**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 Electric Supplier.In the Matter of the Renewal Application of Verde Energy USA Ohio, LLC for Certification as a Retail Natural Gas Marketer. | ))))))) | Case No. 11-5886-EL-CRSCase No. 13-2164-GA-CRS |

**MEMORANDUM CONTRA VERDE’S MOTION FOR GUIDANCE FROM THE PUCO REGARDING H.B. 197 OR TO EXTEND THE TIME PERIOD TO RESPOND TO OCC’S THIRD SET OF DISCOVERY REQUESTS**

**BY**

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April 7, 2020 *Special Counsel for the Office of the Ohio Consumers’ Counsel*

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In its latest attempt[[1]](#footnote-2) to thwart discovery (after it contradictorily complained in the investigation case that OCC was not timely with discovery), Verde filed a motion[[2]](#footnote-3) to use the coronavirus emergency as a basis for seeking a four-month extension (until July 31, 2020) to respond to OCC’s third set of discovery. It is ironic that a threat to the public like Verde would seek to use the recently passed and well-intentioned House Bill 197 to delay responding to discovery about its misdeeds against the public.

Alternatively, Verde requests an additional three-week extension (on top of the six-day extension that OCC and Verde already agreed to) to respond to OCC’s third set of discovery, which would make Verde’s responses due April 22, 2020. It is all the more unfortunate for consumers that Verde’s legal maneuver, in reality, also would accomplish a

delay in an OCC motion to compel answers from Verde if and when Verde’s initial answers are non-responsive. The Public Utilities Commission of Ohio (“PUCO”) should deny Verde’s Motion.

First, HB 197 does not toll the PUCO’s discovery deadlines that are established under PUCO rules. Instead HB 197 tolls statutory deadlines. Second, even if it does, the PUCO’s March 24, 2020 Entry in these cases reinstated the current discovery deadlines, and thus it controls. Third, the PUCO should not grant Verde’s request for a three-week extension of the deadline to respond to OCC’s third set of discovery. Finally, if the PUCO grants any extension of Verde’s response deadline, the PUCO should correspondingly revise the deadline for filing initial comments as it would be unfair to require OCC to file its comments before receiving responses to its discovery, which are currently due on May 2, 2020.

# I. ARGUMENT

A. HB 197 does not toll the deadline for Verde to respond to OCC’s discovery requests.

In its Motion, Verde argues that section 22(A)(7) of HB 197 tolls until July 31, 2020, the deadline for Verde to respond to OCC’s third discovery set.[[3]](#footnote-4) Verde misinterprets HB 197. The law does not apply to the PUCO’s discovery deadlines, which are set by rule and not statutes.

Verde relies on HB 197, Section 22(A)(7). Section 22(A)(7) states that “[t]he time within which discovery or any aspect of discovery must be completed” shall be tolled until the earlier of July 30, 2020 or the end of the state of emergency. Read in isolation, Verde

concludes that the PUCO’s 20-day period set for responding to discovery, set by the PUCO’s rules, is tolled. But Verde’s simplistic view is out of sync with the intent of HB 197 and the catch all provision of Section 22 (subsection (A) (10)), which clarifies that subsection (A)(7) applies to discovery deadlines that are set by statute and not rule.[[4]](#footnote-5)

Tolling the discovery deadline set by PUCO rules, as Verde requests, does not further the objective of the law—to decrease the volume of work handled by state agencies.[[5]](#footnote-6) Tolling the discovery deadline would only affect Verde’s workload, not the workload of a state agency.

Section 22(A)(7) of HB 197 should not be interpreted to apply to the PUCO rules, which set a 20-day response deadline for discovery. The PUCO’s 20-day discovery response deadline is found in the Ohio Administrative Code (4901-1-19(A), 4901-1-20(C)). There is not a statutory discovery deadline for this proceeding involving Verde. This distinction is important because Section 22(A)(7), when read in context, only applies to statutory deadlines, not deadlines found in the Ohio Administrative Code.

The catch-all provision in Section 22(A)(10) specifies that the law tolls “[a]ny *other* criminal, civil, or administrative time limitation or deadline under the Revised Code.” (emphasis added).[[6]](#footnote-7)

Two parts of this section are critical. First, Section 22(A)(10) refers only to limitations or deadlines “under the Revised Code.” The Governor, in explaining his veto of a word in this section of the law explained that Section 22(A)(10) “is intended to apply only to criminal statutes of limitations, civil statutes of limitations, administrative statutes of limitations and other statutorily created time limitations in court cases. “[[7]](#footnote-8) In other words, the catch-all does not apply to Administrative Code deadlines.

Further, this section refers not just to deadlines under the Revised Code but “any *other* ... deadline under the Revised Code.” The only way to give effect to the word “other” is to interpret the law to mean that subsection (a)(7) (and the other subsections (A)(2) through (9)) refer only to Revised Code deadlines and not Administrative Code deadlines. Otherwise, use of the word “other” is gratuitous, and statutes cannot be read to exclude words.[[8]](#footnote-9) Rather each word in a statute is to be given effect.[[9]](#footnote-10)

Likewise, when a catch-all provision (like subsection(A)(10)) includes the word “other,” the specifically enumerated provisions preceding it should be interpreted consistent with the catch-all. In *Carey Electric Co. v. ABF Freight System, Inc.*, for example, the relevant statute included a list of specifically enumerated methods by which delivery could be made, followed by a catch all that allowed deliver by “any other method which includes a written evidence of receipt.”[[10]](#footnote-11) The court found that the specifically enumerated sections must be interpreted consistent with the catch-all, namely that they must include written evidence of receipt.[[11]](#footnote-12) The same applies here with respect to HB 197: Sections 22(A)(2) through (9) must be interpreted as applying only to Revised Code deadlines, given that the catch-all in section (10) applies only to any “other ... time limitation or deadline under the Revised Code.”

When read in context, HB 197, Section 22(A)(7) does not toll discovery response deadlines under the PUCO’s administrative rules. That section only refers to deadlines found under the Revised Code. Since the discovery deadlines for PUCO proceedings are not set by the Revised Code, the law does not require the deadlines to be tolled as Verde argues.

Indeed, the PUCO recently acted with regard to tardy discovery in a case involving another bad-actor marketer, PALMco Power. Note that the PUCO granted OCC’s motion to compel discovery in an Entry issued on April 6, ten days after HB 197 was signed.[[12]](#footnote-13)

B. The PUCO’s March 24, 2020 Entry in this case supersedes any tolling under HB 197, so HB 197 does not toll Verde’s deadline to respond to OCC’s third discovery set.

Even if Verde is correct that Section 22(A)(7) of HB 197 broadly tolls the PUCO’s discovery response deadlines (which it is not), the PUCO’s March 24, 2020 Entry in this case supersedes any such tolling.

In the March 24 Entry, the PUCO established a new procedural schedule for this case. Under the new procedural schedule, comments are due May 2, reply comments are due May 17, Staff’s review is due June 14, and, most importantly, parties are allowed to continue serving discovery requests through June 21, 2020.[[13]](#footnote-14) If parties are required to file comments by May 2, and if parties are allowed to continue serving discovery through June 21, the Entry contemplates the continuation of discovery right now, including parties responding to discovery requests.

The March 24 Entry trumps any tolling that might occur under HB 197. In a recent Supreme Court of Ohio Opinion, the Court interpreted the tolling language found in HB 197.[[14]](#footnote-15) In that Opinion, the Court concluded that courts, hearing panels, boards, and commissions may still require parties to respond to deadlines by issuing an order:

Notwithstanding the tolling of time requirements imposed by this order, the Court, local court, hearing panel, board, *or commission*, as applicable, may still require filing in accordance with existing rules and issue orders setting a specific schedule in a case or requiring parties to file documents by a specific due date if pertaining to a situation that requires immediate attention. A *specific order in a case issued on or after March 9, 2020 shall supersede the tolling provisions of this order*, unless otherwise noted in that specific order.[[15]](#footnote-16)

Under the guidance of this Supreme Court Opinion, the PUCO should similarly rule that it has the authority to control its dockets[[16]](#footnote-17) notwithstanding HB 197 and that the March 24 Entry is controlling. Because the March 24 Entry was issued after March 9, and because it sets May and June deadlines for comments, reply comments, the PUCO Staff’s review, and discovery, that Entry superseded any tolling that might otherwise occur under HB 197.

C. Verde waived its right to any HB 197 tolling by agreeing to respond to OCC’s third set by April 1.

Even if HB 197 tolled the deadline for Verde to respond to OCC’s discovery until July 30, 2020 (which it does not), Verde waived its right to wait until July 30 by *agreeing* to provide discovery responses to OCC’s third set by April 1, 2020. Ohio courts have consistently found that a party is entitled to waive its statutory rights. As the Supreme Court of Ohio has concluded, “Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional.”[[17]](#footnote-18)

As Verde noted in its Motion, “under an agreement between OCC and Verde Energy, responses to [OCC’s third set of discovery] requests are due April 1, 2020.”[[18]](#footnote-19) That agreement was reached after the March 27, 2020 signing of HB 197. On March 24, 2020, OCC sent Verde an offer to extend the discovery deadline from March 26 to April 1. Verde did not immediately accept OCC’s offer of an extension. Instead, Verde’s next communication with OCC regarding the discovery deadline occurred on March 30 (three days after HB 197 was signed). Counsel for OCC and Verde engaged in several telephone communications on March 31 and April 1, after which Verde filed its April 1, 2020 Motion, wherein it referred to the aforementioned agreement between OCC and Verde that Verde would respond to discovery requests by April 1. Accordingly, following the signing of HB 197, Verde explicitly waived its right to any tolling of the discovery deadline to July 30, 2020. Verde cannot now, after agreeing to an April 1 deadline, undo its waiver by claiming that the statute tolls that deadline.

D. The PUCO should reject Verde’s request for three additional weeks to respond to discovery because Verde already agreed to provide those responses by April 1.

Verde’s request for a three-week extension, as an alternative to tolling the deadline to July 30, 2020, makes no sense in light of Verde’s recent agreement with OCC. In support of its request for a three-week extension, Verde cites the well-known challenges that most businesses currently face as a result of the coronavirus.[[19]](#footnote-20) OCC certainly understands that few if any businesses are currently operating under a business-as-usual approach. But Verde’s reliance on COVID-19 issues for a *three-week* extension is entirely inconsistent with Verde’s own conduct in these cases.

On March 22, 2020, counsel for Verde contacted OCC to ask for an 11-day extension of the time to respond to OCC’s third discovery set. Under Verde’s own proposed extension, therefore, it would have been required to respond to OCC’s third set by April 6, 2020. As of March 22, the declared emergency and its impact was readily apparent: Ohio’s state of emergency had been in place for nearly two weeks and the Governor had just issued his stay-at-home order.[[20]](#footnote-21) In other words, at that time, Verde was well aware of any difficulties it might have in responding to OCC’s discovery requests, and Verde was willing to commit to providing discovery responses by April 6, 2020. Subsequently, as explained above, OCC and Verde negotiated a shorter six-day extension that requires Verde to provide responses by April 1, 2020.

Considering this history, Verde’s request for an additional three weeks to April 22, 2020 is patently unreasonable. Verde itself proposed that it provide responses to OCC’s third set by April 6, 2020, and Verde subsequently agreed to provide them by April 1, 2020. Then, almost immediately after agreeing to the April 1st deadline, Verde filed its Motion, seeking three more weeks on top of the extra six days that OCC and Verde agreed to. If the PUCO grants Verde’s request for three more weeks, Verde will have had 47 days to respond to OCC’s third set of discovery. Verde has not established that it requires 47 days to respond to OCC’s third set of discovery.

Further, Verde’s proposal for three additional weeks is inherently unfair under the current procedural schedule. OCC agreed to extend the deadline for responses to April 1st so that OCC would have sufficient time to review the responses and potentially send follow-up discovery requests in advance of the May 2nd comment deadline in this case. Under Verde’s proposed three-week extension, in contrast, OCC would receive responses just 10 days before comments are due. This will not give OCC any opportunity for further discovery. And if Verde’s responses are incomplete, as they very well could be, OCC will have very limited time to work out any resolution with Verde before filing initial comments.

The PUCO should reject Verde’s attempts to avoid the bargain that it struck with OCC, requiring Verde to provide discovery responses by April 1, 2020.

E. The procedural schedule must also be modified to avoid unfairly prejudicing OCC’s right to develop a record in support of its comments.

Certainly, if the PUCO finds that Verde’s responses to OCC’s third set are not due until July 30, 2020 (which it shouldn’t find), OCC and other parties cannot be required to still file comments on May 2, 2020 and reply comments on May 17, 2020. Likewise, it would be unjust and unreasonable to maintain the current discovery cutoff of June 21, 2020 because OCC would then have no opportunity for follow-up discovery based on any responses Verde might provide to OCC’s third set of discovery.

Even if the PUCO rejects Verde’s motion in its entirety, OCC has already been prejudiced by Verde’s failure to provide any responses to OCC’s third set of discovery. Comments are currently due May 2, 2020. If OCC does not receive complete responses to its third set immediately, it will have no opportunity to serve any follow-up discovery. And the longer it takes for Verde to provide full responses, the more and more prejudice OCC suffers as that reduces the time that OCC has to review the discovery and incorporate what OCC learns into its comments. Verde states in its Motion that it “plans to produce responses to interrogatories and responsive documents on a rolling basis, as soon as practicable after responses and documents are verified.”[[21]](#footnote-22) As of the date of this filing (April 7, 2020), Verde has had OCC’s third discovery set for 32days and has yet to provide a single document or a single response to an interrogatory.

The PUCO should deny outright Verde’s requests for additional delay in responding to discovery. But if the PUCO doesn’t do that, then OCC respectfully requests that a status conference be held to address any modifications to the procedural schedule. But again, this case about whether Verde ought to be allowed the privilege of providing energy to Ohioans (it shouldn’t) should move forward.

# II. CONCLUSION

HB 197 does not toll Verde’s deadline to respond to OCC’s third set of discovery. Even if it does (which it doesn’t), the PUCO superseded that tolling with its procedural Entry in this case. Moreover, even assuming HB 197 applies, Verde waived its right to tolling by agreeing to provide responses by April 1, 2020. Accordingly, the PUCO should deny Verde’s motion. Alternatively, the PUCO should establish a new procedural schedule that reasonably protects OCC’s right under law and rule to receive discovery responses and develop its case in advance of any deadline for filing comments in this case. We continue to look forward to a time when Verde’s certificate is denied, and Ohio government need no longer divert its time from other important public services instead of attending to Verde’s latest self-interested gambit against the interest of Ohioans.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra Verde’s Motion For Guidance From The Commission Regarding H.B. 197 Or To Extend The Time Period To Respond To OCC’s Third Set Of Discovery Requests by the Office of the Ohio Consumers’ Counselwas served on the persons stated below via electronic transmission, this 7th day of April 2020.

 */s/* *Christopher Healey*

 Christopher Healey

 Assistant Consumers’ Counsel

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

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1. Verde previously refused to provide responses to OCC’s discovery requests in these cases based on the unsupportable theory that it can refuse to provide responses until after OCC’s motion to intervene is granted. *See* Verde Energy USA Ohio, LLC’s Motion for an Extension of Time to Respond to the Office of the Ohio Consumers’ Counsel’s November 22, 2019 Discovery Requests (Dec. 19, 2019). The PUCO rejected this argument, ordering Verde to respond to OCC’s requests within ten days of the Entry. *See* Entry ¶ 13 (Mar. 3, 2020). [↑](#footnote-ref-2)
2. Verde Energy USA Ohio, LLC’s Motion for Guidance from the Commission Regarding H.B. 197, or to Extend the Time Period to Respond to OCC’s Third Set of Discovery Requests. [↑](#footnote-ref-3)
3. Motion at 1. [↑](#footnote-ref-4)
4. *See Industrial Energy Users-Ohio v. Ohio Power Co.*, 140 Ohio St.3d 509, 516 (2014) (rejecting party’s interpretation of statute because it was taken out of context, and “context matters”). [↑](#footnote-ref-5)
5. *See* <https://www.legislature.ohio.gov/download?key=13596&format=pdf> (Ohio Legislative Service Commission interpreting section 22). [↑](#footnote-ref-6)
6. *See also* <https://www.legislature.ohio.gov/download?key=13596&format=pdf> (Ohio Legislative Service Commission interpreting section 22 as being intended to decrease the volume of work handled by state agencies, which would not apply to Verde’s duty to respond to discovery, given that it is not a state agency). [↑](#footnote-ref-7)
7. <https://www.legislature.ohio.gov/Assets/LegislationDocuments/133/VetoMessageAmSubHB197.pdf>. [↑](#footnote-ref-8)
8. *See State v. Hughes*, 86 Ohio St.3d 424, 427 (1999) (“In construing a statute, we may not add or delete words.”). [↑](#footnote-ref-9)
9. *Id.* [↑](#footnote-ref-10)
10. 1999 Ohio App. LEXIS 3704, at \*21-22 (Ohio Ct. App. Aug. 13, 1999). [↑](#footnote-ref-11)
11. *Id.* [↑](#footnote-ref-12)
12. *In re Commission’s Investigation into PALMco Power OH, LLC*, Case No. 19-2153-GE-COI, Entry (Apr. 6, 2020). [↑](#footnote-ref-13)
13. Entry ¶ 10 (Mar. 24, 2020). [↑](#footnote-ref-14)
14. *In re Tolling of Time Requirements*, 2020-Ohio-1166 (Mar. 27, 2020). [↑](#footnote-ref-15)
15. *Id.* ¶ G. [↑](#footnote-ref-16)
16. *In re Application of Time Warner Communications*, Case No. 94-1695-TP-ACE, Opinion & Order (Mar. 9, 1995) (“Of course, the Commission has the inherent authority to control its own dockets...”). [↑](#footnote-ref-17)
17. *Glidden Co. v. Lumbermens Mut. Ca. Co.*, 112 Ohio St.3d 470, 478 (2006). *See also Pollard v. Elber*, 2018-Ohio-4538, ¶ 35 (Ohio Ct. App. 2018) (“Generally speaking, all personal rights and privileges—whether contractual, statutory, or constitutional—are subject to waiver.”); *State v. Lucas*, 1986 Ohio App. LEXIS 6147, at \*6 (Mar. 20, 1986) (“a defendant may waive his statutory right under R.C. 2945.71 to a speedy trial”); *State v. Gonzalez*, 2009-Ohio-3236, ¶ 12 (Ohio Ct. App. 2009) (“A waiver is a voluntary, intentional relinquishment of a known right.”). [↑](#footnote-ref-18)
18. Motion at 2. [↑](#footnote-ref-19)
19. Motion at 7-8. [↑](#footnote-ref-20)
20. *See* <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/signs-emergency-order-regarding-coronavirus-response>; <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/ohio-issues-stay-at-home-order-and-new-restrictions-placed-on-day-cares-for-children>. [↑](#footnote-ref-21)
21. Motion at 6. [↑](#footnote-ref-22)