**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**MEMORANDUM CONTRA VERDE’S MOTION FOR AN EXTENSION OF TIME TO RESPOND TO OCC’S CASE PREPARATION DISCOVERY**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

# INTRODUCTION

Verde Energy is an energy marketer that the PUCO Staff found to be “unfit” to serve Ohio consumers.[[1]](#footnote-2) Verde has ripped off customers by charging unconscionable rates without providing proper notice as required by Ohio law,[[2]](#footnote-3) deceived consumers by spoofing its Caller ID to pretend the IRS or AEP was calling,[[3]](#footnote-4) slammed (stole) consumers from other marketers,[[4]](#footnote-5) and misled customers through the harassing use of “robo-calling”,[[5]](#footnote-6) among other bad acts.[[6]](#footnote-7) Now Verde wants the PUCO to thwart the state voice of those customers (the Ohio Consumers’ Counsel) from preparing a case against it – regarding Verde’s late-filed application to renew its

operating certificate. Showing its acumen for anti-consumer tactics, Verde has refused to answer OCC’s requests for information (discovery). Instead, Verde has asked the PUCO to indefinitely extend the timeline for Verde to respond to OCC’s requests – until 14 days after the PUCO rules on OCC’s motion to intervene. Verde seeks this ruling despite acknowledging the PUCO rule that says discovery starts when a motion to intervene is filed, not when it’s ruled upon.[[7]](#footnote-8)

Through its application (that missed the PUCO’s deadline), Verde wants the PUCO to renew its certificate to market natural gas to Ohioans. And Verde wants to extend its service to Dayton-area consumers into the territory of Vectren Energy Delivery of Ohio.

Verde’s unilateral refusal to respond to OCC’s discovery is patently violative of its responsibility, under the Ohio Administrative Code, to respond to OCC’s discovery now. In this regard, Verde’s contempt for the PUCO’s rules has been well documented by the PUCO Staff.[[8]](#footnote-9) Verde’s way of doing “business” should not be tolerated, whether in its rip-offs of Ohioans or in case procedure.

The PUCO should deny Verde’s Motion and order it to respond to OCC’s outstanding discovery within three calendar days of a ruling. And the PUCO should order Verde to respond to OCC’s future discovery within ten calendar days.

# ARGUMENT

## **Ohio law and PUCO rules allow movants to intervene (which is OCC’s status to date) to serve discovery before intervention is ruled upon. The PUCO should deny Verde’s motion to thwart OCC’s discovery for consumer protection.**

## This proceeding commenced with the filing of Verde’s Renewal Application on November 7, 2019 (which missed the PUCO’s deadline by a day). On November 22, 2019, OCC filed a Motion to Intervene in this proceeding. Seven days later OCC served its case preparation discovery on Verde (November 29, 2019). Under the PUCO’s rules Verde’s responses to OCC’s discovery would be due 20 days later on December 19, 2019 (a week ago). But instead of following the PUCO rules for discovery, Verde refused to respond to OCC’s discovery. On the day discovery responses were due to OCC (December 19, 2019), Verde filed a motion seeking an indefinite extension of time to respond to OCC’s discovery until 14 days after the PUCO grants OCC’s motion to intervene. Verde’s tactics to avoid responding to OCC’s discovery should not be tolerated by the PUCO.

Under Ohio Adm. Code 4901-1-16(H), OCC is expressly permitted to conduct discovery on Verde while OCC’s Motion to Intervene is pending.[[9]](#footnote-10) Verde’s motion to delay responding to OCC until 14 days after the PUCO rules on OCC’s motion to intervene contradicts the PUCO’s rules of practice and undermines the right to ample discovery that all parties are granted under Ohio law.

R.C. 4903.082 provides that “*all parties* and intervenors shall be granted ample rights of discovery.” (emphasis added). In addition, Ohio Adm. Code 4901-1-16(B) provides that “*any party* to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” (emphasis added). Ohio Adm. Code 4901-1-16(H) provides that a movant to intervene (such as OCC) is considered a party for purposes of conducting discovery. Ohio Adm. Code 4901-1-17(A) states that “*discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible*.” (emphasis added).

It should not be lost on the PUCO that Verde’s arguments in this proceeding are disingenuous. The tactic of Verde’s attempt at delaying OCC’s discovery is exposed by recalling that Verde repeatedly complained during the PUCO’s investigation of Verde that OCC was not diligent in pursuing its discovery.[[10]](#footnote-11) That argument suited Verde’s purposes in the investigation case. Now Verde’s purpose is to put the brakes on discovery. The PUCO should see through Verde’s tactic and not allow it.

By Verde’s own admission,[[11]](#footnote-12) and the express terms of the PUCO’s rules,[[12]](#footnote-13) OCC is a party to this proceeding notwithstanding OCC’s pending Motion to Intervene. OCC’s discovery to Verde relates entirely to Verde’s Renewal Application and thus, is relevant to the subject matter of this proceeding. Verde does not argue otherwise in its Motion.

The PUCO should deny Verde’s Motion and order it to respond to OCC’s outstanding discovery within three calendar days of a ruling. And the PUCO should order Verde to respond to OCC’s future discovery within ten calendar days.

## Verde’s Motion for Extension should be rejected by the PUCO because it lacks good cause and would thwart, under law and rule, OCC’s discovery for consumer protection.

The PUCO’s rules allow the Attorney Examiner to “shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party for good cause shown.”[[13]](#footnote-14) Verde claims that “good cause” exists in this case to grant its request to respond to OCC’s discovery within 14 days of a PUCO order granting OCC’s Motion to Intervene.[[14]](#footnote-15) Verde is wrong.

Verde asserts that good cause exists for its proposed extension because OCC “may lose standing” to conduct discovery and that Verde’s responses to discovery would become “moot” if OCC’s Motion to Intervene is denied.[[15]](#footnote-16) But that is not a basis for granting Verde’s Motion and delaying the expeditious discovery process in this case.[[16]](#footnote-17)

In the *Complaint of the Office of the Ohio Consumers’ Counsel and Communities United for Action v. Duke Energy Ohio, Inc.*, Duke Energy requested through a motion for protective order that the PUCO stay discovery pending the resolution of its motion dismiss.[[17]](#footnote-18) The PUCO later noted that “**there is no basis in our rules for a party to stymie discovery while a motion to dismiss is under consideration.**”[[18]](#footnote-19) In this case, Ohio Adm. Code 4901-1-16(H) *expressly permits* parties to conduct discovery while their Motions to Intervene are pending. Accordingly, there is no basis for Verde’s claim that good cause exists to delay discovery simply because OCC’s Motion to Intervene is pending. Verde wrongly wants to nullify the PUCO’s rule.

Verde further asserts that good cause exists to delay discovery because OCC is “attempting to re-litigate factual and legal issues” in the Verde Investigation case.[[19]](#footnote-20) For the reasons explained in OCC’s Reply[[20]](#footnote-21) to Verde’s opposition to OCC’s Motion to Intervene, the PUCO should reject that argument as well. In fact, OCC is participating in this separate case where Verde is seeking to renew (and expand) its certificate, and where OCC has the right to be heard for consumers that the PUCO should deny the certificate. In addition, OCC’s first set of discovery to Verde relates to Verde’s Renewal Application and Verde’s request to extend its service to new customers in Vectren’s service territory. OCC’s discovery is therefore relevant to this proceeding.

The PUCO should deny Verde’s Motion and order it to respond to OCC’s outstanding discovery within three calendar days of a ruling. And the PUCO should order Verde to respond to OCC’s future discovery within ten calendar days.

1. **Granting Verde’s Motion would prejudice OCC and the natural gas consumers that OCC represents (and that Verde seeks authority to serve).**

Verde claims that the PUCO should grant its Motion because “OCC will not be prejudiced by a short delay.”[[21]](#footnote-22) Verde’s arguments should be rejected. Contrary to Verde’s claims, granting Verde’s Motion would prejudice OCC in reviewing this matter and if necessary, preparing a case against Verde to protect customers.

The delay that Verde seeks in responding to OCC’s discovery could be anything but “short.” Verde’s Motion is really for an indefinite delay in OCC’s investigation of Verde’s application. There is no immediate timeline for the PUCO to rule on OCC’s intervention, which Verde would set as the initiating event for conducting discovery. Sometimes the PUCO does not even address interventions until hearing or in final orders,[[22]](#footnote-23) which under Verde’s Motion would eliminate OCC’s discovery rights. Moreover, Verde’s style of answering discovery could likely result in the need to file a motion to compel, meaning the delay Verde seeks can be compounded. For these reasons, Verde is wrong when it claims that “OCC faces no prejudice from an extension.”[[23]](#footnote-24) OCC is being prejudiced right now with Verde’s refusal to answer discovery. The PUCO expects, under Ohio Adm. Code 4901-1-17(A), that discovery “should be completed as expeditiously as possible.”

Finally, Verde claims that an extension is warranted because Verde would have to expend time and resources to respond.[[24]](#footnote-25) That is not a legitimate reason to grant Verde’s Motion. Expending such time and resources to address consumer issues is the obligation of PUCO certificate holders, especially bad ones like Verde with their terrible history of consumer rip-offs.

In addition, OCC questions the veracity of Verde’s claim that it is somehow burdened by OCC’s discovery requests. OCC’s discovery asks for information that Verde should already have available as a result of preparing the Renewal Application. For example, it should not be a “serious undertaking” for Verde to provide OCC with data responses and communications with the PUCO Staff. It should not be burdensome to provide OCC with the confidential exhibits to the Renewal Application. OCC has provided Verde with an executed Protective Agreement to protect Verde’s confidential information. It should not be difficult for Verde to answer basic questions regarding how it plans to modify its business practices to bring them into compliance with Ohio laws and PUCO rules.

Verde’s assertion that OCC’s discovery requires the extension that Verde seeks has no merit. The PUCO should deny Verde’s Motion and order it to respond to OCC’s outstanding discovery within three calendar days of a ruling. And the PUCO should order Verde to respond to OCC’s future discovery within ten calendar days.

1. **CONCLUSION**

Ohio law, the PUCO’s rules, and precedent of the Supreme Court of Ohio permit OCC to intervene in this case and to conduct discovery (prior to its intervention being granted) in order to protect the consumers that Verde seeks PUCO authority to serve. The PUCO’s rules support the expeditious completion of discovery, and permit OCC to conduct discovery while its Motion to Intervene is being considered by the PUCO.

The PUCO should deny Verde’s Motion and order it to respond to OCC’s outstanding discovery within three calendar days of a ruling. And the PUCO should order Verde to respond to OCC’s future discovery within ten calendar days.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra Verde’s Motion for an Extension of Time to Respond to OCC’s Case Preparation Discovery by the Office of the Ohio Consumers’ Counselwas served on the persons stated below via electronic transmission, this 26th day of December 2019.

*/s/* *Angela D. O’Brien*

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1. *In the Matter of the Commission’s Investigation into Verde Energy USA Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-0958-GE-COI (“Verde Investigation Case”), May 29, 2019 Staff Report (“Staff Report”) at 27. [↑](#footnote-ref-2)
2. *See e.g.* Verde Investigation Case, OCC Ex. 17. [↑](#footnote-ref-3)
3. Verde Investigation Case, OCC Ex. 9 (12/21/18 e-mail from PUCO Staff member Nedra Ramsey to Verde), and OCC Ex. 11 and 12 (e-mails from Duke employee to PUCO Staff member Barbara Bossart). [↑](#footnote-ref-4)
4. Staff Report, at 16-17; Verde Investigation Case, OCC Ex. 7 PUCO Case Report 00239582 (12/6/18 e-mail from Verde representative Edwin Quinonez to PUCO Staff stating that “Verde is unable to locate the signature form that was completed for this enrollment.”). [↑](#footnote-ref-5)
5. Staff Report, at 26. [↑](#footnote-ref-6)
6. *See e.g.* Staff Report, at 26-27. [↑](#footnote-ref-7)
7. *See* Verde Memorandum, at 3; Ohio Adm. Code 4901-1-16(H). [↑](#footnote-ref-8)
8. Staff Report, at 27 (“Staff’s investigation has shown that Verde has failed to meaningfully modify its business practices to bring itself into compliance with the Commission’s rules. Staff has referred hundreds of customer complaints to Verde since July 2018. Yet to Staff’s knowledge, Verde has failed to implement any meaningful corrective or remedial action.”). [↑](#footnote-ref-9)
9. *See In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of the Cincinnati Gas & Electric Company*, Case No. 05-732-EL-MER (December. 7, 2005), at ¶ 14 (PUCO found that “Rule 4901-1-16(H), O.A.C., would allow OCC to commence discovery even though its motion for intervention has not been granted.”). [↑](#footnote-ref-10)
10. *See e.g.* Verde Investigation Case, Verde Motion for Protective Order and supporting Memorandum (September. 19, 2019), at 2-4 (Verde argued that OCC “sat on its hands” and that OCC’s discovery “should not be permitted” because in Verde’s view it was “untimely” and conducted at “the eleventh hour.”); *See also* Verde Investigation Case, Verde Motion for Protective Order and supporting Memorandum (Second) (September 30, 2019), at 1, 6 (Verde argued that OCC’s discovery was “too late” and that OCC purportedly “sat on the sidelines for months” without conducting discovery.). [↑](#footnote-ref-11)
11. Verde Memorandum, at 3. [↑](#footnote-ref-12)
12. Ohio Adm. Code 4901-1-16(H). [↑](#footnote-ref-13)
13. Ohio Adm. Code 4901-1-17(G). [↑](#footnote-ref-14)
14. Verde Memorandum in Support, at 2-3. [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. *See In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 15-1739-EL-RDR, Finding and Order (July 17, 2019), ¶¶ 6, 8-9, 33-35 (OCC filed a Motion to Intervene on December 17, 2015 (which was opposed by FirstEnergy), OCC’s Motion to Compel discovery was granted on November 30, 2016, and OCC’s Motion to Intervene was granted on July 17, 2019). [↑](#footnote-ref-17)
17. *In the Matter of the Complaint of the Office of the Ohio Consumers’ Counsel and Communities United for Action v. Duke Energy Ohio, Inc.*, Case No. 15-1588-GE-CSS, Entry (October 11, 2017). [↑](#footnote-ref-18)
18. *Id.* at ¶ 13, note 2 (emphasis added). [↑](#footnote-ref-19)
19. Verde Memorandum, at 3-4. [↑](#footnote-ref-20)
20. *See* OCC Reply to Verde’s Memo Contra OCC’s Motion to Intervene (December 13, 2019). [↑](#footnote-ref-21)
21. Verde Memorandum, at 4. [↑](#footnote-ref-22)
22. *See supra* note 16; *see also e.g. In the Matter of Joint Application of Direct Energy Services, LLC, et al. for a Waiver of a Provision of Rule 4901:1-29-06(E)(1) of the Ohio Administrative Code*, Case No. 17-2358-GA-WVR, Entry (November 14, 2018) (OCC filed a Motion to Intervene on December 1, 2017, which was granted on November 14, 2018 after OCC’s full participation in the proceeding.); and *In the Matter of the Application of New Communications Online and Long Distance, Inc. for Authority to Provide Competitive Telecommunications Services in Ohio*, Case No. 09-455-TP-ACE, Finding and Order (February 24, 2010) (OCC filed a Motion to Intervene on June 15, 2009, which was later granted over opposition on February 24, 2010.). [↑](#footnote-ref-23)
23. Verde Memorandum, at 5. [↑](#footnote-ref-24)
24. Verde Memorandum, at 4. [↑](#footnote-ref-25)