**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-CRS  Case No. 13-2164-GA-CRS |

**REPLY TO VERDE’S MEMO CONTRA OCC’S MOTION TO INTERVENE**

**BY**

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# I. INTRODUCTION

Verde is a rip-off artist that has hurt Ohioans and thus it apparently makes sense in Verde’s fractured reality that OCC, the voice of the Ohio consumers that Verde has harmed, should be denied participation in this case. But four decades of law and rulings about OCC’s standing to represent consumers show that it is vexatious Verde that has nothing to stand on for denying the consumer advocate’s intervention.

Indeed, Verde’s sordid history of bad acts precedes it, reflecting that OCC meets the statutory standards for intervention. The PUCO found that Verde violated PUCO rules to the detriment of consumers at least 17 times in a span of seven months from October1, 2018 to April 12, 2019.[[1]](#footnote-2) Indeed, as the PUCO also found, Verde did not dispute the violations set forth in the PUCO Staff’s report filed in the PUCO’s investigation of Verde.[[2]](#footnote-3) And these are

just the violations that the PUCO Staff listed in its Report and the PUCO conclusively found were proven by a preponderance of the evidence during that limited seven-month period.

The 17 proven violations are not anomalous.[[3]](#footnote-4) They are merely representative of what common sense tells us is a concerted effort by Verde to mislead customers and a failure to reform its pattern of bad behavior. And given the numerous investigations going on in other service territories where Verde does business, that concerted effort appears to be Verde’s business model.[[4]](#footnote-5)

In the PUCO’s investigation of Verde, the PUCO approved a settlement that allowed Verde to continue serving its current customers but could not market to new customers for an 18-month period ending October 30, 2020.[[5]](#footnote-6) Neither the settlement nor the PUCO order approving the settlement addressed what happens after October 30, 2020. The PUCO did not rule that Verde could market to customers after October 30, 2020. The PUCO did not rule that Verde could keep serving its current customers after October 30, 2020. And the PUCO did not rule that Verde’s natural gas and electric certificates would be extended beyond October 30, 2020.

To the contrary, the status of Verde’s ability to continue serving electric and natural gas customers after October 30, 2020 will be decided in the current cases. Verde’s electric certificate was set to expire March 29, 2020.[[6]](#footnote-7) Verde’s natural gas certificate was set to expire December 6, 2019.[[7]](#footnote-8) The PUCO extended those certificates to November 1, 2020 for the limited purpose of allowing Verde to continue serving its current customers, consistent with the approved settlement from the investigation case, during the pendency of these cases.[[8]](#footnote-9)

The Office of the Ohio Consumers’ Counsel (“OCC”) seeks to intervene in these cases to protect customers and provide the consumer perspective on the next steps the PUCO should take to prevent Verde from harming customers again. OCC seeks to participate in the regulatory process on behalf of Ohio’s residential consumers, as OCC has done in countless other cases, year after year, for the past 44 years.

For the second time,[[9]](#footnote-10) however, Verde opposes OCC participation in a case involving Verde’s request to continue serving Ohio consumers. The gist of Verde’s opposition to OCC’s intervention is this: Verde doesn’t like that OCC represents the customers that Verde deceived, doesn’t like that OCC is shedding light on Verde’s behavior by serving relevant discovery, and doesn’t like that OCC publicly calls out Verde for its deceptive behavior. So, Verde’s response is to ask the PUCO to silence the voice of consumers (OCC) by denying them a voice in this regulatory process.

Unfortunately for Verde, our legal and regulatory system allows both sides of the story to be told. Verde gets a chance to say its part. And OCC gets a chance to explain why consumer protection requires Verde to be denied the opportunity—and indeed, it is an opportunity, and not a right—to serve Ohio customers.

The PUCO should grant OCC’s motion to intervene and reject Verde’s self-serving motion to limit the public’s voice in this proceeding.

# II. REPLY

A. The Ohio Consumers’ Counsel is the statutory representative of Ohio’s residential consumers, and no other party represents that interest.

### 1. The PUCO Staff cannot be substituted for OCC as the consumer advocate.

Verde argues that OCC should be denied intervention in this case because “Staff adequately represents the public interest.”[[10]](#footnote-11) This argument is meritless, and it demonstrates Verde’s misinterpretation of relevant statutes, rules, and PUCO precedent.

First, even if we accept Verde’s proposition that the PUCO Staff adequately represents the public interest (which the General Assembly did not accept in creating OCC), that alone does not eliminate OCC’s role as the residential consumer advocate. The interests of consumers and the public interest often intersect, but they are not synonymous. The PUCO’s own settlement standard makes this clear: the second prong of the PUCO’s three-prong test for evaluating settlements is whether a settlement benefits customers *and* the public interest.[[11]](#footnote-12)

Second, the PUCO Staff and OCC are distinct entities, serving distinct purposes. OCC is the statutory representative of more than four million residential consumers throughout the State of Ohio. Ohio law (R.C. 4911.02) provides that OCC is authorized to “participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers.”[[12]](#footnote-13) The PUCO Staff does not *represent* residential consumers, as Verde claims.[[13]](#footnote-14) The PUCO Staff might *consider* the interests of residential consumers when taking a position, but it might also consider numerous other interests, including those of nonresidential customers, utilities, marketers, environmental advocates, , and the public interest more generally.

If, as Verde claims, the PUCO Staff represents OCC’s interests, then they would also represent Verde’s interests, and there would be no need for Verde to participate in these cases either. Surely Verde is not willing to step aside and simply defer to the PUCO Staff when it comes to advocating Verde’s position. Nor should OCC’s consumer advocacy be ignored on account of the PUCO Staff participating in the case.

### 2. The intervention statute does not permit the PUCO to deny intervention based on an allegation that one party’s interest is represented by another party.

As explained above, the PUCO Staff’s role is not to represent residential consumers—that is OCC’s role, by statute. But even if it were, that still would not allow the PUCO to deny intervention.

Verde cites *Consumers’ Counsel v. PUCO*, 64 Ohio St.3d 123 (1992), claiming that under this authority, the PUCO was only required to grant OCC’s intervention in that case because the PUCO Staff did not participate.[[14]](#footnote-15) But that is not the law.

The law sets standards for intervention. Under R.C. 4903.221, the PUCO, “in ruling upon applications to intervene in its proceedings, shall consider the following criteria: (1) The nature and extent of the prospective intervenor’s interest; (2) The legal position advanced by the prospective intervenor and its probably relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.” As explained in its motion to intervene, OCC easily satisfies these criteria. And notably, the statute does not allow the PUCO to deny a party intervention based on an allegation that some other party to the case has a similar interest.

Further, even if the statute did allow that—and it doesn’t—the PUCO Staff is not a “party” for purposes of intervention. As the PUCO’s rules state “the commission staff shall not be considered a party to any proceeding,” except for purposes of specific, enumerated rules.[[15]](#footnote-16) And those specific, enumerated rules do not include the intervention rule 4901-1-11.

In sum, Verde’s arguments regarding OCC and the PUCO Staff fail at every turn. They fail first because the PUCO Staff and OCC do not represent the same interests. They fail because the law does not allow the PUCO to deny a party intervention simply because another party represents a similar interest. And they fail because the PUCO Staff is not a “party” for purposes of intervention.

### 3. The Supreme Court of Ohio has ruled that intervention is to be liberally allowed, and that applies to OCC’s intervention in these cases on behalf of consumers.

In its memorandum contra OCC’s motion to intervene, Verde cites *Ohio Consumers’ Counsel v. PUCO*, 111 Ohio St.3d 384 (2016), claiming that the case supports Verde’s opposition to OCC’s motion to intervene.[[16]](#footnote-17) Verde, however, conveniently omits the most relevant portions of that decision. In that case, the Supreme Court of Ohio held that “intervention ought to be *liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”[[17]](#footnote-18)

As explained, OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. Verde does not, and cannot, demonstrate otherwise. For these reasons alone, the PUCO should grant OCC’s Motion to Intervene.

Verde argues that the PUCO should deny OCC’s Motion to Intervene because OCC has already had an opportunity to litigate the issues arising in this case.[[18]](#footnote-19) Verde is wrong.

First, Ohio law does not preclude a party from presenting similar facts in different cases involving different legal issues, as is the situation here. Nor should that be a criterion for the PUCO to consider when ruling upon a motion to intervene involving consumer protection. Such an approach does not square with the Court’s admonishment to the PUCO that intervention is to be “*liberally allowed* so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”[[19]](#footnote-20)

Second, Verde’s argument that this case will “serve only to allow OCC to reargue the underlying facts of the COI” is inaccurate. Verde filed its electric renewal application on February 27, 2020—after the PUCO had already ruled in the investigation case. The investigation case focused primarily on a seven-month period (October1, 2018 to April 12, 2019) during which the PUCO’s call center was flooded with calls and complaints about Verde’s marketing practices. The current cases are about whether Verde should be allowed to continue serving Ohioans after October 30, 2020, including, but not limited to, an evaluation of Verde’s managerial fitness. OCC and others are entitled to explore Verde’s managerial fitness (including during periods outside the October 1, 2018 to April 12, 2019 period examined in the investigation case) and to explore Verde’s ability to adhere to the PUCO’s rules and Ohio law on a going-forward basis. At no point in the investigation case did the PUCO conclude that Verde was managerially fit to serve customers beyond October 30, 2020.

In short, Verde attempts to conflate these renewal cases with the investigation case, while overlooking that (i) the cases involve different legal standards and (ii) the underlying facts that justify rejection of Verde’s renewal applications are far broader than the facts at issue in the investigation case regarding hundreds of customer complaints received during a specific, limited period of time.

**4. Verde’s opposition to OCC’s intervention in these cases serves no purpose other than to delay the case, waste resources, and self-servingly hinder OCC’s ability to represent Ohio’s residential consumers.**

Verde cites not a single case where the PUCO has denied OCC intervention simply because the PUCO Staff is also participating in the case. This is because, as explained above, any such ruling would be unlawful. Verde’s continued opposition to OCC’s participation in these cases, despite OCC’s clear statutory authority to represent residential consumers under R.C. Chapter 4911, serves no purpose other than to delay the case and hinder OCC’s ability to develop a record. It is akin to a vexatious litigator who

attempts to achieve a self-serving result through *process*, rather than *substance*, by frustrating parties and wasting judicial and administrative resources.

B. Verde’s complaints about OCC’s discovery requests are both inaccurate and irrelevant.

Verde also argues that OCC’s intervention should be denied because Verde does not like responding to OCC’s discovery requests.[[20]](#footnote-21) The PUCO should give this argument no weight.

First, if Verde has concerns regarding the scope of OCC’s discovery, the proper forum for those concerns is through objections to discovery or a motion for protective order, not opposition to a motion to intervene.

Second, Verde’s attempt to draw a parallel between the PUCO’s rules and the Ohio Civil Rules fails. As Verde correctly notes, in civil cases, a party may serve up to 40 interrogatories in a case without leave of court.[[21]](#footnote-22) But as Verde readily admits, there is no such limit in the PUCO’s rules. And Verde cites not one case in which the PUCO has adopted the Civil Rules’ 40-interrogatory limit.

Third, Verde seems to want it both ways. In the investigation case, Verde complained that OCC supposedly waited until the last minute to serve discovery when OCC could have served it earlier.[[22]](#footnote-23) Now, when OCC endeavored to serve its discovery early (for example, by serving discovery in the electric case seven days after Verde’s renewal application and in the natural gas case three weeks after Verde’s renewal

application), Verde complains that OCC is serving too much discovery early when the discovery cutoff is months away.[[23]](#footnote-24)

Fourth, OCC took great pains to ensure that its written discovery in this case to date was as narrowly focused as possible while still providing information that is essential to prove that Verde’s certificates should not be renewed. For example, in many of its interrogatories, OCC limited its requests to the time period after April 12, 2019, *i.e.*, the end of the period investigated by Staff in the investigation case to avoid duplication with the investigation case. In most other instances, OCC limited its requests to facts and events that have occurred since Verde’s certificates were last renewed (December 11, 2017 for natural gas and March 29, 2018 for natural gas) to keep its factual investigation within the proper scope of these cases.

Fifth, OCC had no choice but to serve detailed and comprehensive discovery on Verde in early March because of the procedural schedule in this case. Verde filed its electric renewal application on February 27, 2020. On March 3, 2020, the PUCO set a procedural schedule with comments due April 2. In response to that Entry, OCC immediately intervened in the case and served discovery. Had OCC waited any longer, it would not have been able to receive discovery responses (under the typical 20-day turnaround) before comments were due.

# III. CONCLUSION

OCC’s Motion to Intervene should be granted. OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. That is all that is required for intervention. OCC should not be silenced simply because vexatious Verde, in pursuit of its own self-interest, is tired of being reminded of the many ways in which it has harmed the Ohio consumers that OCC represents.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply To Verde’s Memo Contra OCC’s Motion To Intervene by the Office of the Ohio Consumers’ Counselwas served on the persons stated below via electronic transmission, this 30th day of March 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. *In re the Commission’s Investigation into Verde Energy USA Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI, Opinion & Order ¶ 60 (Feb. 26, 2020). [↑](#footnote-ref-2)
2. *Id.* [↑](#footnote-ref-3)
3. During that same period, the PUCO Staff received 481 calls about Verde, 231 of which were related to “enrollment disputes, misleading information, and false representations where Verde allegedly purported to be another utility.” Id. ¶7. [↑](#footnote-ref-4)
4. *See, e.g., Pennsylvania PUC, Bureau of Investig. & Enforcement v. Verde Energy USA, Inc.*, Docket No. C-2020, Formal Complaint (Jan. 30, 2020). [↑](#footnote-ref-5)
5. *Id.* ¶ 18. [↑](#footnote-ref-6)
6. *See* Renewal Certificate, *available at* <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=830d58fe-2871-4537-ae15-f4bab5542d5a>. [↑](#footnote-ref-7)
7. *See* Renewal Certificate*, available at* <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=5c7c5c38-fb21-44f3-a39b-f77a086bf0fb>. [↑](#footnote-ref-8)
8. Entry ¶ 9 (Mar. 3, 2020). [↑](#footnote-ref-9)
9. This reply pertains to OCC’s motion to intervene in Verde’s electric certificate, Case No. 11-5886-EL-CRS. OCC and Verde have already filed their respective papers regarding OCC’s motion to intervene in Verde’s natural gas certificate in Case No. 13-2164-GA-CRS. [↑](#footnote-ref-10)
10. Verde Memorandum Contra at 2. [↑](#footnote-ref-11)
11. *Consumers’ Counsel v. PUCO*, 64 Ohio St.3d 123, 126 (1992). [↑](#footnote-ref-12)
12. R.C. 4911.02(B)(2)(c). [↑](#footnote-ref-13)
13. *See* Verde Memo Contra at 4 (“Staff will capably represent the interests of residential consumers in this case.”). [↑](#footnote-ref-14)
14. Verde Memo Contra at 3-4. [↑](#footnote-ref-15)
15. Ohio Adm. Code 4901-1-10(C). [↑](#footnote-ref-16)
16. Verde Memo Contra at 3. [↑](#footnote-ref-17)
17. *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 2006-Ohio-5853, ¶20 (2006) (emphasis added). [↑](#footnote-ref-18)
18. Verde Memo Contra at 2-3. [↑](#footnote-ref-19)
19. *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 2006-Ohio-5853, ¶20 (2006) (emphasis added). [↑](#footnote-ref-20)
20. Verde Memo Contra at 4-5. [↑](#footnote-ref-21)
21. Verde Memo Contra at 5. [↑](#footnote-ref-22)
22. Case No. 19-958-GE-COI, Verde Energy USA Ohio, LLC’s Motion for Protective Order (Sept. 19, 2019). [↑](#footnote-ref-23)
23. Verde Memo Contra at 5. [↑](#footnote-ref-24)