

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into Verde Energy USA)	
Ohio, LLC's Compliance with the)	Case No. 19-0958-GE-COI
Ohio Administrative Code and)	
Potential Remedial Actions for Non-)	
Compliance.)	

**MEMORANDUM CONTRA VERDE'S MOTION TO QUASH SUBPOENAS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Verde Energy, after being the subject of hundreds of Ohioans' complaints and a (commendable) investigation by the PUCO Staff, wants to exit this case without ever appearing under oath to give public testimony in a PUCO public hearing about its offenses against the Ohio public. To avoid this accountability, Verde asks the PUCO to quash OCC's subpoenas for Verde to show up, take the oath and testify.¹ Verde's attempt to avoid sworn testimony should be denied by the PUCO. Verde is subject to the Ohio rule providing that it can be subpoenaed, and OCC has properly subpoenaed it under that rule (Ohio Adm. Code 4901-1-25).

The PUCO Staff filed a report in this case detailing extensive allegations of unfair, misleading, deceptive, unconscionable, and unlawful acts and practices in Verde Energy's marketing of electricity and natural gas to Ohioans.² Accordingly, under Ohio Adm. Code 4901-1-28(E), OCC properly filed a motion asking the PUCO to issue

¹ Verde Energy USA Ohio, LLC's Motion to Quash Subpoenas From the Office of the Ohio Consumers' Counsel (Oct. 10, 2019) (the "Motion to Quash").

² Corrected Staff Report (May 29, 2019) (the "Staff Report").

subpoenas for Verde employees with knowledge of the information underlying the allegations in the Staff Report.

PUCO Attorney Examiner Gregory Price signed the subpoenas. OCC properly served the subpoenas and filed return of service forms with the PUCO, consistent with Ohio Adm. Code 4901-1-25(B).

Verde has not shown good cause for quashing the subpoenas. The PUCO should deny the Motion to Quash.

I. ARGUMENT

A. OCC complied with Ohio Adm. Code 4901-1-25 in serving the subpoenas.

Ohio Adm. Code 4901-1-25(B) states that service of a subpoena “shall be made by delivering it to such person, or by reading it to him or her in person, leaving it at his or her place of residence, leaving it at his or her business address if the person is a party or employee of a party to the case, or mailing the subpoena via United States mail as certified or express mail, return receipt requested, with instructions to the delivering postal authority to show to whom delivered, date of delivery, and address where delivered.” As OCC’s returns of service demonstrate, it served the subpoenas consistent with this rule.

Each of the subpoenas was served at Verde’s business address in Ohio, 440 Easton Commons Way, Suite 125, Columbus Ohio 43219. In addition, the subpoena for Verde employee Kira Jordan was served in person in Texas, where counsel for Verde agreed to accept personal service of the subpoena on Ms. Jordan.

Despite this, Verde claims that service is invalid because (i) service on the in-state agent is insufficient and (ii) service outside of Ohio is *per se* invalid. Each of these arguments is unpersuasive.

In support of its first argument regarding service on the statutory agent, Verde cites *Burgess v. Prudential Insurance Co. of America*³ and *McGuire v. Draper, Hollenbaugh & Briscoe, LPA.*⁴ But these cases actually support OCC's position. The *Burgess* court found that R.C. 3909.05 "gives a party the ability to call individual employees of the out-of-state corporation into the state for depositions or testimony at trial" as long as the individual is personally served with the subpoena.⁵ As this language from *Burgess* confirms, an out-of-state witness can be compelled to appear for testimony at trial if personal service was made, and in this case, OCC in fact made personal service on Kira Jordan in Texas. *Burgess*—and *McGuire*, which simply follows *Burgess*—therefore, are no help to Verde.

Moreover, both *Burgess* and *McGuire* were explicitly rejected by the Ohio 10th District Court of Appeals in *A.O. Smith Corp. v. Perfection Corp.*, 2004-Ohio-4041, when applied to a subpoena directed at a corporation. In *A.O. Smith*, the Court made a distinction between subpoenaing an individual employee and subpoenaing a corporation. As the *A.O. Smith* court reasoned (and consistent with *Burgess* and *McGuire*), when subpoenaing a specific individual, service on the corporate agent might be insufficient. But when subpoenaing the corporation generally, service on the statutory agency is valid,

³ 1988 WL 68686, 1988 Ohio App. LEXIS 2867 (June 29, 1988).

⁴ 2002 Ohio App. LEXIS 6003 (Nov. 4, 2002).

⁵ *Burgess*, 1988 Ohio App. LEXIS 2867, at *14.

even if the person that the corporation identifies as the designee is located out of state.⁶ That is exactly what OCC did in this case with its second and third subpoenas. Those subpoenas were not directed to a specific individual but instead were corporate subpoenas on Verde. The fact that the relevant Verde witness might be located out of state is irrelevant.

Likewise, Verde's claim that out-of-state service is *per se* invalid doesn't square with the actual language of Ohio Adm. Code 4901-1-25. As Verde notes in its Motion to Quash, the PUCO's rules provide that a "subpoena may be served at any place within this state."⁷ Verde incorrectly cites this language, claiming that it "*requires* that a Commission subpoena be served 'within this state.'"⁸ The PUCO's rule says no such thing.

The rule's language is permissive, not mandatory. It merely states that subpoenas *may* be served at any place within Ohio. It says nothing at all about whether subpoenas served outside of Ohio are valid. Had the PUCO intended to limit subpoenas *only* to the State of Ohio, the rule would say that subpoenas *shall* be served within this state, not *may*. Indeed, the PUCO clearly knew the difference between "shall" and "may" when drafting this rule: the immediately preceding sentence in the rule states that a subpoena "shall" be served in one of several ways.⁹ Had the PUCO intended to provide that service "shall" take place *only* within the State of Ohio, it would have said so, but instead it chose to use the permissive word "may." In other words, contrary to Verde's claim,

⁶ *A.O. Smith*, 2004-Ohio-4041, ¶ 17.

⁷ Ohio Adm. Code 4901-1-25 (B).

⁸ Motion to Quash at 6 (emphasis added).

⁹ Ohio Adm. Code 4901-1-25(B).

nothing in the plain language of Ohio Adm. Code 4901-1-25(B) requires service to take place in Ohio.

Nor is the ability to serve parties outside the State of Ohio unusual. As explained above, *Burgess* and *McGuire* stand for the proposition that a specific out-of-state witness can be subpoenaed as long as personal service is made. And *A.O. Smith* stands for the proposition that a corporate designee located out of state can be compelled by subpoena to testify as long as service is made on the company's statutory agent.

Ohio's Civil Rules say the same thing: "Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state."¹⁰

Verde cites no authority for its broad claim that an out of state witness can never be compelled to testify before the PUCO. OCC therefore succeeds on both counts: it made personal service on Verde witness Jordan, consistent with *Burgess* and *McGuire*, and it served Verde's statutory agent with respect to the corporate designees, consistent with *A.O. Smith*. Thus, Verde's Motion to Quash fails.

B. The Attorney Examiner's decision in the PALMco case is not determinative here.

It is true, as Verde points out, that in a recent case involved PALMco (another energy marketer), that the Attorney Examiner granted the marketer's motion to quash and instead found that OCC could move for the admission of deposition transcripts in lieu of

¹⁰ Ohio R. C.P. 4.3(A).

cross-examination at hearing.¹¹ But that ruling is not determinative for at least two reasons.

First, in the PALMco case, OCC did not serve any corporate subpoenas. All of OCC's subpoenas in that case were directed at specific individuals. Here, OCC served two corporate subpoenas on Verde. The distinction between the two, as recognized by the *A.O. Smith* court, did not apply in the PALMco case, but it does apply here.

Second, while the Attorney Examiner in the PALMco case did note that there was a "safe path" that allowed OCC to submit the deposition transcript into evidence, he did not rule that this is the only path.¹² Verde suggests that because OCC might be able to avail itself of this option in this case, OCC is *required* to do so rather than subpoena witnesses for live testimony. There is no support for Verde's attempt to coerce OCC into a particular legal strategy. Indeed, the Attorney Examiner in the PALMco case explicitly noted that admitting the deposition transcript "may not be the only path" and that "[i]n some future case, somebody may want to present a different path that will be within the rules."¹³ This is that future case, and as explained above, OCC's subpoenas on Verde and Verde witness Jordan are within the rules. The PUCO should not deny OCC its legally-valid option of cross examining these witnesses simply because Verde prefers an alternative path of least resistance.

¹¹ Case No. 19-957-GE-COI, Tr. Vol. I at 99.

¹² *Id.*

¹³ Case No. 19-957-GE-COI, Tr. Vol. I at 99.

II. CONCLUSION

OCC successfully personally served Verde witness Jordan with a subpoena in Texas. And OCC successfully served corporate subpoenas on Verde at its statutory agent in Ohio. Each of these is valid under the PUCO's rules and Ohio case law interpreting the rules for subpoenaing out-of-state witnesses. Verde should not be allowed to escape from this case without ever appearing under oath to give public testimony regarding its offenses against the Ohio public, as described in the Staff Report and elsewhere in the record in this case.

Verde has therefore failed to establish that OCC's subpoenas are "unreasonable or oppressive" as required to quash a subpoena under Ohio Adm. Code 4901-1-25. The PUCO should deny the Motion to Quash and should require Verde witness Jordan, as well as Verde's corporate designee witnesses to appear for cross examination at the hearing in this case.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Angela D. O'Brien

Angela D. O'Brien (0097579)
Counsel of Record
Christopher Healey (0086027)
Bryce McKenney (0088203)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [O'Brien]: (614) 466-9531
Telephone [Healey]: (614) 466-9571
Telephone [McKenney]: (614) 466-9585
angela.obrien@occ.ohio.gov
christopher.healey@occ.ohio.gov
bryce.mckenney@occ.ohio.gov
(willing to accept service by e-mail)

Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
bojko@carpenterlipps.com
(willing to accept service by e-mail)

*Outside Counsel for
The Office of the Ohio Consumers' Counsel*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Memorandum Contra was provided to the persons listed below electronically this 15th day of October 2019.

/s/ Angela D. O'Brien

Angela D. O'Brien
Assistant Consumers' Counsel

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

SERVICE LIST

Thomas.lindgren@ohioattorneygeneral.gov

Andrew.shaffer@ohioattorneygeneral.gov

dproano@bakerlaw.com

kkash@bakerlaw.com

dlemon@bakerlaw.com

tathompson@bakerlaw.com

Joe.Oliker@igs.com

Michael.Nugent@igs.com

Bethany.Allen@igs.com

rhooper@bakerlaw.com

C. Alexis Keene

Interim General Counsel and Corporate
Secretary

Verde Energy USA Ohio, LLC
12140 Wickchester Ln., Suite 100
Houston, TX 77079

akeene@sparkenergy.com

Karen White

Verde Energy USA Ohio, LLC
12140 Wickchester Ln., Suite 100
Houston, TX 77079

kwhite@sparkenergy.com

Attorney Examiners:

Anna.Sanyal@puco.ohio.gov

Gregory.Price@puco.ohio.gov

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