**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 |

**MEMORANDUM CONTRA VERDE’S MOTION FOR A SEVEN-DAY EXTENSION FOR RESPONDING TO OCC’S SECOND SET OF DISCOVERY**

**BY**

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

1. **INTRODUCTION**

This case involves alleged misleading and deceptive practices by Verde Energy USA Ohio, LLC (“Verde”) in its marketing of electricity and natural gas to Ohioans. The allegations were made by the Staff of the Public Utilities Commission of Ohio (“PUCO”).[[1]](#footnote-2) Verde is accused of at least 231 instances of false, misleading, and deceptive marketing practices in telephonic marketing of utility service to residential consumers between October 1, 2018 and April 12, 2019.[[2]](#footnote-3) This represents more than half of the customer contacts with the PUCO concerning Verde and 18% of the complaints against energy marketers during that timeframe.[[3]](#footnote-4) Per the conclusions in the Staff Report, Verde’s practices violate not only Ohio law and PUCO rules but also federal law and rules of the Federal Communications Commission.[[4]](#footnote-5) The PUCO Staff recommended that the PUCO consider suspending or rescinding Verde’s certificates to market utility service in Ohio.[[5]](#footnote-6)

On May 6, 2019, the PUCO issued an Entry that amended a previously ordered procedural schedule (“May 6 Entry”). The entry extended the testimony deadlines and rescheduled the evidentiary hearing. Importantly, the Entry also shortened the time for discovery responses to seven days,[[6]](#footnote-7) despite a request by Verde to stay discovery so that pending negotiations could continue. The Entry also expedited the pleading cycle by ruling that the filing of a memorandum contra a motion would be in five business days, with no reply to a memorandum contra allowed.[[7]](#footnote-8) The procedural schedule was further modified by PUCO Entries dated May 16, 2019, May 30, 2019, and July 9, 2019. Because of settlement talks, the PUCO suspended the procedural schedule by Entry dated August 5, 2019. None of these Entries however, changed the expedited discovery process that the PUCO established in its May 6, 2019 Entry.

The Office of the Ohio Consumers’ Counsel (“OCC”) served discovery on Verde on August 22, 2019, which makes responses due on August 29th under the May 6 Entry. The next day Verde contacted OCC’s counsel and asked for a seven-day extension of the due date for responding to OCC’s discovery. OCC’s counsel replied that it would agree to a two-day extension of the deadline. Under the PUCO’s computation of time rules,[[8]](#footnote-9) a two-day extension would actually be a five-day extension, to September 2nd, because of the Labor Day holiday. Verde subsequently declined this offer and filed a motion with the PUCO seeking a seven-day extension of the deadline for filing the discovery responses.

Verde also seeks an expedited ruling on its motion.[[9]](#footnote-10) In such cases, an immediate ruling may be issued without the filing of memoranda only if the motion requests an extension of time to file pleadings or other papers of five days or less or all parties consent to an immediate ruling without the filing of memoranda.[[10]](#footnote-11) Verde’s request for a seven-day extension does not qualify for a PUCO ruling without the filing of memoranda.

Verde has not shown good cause to extend the deadline to respond to OCC’s August 22nd discovery and will be prejudicial to OCC. The PUCO should deny Verde’s motion.

**II. STANDARD OF REVIEW**

Under Ohio Adm. Code 4901-1-13, the PUCO may grant extensions of time to file pleadings or other papers upon motion of any party for good cause shown. As discussed below, the motion does not provide good cause and the PUCO should deny the motion.

1. **ARGUMENT**
2. **Verde has not shown good cause for an extension of the seven-day deadline for responding to discovery in this case.**

Verde asserts that there is good cause to grant its motion because of the scope of OCC’s discovery.[[11]](#footnote-12) Verde points to the ten interrogatories (with a total of 32 subparts) and 11 requests for production of documents in OCC’s discovery.[[12]](#footnote-13) However, responding to OCC’s discovery should not be burdensome for Verde. Only three of the interrogatories have subparts and they ask questions concerning the number of Verde’s customers in Ohio, the current variable rate Verde charges, and Verde’s corporate structure.[[13]](#footnote-14) This information should be relatively easy for Verde to compile.

Verde also asserts that there is good cause for the seven-day extension to respond to OCC’s discovery because there is no longer a hearing scheduled in this case.[[14]](#footnote-15) That fact does not constitute good cause to grant the extension. The PUCO often quickly moves to hearing once a settlement is filed in a case. For example, in the PALMco case, the settlement was filed on July 31, 2019 and the PUCO scheduled a hearing for September 18, 2019 – about seven weeks after the settlement was filed.[[15]](#footnote-16) Testimony is currently due on September 4, 2019, just five weeks after the settlement was filed.[[16]](#footnote-17) The absence of a current procedural schedule does not constitute good cause for extending the deadline for discovery.

Verde also contends that OCC would not be prejudiced by the extension.[[17]](#footnote-18) That is not true. The information OCC seeks is necessary to develop its position in this case, value settlement proposals, and draft testimony if settlement cannot be reached. The extension would impede OCC’s preparation for all aspects of this case, including but not limited to a hearing.

Further, Verde mischaracterized the May 6 Entry establishing the procedural schedule. Verde gives the impression that the shortened discovery time was necessitated “in light of the time frame for this proceeding.”[[18]](#footnote-19) But Verde misquoted the Entry. The phrase “in light of the time frame for this proceeding” was used to introduce a paragraph discussing the need for amending the response times for motions. The paragraph discussing shortened response times for discovery actually states, in full:

In addition, the attorney examiner finds that, for all discovery requests served after the issuance of this Entry, the response time for discovery shall be shortened to seven calendar days. Unless otherwise agreed to by the parties, discovery requests and replies shall be served by hand delivery, facsimile, or e-mail. An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him/her that a request will be forthcoming.[[19]](#footnote-20)

The Entry doesn’t have the context that Verde claims that it does.

Verde has not shown good cause for the motion as required by the PUCO’s rules and prejudice to OCC will occur. Accordingly, the PUCO should deny the motion.

1. **OCC’s counteroffer to five Verde up to two days extra to respond to the discovery serves nearly the same purpose as Verde’s motion and is reasonable.**

As Verde noted, OCC countered Verde’s seven-day request with an offer of up to two additional days for Verde to respond to the discovery.[[20]](#footnote-21) Under the PUCO’s computation of time rules, a two-day extension provides nearly the same amount of time for Verde to respond to the discovery.

Verde’s discovery responses are currently due on Thursday, August 29th. A two-day extension would move the date to Saturday, August 31st. The PUCO’s rules state that if a deadline falls on a Saturday, Sunday, or legal holiday the deadline becomes the next business day.[[21]](#footnote-22) Monday, September 2nd is a legal holiday (Labor Day), so with a two-day extension the deadline would be Tuesday, September 3rd. Thus, the two-day extension would actually result in a five-day extension.

OCC’s counteroffer of a two-day extension (in reality, a five-day extension) is reasonable. The PUCO should deny Verde’s motion.

1. **CONCLUSION**

Verde has not shown good cause for its motion as required by Ohio Adm. Code 4901-1-13. The PUCO should deny Verde’s motion for a seven-day extension of the deadline for responding to OCC’s discovery.

Respectfully submitted,

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*/s/ Terry L. Etter*

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission, this 28th day of August 2019.

*/s/ Terry L. Etter*

Terry L. Etter

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**SERVICE LIST**

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1. Corrected PUCO Staff Report (May 29, 2019). [↑](#footnote-ref-2)
2. *Id.* at 9. [↑](#footnote-ref-3)
3. *See id.*; Staff Letter (April 16, 2019) at 1. [↑](#footnote-ref-4)
4. *See* 47 U.S.C. §§227(b) and (e); 47 C.F.R. §§64.1200(a) and (b), 64.1604. [↑](#footnote-ref-5)
5. Staff Letter at 2. [↑](#footnote-ref-6)
6. Entry, ¶11. [↑](#footnote-ref-7)
7. *Id.*, ¶9. [↑](#footnote-ref-8)
8. Ohio Adm. Code 4901-1-07(A). [↑](#footnote-ref-9)
9. Motion at 3. [↑](#footnote-ref-10)
10. Ohio Adm. Code 4901-1-12(C). [↑](#footnote-ref-11)
11. Motion at 5. [↑](#footnote-ref-12)
12. *Id.* at 4. [↑](#footnote-ref-13)
13. *See id.*, Exhibit 1 at 10-12. [↑](#footnote-ref-14)
14. *Id.* at 5. [↑](#footnote-ref-15)
15. Case No. 19-957-GE-COI, Entry (August 14, 2019), ¶10. [↑](#footnote-ref-16)
16. *Id.* [↑](#footnote-ref-17)
17. Motion at 5. [↑](#footnote-ref-18)
18. *Id.* at 4 quoting Entry, ¶9. [↑](#footnote-ref-19)
19. Entry, ¶11. [↑](#footnote-ref-20)
20. Motion at 5. [↑](#footnote-ref-21)
21. *See* Ohio Adm. Code 4901-1-07(A). [↑](#footnote-ref-22)