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2020 Opinion and Order (“Order”). OCC asks the PUCO to give residential consumers more protection from the unfair, misleading, deceptive, and unconscionable marketing practices of Verde Energy USA Ohio (“Verde”).

The PUCO opened an investigation and directed Verde to show cause why its certificates to serve electricity and natural gas customers in Ohio should not be suspended, rescinded, or conditionally rescinded.<sup>3</sup> The PUCO Staff filed its Staff Report, recommending an appropriate response to Verde’s misdeeds: (i) suspend or rescind Verde’s certificates to provide utility service to consumers;<sup>4</sup> (ii) order Verde to refund natural gas and electric consumers the difference between utilities’ default rate and the rate Verde actually charged;<sup>5</sup> (iii) pay a \$1.5 million forfeiture;<sup>6</sup> and (iv) prohibit Verde from transferring any customer contracts to another entity.<sup>7</sup>

Those excellent recommendations of the PUCO Staff would have gone a long way toward addressing Verde’s egregious misconduct. But the PUCO Staff entered into a Settlement with Verde that fell far short of the consumer protections it recommended in the Staff Report.<sup>8</sup> OCC opposed the Settlement, advocating that it failed to protect consumers and did not provide refunds for the natural gas consumers who were harmed by Verde’s unfair, misleading, deceptive, and unconscionable marketing practices.<sup>9</sup>

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<sup>3</sup> See April 17, 2019 Entry at ¶9.

<sup>4</sup> See Staff Report at 25-26.

<sup>5</sup> *Id.* at 25.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 26.

<sup>8</sup> Jt. Ex. 1 (Stipulation and Recommendation (September 6, 2019)) (“Settlement”).

<sup>9</sup> See Initial Brief by OCC (December 2, 2019) (“OCC’s Initial Brief”); Reply Brief by OCC (December 17, 2019) (“OCC’s Reply Brief”).

Because of these inadequacies, the Settlement fails to satisfy the PUCO's three-prong test for settlements.

On February 26, 2020, the PUCO approved the Settlement without modification.<sup>10</sup> The Order approving the Settlement is unlawful and unreasonable in the following respects:

**ASSIGNMENT OF ERROR NO. 1:** The PUCO erred by unlawfully, unreasonably, and unfairly shifting the burden of proof in this proceeding to OCC while simultaneously restricting and limiting OCC's ability to prove the violations set forth in the 517 customer contacts and complaints in the Staff Report.

- A. Verde was supposed to show cause why its certifications should not be suspended or rescinded, but after the Staff settled with Verde the PUCO wrongly treated OCC as if it bore the burden of proof.
- B. Assuming that OCC had the burden of proof in this proceeding (which it did not), the PUCO improperly, unfairly and unlawfully restricted OCC's ability to prove the violations set forth in the complaints and Staff Report.
- C. The PUCO erroneously blamed OCC for the lack of evidence about Verde's bad acts when the PUCO should use its considerable resources, including the call center (which OCC is prohibited by law from having) to obtain and use evidence from Ohio consumers who may lack the resources and experience to participate in PUCO legal proceedings in Columbus.
- D. The PUCO erred in refusing to consider Verde's own admissions that it violated the PUCO's rules.

**ASSIGNMENT OF ERROR NO. 2:** The PUCO erred in finding that the Settlement was in the public interest and benefits consumers.

- A. The Settlement is not in the public interest and does not benefit consumers because it required no refunds to the natural gas customers Verde harmed.
- B. The Settlement is not in the public interest and does not benefit consumers because it allows "managerially unfit" Verde to continue serving customers.

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<sup>10</sup> See Order (February 26, 2020).

- C. The Settlement is not in the public interest and does not benefit consumers because the \$675,000 forfeiture is insufficient for Verde's bad acts against Ohioans and insufficient to deter Verde from engaging in future customer abuses.

**ASSIGNMENT OF ERROR NO. 3:** The PUCO Erred in Approving a Settlement that Violates Important Regulatory Principles.

- A. The PUCO erred by failing to ban Verde from Ohio for violations of law and regulations against the spoofing of Caller ID information to deceive Ohioans.

**ASSIGNMENT OF ERROR NO. 4:** The PUCO erred in approving the Settlement without implementing any guardrails around Verde's business practices that would protect consumers and further the public interest.

The reasons in support of this application for rehearing are set forth in the accompanying Memorandum in Support. The PUCO should grant rehearing and abrogate or modify its February 26, 2020 Opinion and Order as requested by OCC.

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

Verde knowingly charged some consumers exorbitant, unconscionable rates up to four times more than the rates charged by the consumers’ incumbent electric and natural gas utilities.<sup>11</sup> It is also well-established that Verde engaged in other unfair, misleading, deceptive, and unconscionable acts and practices in its marketing and supplying of electricity and natural gas services to Ohioans.<sup>12</sup> These unlawful practices were documented in 517 consumer complaints and contacts Ohioans made to the PUCO’s call center regarding Verde.<sup>13</sup> The evidence provided in the Staff Report, and the PUCO’s files concerning customers’ complaints shows that Verde had misled customers by using deceptive marketing practices, spoofing, and failing to provide them notice of contract renewals.<sup>14</sup>

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<sup>11</sup> OCC Ex. 19B at 18 (Williams Direct); JDW-08.

<sup>12</sup>See *e.g.* Staff Report at 9; and OCC Ex. 7.

<sup>13</sup> Staff Report at 9.

<sup>14</sup> See *e.g. id.* at 3; OCC Ex. 7.

The record evidence also shows that Verde tried to deceive the Chief of the PUCO's Reliability and Service Analysis Division.<sup>15</sup> The evidence demonstrates that Verde regularly "spoofed" (*i.e.* falsified) caller identification information during telemarketing calls to mislead customers into believing they were answering calls from the IRS or from their local utilities.<sup>16</sup> Attorney Examiner Price even stated that "the record is clear there was spoofing" by Verde.<sup>17</sup> In addition to violating numerous PUCO rules,<sup>18</sup> spoofing can also violate the federal Truth in Caller ID Act.<sup>19</sup>

There was a mountain of evidence demonstrating that Verde engaged in unfair, misleading, deceptive, and unconscionable marketing practices harming Ohio consumers. But the PUCO approved a Settlement entered into by Verde and the PUCO Staff that does not adequately protect consumers from Verde's predatory business practices.<sup>20</sup> The Settlement is inadequate for consumer protection because it: (1) lacks specific guidelines for Verde to reform its predatory marketing practices in the future; (2) provides zero refunds to Verde's natural gas customers who were harmed; and (3) does not require Verde to immediately reform its business practices to protect Verde's existing customers (who Verde continues to serve today) from harm, *despite the PUCO Staff's determination*

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<sup>15</sup> See *e.g.* OCC Ex. 8 (3/26/19 e-mail from Barbara Bossart to Nedra Ramsey).

<sup>16</sup> See *e.g.* Tr. Vol. I, at 209:3-6, 8-14; Staff Report, at 11; OCC Ex. 11 (3/22/19 e-mail from Duke employee to Barbara Bossart); OCC Ex. 12 (3/15/19 e-mail from Duke employee to Barbara Bossart).

<sup>17</sup> Tr. Vol. 1, at 219:16-17.

<sup>18</sup> The Staff Report states (at 26) that Verde's "spoofing" deception violated Ohio Adm. Code 4901:1-21-03(A), 4901:1-21-05(C)(8)(h), 4901:1-21-05(C)(10), 4901:1-29-03(A), 4901:1-29-05(D), and 4901:1-29-10(A).

<sup>19</sup> See 47 U.S.C. § 227(e)(1) ("It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification with the intent to defraud, cause harm, or wrongfully obtain anything of value . . ."); See also OCC Ex. 19B (Williams Direct), JDW-10.

<sup>20</sup> See Order.

*that Verde is incapable of providing adequate service to Ohio consumers.* The Settlement also imposes a forfeiture on Verde that is less than half of the \$1.5 million that the PUCO Staff recommended in the Staff Report. The forfeiture is insufficient to deter Verde from abusing Ohio customers. And Verde is free once again to begin marketing its services to customers in Ohio, starting in October of this year. The PUCO should have zero tolerance of marketer misdeeds (meaning one and done, for the marketer's privilege of serving Ohioans). The PUCO should grant this application for rehearing.

## **II. STANDARD OF REVIEW**

After the PUCO issues an order, any party in a PUCO proceeding has a statutory right to apply for rehearing “in respect to any matters determined in the proceeding.”<sup>21</sup> An application for rehearing must be in writing and “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.”<sup>22</sup>

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is “sufficient reason” to do so. After such rehearing, the PUCO may “abrogate or modify” the order in question if the PUCO “is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted.”<sup>23</sup>

As further explained below, this standard has been met. The PUCO should grant rehearing and abrogate or modify its Order consistent with the recommendations set forth below.

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<sup>21</sup> R.C. 4903.10.

<sup>22</sup> R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

<sup>23</sup> R.C. 4903.10(B).

### III. ASSIGNMENTS OF ERROR

**ASSIGNMENT OF ERROR NO. 1: The PUCO erred by unlawfully, unreasonably, and unfairly shifting the burden of proof in this proceeding to OCC while simultaneously restricting and limiting OCC's ability to prove the violations set forth in the 517 customer contact and complaints in the Staff Report.**

- A. **Verde was supposed to show cause why its certifications should not be suspended or rescinded, but after the Staff settled with Verde the PUCO wrongly treated OCC as if it bore the burden of proof.**

The PUCO ordered Verde to respond to the findings in the Staff Report and “show cause why its certification as a CRES provider and its certification as a CRNGS supplier should not be suspended, rescinded, or conditionally rescinded.”<sup>24</sup> Plainly, by these words, the PUCO directed *Verde* to carry the burden of responding to the Staff Report.

But Verde did not meet its burden; nor did it even attempt to address its burden. Indeed, Verde declined to present a single witness to the PUCO to prove anything.

Alternatively, as the PUCO noted in its Order, the alleged violations must be proven by the complainant in this proceeding, Staff, inasmuch as R.C. 4928.16 and 4929.24 authorize the PUCO to initiate this action under R.C. 4905.26.<sup>25</sup> “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).”<sup>26</sup>

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<sup>24</sup> See April 17, 2019 Entry at ¶9.

<sup>25</sup> Order at ¶60; see also R.C. 4928.08(D) allowing the PUCO to suspend or rescind the certificate of an electric energy marketer for anti-competitive or unfair deceptive or unconscionable acts or practices after reasonable notice and opportunity for hearing.

<sup>26</sup> *Id.*

By the very authority cited and relied upon by the PUCO in its Order, OCC did not, and cannot, bear the burden of proof in this proceeding. Notwithstanding the foregoing, the PUCO, through its numerous rulings during the proceeding, unilaterally and unlawfully shifted the burden of proof to OCC. And then it proceeded to find that OCC failed to satisfy this burden of proof, thus warranting the PUCO's approval of the Settlement.

In this regard, the PUCO concluded that OCC's testimony was not specific enough to identify which complaint files were reviewed, which customers were harmed, how the customers were harmed, and which rules were violated.<sup>27</sup> The Order also stated that there was not sufficient evidence in the record to prove, by a preponderance of evidence, many of the violations raised by OCC because OCC failed to specifically identify each rule that was violated, how many times each rule was violated, and what evidence in the complaint files support each alleged violation. The PUCO found that OCC's approach to the case precluded Verde from responding to allegations and denied Verde due process.<sup>28</sup>

The PUCO's findings, however, are inapt because they are premised upon an erroneous conclusion of law: *i.e.*, that OCC bears the burden of proof in this case. It does not. The PUCO cannot rely upon OCC's alleged failure to prove its case as a justification

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<sup>27</sup> Order at ¶61.

<sup>28</sup> *Id.* at ¶64.

to approve the Settlement.<sup>29</sup> But that is precisely what the PUCO mistakenly did in its Order. For this reason alone, the PUCO should grant rehearing.

Additionally, the PUCO's burden-shifting to OCC is inconsistent with the burden of proof that applies to settlements. It is well-established that Verde and the PUCO Staff, as signatories to the Settlement, carry the burden in this case of demonstrating that the Settlement was the result of serious bargaining, benefits customers and the public interest, and does not violate important regulatory principles.<sup>30</sup> OCC does not carry the burden of proof on these issues either, as a matter of law.

The PUCO's rules acknowledge the burden of the settling parties. While the PUCO's rules require "at least one" witness to testify in support of the Settlement,<sup>31</sup> the PUCO has held that "the rule appropriately requires the signatory parties, consistent with *their evidentiary burden* to support the stipulation, to determine *whether testimony from multiple witnesses is necessary* or whether the testimony of one witness is sufficient to demonstrate that the stipulation is reasonable and satisfies the Commission's three-part test."<sup>32</sup>

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<sup>29</sup> For example, with respect to the \$1.5 million forfeiture that was recommended in the Staff Report and which OCC supported, the PUCO held that OCC failed to present any evidence supporting the requested forfeiture beyond the Staff Report. The PUCO went on to note that the PUCO Staff would have had to present a witness to support and establish the \$1.5 million amount but because the PUCO Staff entered into the Settlement, it did not present such testimony. Order at ¶70. This is not a failing of OCC and should not be cited as a basis to approve a Settlement that contains a forfeiture less than half of the \$1.5 million amount initially recommended by the PUCO Staff. *Id.*

<sup>30</sup> See, e.g., *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt.*, Case No. 14-1693-EL-RDR, Opinion & Order at 18 (March 31, 2016).

<sup>31</sup> See Ohio Adm. Code 4901-1-30(D).

<sup>32</sup> *In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agmt.*, Case No. 14-1693-EL-RDR, Opinion & Order at 18 (March 31, 2016) (emphasis added).

Verde and the PUCO Staff failed to demonstrate that the Settlement satisfies the PUCO's three-part test. Verde refused to present any witnesses to support the Settlement. And the testimony of PUCO Staff witness Nedra Ramsey did little more than recite the terms of the Settlement and conclusively state that the Settlement satisfied the three-part test. That is not enough.

OCC does not bear the burden of proof in this proceeding. Because the PUCO's approval of the Settlement was premised upon OCC's alleged failures of proof, the PUCO should grant rehearing.

Bigger picture, in cases such as this involving an obvious bad actor like Verde – and whether OCC is involved or not, the PUCO should be protecting the public by placing the burden on the regulated entity to show cause why it should not be found culpable for whatever are the misdeeds at issue. The PUCO's order sets a bad precedent for public protection (indeed it places the burden on the public), and that should be rectified on rehearing.

**B. Assuming that OCC had the burden of proof in this proceeding (which it did not), the PUCO improperly, unfairly and unlawfully restricted OCC's ability to prove the violations set forth in the complaints and Staff Report.**

Even if OCC had the burden of proof in this proceeding (which it did not), the PUCO erred in improperly, unfairly, and unlawfully restricting OCC's rights to prove the violations set forth in the complaints and the Staff Report. The PUCO cannot tie OCC's hands behind its back, preventing it from fully exploring and developing the complaints and violations against Verde. (But claims were made that that Verde should not be

subject to discovery and hearing standards otherwise applicable to utilities.)<sup>33</sup> And then rulings were made against OCC for its alleged proof failings.

For example, on October 16, 2019, the Attorney Examiner granted Verde's motion to quash OCC's subpoenas for Verde's witnesses to appear and provide testimony at the hearing.<sup>34</sup> The PUCO affirmed this ruling in the Order.<sup>35</sup> In so ruling, however, the PUCO relied upon an inaccurate fact "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."<sup>36</sup> Contrary to the PUCO's statement,<sup>37</sup> the three subpoenas in question were properly served on Verde's statutory agent and served in person on Verde's general counsel, Ms. Alexis Keene. Ms. Keene had agreed to accept the subpoena on behalf of Ms. Jordan.<sup>38</sup> OCC followed the proper procedure and should have been entitled to cross-examine Ms. Jordan at the evidentiary hearing. During those cross-examinations, OCC would have had the opportunity to establish additional evidence and elicit admissions relating to the complaints and the Staff Report that the PUCO cites as proof of OCC's failings in its Order.

The PUCO found that OCC was not prejudiced or unduly harmed by the quashing of the subpoenas because it got to depose Verde employee Ms. Jordan. However, the

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<sup>33</sup> Order at ¶82.

<sup>34</sup> *Id.*; *see also* Tr. Vol. I at 58-59.

<sup>35</sup> Order at ¶82.

<sup>36</sup> *Id.*

<sup>37</sup> The PUCO based its decision on incorrect facts and information that is not supported by the record before it, contrary to R.C. 4903.09. This is yet another reason rehearing should be granted.

<sup>38</sup> *See* Return of Service for Kira Jordan served in Houston, Texas filed on October 15, 2019. *See also* Returns of Service for Kira Jordan and designated corporate witnesses served on Verde's statutory agent in Ohio filed on October 10, 2019.

deposition of Ms. Jordan occurred before the Attorney Examiner quashed OCC's subpoenas and before OCC knew that it would be unable to cross-exam Ms. Jordan at the evidentiary hearing. Accordingly, the deposition of Ms. Jordan was designed to obtain discovery of necessary information regarding Verde's business practices rather than to establish the numerous customer complaints and violations of the PUCO's rules, which Counsel expected to reserve for the evidentiary hearing. The PUCO's restriction on OCC's ability to cross-examine Ms. Jordan at the evidentiary hearing unfairly changed the rules of game, in violation of ample discovery rights under R.C. 4903.082, altering OCC's ability to use Ms. Jordan to prove elements of its case. For this additional reason, the PUCO should grant rehearing.

The PUCO also unreasonably and unlawfully limited OCC's ability to cross-examine PUCO Staff witnesses by limiting which PUCO Staff witnesses OCC was allowed to subpoena and then severely restricting OCC's cross examination of those witnesses.<sup>39</sup> OCC was also prohibited from asking Staff witnesses about customer contacts and complaints referenced in the Staff Report.<sup>40</sup> These limitations placed on OCC directly contradict Ohio Adm. Code 4901-1-28(E).

Under that PUCO rule, OCC properly filed motions asking the PUCO to approve subpoenas for two PUCO employees to testify at the hearing. OCC sought subpoenas for Barbara Bossart, Chief, Reliability and Service Analysis Division, Service Monitoring and Enforcement Department; and Robert Fadley, Director, Service Monitoring and Enforcement Department. Based on information and belief, these two PUCO employees

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<sup>39</sup> Tr. Vol. I at 36.

<sup>40</sup> See e.g., Tr. Vol. II at 317-18.

made or contributed to the Staff Report filed in this case, allowing them to be subpoenaed under Ohio Adm. Code 4901-1-28(E). OCC requested that they be called as witnesses because of their knowledge of the underlying Commission-Ordered Investigation and the Staff Report filed in this case.<sup>41</sup> Their knowledge and expertise were important especially given that under Ohio Adm. Code 4901-1-28(E), the Staff Report shall be deemed admitted into evidence at the time of its filing at the PUCO. Mr. Fadley and Ms. Bossart's testimony on the conclusions in the Staff Report should not have been restricted. But it was.<sup>42</sup>

In short, the PUCO improperly, unfairly, and unlawfully restricted OCC's rights to prove the violations set forth in the customer complaints and the Staff Report. The PUCO should therefore grant rehearing of its decision that the Settlement was reasonable and satisfied the three-prong test for evaluating settlements because of OCC's failure to prove Verde's misconduct.

**C. The PUCO erroneously blamed OCC for the lack of evidence about Verde's bad acts when the PUCO should use its considerable resources, including the call center (which OCC is prohibited by law from having) to obtain and use evidence from Ohio consumers who may lack the resources and experience to participate in PUCO legal proceedings in Columbus.**

The PUCO ruled that OCC had not met its burden of proving that Verde violated PUCO rules and Ohio law. In particular, the PUCO faults OCC for relying upon the complaint files compiled by its own PUCO Staff that contain hundreds of records of customer contacts with the PUCO's call center concerning Verde's misdeeds. The PUCO

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<sup>41</sup> OCC's Motion for Subpoenas at 1-2 (October 4, 2019).

<sup>42</sup> Tr. Vol. I at 36; Tr. Vol. II at 317-18.

characterized the information collected from customers by its Staff (including its call center) as hearsay and hearsay upon hearsay.<sup>43</sup> Accordingly, the PUCO appears to have given little weight, if any, to Ohioans' complaints about Verde, which were compiled by its own Staff and were the basis of the PUCO-initiated investigation.<sup>44</sup> This is another reason the PUCO should rehear its conclusions about the lack of evidence, and adopt OCC's recommendations.

Under the PUCO's approach, the victims' complaints to the PUCO's call center are to be considered hearsay and not evidence of marketer misconduct. These Ohioans who were deceived and ripped off may not have (nor should they be required to expend) the resources for hiring legal counsel or the ability to take time off from their jobs, arrange childcare or eldercare, and travel to Columbus to appear before the PUCO to testify and be cross-examined. Under these circumstances, the PUCO should use its resources to develop a real opportunity for consumers to give evidence that the PUCO will not simply dismiss as hearsay.

One approach would be for the PUCO to schedule local hearings for testimony. Another approach would be for the PUCO's call center to use other means, such as listening to third-party verifications and documenting Verde's use of spoofing Caller ID for calls to consumers, that would be evidence. This should be done without leaning on consumers and OCC for overcoming the natural impediments for consumers to participate in the PUCO's processes.

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<sup>43</sup> Order, at ¶62.

<sup>44</sup> However, these records kept in the normal course of the PUCO's business should have been treated as an exception to the hearsay rule under Ohio Rules of Evidence 803(6), the business records exception.

The PUCO's ruling is unfortunate both for Ohioans who are victims of Verde and for Ohioans who could be victims of other bad-acting marketers. In effect, the PUCO has adopted a standard that gives an advantage to the regulated violator of its rules over the Ohio consumers who are its victims. And that message will be favorably received by any other disreputable marketers going forward.

Note that, under R.C. 4905.261, the PUCO "shall operate a telephone call center for consumer complaints, to receive complaints by any person, firm, or corporation against any public utility." The PUCO's call center is the one and only government call center for handling utility consumer complaints in Ohio. As the PUCO well knows, OCC has been prohibited under R.C. 4911.021 from "operat[ing] a telephone call center for consumer complaints." OCC merely receives information from the PUCO about its complaint calls from Ohioans (R.C. 4905.261) but the complaint contact is between the consumer and the PUCO. The PUCO's special arrangement for call center contacts with consumers should be elevated, by the PUCO, toward converting those contacts into whatever the PUCO deems necessary to meet its evidentiary standards. This is especially so given the limits on OCC's resources including the prohibition against operating a call center to help Ohio consumers.

As some unfortunate irony, given the significance of a call center in consumer complaints against Verde and other marketers, it was reported (in a Columbus Dispatch story) that at least one marketer was vocally involved when, in 2011, the Kasich Administration dealt a significant blow against OCC's consumer advocacy through a

major budget cut.<sup>45</sup> What OCC and consumers lost at that time (due to lack of funds after the budget cut) was what remained of the OCC call center for non-complaint calls involving education and information for consumers. Accordingly, given the PUCO's standard against treating the customer complaints as evidence, the PUCO should activate its call center to find solutions now on rehearing and in the future for developing information that will stand up as evidence and stand up for the Ohio consumers that the PUCO serves.

Moreover, the PUCO does not allow OCC or others to conduct discovery on its employees (its staff), under Ohio Admin. Code 4901-1-16(I). That makes the challenge of obtaining evidence even more difficult to overcome. The rule prohibiting discovery on the PUCO Staff should not apply to these types of cases and should be lifted for rehearing.

Finally, the Ohio Power Siting Board has had a recent initiative to “improve public participation” in the siting process.<sup>46</sup> The PUCO also should be making participation on utility matters easier for customers, not more difficult, on this rehearing and in other cases involving bad acts by disreputable marketers like Verde.

**D. The PUCO erred in refusing to consider Verde's own admissions that it violated the PUCO's rules.**

The 517 customer contacts and complaints in the record in this case are replete with admissions by Verde's own representatives that Verde violated various PUCO

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<sup>45</sup> The Columbus Dispatch, *Kasich friends in high demand* (May 23, 2011): <https://www.dispatch.com/article/20110523/NEWS/305239825>.

<sup>46</sup> <https://www.opsb.ohio.gov/rules/2020-rule-review/>.

rules.<sup>47</sup> As OCC explained in its Initial Brief, these admissions by Verde qualify as statements against interest by a party-opponent (Verde) and thus, are specifically *excluded* from the definition of hearsay under Ohio Rule of Evidence 801(D)(2).

However, the PUCO refuses to consider *any* of Verde’s own admissions that it violated the PUCO’s rules because one of the case reports (Case No. 00256087) contains Verde’s offer to settle the individual complaint.<sup>48</sup> According to the PUCO, “offers made by Verde to settle this individual complaint [] should not be relied upon as evidence of a violation” under Ohio Evidence Rule 408.<sup>49</sup> However, OCC never cited Verde’s offers of settlement as evidence of Verde’s wrongdoing.

To the contrary, OCC cited Verde’s unequivocal admissions of violation (which are excluded from hearsay under Ohio Evidence Rule 801(D)(2)) as evidence of Verde’s wrongdoing.<sup>50</sup> The PUCO wrongly conflates Verde’s admissions of violation with Verde’s separate offers of settlement. The PUCO’s refusal to consider Verde’s own admissions of violation was unreasonable and unlawful, and the PUCO should grant rehearing for this reason as well. Indeed, if a marketer’s own admissions that it violated the law are not sufficient to establish wrongdoing, nothing is.

**ASSIGNMENT OF ERROR NO. 2: The PUCO erred in finding that the Settlement was in the public interest and benefits consumers.**

In its Order, the PUCO noted that the “serious allegations regarding Verde’s conduct in the competitive retail electric and gas marketplace . . . warrant[s] serious

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<sup>47</sup> See e.g. OCC Initial Brief, note 46.

<sup>48</sup> Order at ¶62.

<sup>49</sup> *Id.*

<sup>50</sup> See OCC Initial Brief, note 46.

consequences.”<sup>51</sup> The Order determined that Verde violated the PUCO’s rules 17 times. In addition, the Staff Report concluded that “Verde does not currently possess the fitness or managerial capability to provide competitive services in the state of Ohio.”<sup>52</sup> Nevertheless, the PUCO approved a Settlement that is not in the public interest and does not benefit consumers.<sup>53</sup>

**A. The Settlement is not in the public interest and does not benefit consumers because it required no refunds to the natural gas customers Verde harmed.**

The PUCO’s second criterion for considering settlements is whether the settlement, as a package, benefits customers and the public interest. Contrary to the PUCO’s conclusions, the Settlement filed in this case fails to meet this criterion because it does not require Verde to pay a single penny in refunds to the natural gas customers it harmed. And yet, refunds for harm caused to consumers is fundamental to enforcement of consumer protection rules. Ohio statutes (R.C. 4928.16 (electric) and R.C. 4929.24 (gas)) expressly provide the PUCO the authority to order energy marketers to make restitution to customers harmed by their violations of Ohio law and PUCO rules.<sup>54</sup>

The PUCO Order states that the purpose of the Settlement is to “provide[] redress for all issues identified in the Staff Report.”<sup>55</sup> But the Settlement falls short of this objective. The Staff Report recommended that the PUCO require Verde to refund both electric and natural gas customers “the difference between the electric distribution and/or

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<sup>51</sup> Order at ¶ 59.

<sup>52</sup> Staff Report at 27.

<sup>53</sup> *Id.* at ¶¶59-71.

<sup>54</sup> R.C. 4928.16(B)(1) and R.C. 492.24(B)(1).

<sup>55</sup> Order at ¶59.

natural gas utility's default rate that the rate Verde actually charged them."<sup>56</sup> While the Settlement requires Verde to make refunds to electric customers, it does not require Verde to provide refunds to natural gas customers at all.

The Order justifies the Settlement's failure to refund natural gas customers by stating that "Verde has already re-rated natural gas customers voluntarily as part of the Staff investigation, thereby protecting both current and former customers."<sup>57</sup> While the evidence indicates that Verde did make some refunds to some individual natural gas customers (those who actively pursued complaints with the PUCO), neither Verde nor Staff demonstrated that Verde's refunds were made to all retail natural gas customers who Verde charged exorbitant rates (up to 4 times the standard choice rate.) Yet that was the recommendation the PUCO Staff made in the Staff Report to remedy the harm caused by Verde's price gouging.

Additionally, under the Settlement, Verde was required to provide refunds "[f]or *all* retail electric customers enrolled by Verde Energy in Ohio from October 1, 2018 through April 30, 2019 . . ."<sup>58</sup> There is no basis for denying refunds to all natural gas customers enrolled by Verde in Ohio from October 1, 2019 through April 30, 2019. The Settlement fails to require restitution to the natural gas customers who were harmed by Verde's price gouging and is contrary to the public interest.

It is in the public interest to compensate all consumers who were harmed by Verde's unlawful acts, and the public interest can only be served if and when all

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<sup>56</sup> Staff Report, at 26.

<sup>57</sup> Order at ¶67.

<sup>58</sup> Jt. Ex. 1 at 4 (emphasis added).

customers who experienced harm are made whole. The PUCO erred by approving an unlawful and unreasonable Settlement that did not require Verde to make refunds or credits to both natural gas and electric customers who were harmed and charged Verde's exorbitant rates. Thus, the Settlement does not fully provide redress for the consumers harmed by Verde. As such, the PUCO should have concluded that the Settlement is unjust and unreasonable and fails to fully address the harm Verde caused to Ohioians, through its misdeeds, including its price gouging.

Further, there is no evidence in the record of this case that Verde lacks sufficient resources to fully recompense all consumers harmed by its unlawful actions. The PUCO should have ordered full refunds to consumers even if Verde must liquidate its assets in order to do so. The PUCO failed to do so, which is an error.

**B. The Settlement is not in the public interest and does not benefit consumers because it allows “managerially unfit” Verde to continue serving customers in the future and because it allows Verde to serve customers.**

The Staff Report declared Verde to be “managerially unfit to provide competitive services in the state.”<sup>59</sup> The PUCO Staff's finding was based on evidence documented in the Staff Report of systemic issues plaguing Verde's provision of electric and natural gas services in Ohio, including “misleading and deceptive practices used to enroll customers, a failure to maintain documents and other data as required, probable non-compliance with certain requirements of the third-party verification (TPV) rules, and violations of the noticing requirements.”<sup>60</sup> The Staff's findings that Verde abused customers in so many

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<sup>59</sup> Staff Report at 27.

<sup>60</sup> Staff Report at 5.

ways, combined with OCC's evidence, should have meant the end for Verde. But Verde was allowed to continue serving its existing customers, unfortunately for them, and will be back marketing to Ohioans in October. That result violates the public interest and consumer benefit. The PUCO should rehear its Order.

Further, the Settlement approved by the PUCO allows Verde to continue serving its existing customers without requiring Verde to make any changes to reform its "unfit" business practices. For that reason, the Settlement is also contrary to the public interest -- and the PUCO should grant rehearing.

The Order states that the Settlement "as a whole acts as a deterrent to prevent Verde from harming both existing and future customers."<sup>61</sup> The PUCO found that the Settlement's requirement that Verde file "an action plan for compliance at least ninety (90) days prior to resuming marketing and customer enrollment in Ohio"<sup>62</sup> will protect customers from Verde's abuse. But the "action plan" does nothing to help Verde's existing customers because it applies only to future customers and contains no specific requirements for Verde to reform its business practices.

The PUCO states that "OCC did not present any evidence that demonstrated existing customers continue to be harmed by Verde's practices."<sup>63</sup> That is inaccurate. OCC presented evidence that Verde's existing customers continue to be harmed through unconscionable rates and through Verde's practice of automatically renewing customers onto high monthly variable rate contracts without proper notice under the PUCO's

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<sup>61</sup> Order at ¶65.

<sup>62</sup> Joint Ex. 1 at 4.

<sup>63</sup> Order at ¶65.

rules.<sup>64</sup> The PUCO also ignores the Staff Report’s finding that “Verde does not currently possess the fitness or managerial capability to provide competitive services in the state of Ohio.”<sup>65</sup>

In short, the Settlement does not require Verde to take a single action *now* to reform its business practices to protect the customers it *currently* serves. Signing the Settlement with PUCO Staff did not magically make Verde “fit” to serve Ohio customers.

The Order adopting the Settlement harms customers and the public interest because it allows Verde to continue to exist in Ohio with access to Ohioans and because it does not require Verde to do anything to change its current business practices that have harmed customers. Accordingly, rehearing should be granted.

**C. The Settlement is not in the public interest and does not benefit consumers because the \$675,000 forfeiture is insufficient for Verde’s bad acts against Ohioans and insufficient to deter Verde from engaging in future customer abuse.**

Punitive measures in the form of civil forfeitures or some other form of monetary penalty (e.g., treble damages) are fundamental principles for enforcing consumer protection rules. Such measures serve to punish bad actors for violating the rules and bringing harm to consumers. The measures also serve as a deterrent to other potential bad actors by showing that rule breaking will not be tolerated. Ohio law expressly gives the PUCO authority to assess forfeitures on bad actors for violating the PUCO’s rules.<sup>66</sup>

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<sup>64</sup> See e.g. OCC Ex. 17, PUCO Case Report 00244217, at 54 (1/24/19 e-mail from Verde representative Louise Bourgeois to PUCO Staff admitting that the customer did not receive an expiration notice as required by the PUCO’s rules); and OCC Ex. 7 (PUCO Case Report 00257020); See also OCC Ex. 19B (Williams Direct) at 23-24.

<sup>65</sup> Staff Report at 27.

<sup>66</sup> R.C. 4928.16 (electric) and R.C. 4929.24 (natural gas).

In this case, the Order found that the Settlement’s \$675,000 forfeiture (less than half of the \$1.5 million recommended in the Staff Report)<sup>67</sup> imposed on Verde was reasonable.<sup>68</sup> It is not. The PUCO erred in finding that the evidence in this case does not warrant a \$1.5 million forfeiture. The PUCO found that “OCC has proven, at most, one violation and the Staff Report evidences another 17 violations.”<sup>69</sup> The PUCO found that “the only basis that OCC presents for [\$1.5 million] forfeiture is that it was Staff’s initial recommendation.”<sup>70</sup> The PUCO’s determinations are unreasonable and ignore the ample record evidence of Verde’s violations and its unwillingness to reform its business practices even when faced with hundreds of customer complaints and a PUCO Staff investigation.

As noted above, OCC did not have the burden of proving Verde’s violations in this case. And even if OCC did bear the burden of proof in this case (it did not), the PUCO unlawfully hindered OCC’s ability to prove those violations by quashing OCC’s subpoenas of Verde’s witnesses and restricting OCC’s ability to examine PUCO Staff witnesses. In addition, the PUCO wrongly refused to consider Verde’s own admissions that it violated the PUCO’s rules. Therefore, the PUCO’s finding that Verde committed only 18 violations grossly understates the evidence of Verde’s wrongdoing.

The PUCO also summarily dismissed the evidence of regulatory actions against Verde’s affiliates in other states.<sup>71</sup> This evidence demonstrates that Verde’s parent

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<sup>67</sup> Staff Report at 25.

<sup>68</sup> Order at ¶70.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Order at ¶70.

company, Spark Energy, lacks the managerial capabilities or willingness to reform its marketing and business practices even when faced regulatory and enforcement actions. OCC witness Alexander described in her testimony numerous regulatory proceedings against Verde's affiliates in other states involving the exact type of deceptive marketing practices and consumer protection violations identified in the Staff Report.<sup>72</sup> Ms. Alexander testified regarding proceedings against Verde affiliates in Massachusetts, Pennsylvania, Maryland, New York, Connecticut, Illinois, and Maine.<sup>73</sup> The PUCO disregarded this evidence "because these proceedings involve facts and evidence different from this proceeding."<sup>74</sup>

The PUCO's refusal to consider this evidence was unreasonable. As explained in the Staff Report,<sup>75</sup> violations in other states are extremely relevant as "aggravating factors" regarding a marketer's managerial, financial, and technical capability to provide competitive retail services. After the PUCO Staff's investigation, it concluded that the actions of Verde's affiliates in other states and Verde's management (Spark Energy) "reveals its inability to provide adequate service to customers."<sup>76</sup>

As demonstrated by the multiple regulatory actions against Verde affiliates in other states, the level of forfeiture will do little to deter Verde from misleading or deceiving Ohioans in the future. The \$675,000 forfeiture is nothing more than a cost of

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<sup>72</sup> OCC Ex. 1 (Alexander Direct) at 13.

<sup>73</sup> See *e.g. id.* at 17-33.

<sup>74</sup> Order at ¶70.

<sup>75</sup> Staff Report at 24-25.

<sup>76</sup> *Id.* at 24.

doing business for Verde. Therefore, the PUCO should grant rehearing and order Verde to pay a \$1.5 million forfeiture.

**ASSIGNMENT OF ERROR NO. 3: The PUCO Erred in Approving a Settlement that Violates Important Regulatory Principles.**

The PUCO should grant rehearing because the Order adopted a Settlement that violates important regulatory principles. Ohio energy policy and law plainly require Verde to provide “adequate” and “reasonably priced” electric and natural gas services to customers.<sup>77</sup> Ohio law also requires Verde to have the managerial capability to provide service.<sup>78</sup>

The Staff Report states that “Verde’s managerial capabilities are not sufficient to ensure it provides [electric and natural gas service] in compliance with the Ohio Administrative Code and also reveals its inability to provide adequate service to customers.”<sup>79</sup> The Staff Report also found that despite numerous warnings, “Verde has failed to meaningfully modify its business practices to bring itself into compliance with the Commission’s rules” and that “Verde has failed to implement any meaningful corrective or remedial action.”<sup>80</sup> The evidence in this case also demonstrates that Verde charges its customers exorbitant rates for natural gas and electric service,<sup>81</sup> which contradicts the Ohio regulatory policy of providing “reasonably priced” service.<sup>82</sup>

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<sup>77</sup> O.R.C. 4928.02(A), O.R.C. 4929.02(A)(1).

<sup>78</sup> O.R.C. 4928.08(B), O.R.C. 4929.20(A).

<sup>79</sup> Staff Report, at 25.

<sup>80</sup> *Id.*

<sup>81</sup> See e.g. OCC Ex. 19C (Williams Confidential Direct) at 17, 19.

<sup>82</sup> O.R.C. 4928.08(B), O.R.C. 4929.20(A).

Despite the findings in the Staff Report that Verde is managerially unfit, and the undisputed evidence regarding the high rates Verde charges its customers, the Settlement allows Verde to continue serving its existing customers and to begin marketing and enrolling new customers in October 2020 (after an 18-month “stay-out” period that began on May 3, 2019).<sup>83</sup> These lax Settlement provisions are particularly harmful to customers given that the Settlement provides no specific requirements that Verde change its practices to comply with Ohio law. The Settlement does not require Verde to take any immediate action to reform its business practices in order to provide adequate services to existing customers. Nor does the Settlement address the outrageous rates that Verde charges customers after their fixed-rate contracts expire and Verde automatically renews them on to a monthly variable rate contract.

**A. The PUCO erred by failing to ban Verde from Ohio for violations of law and regulations against the spoofing of Caller ID information to deceive Ohioans.**

As explained above, spoofing violates the PUCO’s rules and federal law. The PUCO erred by not banning Verde for violating the law against spoofing. The Settlement fails to require Verde to take any action to address what the PUCO Staff found to be an “alarming” amount of spoofing activities. Therefore, the Settlement violates the important regulatory principles protecting customers from being subjected to and deceived by Verde’s rampant spoofing practices. Yet the Order allows Verde to continue providing service to Ohio consumers even though it clearly violated the law against spoofing. Verde should be banned from providing service to Ohioans.

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<sup>83</sup> Joint Ex. 1, at 3.

**ASSIGNMENT OF ERROR NO. 4: The PUCO erred in approving the Settlement without implementing needed guardrails around Verde's business practices that would protect consumers and further the public interest.**

It was an error by the PUCO to approve the Settlement without first modifying it to protect consumers and to further the public interest. Specifically, OCC proposed several recommendations for modifications to the Settlement that would have made it satisfy the criterion for evaluating settlements. The PUCO erred in rejecting those proposed modifications. Those recommended modifications that the PUCO should have included if it was going to approve the Settlement in this case include the following.

First, the PUCO should have modified the Settlement **by requiring Verde to re-rate all natural gas and electric consumers and fully compensate them for the difference between what they paid Verde and what they would have paid under the utility's default rate by refunding to each consumer that difference in full.** As explained above, there is no basis for excluding natural gas customers from refunds under the settlement. Verde's natural gas customers, like Verde's electric customers, were harmed by having to pay rates that were up to 4 times the standard choice rate.

Nor is there any basis for setting refunds for electric customers based on the difference between what they paid Verde and some arbitrary renewable rate. Neither Verde nor the PUCO Staff offered evidence to support "re-rating" (refunding) customers to the second lowest 12-month fixed 100% renewable price shown on the PUCO's historic apples-to-apples chart for the week of December 17, 2018. The appropriate benchmark for determining the refunds owed to customers is the difference between the rate that Verde over-charged customers and the utility's price to compare (the standard

offer rate).<sup>84</sup> But the PUCO ignored that evidence. Accordingly, the PUCO erred by not modifying the Settlement to give full refunds to customers based on the utility's price to compare.

Second, the PUCO should have required Verde to **make specific changes to its business practices to ensure compliance with the PUCO's rules** and to address the violations documented in the Staff Report and Staff Report's conclusion that "Verde does not currently possess the fitness or managerial capability to provide competitive services in the state of Ohio."<sup>85</sup> The PUCO Staff determined that despite being notified of "hundreds of customer complaints . . . Verde has failed to implement any meaningful corrective or remedial action."<sup>86</sup> Nothing in the Settlement specifies what remedial actions (if any) Verde will take to address the violations identified in the Staff Report or to protect the customers that Verde currently serves.<sup>87</sup>

The Settlement's provision that requires Verde to "submit an action plan for compliance at least ninety (90) days prior to resuming marketing and customer enrollment in Ohio"<sup>88</sup> is also vague and inadequate to ensure that Verde's future customers will be protected. Moreover, the "action plan" provision pales in comparison to reforms Verde's affiliates have agreed to undertake in other states for consumer protection. As noted above, there have been numerous regulatory proceedings against Verde's affiliates in other states involving similar deceptive marketing practices and

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<sup>84</sup> OCC Ex. 19B (Williams Direct) at 11.

<sup>85</sup> Staff Report at 27.

<sup>86</sup> *Id.* at 27.

<sup>87</sup> OCC Ex. 1 (Alexander Direct) at 10.

<sup>88</sup> Joint Ex. 1 at 4.

consumer protection violations identified in the Staff Report.<sup>89</sup> Those proceedings specifically enjoined Verde's affiliates from engaging in deceptive marketing practices such as representing to the customer an affiliation with the utility or that the customer will save money by switching unless the customer would pay less than the utility's price to compare.<sup>90</sup> Verde affiliates have also committed to substantial marketing reforms in other states,<sup>91</sup> but Verde refuses to do so in Ohio. There is no reason why the PUCO should not require Verde to extend similar protections to Ohio customers. The PUCO unreasonably failed to consider the regulatory actions against Verde's affiliates in other states and thus, rehearing should be granted to modify the Settlement.

Third, the PUCO should have included a comprehensive and independent verification process to **ensure that any customer refunds under the Settlement are completed and disbursed correctly**. This would include a provision for consequences to Verde if the verification process reveals that Verde has not made all of the consumer refunds represented in the Settlement, a requirement for Verde to make restitution to any consumers missed or not covered by the Settlement, and a provision for additional monetary penalties.

Although the Settlement addresses the refunds to electric customers who were overcharged, it does not address how the refunds will be verified. It does not include any process that describes how the PUCO Staff or an independent third-party has or will verify that the customers referred to in the Settlement have indeed received the full

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<sup>89</sup> OCC Ex. 1 (Alexander Direct) at 13.

<sup>90</sup> *Id.* at BRA-12.

<sup>91</sup> *Id.* at BRA-12.

refunds due them. This is particularly important given the evidence in this case that Verde's own refund methodology produces a total value of customer refunds significantly in excess of the approximate \$1,068,000 refunds referenced in the Settlement.<sup>92</sup> The Settlement also does not address consequences if Verde fails to properly re-rate customers. The PUCO should rectify these shortcomings in the Settlement.

Fourth, the PUCO should have required Verde to modify its business practices to address Verde's failure to provide appropriate contract expiration notices to consumers as required by the PUCO's rules.<sup>93</sup> The Staff Report found that Verde customers complained about not receiving expiration notices when their fixed-rate contracts expired and then being automatically renewed to monthly contracts charging high variable rates.<sup>94</sup> This was confirmed by public witnesses who testified during the evidentiary hearing that they were grossly overcharged by Verde after Verde automatically renewed their fixed rate contract to a monthly variable rate contract that charged three times what they initially agreed to pay.<sup>95</sup> When the PUCO Staff confronted Verde with these complaints, Verde asserted that it was not required to provide contract expiration notices under Verde's terms of service with the customers.<sup>96</sup> But as the PUCO Staff correctly noted in

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<sup>92</sup> See OCC Ex. 19B (Williams Direct), at 13.

<sup>93</sup> See Ohio Adm. Code 4901:1-21-11(G), 4901:1-29-10(F).

<sup>94</sup> Staff Report at 23.

<sup>95</sup> Tr. Vol. 1 at 25-28. See also OCC Ex. 17 (PUCO Case Report 00244217); OCC Ex. 7 (PUCO Case Report 00257020).

<sup>96</sup> OCC Ex. 17 (PUCO Case Report 00244217) at 54 (1/24/19 e-mail from Verde representative Louise Bourgeois to PUCO Staff). Staff Report at 23.

the Staff Report, Verde's "terms of service do not supersede the Ohio Administrative Code."<sup>97</sup>

Verde's refusal to provide contract expiration notices as required by the PUCO's rules harms the customers that Verde currently serves. The PUCO should modify the Settlement to **prohibit Verde from automatically renewing customers** to monthly variable rate contracts. At a minimum, the PUCO should modify the Settlement to require Verde to provide customers with appropriate contract expiration notices as required by the PUCO's rules.

Similarly, the PUCO should **prohibit Verde from luring customers into contracts with low fixed "teaser" rates** that are later automatically renewed to unconscionably high monthly variable rates. For example, evidence in this case demonstrates that Verde charged some electric customers a fixed rate of \$.0599/kwh and then switched them to a monthly variable rate of \$.19/kwh, resulting in huge overcharges.<sup>98</sup> OCC presented evidence that some Verde gas customers paid rates nearly four times the utility's standard offer.<sup>99</sup> These unconscionable rates are contrary to Ohio's statutory electric and gas service policies that electric and gas services be "reasonably priced."<sup>100</sup> Accordingly, the PUCO should prohibit Verde from charging customers monthly variable rates in excess of the utility's standard offer rate.

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<sup>97</sup> Staff Report at 24.

<sup>98</sup> OCC Ex. 7 (PUCO Case Report 00257020); OCC Ex. 17 (PUCO Case Report 00244217).

<sup>99</sup> OCC Ex. 19B (Williams Direct) at 18, JDW-08.

<sup>100</sup> R.C. 4928.02(A), 4929.02(A)(1).

Fifth, given the “clear” evidence of Verde’s spoofing activities,<sup>101</sup> the PUCO should modify the Settlement to include a “no tolerance” policy for spoofing. In other words, if Verde is allowed to continue to provide service to Ohio consumers, **Verde’s certificates should be immediately suspended if it engages in even a single act of spoofing.** Indeed, PUCO Staff witness Nedra Ramsey testified that even a single customer complaint regarding spoofing is cause for concern.<sup>102</sup> In this case Verde’s spoofing continued despite warnings from the PUCO Staff regarding an “alarming number of complaints from consumers.”<sup>103</sup> As noted above, spoofing is illegal under state and federal law. The PUCO should not tolerate such deceptive practices from Verde.

Likewise, the PUCO should modify the Settlement by adopting a **no tolerance policy for slamming customers.** There is evidence that Verde unlawfully enrolled (*i.e.* slammed) customers without obtaining their proper consent under the PUCO’s rules in both telemarketing and door to door sales.<sup>104</sup> Slamming is illegal,<sup>105</sup> and Verde should not be permitted to operate in Ohio if it engages in this illegal practice.

Sixth, the PUCO should modify the Settlement to require Verde to conduct audits of its third-party telemarketing agents to **verify that they are not using spoofing or robocall technology when they solicit customers.** The PUCO Staff found that Verde “consistently and continuously” violated the PUCO’s rules by using robo-call and

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<sup>101</sup> Tr. Vol. 1, at 219:16-17.

<sup>102</sup> Tr. Vol. I at 207: 19-20, 208: 13-20.

<sup>103</sup> OCC Ex. 9 (12/21/18 e-mail from Nedra Ramsey to Verde).

<sup>104</sup> OCC Ex. 19B (Williams Direct) at 26; *See also* OCC Ex. 7, PUCO Case Report 00233259, (PUCO Staff found that Verde engaged in “slamming” by switching the customer’s electricity supply from Dynegy to Verde without the customer’s consent, resulting in Verde re-rating the customer).

<sup>105</sup> Ohio Adm. Code 4901:1-10-01(A)(A). Ohio Adm. Code 4901:1-13-01(T).

spoofing technology to mislead customers into speaking with Verde sales agents.<sup>106</sup> If Verde is permitted to continue marketing to Ohio consumers, it should be required to conduct regular audits of its telemarketers to prevent these illegal practices.

Seventh, the PUCO should modify the Settlement to **ban Verde from conducting door-to-door sales activities**. The Staff Report identified numerous complaints from customers who were unlawfully enrolled by Verde (slammed) through its door-to-door marketing.<sup>107</sup> Verde was unable to produce signed customer contracts from these door to door solicitations as required by the PUCO's rules.<sup>108</sup> Verde claimed that "it is not required to obtain a signed contract" for door-to-door solicitations.<sup>109</sup> Verde is wrong, and the PUCO should not allow Verde to engage in door to door marketing if it cannot comply with the PUCO's rules.

At a minimum, the PUCO should impose restrictions on Verde's door-to-door marketing. Such restrictions can include: notifying the utility of when and where Verde will be conducting its door-to-door sales activities; requiring sales agents to wear clothing branded with the Verde logo; requiring experienced and properly trained sales agents to accompany less-experienced agents on sales calls; and prohibiting Verde from offering gift or cash cards to potential customers as an incentive to enroll. These measures would help protect customers from Verde's misleading marketing practices and would help prevent Verde from exploiting vulnerable populations such as elderly, low income, or non-English speaking customers.

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<sup>106</sup> Staff Report at 26.

<sup>107</sup> Staff Report at 16.

<sup>108</sup> Ohio Adm. Code 4901:1-21-06(D)(1)(a), 4901:1-29-06(D)(1).

<sup>109</sup> Staff Report at 17.

Eighth, the PUCO should prohibit Verde from obtaining lists of customers' personal contact information that is kept by the energy utilities. Verde should be prohibited from accessing those lists of customer information for solicitation purposes. Verde has shown itself to be unworthy of obtaining Ohioans' personal contact information for marketing energy.

Because the PUCO failed to reject the Settlement in its entirety, the PUCO erred in failing to modify the Settlement consistent with the recommendations above to protect consumers and further the public interest.

#### **IV. CONCLUSION**

The Settlement adopted by the PUCO harms Ohio customers and the public interest and violates important regulatory principles. The PUCO erred in shifting the burden of proof to OCC in a complaint investigation proceeding instituted by the PUCO and its Staff where it also issued a show cause order directed at Verde. And, even if it was appropriate for OCC to shoulder the burden of proof (which it was not), the PUCO erred by making numerous evidentiary and procedural rulings that restricted OCC's ability to prove the violations of the customer complaints.

In sum, the Settlement should have protected consumers. It did not. The PUCO's Order fails Ohio's consumers. The PUCO's Order approving the Settlement without modification to protect Ohioans from Verde's misdeeds is unlawful and unreasonable. The PUCO should grant rehearing to fully address Verde's unconscionable conduct and provide consumer protections for customers that is missing in the Settlement.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Application for Rehearing was served via electronic transmission to the persons listed below on this 27<sup>th</sup> day of March 2020.

/s/ Angela D. O'Brien  
Angela D. O'Brien

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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