we find that the other case reports submitted by OCC contain similar statements. In any event, OCC has failed to specifically identify which statements it relies upon, hearsay or otherwise, to demonstrate any violations of the Commission's rules with regard to the case reports submitted. To that extent, we find that OCC has only established, at best, one violation through Case No. 00256087.

{¶ 63} The Commission further notes that Verde provided numerous recordings of sales calls over the course of the investigation. Several of those sales calls are documented in the Staff Report (OCC Ex. 5 at 11-13, footnotes 17-21). Because Verde chose not to question or rebut these specific sales calls, we will rely upon the sales calls identified by the Staff Report. However, beyond the calls identified in the Staff Report, no recordings of sales calls were properly authenticated and admitted into evidence in this proceeding, and we will not consider such recordings, transcripts, or descriptions of those sales calls.

{¶ 64} We do not find Verde is a sympathetic actor in this proceeding. As stated above, the Staff Report contained serious allegations regarding Verde's conduct, and to the extent such allegations are supported by evidence in the record of this proceeding, such conduct warrants serious consequences for Verde. However, due process requires notice and an opportunity to be heard. OCC's failure to specifically identify which rules were allegedly violated, how many times each rule was allegedly violated, and what evidence in the complaint files supports each alleged violation precludes Verde from the opportunity to respond to those allegations.

{¶ 65} We now turn to specific arguments made by OCC and IGS. OCC claims that the 18-month prohibition against marketing fails to stop Verde from exploiting its existing customers. A review of the proceeding indicates that Staff, which is tasked with monitoring service quality and compliance with Commission rules, will continue to do so and will

promptly take action if necessary (Tr. I at 272). In fact, Staff believes that the entire Stipulation is a deterrent against unfair and misleading practices, including spoofing (Tr. I at 204-207, 220). The customer notice that will be sent to all customers enrolled since June 1, 2018, under Condition III(6) is another way the Stipulation protects existing customers by affording them an opportunity to end their relationship with Verde should they choose to do so. Moreover, during the hearing, OCC did not present any evidence that demonstrated existing customers continue to be harmed by Verde's practices. As such, we find that the Stipulation, as a whole, acts as a deterrent to prevent Verde from harming both existing and future customers.

{¶ 66} Turning to OCC's arguments regarding re-rates, we first find that the \$1,068,000 re-rate amount for electric customers under Condition III(3) is not a cap, and is merely an estimate, as evidenced by the word "approximately," which qualifies that number. This fact was confirmed by OCC's witness (Tr. I at 131). As such, no modification of the Stipulation for further clarification is necessary. Also, redress for electric customers during Staff's investigation period, which was from October 1, 2018, to April 12, 2019, is appropriately afforded under Condition III(3), which mirrors this timeframe and provides re-rates for customers enrolled by Verde from October 1, 2018, to April 30, 2019. Staff's testimony bolsters our finding that refunds outside the investigation period are not necessary: complaints against Verde began trickling in to the Commission's call center beginning October 2018 and spiked in January 2019. In fact, Staff had no reasons to investigate Verde prior to October 2018. (Tr. I at 167-168.) Moreover, OCC failed to provide evidence that Verde violated Commission rules and overcharged its customers during other months separate from the Staff investigation time period for which it must also pay restitution. Next, re-rating customers to the second lowest renewable benchmark price was a reasonable result of negotiations between Staff and Verde. Though one of OCC's witnesses claimed this benchmark would lead to electric customers losing out on \$1.6 million in refunds, OCC's witnesses did not provide any information for us to conclude that this negotiated benchmark was, in fact, inappropriate (Tr. I at 129-130; OCC Ex. 19B at 12). Finally, we determine that a \$0.70 reduction, per month, from the re-rates of only the specific

customers who opted to be a part of Verde's rewards program, is an inconsequential amount and does not significantly reduce re-rates for these customers. Consequently, we find that the Stipulation adequately protects and compensates all Verde electric customers who may have been harmed during Staff's investigation period.

{¶ 67} We also disagree with OCC's contention that the Stipulation ignores Verde's current and former natural gas customers. As noted above, the notification provided under Condition III(6) allows current natural gas customers to switch their service from Verde to another provider, should they choose to do so. Further, the evidence indicates Verde has already re-rated natural gas customers voluntarily as part of the Staff investigation, thereby protecting both current and former customers (Tr. II at 426).

{¶ 68} Next, with regard to Condition III(4), during the hearing, Staff explained it is well-versed in reviewing action plans within the context of investigatory actions and there is a robust internal review process in place. Staff also identified the various steps it would take to review the action plan Verde will submit, including examining third-party verification scripts, sales scripts, and contracts; monitoring of third-party vendors; and reviewing Verde's internal complaint resolutions process. In general, Staff will ensure the violations identified in the Staff Report are mitigated under the action plan. (Tr. I at 281-283.) Moreover, OCC and IGS have not demonstrated that their expertise is necessary to supplement Staff's review of the action plan. Finally, a formal Commission approval is unnecessary. As in other cases of non-compliance, Staff will review, approve, and enforce the action plan (Tr. I at 281-282). Further, the Stipulation does not preclude OCC or IGS from filing a complaint or the Commission from initiating another COI, if warranted by Verde's future actions. As such, OCC's and IGS's calls for more specificity are unfounded and we find that the approach outlined in Condition III(4) offers Staff the flexibility to employ its normal procedure for reviewing action plans to ensure Verde's compliance with Ohio laws and Commission regulations.

{¶ 69} We also determine that Condition III(6) adequately describes the notice Verde should send, by requiring that current customers be informed that they may cancel their

contracts without penalty and that Verde may have misled customers during marketing of its products. We further find this provision is an additional, negotiated benefit for customers who have enrolled since June 1, 2018, and were likely not misled by Verde. As we have noted before, Staff uncovered no issues with Verde's services in Ohio prior to October 2018.

{¶ 70} With regard to OCC's arguments pertaining to the forfeiture, we find that the evidence in the record does not substantiate a \$1.5 million forfeiture. OCC does not present any testimony supporting a forfeiture of \$1.5 million. As explained above, OCC has proven, at most, one violation, and the Staff Report evidences another 17 violations. A total of 18 violations does not substantiate a \$1.5 million forfeiture. In fact, the only basis that OCC presents for the proposed forfeiture is that it was Staff's initial recommendation. However, Staff would have needed to present a witness to explain its determination that \$1.5 million was the appropriate forfeiture. As Staff reached a settlement with Verde, no Staff witness was presented on this issue. Moreover, while forfeitures are important to send a message to the marketplace that violations of the Commission's rules will be penalized, in this particular matter, we must also be guided by our past precedent. The record demonstrates that \$675,000 is the largest civil forfeiture ever assessed by the Commission against a competitive retail service provider (Tr. I at 280). We also decline to take note of the forfeitures and other penalties assessed by other jurisdictions on Spark affiliates because these proceedings involve facts and evidence different from this proceeding. Our opinion that the Stipulation in this matter is reasonable is based on the underlying facts, issues, and legal arguments made in this case. Further, we recognize that Staff was aware of these parallel proceedings as evidenced by its findings in the Staff Report (OCC Ex. 5 at 24-25; Tr. I at 155). Armed with this knowledge, Staff negotiated with Verde to enter into this Stipulation to ensure that Verde's current and former customers are protected, to deter Verde from further misconduct, and to effectuate a speedy resolution of the issues identified in the Staff Report. Therefore, we find that there is insufficient evidence in the record to support a civil forfeiture of \$1.5 million.

{¶ 71} Consequently, for the reasons stated above, we reject OCC's and IGS's arguments and find that the Stipulation satisfies the second prong of the Commission's three-prong test for settlements.

3. DOES THE STIPULATION VIOLATE ANY IMPORTANT REGULATORY PRINCIPLE OR PRACTICE?

{¶ 72} Citing to R.C. 4928.02 and 4929.02, Verde notes that state policy on retail energy service favors consumer choice, market access, flexible regulation, and protection from unreasonable sales practices. Verde believes that the Stipulation meets the third prong of the Commission's test because the Stipulation resolves all issues identified in the Staff Report in a manner consistent with R.C. 4928.02 and 4929.02 and other regulatory principles and practices. Though OCC was able to admit customer contacts and complaints into evidence for the purpose of proving the allegations in the Staff Report, Verde avers that these documents are replete with hearsay (Tr. II at 378). Not only does Verde believe OCC Exhibit 7 is inadmissible, it argues that the documents included in this exhibit have limited relevancy. According to Verde, the purpose of the Stipulation was to resolve all allegations in the Staff Report in a just and efficient manner and consistent with Ohio law and the Commission's regulations; whether violations occurred or not was not the purpose of the settlement. Verde points to Staff's belief that the Stipulation is consistent with the third prong of the settlement test (Tr. I at 274). In contrast, Verde notes that neither of OCC's witnesses named a regulatory principle or practice that the Stipulation could violate.

{¶ 73} Though OCC drew attention during the hearing to investigations in other jurisdictions against entities currently owned by Verde's parent company, Verde argues that OCC witness Alexander failed to identify how those violations have anything to do with Verde's current management (Tr. I at 66). As such, Verde urges the Commission to not credit her testimony as to the third prong of the test. With regard to OCC witness Williams, Verde discounts his testimony because he testified that the Stipulation is not harsh enough and appears to have taken a similar stance the 37 times he has previously testified (Tr. II at

389). Therefore, Verde urges the Commission to not credit his testimony with regard to the third prong as well.

{¶ 74} Finally, Verde believes the Stipulation honors the important regulatory principle that customers should receive restitution when appropriate. Further, Verde counters OCC's argument during the hearing that the Stipulation may allow Verde to profit from alleged violations because OCC failed to establish that Verde would indeed profit from its alleged violations.

{¶ 75} Staff questions OCC's basis for its argument that Verde does not have the requisite managerial, technical, and financial capability to provide service in Ohio. Staff argues that OCC's claim is based solely on the Staff Report; however, the Stipulation, which is at issue in this proceeding, was crafted to ensure compliance with Ohio laws and Commission rules. As such, Staff states OCC has failed to demonstrate how the Stipulation violates any important regulatory principle or practice.

{¶ 76} OCC, in its initial and reply briefs, reiterates previous arguments to emphasize the fact that the Stipulation does not meet the third prong of the settlement test and should be rejected. First, OCC notes the Stipulation allows Verde to continue serving existing electric and natural gas customers without first requiring any remedial measures to protect these customers. In its reply brief, OCC elaborates that Verde is managerially unfit to provide service to Ohio consumers because of the allegations contained within the Staff Report. Second, OCC finds the Stipulation to contain no mechanism for stakeholder input. Third, OCC believes the Stipulation's provisions are lax and harmful to customers due to a lack of specific requirements forcing Verde to change its practices to comply with Ohio law. Fourth, OCC argues that spoofing and slamming are not even addressed in the Stipulation, even though these acts are egregious enough to permanently expel the Company from the state. Because of these failures, OCC is convinced the Stipulation fails to require Verde to bring its marketing acts and practices into compliance with Ohio law and Commission rules and, consequently, fails to protect customers harmed by Verde in the past or in the future.

{¶ 77} OCC also argues that the Commission can properly consider OCC Exhibit 7, which is the compilation of the customer contacts and complaints Staff received regarding Verde, because these statements qualify as party admissions, which are not considered hearsay. Evid.R. 801(D)(2). Further, OCC argues that, even if they are construed as hearsay, these case reports fall under exceptions to the hearsay rule as business records and public records. Evid.R. 803(6) and (8). Moreover, OCC reminds the Commission that, as an administrative agency, it is not precluded from considering hearsay. Finally, OCC argues that not considering OCC Exhibit 7 would be contrary to Commission policy and rules because utility customers are encouraged to contact the Commission with issues and these complaints should be considered by the Commission.

{¶ 78} Upon review, we find that we have discussed OCC's arguments regarding Verde's fitness to provide service to existing electric and natural gas customers and the action plan, especially regarding specificity of terms and stakeholder input, in our analysis for prong two of the settlement test above and found them unpersuasive. Moreover, we reiterate that the Commission, through Staff, retains continuing jurisdiction over Verde to ensure that the Company does not engage in further misconduct, including spoofing, and find it unnecessary to establish specific restrictions in Condition III(5). We also note that Staff may elect to take further action against Verde when it renews its electric and natural gas certificates.⁶ Also, as explained above, though the Commission as an administrative agency may consider statements containing hearsay, OCC Exhibit 7 contains multiple levels of hearsay statements, which affects the weight we should place on this particular evidence. Further, we continue to decline to impose restrictions on Verde based on outcomes of other proceedings in other jurisdictions because Staff and Verde arrived at the Stipulation based on the facts and circumstances of this proceeding. Finally, we find that OCC has failed to establish that the Stipulation violates important regulatory principles and practices because Verde may profit from alleged violations. We believe that adopting the Stipulation will allow Verde customers, both former and current, to trade the uncertainty of litigation for

⁶ At the request of Staff, Verde's natural gas renewal application is currently suspended in Case No. 13-2164-GA-CRS.

tangible benefits in the form of expeditious refunds. (Tr. I at 29-30, 33-34, 237, 246, 260.) Additionally, the Stipulation aims to protect a wider swathe of customers than initially contemplated in the Staff Report by including customers who were enrolled since June 1, 2018, and allowing them to cancel their contracts with Verde. Consequently, we find that OCC has failed to demonstrate that the Stipulation does not satisfy the third prong of our three-part test.

C. *Prior Ruling Regarding Subpoenas*

{¶ 79} OCC requests the Commission to overturn the attorney examiner's October 16, 2019 ruling granting Verde's motion to quash, in part, with regard to OCC's subpoenas directing Verde to designate corporate witnesses to appear at the hearing and Verde employee Kira Jordan to also appear at the hearing. OCC reiterates that Ohio Adm.Code 4901-1-25 allows OCC to subpoena these individuals. Further, OCC argues that Verde has consented to jurisdiction under R.C. 4928.09 and 4929.21. Additionally, under Ohio Adm.Code 4901:1-29-03, OCC states that Verde is required to maintain an employee and an office open for business in Ohio. By maintaining this office, OCC argues that Verde has subjected itself to Ohio jurisdiction and consented to being subpoenaed here. OCC also interprets R.C. 4928.09(B) and 4929.21(B) to mean that the Commission can subpoena a marketer's out-of-state witness. OCC urges the Commission to interpret the statutory language for electric and natural gas marketers similar to R.C. 3909.05, which governs out-of-state insurance companies, and find that Verde, in consenting to jurisdiction, has also consented to providing out-of-state witnesses to appear before a hearing at the Commission. Finally, OCC argues that Ohio Adm.Code 4901-1-25(B) cannot limit service of subpoenas to only witnesses who are within Ohio.

{¶ 80} Verde, in its reply brief, argues that OCC's arguments regarding quashed subpoenas are legally erroneous. Verde agrees that Ohio Adm.Code 4901-1-25(A), the Commission's subpoena rule, can be interpreted to permit a corporate subpoena. Further, Verde agrees that it has consented to Ohio's jurisdiction under R.C. 4928.09 and 4929.21. However, Verde argues that, while it has submitted to Ohio jurisdiction for regulatory

purposes and for service of process, Ohio law does not allow OCC to assert personal jurisdiction over an individual who is an employee of a Texas corporation. *Burgess v. Prudential Ins. Co. of America*, 1st Dist. Hamilton No. Hamilton No. C-870225, 1988 WL 68686, *5; *McGuire v. Draper, Hollenbaugh & Briscoe Co.*, L.P.A., 4th Dist. Highland No. 01CA21, 2002-Ohio-6170, ¶ 106. In essence, Verde argues OCC's contention gives the Commission greater territorial reach than a federal district court or an Ohio court of common pleas. Fed.R.Civ.P. 45(c); Civ.R. 45(A)(1)(b).

{¶ 81} Moreover, Verde believes OCC was not prejudiced as a result of the quashed subpoenas. Verde highlights the various opportunities it had to conduct discovery in this matter, including serving seven sets of discovery requests on Verde; 40 requests for production of documents; 57 interrogatories (with as many as 20 subparts each); 18 requests for admission; and a full day deposition of Ms. Jordan. Verde states that the topics referenced in OCC's hearing subpoenas directed to Verde were covered in Ms. Jordan's deposition. As such, Verde claims OCC had more time to question Ms. Jordan than it would have had at the hearing and urges the Commission to reject OCC's demand.

{¶ 82} Upon review, we find that the attorney examiner made a reasonable and appropriate ruling on October 16, 2019, and, consequently, affirm the ruling. During the hearing, the attorney examiner quashed the subpoenas because this is a Commission-ordered investigation as opposed to a rate or tariff proceeding initiated by a public utility, and the attorney examiner ruled that the subpoenas were not valid to compel out-of-state witnesses to appear in Ohio to testify against their will (Tr. I at 36-59). However, to provide OCC adequate opportunity to present its case, the attorney examiner allowed OCC to depose Ms. Jordan and file the deposition in the docket in lieu of Ms. Jordan's testimony (Tr. I at 57). OCC did file Mr. Jordan's deposition in this docket on October 15, 2019, as modified by a filing on November 4, 2019. A review of this deposition reveals that OCC was able to depose Ms. Jordan for a full day. Further, OCC does not dispute that, during this deposition, it was able to question Ms. Jordan regarding topics that were the focus of the second and third subpoena, which include OCC's sixth set of discovery served upon Verde on

September 25, 2019, and spoofing (Jordan Dep. at 118-129). Consequently, we find that OCC has failed to demonstrate how deposing Ms. Jordan before the hearing on the very topics it wished to could be prejudicial. As such, OCC can point to no consequent harm or disadvantage it suffered. We clarify that our ruling today does not indicate that parties are not able to ever subpoena witnesses employed by out-of-state companies. But here, where the corporate entity has designated an employee who can testify about subjects OCC identified, has allowed OCC to depose this individual, and OCC can point to no actual harm it suffered by not being able to question the individual at hearing, we do not find it appropriate to disturb the attorney examiner's ruling. Furthermore, we note that the subpoenas in question were actually served on Verde's general counsel via e-mail and OCC failed to obtain personal service on Ms. Jordan. Therefore, we affirm the attorney examiner's previous ruling.

IV. ORDER

{¶ 83} It is, therefore,

{¶ 84} ORDERED, That the Stipulation between Staff and Verde be approved, as further described in this Opinion and Order. It is, further,

{¶ 85} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

COMMISSIONERS

Approving:

Sam Randazzo, Chairman
M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

AS/kck

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

Summary: Opinion & Order that the Commission adopts the joint stipulation and recommendation entered into by Staff and Verde Energy USA Ohio, LLC d/b/a Verde Energy electronically filed by Docketing Staff on behalf of Docketing