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 Ohio Administrative Code and Potential Remedial Actions for Non-Compliance	CASE NO.: 19-0958-GE-COI

VERDE ENERGY USA OHIO, LLC'S POST-HEARING BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

After months of extensive negotiations between the Staff of the Service Monitoring and Enforcement Department of the Public Utilities Commission of Ohio ("Staff") and Verde Energy USA Ohio, LLC ("Verde Energy"), the parties agreed to settle this matter on the terms set forth in the Joint Stipulation and Recommendation dated September 6, 2019, subject to Commission approval ("Joint Stipulation"). The Office of the Ohio Consumers' Counsel ("OCC") was repeatedly invited to participate in these settlement discussions. Instead of contributing to the settlement, for months OCC sat on the sidelines during the negotiations. OCC has now opposed the settlement.

As part of the Joint Stipulation, Verde Energy has agreed to pay the largest civil forfeiture ever assessed by the Public Utilities Commission of Ohio (the "Commission") against a competitive energy supplier in this state, excepting perhaps the civil forfeiture in the parallel PALMco Power investigation (19-0957-GE-COI). Verde Energy has also agreed to provide substantial restitution to Ohio consumers who may have been impacted by the practices alleged in the Report filed by Staff on May 29, 2019 (the "Staff Report"). In addition, Verde Energy has agreed to a number of additional provisions intended to ensure compliance with the Commission's marketing and enrollment rules in Ohio.

As a package, the proposed settlement meets all three prongs of the Commission's test for approving such negotiated resolutions: (1) it is a product of serious bargaining among capable, knowledgeable parties; (2) it is a package that benefits Ohio consumers and the public interest; and (3) it does not violate any important regulatory principles or practices.

In opposing the comprehensive settlement between Verde Energy and Staff, OCC produced no evidence demonstrating that these three prongs have not been met in this case. Instead, OCC for the most part regurgitated information and evidence already included or

referenced in the Staff Report, which the Staff knew about when entering into the settlement with Verde Energy. OCC also sponsored two witnesses to oppose the settlement, one of whom misconstrued the plain terms of the proposed settlement in crafting her opposition (Barbara Alexander) and the other whom advocated a "presumed guilty" standard to judge Verde Energy (James Williams). The cross-examination of both of these OCC witnesses revealed significant shortcomings with their direct testimony.

Ultimately, OCC opposes any settlement that is less than the full recommendations outlined in the Staff Report. However, accepting OCC's proposition would undermine the very purpose of a negotiated resolution, which is to arrive at a compromise that is acceptable to both sides in lieu of continued litigation. Moreover, the settlement agreed to by Verde Energy and Staff is severe and consequential. The settlement represents a significant financial impact on Verde Energy, not only from the standpoint of the largest settlement payment ($675,000) by a competitive supplier in Ohio history (excepting, perhaps, the PALMco settlement) and customer restitution of over $1.068 million, but also from the significant loss of market share and resulting loss of revenue due to the 18-month marketing stay imposed by the settlement. In addition, the Joint Stipulation as a whole acts as a deterrent for future alleged violations of Ohio rules regarding the marketing and enrollment of customers in Ohio. The settlement should be approved by the Commission as agreed to by Verde Energy and Staff.

STANDARD OF REVIEW

The Commission reviews settlement agreements under a three-part test:

1. Whether the settlement agreement is a product of serious bargaining among capable, knowledgeable parties;
2. Whether the settlement, as a package, benefits consumers and the public interest; and

3. Whether the settlement package violates any important regulatory principles or practices.

Ohio Consumers' Counsel v. Pub. Util. Comm., 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶ 16 (2006).

ARGUMENT

The Commission should approve the Joint Stipulation, which meets all three parts of the Commission test. The Joint Stipulation is the product of months of research, due diligence, communication, and negotiation between Staff and Verde Energy. While Staff and Verde Energy were operating on separate sides of this matter, they negotiated in good faith with the goal of arriving at a resolution that meets the Commission's test.

First and foremost, Ohioans would benefit from the settlement. The Joint Stipulation provides more than $1.068 million in restitution to consumers presumably affected by Verde Energy's alleged conduct. Those consumers will also have the opportunity to cancel their contracts without penalty and return to the utility's standard service offer or enroll with another provider. Any consumers affected by the alleged unfair marketing practices will have the opportunity to shop for generation service. In addition, the multimillion-dollar concessions provided for in the Joint Stipulation serve as a powerful deterrent in Ohio's competitive marketplace. Staff characterized the Joint Stipulation as a "huge" deterrent to violations of Ohio's rules:

> Q. (by Mr. Proaño) What did you mean by big deterrent and what provisions were you thinking of?
>
> A. (by Ms. Ramsey) Well, provision 1, Verde stopped marketing in Ohio to gas or electric customers, and they will continue until October 30, 2020. Verde's not being assigned MVR customers which is impacting their revenue. Electric customers will be re-rated. And if Verde wants to transfer customers, they have to give Staff prior consent, and they have to submit an action plan 90 days before marketing. Then all of their customers who were enrolled from June 1, 2018, will

receive notice that they can drop without penalty, in addition to paying a forfeiture of $675,000. **Those are all huge deterrents from future violations.**

(Hearing, Vol. I, at 277:1-15 (emphasis added).) At the same time, Ohio's competitive marketplace benefits from rules that are enforced reasonably.

I. Prong One: The Joint Stipulation is the Product of Serious Negotiations Among Capable, Knowledgeable Parties.

The Joint Stipulation meets the first prong of the Commission's test because it is the product of serious bargaining between capable counsel. OCC does not challenge prong one.

Tom Lindgren of the Ohio Attorney General's Office negotiated the Joint Stipulation on behalf of Staff. Mr. Lindgren has been a member of the Ohio bar for over thirty years.[1] On the other side of the table, Verde Energy was represented by attorneys from BakerHostetler,[2] a national law firm.

Nedra Ramsey, of Staff's Reliability and Service Analysis Division, testified before the Commission that the Joint Stipulation is the product of serious bargaining among capable, knowledgeable parties. (Direct Testimony of Nedra Ramsey, October 2, 2019 ("Ramsey Testimony"), at 4:48-55.) That testimony is uncontroverted. At the hearing, OCC witness Barbara Alexander agreed that there was nothing in her testimony regarding prong one of the three-prong test:

> Q. (by Mr. Proaño). There's nothing in your testimony regarding the Joint Stipulation on prong one of the test which is the arm's length negotiations between competent counsel, correct?
>
> A. (by Ms. Alexander). I did not address that matter.

[1] Mr. Lindgren was admitted to the bar on November 16, 1987 (attorney registration number 39120). The Commission may take judicial notice of Mr. Lindgren's admission date, which is a matter of public record.
[2] David Proaño was admitted to the Ohio bar on May 9, 2005 (attorney registration number 78838); Kendall Kash on November 16, 2015 (attorney registration number 93717); Daniel Lemon on November 13, 2017 (attorney registration number 97113); Taylor Thompson on November 13, 2018 (attorney registration number 98113). Rachel Hooper is a member of the Texas bar, and her motion to appear before the Commission *pro hac vice* was granted by journal entry on July 31, 2019.

(Hearing, Vol. I, at 64:13-17.) Nor does the direct testimony of OCC witness James Williams contradict or even challenge Ms. Ramsey's statement that the Joint Stipulation was the product of serious bargaining between capable parties. (*See generally* Direct Testimony of James D. Williams, October 2, 2019 ("Williams Testimony").)

OCC goes on to argue that the Joint Stipulation utterly fails to protect Ohio consumers and violates important regulatory principles. This simply makes no sense. Why would Staff—a capable, knowledgeable party—agree to such a settlement? As the Principal Assistant Attorney General of the Public Utilities Section, Mr. Thomas Lindgren, representing the Staff in this case, is an experienced and knowledgeable lawyer. Ohio courts presume that arm's-length bargaining arrives at the "true value" of property. *Cincinnati School Bd. of Educ. v. Hamilton Cty. Bd. of Revision*, 78 Ohio St.3d 325, 327, 1997-Ohio-212, 677 N.E.2d 1197, 1199 (1997); *see also Conalco, Inc. v. Monroe Cty. Bd. of Revision*, 50 Ohio St.2d 129, 130, 363 N.E.2d 722, 723 (1977) ("[T]he best evidence of true value is the actual sale of the property in an arm's length transaction . . . "). The same reasoning applies here. The best evidence of the true value of the case is the settlement agreement reached between Staff and Verde Energy in arm's-length negotiations and with capable counsel on both sides, as the Joint Stipulation was. OCC has failed to demonstrate why those negotiations between knowledgeable and capable parties should be disrupted or undone. As OCC has not disputed, the Joint Stipulation meets the first prong of the Commission test for approving settlements.

II. Prong Two: The Settlement, as a Whole, Benefits Consumers and the Public Interest.

The Joint Stipulation meets the second prong of the Commission's test because it benefits Ohio consumers and the public interest. There is no requirement under Ohio law that a settlement match word-for-word all of the recommendations in a Staff Report. Such a

requirement would undermine the very purpose of negotiated resolutions. Nevertheless, the terms of the Joint Stipulation closely track the recommendations of the Staff Report:

Staff Report Recommendation	Joint Stipulation Term
Suspend, conditionally rescind, or rescind Verde Energy's certification.	Verde Energy voluntarily ceased all marketing and customer enrollment activities in Ohio [on] May 3, 2019. Staff and Verde Energy agree that this suspension by Verde Energy of all marketing activities and customer enrollment in Ohio will continue until October 30, 2020, for a total of eighteen (18) months. Additionally, Verde Energy will withdraw from Dominion's MVR program for a period of one year.
Order Verde to pay a forfeiture of $1,500,000.	Verde Energy agrees to pay a forfeiture of $675,000.
Provide restitution to customers enrolled during the above noted timeframes by refunding the difference between the electric distribution and/or natural gas utility's default rate, as applicable, and the rate Verde actually charged them.	For all retail electric residential customers enrolled by Verde Energy in Ohio from October 1, 2018 through April 30, 2019, Verde Energy will re-rate those customers to the second lowest 12-month fixed 100% renewable price shown on the PUCO's historic apples-to-apples chart for the week of December 17, 2018, adjusted for any rewards provided by Verde Energy to re-rated customers as part of Verde Energy's shopping rewards program. This will result in [customer] refunds of approximately $1,068,000.
Verde shall be prohibited from transferring any customer contracts to another entity.	Verde Energy will not transfer or sell customer contracts to another entity during the stay-out period without the prior consent of PUCO Staff, except as necessary in connection with any settlement with intervenor, Interstate Gas Supply, Inc.
Verde shall notify all current customers that were enrolled since June 1, 2018 that they may cancel their current contracts without penalty due to possible misleading marketing practices during that time.	Verde will notify all customers enrolled in Ohio since June 1, 2018 that they may cancel contracts without penalty at the customer's election. The notice shall indicate that PUCO Staff has alleged that Verde Energy may have mislead customers in Ohio during the marketing of its product. The notice shall be sent within 30 days of the Order approving the Stipulation.
[No corresponding recommendation].	Verde will submit an action plan for compliance at least ninety (90) days prior to resuming marketing and customer enrollment in Ohio.

Despite the Joint Stipulation tracking the recommendations in the Staff Report, OCC continues to oppose it. At the hearing, OCC's witnesses made clear that OCC disfavors settlement and would oppose *any* settlement agreement with terms less strenuous than those outlined in the Staff Report.

> Q. (By Ms. Hooper) And so your testimony in writing and here today is that the settlement should be limited to the recommendations in the Staff Report; is that right?
>
> A. (By Mr. Williams) If you give me a moment, please.
>
> Q. Sure.
>
> A. I believe that that's a pretty complete list. There would be additional recommendations that I made in my testimony kind of above and beyond that but that's -- **that should be the point of departure** for figuring out how to deal with some type of resolution for this case.
>
> Q. So the Staff Report is a minimum for you.
>
> A. I would say similar to the rules, the PUCO rules are minimum service standards, and Verde went well below it. So in terms of establishing at this point, **I had recommendations that would go beyond what was in the Staff Report**.

(Hearing, Vol. II, at 398:9-14 (emphasis added).) In other words, Mr. Williams believes that Staff's "demand" in the Staff Report (the recommendations) should be the floor for negotiations, and that a proper settlement must contain provisions above and beyond those sought by the Staff Report.

Mr. Williams's testimony shows that OCC is unwilling to accept any settlement whatsoever in this case, as the term "settlement" is typically understood. "As a general rule of law, a settlement agreement is a compromise achieved by the adverse parties in a civil action." *Marks v. Allstate Ins. Co.*, 5th Dist. No. 2002CA00417, 153 Ohio App.3d 378, 2003-Ohio-4043, 794 N.E.2d 129, ¶ 23 (citation and internal quotation marks omitted). It would be odd indeed for a party to "compromise" by paying more than the other side's demand. This impossible standard for an acceptable settlement may explain why Mr. Williams has testified in thirty-seven cases on

behalf of the OCC, but never once in support of a settlement agreement. (Hearing, Vol. II, at 388:15-389:1.)

One fundamental flaw in OCC's position is that it assumes that all of the allegations contained in the Staff Report have merit. It is easy to take an extreme position on the settlement value of a lawsuit if you assume the truth of all allegations, as Mr. Williams did:

> Q. (by Ms. Hooper) You accepted everything in the Staff Report as true, correct?
>
> A.(by Mr. Williams) I have no reason to believe there is anything in the Staff Report that was not true.

(Hearing, Vol. II, at 397:19-22.) It is also easy to take an extreme position if you assume the company would not prevail on at least some allegations, as Ms. Alexander did:

> Q. (by Mr. Lindgren) Thank you. And the Commission in this case could modify the Stipulation and impose even a lower penalty, for example, the forfeiture or the suspension period; is that right?
>
> A. I find that highly unlikely in this particular case.
>
> Q. But it is possible though, isn't it?
>
> A. How would I know what's possible? I am telling you my opinion is that it's highly unlikely given the Staff Report that is on the record here.

(Hearing, Vol. I, at 107:12-21.) If this case proceeded to a hearing on the merits, OCC would not bear the burden of proving the allegations in the Staff Report. Staff would. And Verde Energy would strongly contest the veracity of those allegations. Perhaps that is why Staff was willing to settle, but OCC was not. By all appearances, OCC entered this phase of the case in an antagonistic posture unwilling to bend to any reasonable resolution short of the harsh punishments outlined in the Staff Report plus additional penalties.

Contrary to OCC's argument, the terms in the Joint Stipulation, as a whole, benefit consumers and the public interest. In addition to its obvious role in ensuring Verde Energy's future compliance, deterring potential future violations, and benefitting consumers (*see* II.A–II.G), the Joint Stipulation advances Ohio statutory policy, which favors "diversity of electricity

supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers." R.C. 4928.02(C). By contrast, the original recommendation of the Staff Report—that Verde Energy's certificates be suspended, conditionally rescinded, or rescinded—would reduce the diversity of supplies and suppliers in the Ohio market by removing Verde Energy's ability to do business in this state as a retail energy supplier. (*See* Staff Report at 24.)

This blow to diversity in the competitive marketplace would be twofold. First, as the following testimony by Staff witness Ms. Ramsey demonstrates, Verde Energy's participation in the market promotes diversity of electricity *supplies* by providing consumers the option of purchasing renewable energy:

> EXAMINER PRICE: And maybe you can clean up something that's been hanging over our heads. To the best of your knowledge, are all of Verde's electric contracts 100 percent renewable in the state of Ohio, renewable energy?
>
> THE WITNESS: I know the majority of the contracts that I actually reviewed did indicate 100 percent renewable.

(Hearing, Vol. I, at 246:18-25.)

Second, suspension or rescission of Verde Energy's certificates would reduce diversity of *suppliers* by removing a significant supplier from the Ohio market. This change, in turn, would undermine consumer choice and market competition. Ohio statutory policy favors giving Verde Energy the opportunity to remedy alleged past failures and present a plan for future compliance, as opposed to expelling Verde Energy from the Ohio market altogether.

The Joint Stipulation, as a whole, and each of its six paragraphs benefit consumers and the public interest. Each paragraph is discussed in detail below.

A. Paragraph one of the Joint Stipulation benefits consumers and the public interest by prohibiting Verde Energy from resuming marketing and enrollment operations for 18 months, preventing future violations of the Commission's rules and giving Verde Energy time to prepare a comprehensive compliance plan.

Paragraph one of the Joint Stipulation provides:

> *Verde Energy has voluntarily ceased all marketing and customer enrollment activities in Ohio, as represented to the Commission in the Motion filed in this matter on May 3, 2019. Staff and Verde Energy agree that this suspension by Verde Energy of all marketing activities and customer enrollment in Ohio will continue until October 30, 2020, for a total of eighteen (18) months.*

This provision is effectively a time-limited version of the Staff Report's recommendation that Verde Energy's certificates be suspended. (Hearing, Vol. I, at 253:14-24 (Nedra Ramsey testimony that there is "no functional difference" between a suspension and the marketing stay imposed by the Joint Stipulation)). This marketing stay benefits consumers and the public interest because it "will eliminate the possibility for new customers to experience the harm alleged in this proceeding." (Ramsey Testimony at 5.)

By prohibiting Verde Energy from marketing and enrolling new customers for 18 months, the Joint Stipulation also deters Verde Energy and any other companies from engaging in conduct that violates the Commission's rules for retail providers. (Hearing, Vol. I, at 262:9-16 (Nedra Ramsey testimony, suspending marketing activity is "a deterrent to violating any provision of the Ohio Administrative Code.").)

Verde Energy will use the 18-month marketing stay to evaluate its marketing practices and develop a plan for compliance with the Commission's rules, as stated in paragraph 5 of the Joint Stipulation. (Ramsey Testimony at 5.) Verde Energy will submit that plan to Staff for review and approval at least 90 days prior to Verde Energy's resuming marketing activities. This, too, benefits Ohio consumers by ensuring that Verde Energy's practices, including its marketing and enrollment practices, comply with applicable law and the Commission's rules

before Verde Energy re-enters the marketplace. Staff will act as a gatekeeper, which also benefits Ohio consumers because they can provide relevant knowledge and guidance to Verde Energy.

OCC takes issue with paragraph one of the Joint Stipulation, insisting that the Commission should take the extreme and unprecedented step of revoking Verde Energy's certificates permanently. (Williams Testimony at 20–21.) But Barbara Alexander, who testified about proceedings in other states, could not point to a single instance where a supplier's certificates were permanently revoked, let alone in the very first enforcement action against it:

> Q. (By Mr. Lindgren) So to be clear, in none of these other decisions was the company's license or certificate permanently revoked; is that correct?
>
> A. (By Ms. Alexander) That is correct.
>
> Q. Thank you. And, Ms. Alexander, are you aware this is the first time that Verde has been before this Commission in a case involving alleged violations of the marketing rules?
>
> A. I am not aware of that, but I'll accept your statement on that regard.

(Hearing, Vol. I, at 105:24–106:12.) The facts here do not justify the unprecedented step of revoking Verde Energy's certificates permanently. The problems identified in the Staff Report are of recent vintage, according to Ms. Ramsey. (Hearing, Vol. I, at 167:3-10) (prior to October 2018, Staff received "little to no complaints" about Verde Energy). This shows that Verde Energy can operate lawfully in Ohio's marketplace, and that any alleged problems with its marketing and enrollment practices can be ameliorated prior to resuming operations in Ohio.

OCC further argues paragraph one is confusing and unclear, but nothing about this provision is vague. OCC's argument that paragraph one might be interpreted to apply only to electric customers finds no footing in the plain language of the provision. (Hearing, Vol. I, 110:2-16 (Ms. Alexander testifies that the provision should say "electric and natural gas" because otherwise it is "never quite clear what was intended").) The provision applies to "all

marketing and customer enrollment activities in Ohio." All means all; the provision contains no language that might limit the impact of that word. *Merriam-Webster's Collegiate Dictionary* 31 (11th ed. 2014) ("all" includes "every member and individual component" of something); *see also State ex rel. Bott Law Group, L.L.C. v. Ohio Dept. of Nat. Resources*, 10th Dist. Franklin No. 12AP-448, 2013-Ohio-5219, ¶ 21 (rejecting attempt to limit the word "all" when interpreting a statute).

Because paragraph one requires Verde Energy to cease all marketing and enrollment activities in Ohio for eighteen months, it benefits consumers and the public interest.

B. Paragraph two of the Joint Stipulation benefits consumers and the public interest by requiring Verde Energy to withdraw from the MVR program, deterring future misconduct.

Paragraph two of the Joint Stipulation provides:

> *Verde Energy will withdraw from Dominion's MVR program for a period of one year, commencing as of the date Verde Energy notified Dominion of its withdrawal from the MVR program. Verde Energy may enroll retail customers through Dominion's MVR program at the conclusion of this one-year period.*

This provision benefits consumers and the public interest by deterring Verde Energy and other companies from engaging in non-compliant activities in the future. (Ramsey Testimony at 5.)

OCC objects to paragraph two because it does not ensure that Verde Energy's "prior conduct [that] is documented in the Staff Report will not be replicated." (Hearing, Vol. I, at 111:4-9.) But the Staff Report does not identify any "conduct" by Verde Energy related to the MVR program—indeed, there is no mention of that program anywhere in the Staff Report. Verde Energy could not have deceived customers into enrolling; they are randomly assigned to Verde Energy by Dominion. Moreover, OCC has not identified any rules allegedly violated by Verde Energy due to its participation in the MVR program, nor could it.

Because paragraph two deters violations of the Commission's rules, it benefits consumers and the public interest.

C. Paragraph three of the Joint Stipulation benefits consumers and the public interest by providing over $1.068 million directly to Ohio consumers enrolled during the period identified in the Staff Report.

Paragraph three of the Joint Stipulation provides:

> *For all retail electric residential customers enrolled by Verde Energy in Ohio from October 1, 2018 through April 30, 2019, Verde Energy will re-rate those customers to the second lowest 12-month-fixed 100% renewable price shown on the PUCO's historic apples-to-apples chart for the week of December 17, 2018, adjusted for any rewards provided by Verde Energy to re-rated customers as part of Verde Energy's shopping rewards program. This will result in refunds of approximately $1,068,000.*

This paragraph will benefit consumers and the public interest in numerous ways. First, the refunds will be paid out directly to consumers, so they benefit financially. (Ramsey Testimony at 5.) In her deposition testimony, Kira Jordan indicated that the re-rate amount provided to Ohio consumers will likely exceed the $1.068 million estimate provided in paragraph three. (Deposition of Kira Jordan (Oct. 10, 2019) ("Jordan Deposition"), at 176:12-24.)

These refunds not only benefit Ohioans, but they are a disincentive for Verde Energy and other competitive suppliers to engage in the type of conduct alleged in the Staff Report in the future. (Hearing, Vol. I, at 262:9-16 (Nedra Ramsey testimony, re-rating customers is "a deterrent to violating any provision of the Ohio Administrative Code.").)

Despite arguing vociferously that the re-rate provision is insufficient, OCC's witnesses were ignorant of basic facts underlying the provision and the ultimate amount of the re-rate. For instance, Ms. Alexander had no idea that Verde Energy provides only 100% renewable energy to customers, which is necessary to understand why the specific re-rate price was selected:

> EXAMINER PRICE: Do you know whether Verde only exclusively offers 100 percent renewable energy contracts for electric?
>
> THE WITNESS (Ms. Alexander): Do I know?
>
> EXAMINER PRICE: Yeah.
>
> THE WITNESS: Oh, no, I don't.

(Hearing, Vol. I, at 131:1-6.) A Google search for "Verde Energy" yields as its first result Verde Energy's website; the landing page contains no fewer than six references to "100% renewable energy."[3]

Ms. Alexander also did not know whether Staff had conducted a cost or pricing analysis prior to agreeing to this provision:

> Q. (By Mr. Proaño) And so are you aware whether or not PUCO Staff conducted that analysis before agreeing to use this specific price for the re-rate?
>
> A. (By Ms. Alexander) I don't know.
>
> Q. So you don't know whether or not PUCO Staff did such an analysis in agreeing that the lowest 12-month fixed 100 percent renewable price for that week PUCO's historic Apples to Apples chart was appropriate?
>
> A. No.

(Hearing, Vol I, at 130:16-25.) Nor could Ms. Alexander have done such an analysis herself to determine whether the re-rate provision in paragraph 3 was appropriate:

> Q. (By Mr. Proaño) Is it your understanding that renewable products in Ohio are generally more expensive than nonrenewable products?
>
> A. (By Ms. Alexander) Don't have to be.
>
> Q. That's not my question. Is it your understanding that on -- generally renewable products are more expensive? . . .
>
> A. I have no current or historical knowledge about the cost of renewable energy certificates in the Ohio market. You asked me a hypothetical question, and my answer was it doesn't have to be more expensive. That's all I am telling you. Beyond that I have no numbers to provide to you or particular knowledge. I have not looked at the historical costs of RECs, and I particularly don't know them in December 2018.

[3] https://www.verdeenergy.com/.

(Hearing, Vol. I, at 129:12–131:6.)[4]

In short, Ms. Alexander's testimony that the re-rate amount "is not based on any calculation of actual customer harm" has no basis in fact. (Direct Testimony of Barbara Alexander, October 2, 2019 ("Alexander Testimony"), at 10–11.) Ms. Alexander admittedly knows nothing about why the specific re-rate price was selected or whether Staff conducted any analysis to reach that price—subjects on which she is providing expert testimony. Indeed, her testimony revealed she lacked knowledge (easily ascertained with some research) of basic facts necessary to opine on the substance of paragraph three.

Ms. Ramsey, by contrast, testified that Verde Energy provided Staff with a detailed spreadsheet of "underlying data on customer usage, customer data, customer names, rates, and the re-rate calculation to support that $1.068 million re-rate number." (Hearing, Vol. I, 286:23–287:3.) Ms. Ramsey testified that the Joint Stipulation "provides a fair resolution for all Ohio consumers." (Ramsey Testimony at 7.)

OCC also takes issue with the language "[t]his will result in refunds of approximately $1,068,000," because, according to Mr. Williams, that "could be interpreted as a limitation in the settlement refunds that may be provided." (Williams Testimony at 13.) Much like OCC's interpretation of "all" in paragraph one of the Joint Stipulation, this tortured reading of paragraph three cannot be squared with its plain language. Paragraph three explains how the re-rate is to be calculated; the $1,068,000 figure was merely an estimate of the re-rate amount as of the date the parties entered the agreement—Ms. Alexander even agreed on cross-examination that it was not a cap:

[4] This quote omits an objection by counsel for OCC, which was overruled by Attorney Examiner Sanyal.

Q. (By Mr. Proaño) The final question, Ms. Alexander, the 1.068 million referenced in paragraph 3 of the Joint Stipulation, that is not a cap, correct?

A. (By Ms. Alexander) That is true.

(Hearing, Vol. I, at 131:14-17.) Two more OCC objections bear mention, neither of them consequential. First, Mr. Williams testified that customers outside of the timeframe identified in the Staff Report will not benefit from the re-rate. (Williams Testimony at 14.) But as Ms. Ramsey testified, the timeframe of the Staff Report was chosen for a reason: that was when Staff began receiving a significant number of customer complaints about Verde Energy. (Hearing, Vol. I, at 166:25–167:25.) It makes no sense to re-rate customers who were not affected by the conduct alleged in the Staff Report.

Second, OCC objects to the provision of the re-rate that provides an adjustment for rewards provided to customers, because it does "does not include provisions for monitoring how the rewards program adjustments will be calculated and distributed." (Williams Testimony at 15; *see also* Alexander Testimony at 11.) But Verde Energy explained in subsequent discovery responses and in deposition testimony—provided to OCC and made part of the record—exactly how the adjustment would be calculated and how the rewards would play into that calculation: for customers enrolled in the rewards program, their re-rate will be reduced by seventy cents per month of their enrollment in the rewards program during the re-rate period. (Verde Ex. 1; Hearing, Vol. I, 92:7-9; Jordan Deposition at 181:11-22) This represents Verde Energy's *actual out-of-pocket costs* of providing the rewards program benefits to customers who opted-in to the program, and nothing more. (Verde Ex. 1).

The Commission should find that paragraph three, which provides for over $1.068 million in benefits directly to Ohio consumers and deters future misconduct, is a beneficial to Ohio consumers and the public interest.

D. Paragraph four of the Joint Stipulation benefits consumers and the public interest by preventing Verde Energy from transferring customer contracts, deterring future misconduct.

Paragraph four of the Joint Stipulation provides:

> *Verde Energy will not transfer or sell customer contracts to another entity during the stay-out period without the prior consent of PUCO Staff, except as necessary in connection with any settlement with intervenor, Interstate Gas Supply, Inc.*

This term is clear, enforceable, and in the public interest. And much like paragraph two, which requires Verde Energy's withdrawal from Dominion's MVR program, paragraph four is valuable for its deterrent effect. (Hearing, Vol. I, at 276:21–277:15.) The inability to transfer customers imposes significant opportunity costs on Verde Energy, while the need to secure Staff's approval will incentivize improved efforts at compliance.

It is worth noting that on the issue of transferring customer contracts, Verde Energy agreed to do what was recommended in the Staff Report, subject to a narrow exception for a potential settlement with IGS. (Joint Stipulation at 4.) In fact, this term extends beyond the Staff Report's recommendation. The Staff Report recommended that if the Commission decided not to suspend or rescind Verde Energy's certificates, then Verde Energy should be "prohibited from transferring any customer contracts to another entity until all affected customers have been provided notification and restitution." (Staff Report at 25.) In other words, the Staff Report's recommendation limited the no-transfer period until Verde Energy completed notice and paying restitution; it did not require Verde Energy to obtain Staff's approval before transfers could go forward. By contrast, the Joint Stipulation explicitly requires Staff consent prior to any transfers. (Joint Stipulation at 4.)

OCC objects that paragraph four is "vague" because, as Ms. Alexander testified, "there is no public basis for determining what would be proper or what the conditions of transfer would

be." (Hearing, Vol. I, at 112:15-23.) This reflects a deeper problem with OCC's objections generally: simply put, OCC does not trust Staff to do its job.

> **Q. (By Mr. Proaño) Do you believe PUCO Staff is competent, capable in their jobs?**
>
> **A. (By Ms. Alexander) I have no idea.**

(Hearing, Vol. I, at 74:13–75:4 (emphasis added).)[5] This is also evident from Ms. Alexander's testimony about paragraph five, where she did not trust that Staff would require Verde Energy to submit a robust action plan prior to re-entering the market. (Hearing, Vol. I, at 85:1-19.) It is further evident from Ms. Alexander's testimony regarding paragraph one, where she complains that OCC does not "have any assurances" that Verde Energy will "fix any of the behaviors that the Staff identified," (Hearing, Vol. I, at 110:22-24), despite the fact that the Joint Stipulation encompasses all issues addressed in the Staff Report, and the fact that Staff will continue to monitor customer complaints about Verde Energy and could re-open its investigation at any time. (Hearing, Vol. I, at 272:13-24.) Leaving no doubt, Ms. Alexander testified that she has no faith that Staff will require Verde Energy to send an acceptable notice to its current customers under paragraph six of the Joint Stipulation. (Hearing, Vol. I, at 87:1-3.)

At odds with this testimony, Ms. Alexander testified during cross examination that Staff conducted an "excellent investigation and documentation of alleged violations and conduct." (Hearing, Vol. I, at 113:4-5.) And Mr. Williams testified that he had "no reason to believe that there is anything in the Staff Report that was not true." (Hearing, Vol. II, at 397:21-22.) Further, OCC has presented no evidence that it conducted any independent investigation in this case; rather, its argument relies almost exclusively on the Staff Report and other records produced by

[5] This quote omits an irrelevant statement made by the witness, which was struck by Attorney Examiner Sanyal after a motion from Verde Energy.

Staff, demonstrating Staff is reliable and fully competent and capable in their jobs. (*See* Hearing, Vol. II, at 391:17–392:6.)

OCC thus presents the Commission with the paradox of Schrödinger's Staff: both highly competent and completely inept, depending on which version is convenient for OCC at the time. But the record provides no justification for OCC's apparent belief that Staff will not act in the public interest when approving or rejecting any proposed transfers by Verde Energy, or in enforcing any other term in the Joint Stipulation.

Because paragraph four deters future noncompliance with Ohio's laws and regulations, it benefits consumers and the public interest.

E. Paragraph five of the Joint Stipulation benefits consumers and the public interest by requiring Verde Energy to submit an action plan to Staff, ensuring that future marketing and enrollment operations will comply with Ohio laws and regulations.

Paragraph five of the Joint Stipulation provides:

> *Verde Energy will submit an action plan for compliance at least ninety (90) days prior to resuming marketing and customer enrollment in Ohio.*

This action plan is intended to advance the "primary objective" of the Joint Stipulation: "to avoid, to the extent reasonably possible, the potential for future customer complaints resulting from marketing, solicitation, and customer enrollment practices by Verde Energy to consumers of power and gas in Ohio." (Joint Stipulation at 2.) This benefits consumers by ensuring that Verde Energy's future marketing and enrollment activities comply with Ohio law.

OCC's primary objection to this provision is that it does not explicitly require reforms. Ms. Alexander argued that the provision has "no teeth" because it "doesn't specifically require any reforms or correct the lack of managerial oversight." (Hearing, Vol. I, at 76:4-13.) This argument simply ignores the practical reality, which is that Verde Energy has every incentive to create an effective, Staff-approved compliance plan, and then follow it. (Hearing, Vol. I, at

159:3-7.) Further, the Commission's rules continue to apply to Verde Energy going forward, regardless of what the action plan says. And Ms. Ramsey testified that Staff would pursue enforcement actions against Verde Energy for future violations:

> Q. (By Mr. Lindgren) If Verde should happen to violate a Commission rule, one of the rules that was cited in the Staff Report, is it still going to be a violation even if it's not expressly stated in the Stipulation?
>
> A. (By Ms. Ramsey) Yes.
>
> Q. Thank you. And the Staff could still pursue an enforcement action against Verde for that alleged violation even if it's not expressly spelled out in the stipulation; is that right?
>
> A. Absolutely.
>
> Q. Thank you. And would Staff do so?
>
> A. Absolutely.

(Hearing, Vol. I, at 272:13-24.)

Moreover, the Joint Stipulation's provision for an action plan establishes a clear enforcement mechanism that has deep roots in established Staff practices and procedures, as Ms. Ramsey testified:

> Q. (By Mr. Proaño) Could you describe what the practice is at PUCO Staff with respect to action plans.
>
> A. (By Ms. Ramsey) Everything I just said. The Company will submit the plan to our Staff for our review. We will read TPV scripts, sales scripts. We look over contracts. We want to know how it -- telemarketers using outside -- or third-party vendors, we want to know how they are monitoring those third-party vendors. When they receive a complaint, we want to know what their process is, how they analyze the different complaints they receive and take action on a larger scale before Staff finds the issues.
>
> I mean, they are getting each individual complaint. We expect the suppliers to look at those complaints, determine is there a pattern, is there something they need to address with any of their vendors, any of their sales representatives. We expect them to take action. And the compliance plan needs to show that they are in compliance with all the rules.
>
> Q. Is it your understanding today that normal procedure for reviewing action plans and commenting on them would be applied to this settlement?
>
> A. Absolutely.

Q. And so this isn't anything novel or new, is it?

A. It is not.

Q. Is it also true that PUCO Staff's expectation is the action plan will address specific allegations in the Staff Report?

A. Yes.

(Hearing, Vol. I, at 281:16–282:23.) Thus, Staff has a clear set of processes and standards that will guide the proposal, review, approval, and implementation of an action plan for compliance. Paired with Staff's testimony that (1) it is willing and able to pursue enforcement actions for future violations and (2) it expects Verde Energy to be proactive in identifying patterns indicating potential issues of non-compliance, the action-plan provision represents a clear enforcement mechanism for the Joint Stipulation.

Not only does OCC's argument once again wrongly assume that Staff is incompetent, but Ms. Alexander appears to have conducted no inquiry whatsoever on the subject:

Q. (By Mr. Proaño) And paragraph 5 requires Verde Energy to submit an action plan for compliance at least 90 days prior to resuming marketing and customer enrollment in Ohio if this is approved by the Commission, that's enforceable, correct?

A. (By Ms. Alexander) The term "action plan" is not enforceable in my opinion.

Q. Why not?

A. Because it has no meaning. It is not defined, no details of what will be included. No corrective actions are specifically identified. That is vague and unenforceable. It's -- it could mean whatever Verde Energy decides it means.

Q. Have you talked to PUCO Staff about their understanding of what action plan means?

A. I don't need to. No, I have not.

Q. And so you don't know what they understand it to mean, do you?

A. It doesn't matter what they think.

(Hearing, Vol. I, at 85:1-19.) To be clear, Staff is the regulatory agency that will oversee Verde Energy's participation in the Ohio market when Verde Energy resumes its marketing and enrollment operations. Staff could re-open its investigation against Verde Energy at any time.

The idea that "it doesn't matter" what Staff thinks about Verde Energy's compliance plan is absurd.

Requiring Verde Energy to prepare a plan for compliance with Ohio laws and regulations prior to re-entering the Ohio market protects Ohio consumers and the public generally, and the Commission should find it satisfies prong two.

F. Paragraph six of the Joint Stipulation benefits consumers and the public interest by allowing consumers to cancel contracts with Verde Energy without penalty, maximizing consumer choice.

Paragraph six of the Joint Stipulation provides:

> *Verde Energy will notify all customers enrolled in Ohio since June 1, 2018 that they may cancel contracts without penalty at the customer's election. The notice shall indicate that PUCO Staff has alleged that Verde Energy may have misled customers in Ohio during marketing of its product. The notice shall be sent within 30-days of the Order approving the Stipulation.*

This provision benefits Ohio consumers and the public interest because it ensures that any consumers who may have been misled will continue to receive service from Verde Energy only if they so choose. Consumer choice is a foundational part of the policy behind Ohio's competitive energy service markets. *See* R.C. 4928.02(B) (endorsing "the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs"); R.C. 4929.02(A)(2) (same for natural gas). Paragraph six is consistent with that policy, and seeks to maximize consumer choice.

This provision applies to consumers who enrolled with Verde Energy on June 1, 2018 or later—four full months earlier than the period covered by the Staff Report. (Joint Stipulation at 4; Staff Report at 8.) That date is noteworthy because even if each violation alleged in the Staff Report had occurred as alleged—something Verde Energy strongly disputes—there is simply no evidence on the record establishing any violations prior to October 1, 2018. Verde Energy is,

thus, agreeing to send notice of potential violations to customers whose putative harms are purely speculative. This provision benefits consumers enrolled since June 1, 2018 even though there is no evidence that those consumers enrolled before October 1, 2018 were misled.

OCC's objection to paragraph five focuses on "vagueness," apparently regarding the content of the notice and the rights of consumers:

> Q. (By Mr. Proaño) Is paragraph 6 enforceable if this is approved by the Commission?
>
> A. (By Ms. Alexander) The fact that there is a notice is enforceable. **The contents of the notice and the rights people have are not set forth, and so the vagueness of this provision leads me to my criticism.**
>
> [. . .]
>
> Q. Have you asked PUCO Staff or has OCC, to your knowledge, asked PUCO Staff how they intend to work with Verde Energy to send out this notice required by paragraph 6?
>
> A. No.

(Hearing, Vol. I, at 86:23–87:3, 87:13-17 (emphasis added).) This objection is puzzling in light of the express terms of the Joint Stipulation, which make the notice's contents quite clear—customers must be told of their right to cancel without penalty, and Verde Energy must inform customers of PUCO Staff's allegations that customers may have been misled. (Joint Stipulation at 4.) And, as reflected by Mr. Proaño's question, Verde Energy has every incentive to work with Staff to ensure the content of the notice is acceptable, for the same reasons identified in part E of this section, *supra*. Therefore, the Commission should find that the notice provision is enforceable, advances the state policy of consumer choice, and takes special care to protect Ohio consumers.

G. The Joint Stipulation benefits consumers and the public interest by requiring Verde Energy to pay a forfeiture of $675,000, deterring future misconduct.

Finally, in addition to the settlement terms described above, Verde Energy has agreed to pay a forfeiture of $675,000 to the State of Ohio within 30 days of the approval of the Joint

Stipulation. (Joint Stipulation at 4.) This forfeiture is not being paid in a vacuum; it is part of a carefully crafted package of settlement terms that, as a whole, benefits consumers and the public interest.

This forfeiture benefits Ohio consumers and the public interest by deterring providers from violating Ohio regulations governing the marketing, solicitation, customer enrollment, and sale of electric and natural gas services. Competitive providers across Ohio will be put on notice that the Commission takes customer complaints in this area seriously and that it will impose serious costs on providers unable to demonstrate compliance with applicable laws and the Commission's rules. Not only does the forfeiture deter other companies from engaging in the kinds of activities alleged in the Staff Report, it also serves as a specific deterrent that Verde Energy forgets at its own peril:

> EXAMINER PRICE: Ms. Ramsey, it would take an incredible lack of sight for a company that's already paid a $675,000 civil penalty to think they could engage in behavior that violates the rules and that the Staff is not strictly scrutinizing its activities, wouldn't it?
>
> THE WITNESS (Ms. Ramsey): I agree with you.

(Hearing, Vol. I, at 206:4-10.)

By any reasonable measure, a forfeiture of this magnitude is "substantial" and would have significant deterrence value even without the other terms in the Joint Stipulation. Yet OCC still insists that the forfeiture is not enough, apparently for the sole reason that it is not the specific number identified in the Staff Report:

> Q. Thank you. Would you agree with me that the $675,000 forfeiture provided in the Stipulation is a substantial forfeiture?
>
> A. I have no idea.
>
> Q. You use the term "substantial forfeiture." What did you mean by that?
>
> A. I was referring to the Staff Report which sought at a minimum 1.5 million.

(Hearing, Vol. I, at 104:22–105:4.)

But the $1.5 million figure identified in the Staff Report bears no relation to any objective criteria, and OCC offered no specific explanation for why $1.5 million, rather than $675,000, was an appropriate forfeiture based on the facts of this case. Instead of comparing the forfeiture in the Joint Stipulation to an arbitrary number identified in the Staff Report, the Commission should look to its own history for context and guidance:

> EXAMINER PRICE: Let me see if this helps to cut through this. Questions on settlements, and leaving aside PALMco, are you aware of whether **this would be the largest ever civil forfeiture ever assessed by the Commission against a competitive retail service provider whether settled or went to full litigation?**
>
> THE WITNESS: (By Ms. Ramsey) Okay. So the one that's pending I don't -- I don't know --
>
> EXAMINER PRICE: Leaving aside PALMco.
>
> THE WITNESS: **Yes.**
>
> EXAMINER PRICE: Then what --
>
> THE WITNESS: This would be the largest forfeiture assessed to a --
>
> EXAMINER PRICE: CRES provider.
>
> THE WITNESS: CRES provider.
>
> EXAMINER PRICE: Would this also be the largest against a competitive retail natural gas supplier?
>
> THE WITNESS: Yes, it would be.

(Hearing, Vol. I, at 279:20–280:14 (emphasis added).)

In light of the undisputed testimony that the Joint Stipulation's $675,000 forfeiture would be the largest ever paid by a CRES or CRNGS provider—PALMco perhaps excepted—the Commission has ample grounds for concluding that the forfeiture benefits Ohio consumers and the public interest.

In summary, the settlement package benefits consumers and the public interest by providing over a million dollars in restitution to Ohio consumers, deterring future misconduct through substantial forfeitures and penalties, and requiring Verde Energy to cease marketing and

enrollment activities for eighteen months and submit a plan for operating in compliance with Ohio laws and regulations. It thus meets prong two of the Commission's test.

III. Prong Three: the Joint Stipulation Does Not Violate Any Important Regulatory Principles or Practices.

The third and final prong of the Commission's test asks "whether the settlement package violates any important regulatory principles or practices." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶ 16 (2006). Broadly speaking, state policy on retail energy service favors consumer choice, market access, flexible regulation, and protection from unreasonable sales practices. *See* R.C. 4928.02; R.C. 4929.02. Because the Joint Stipulation resolves the issues alleged in the Staff Report in a manner consistent with these and other important regulatory principles and practices—including the need to provide customer restitution, where appropriate—the Commission should approve the Joint Stipulation.

A. The available evidence shows that the Joint Stipulation is consistent with Ohio regulatory principles and practices, and OCC fails to show otherwise.

The veracity—or lack thereof—of the allegations in the Staff Report is not the subject of this proceeding. Furthermore, in many instances, the *sole* evidence for the allegations in the Staff Report are documents admitted over counsel's objections as to authenticity, foundation, and hearsay. (*See* Hearing, Vol. II, at 376:11–378:21.)

The OCC sponsored documents regarding consumer complaints against Verde Energy—OCC Exhibit 7. These documents are PUCO documents obtained by the OCC via a public records request. Each page contains statements made by declarants outside of the Commission and, as such, are reliable hearsay. Attorney Examiner Price recognized that these documents are replete with hearsay and triple hearsay. (Hearing, Vol. II, at 378:9-16.)

Verde Energy waives no objections as to the admissibility of OCC Exhibit 7, and it reiterates its position that OCC Exhibit 7, consisting of PUCO documents, is inadmissible under Ohio Supreme Court precedent. *See Zalud Oldsmobile Pontiac, Inc. v. Tracy*, 77 Ohio St.3d 74, 80, 1996-Ohio-90, 671 N.E.2d 32 (1996) ("Thus, to be admissible under [Evid. R. 803(8)], the record must be an agency's record, not a statement from someone outside the agency."). In any event, these documents have limited relevancy. The purpose of settlement is not to establish that violations occurred, but to resolve allegations of violations in a just and efficient manner. This settlement package in particular is meant to "avoid, to the extent reasonably possible, the potential for future customer complaints" regarding Verde Energy's sales practices in Ohio. (Joint Stipulation at 2.) The Joint Stipulation, if adopted, will accomplish that objective, and its potential approval by the Commission should be decided with that objective in mind.

Of course, Staff still believes that the allegations and conclusions in the Staff Report are accurate:

> Q. I'm David Proaño, counsel for Verde Energy. You believe the Staff did a thorough job with the Staff Report in this case?
>
> A. (By Ms. Ramsey) Yes, I do.
>
> Q. And do you believe the truth of the statements and conclusions made by the Staff in that report?
>
> A. Yes.

(Hearing, Vol. I, at 274:9-16.) But the question under the Commission's third prong is not whether there were verifiable allegations against Verde Energy in the Staff Report. The question is whether the Joint Stipulation resolves those alleged violations in a manner consistent with Ohio's regulations and the principles underpinning them. Yet OCC's argument on the third prong appears simply to rehash its argument on the second prong—that there have been

allegations of wrongdoing and that the Joint Stipulation does not go far enough in response. (*See* Alexander Testimony, at 7:1–9:11; Williams Testimony, at 20:13–21:8, 31:13–32:2.)

Despite its understandably positive position on its own Staff Report, Staff clearly believes that the settlement package is consistent with Ohio regulatory principles:

> Q. (By Mr. Proaño) You believe the Staff Report is fairly broad and comprehensive and covers a lot of different customers' contacts and complaints?
>
> A. (By Ms. Ramsey) It does.
>
> Q. Given all that knowledge of the truth in your view of the statements in the Staff Report and the breadth and extensiveness of the Staff Report, you believe that the settlement in this case is appropriate, correct?
>
> A. Yes, I do.
>
> Q. And you also believe that the settlement in this case satisfies the three-part Commission test that's at issue in this hearing, correct?
>
> A. Correct.

(Hearing, Vol. I, at 274:17–275:5.) In other words, Staff is fully aware of what is in the Staff Report. Staff is deeply knowledgeable about the regulation of Ohio's competitive electric and natural gas service markets. Staff is thorough and competent. And Staff chose to settle the case.

That result is fully consistent with Ohio law. If an alleged pattern of violations is enough to establish that a settlement package violates "important regulatory principles or practices," it is hard to see how any case involving alleged regulatory violations could ever be settled. In contrast to Staff's clear recognition that the Joint Stipulation is appropriate and consistent with Ohio law, neither of OCC's witnesses even named the "important regulatory principles or practices" that the Joint Stipulation supposedly violates.

Ms. Alexander did draw attention to investigations in other states against providers *currently* owned by Verde Energy's parent company. (*See* Hearing, Vol. I, at 64:24–65:15.) But remarkably, Ms. Alexander admitted that she failed to investigate basic facts about whether those violations have anything to do with *current* Verde Energy management:

> Q. (By Mr. Proaño) At the time of those investigations, were those companies affiliates of Spark Energy?
>
> A. (By Ms. Alexander) I do not know the answer to that question. I would have to research my records in those cases. I don't recall specifically.
>
> Q. And you didn't check for purposes of your direct testimony before drawing the Commission's attention to those three cases as evidence that the Commission should take more severe action in this case?
>
> A. What I did check is to determine that they are affiliates of Spark Energy at this time.
>
> Q. What you didn't check is whether or not they were affiliates of Spark Energy during the relevant time of these investigations in Pennsylvania and Maryland, correct?
>
> A. I didn't check that because I didn't find that relevant to any of the concerns that I'm raising in my testimony.
>
> Q. So you don't consider it relevant to point out that -- to point the Commission to proceedings that may not have even involved Spark Energy?
>
> A. Spark Energy currently owns and -- these companies and operates them out of its Houston, Texas, headquarters and is therefore, responsible in my opinion for the history of those companies when it seeks to do business in Ohio.
>
> [. . .]
>
> Q. And so you expect the Commission to give weight to your testimony regarding those three proceedings even though Spark Energy may not have been the corporate parent at the time of the underlying allegations in those cases, correct?
>
> A. Yes, I do.

(Hearing, Vol. I, at 66:1-25, 67:8-13.)[6] Ms. Alexander is an experienced expert witness, who, by her own reckoning, has submitted testimony against a competitive supplier on at least ten occasions. (Hearing, Vol. I, at 70:18-22.) Yet she failed to investigate basic facts relevant to her testimony, and she failed to meaningfully articulate why those facts, if true, have any bearing on the "important regulatory principles or practices" that this Commission must consider in weighing the Joint Stipulation. For these reasons, the Commission should not credit her testimony as to the third prong of its test.

[6] This quote omits an objection, which was overruled by Attorney Examiner Sanyal.

As for Mr. Williams, his testimony merely restates his belief that the Joint Stipulation is not harsh enough. (*See* Williams Testimony at 20:13–21:8, 31:13–32:2.) And in the approximately 37 times Mr. Williams has testified before the Commission since 1996, it would appear that he always takes that same position:

> Q. (By Ms. Hooper) Have you ever provided testimony in support of the three-prong test being met?
>
> A. As I believe I already stated, I have not filed testimony supporting the office's position on -- on a three-prong test.

(Hearing, Vol. II, at 389:21-25.) Accordingly, the Commission should not credit Mr. Williams's testimony as to the third prong, either. Because both of OCC's witnesses fail to even identify any "important regulatory principles or practices" offended by the settlement package, prong three has been met.

B. The Joint Stipulation is fully consistent with the principle of restitution for customers.

The Joint Stipulation honors the important regulatory principle that customers should receive restitution, where appropriate. As explained at length above, the Joint Stipulation requires Verde Energy to re-rate customers in the approximate amount of $1.068 million, although updated estimates indicate that the re-rate number will likely be higher. (Joint Stipulation at 4; Jordan Deposition at 176:12-24.) This amount would be in addition to refunds that Verde Energy customers have already received. (*E.g.*, Hearing, Vol. I, at 29:24–30:12.)

The testimony of all four consumer witnesses at the hearing supports Verde Energy's position that the Joint Stipulation honors the important regulatory principle of consumer restitution, because these witnesses either already received restitution, never incurred costs in the first place, or, if necessary, would receive restitution in the future in accord with the terms of the Joint Stipulation. The first witness, William Bown, testified that he did not accept an offer of

service from a caller purporting to be from Verde Energy. (Hearing, Vol. I, at 14:7-10.) Bown further testified that he had received no more calls from anyone claiming to be from Verde Energy, and he was unable to dispute that he had been added to Verde Energy's internal "do not call" list after his complaint to Staff. (Hearing, Vol. I, at 16:1-7.)

The second and third consumer witnesses, Dennis and Brenda Poffenberger, are a married couple that testified that they paid higher electric rates to Verde Energy after their initial contract expired. (Hearing, Vol. I, at 20:7-14, 25:14-24.) When Ms. Poffenberger brought these bills to Verde Energy's attention via a complaint to Staff, she and her husband received a check from Verde Energy in the amount of $1,886.33. The Poffenbergers were satisfied with the amount of the check, and so they cashed it. (Hearing, Vol. I, at 29:24–31:6.) This substantial restitution is all the more noteworthy for the fact that neither Mr. or Mrs. Poffenberger could deny under oath that they had received a contract-expiration notice from Verde Energy. (Hearing, Vol. I, at 28:8-14, 32:3-14.)

The fourth and final consumer witness, Tomas Quintana, testified that he counseled his niece, Nathaly Leyton to file a complaint with Staff regarding welcome letters that he asserted were sent to Ms. Leyton by Verde Energy, even though she claimed never to have heard of Verde Energy. (Hearing, Vol. I, at 134:6–135:22.) Counsel for Verde Energy objected and moved to strike much of Mr. Quintana's testimony as hearsay, because it consisted chiefly of secondhand statements purportedly made by Ms. Leyton.[7] (Hearing, Vol. I, at 135:23–136:7.) But even if Mr. Quintana's testimony were admissible, there is no testimony on the record as to

[7] Verde Energy respectfully notes that the same may be said of much of (1) the other consumer testimony offered at the hearing and (2) of the consumer complaints referenced in the Staff Report and elsewhere. Although an administrative agency is not strictly bound by the Ohio Rules of Evidence, the power to consider hearsay evidence is not unlimited, and Verde Energy preserves all objections as to such evidence. *See, e.g.*, *Almondtree Apts of Columbus, Ltd. v. Bd. of Revision of Franklin Cty.*, 10th Dist. Franklin No. 87AP-1216, 1988 WL 70505, *2 ("The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner.").

what, if anything, occurred with Ms. Leyton's putative complaint. (*See* Hearing, Vol. I, at 139:4-19.) To the extent that Ms. Leyton may be entitled to restitution for any alleged violations by Verde Energy under the terms of the Joint Stipulation, she will be re-rated and refunded in accord with the terms of the Joint Stipulation, if it is approved by the Commission. (*See* Joint Stipulation at 4.)

Despite a voluminous record demonstrating that the Joint Stipulation honors the principle of customer restitution, OCC argues that the Joint Stipulation will allow Verde Energy to "profit" from its alleged violations. That argument is without foundation:

> Q. But if Verde is permitted to profit from its misconduct or alleged misconduct, then how is paying a forfeiture and a re-rate amount amounting to approximately $1.8 million --
>
> EXAMINER PRICE: You're assuming a fact not in evidence. There is no evidence that they are profiting at all.
>
> MS. O'BRIEN: It's a hypothetical.
>
> EXAMINER PRICE: If you have got a witness that can demonstrate they profited from the misconduct, then you can ask the question.
>
> [. . .]
>
> Q. Now, my question is if Verde can make more money serving its existing customers or continue making money serving its existing customers, how does the forfeiture amount in the re-rate amount serve as a deterrent for its alleged behavior set forth in the Staff Report?
>
> MR. PROAÑO: Objection, foundation.
>
> EXAMINER SANYAL: Do you have a response?
>
> MS. O'BRIEN: Your Honor, I rephrased it every way to Sunday; and, you know, he's objecting that it's asked and answered. I am trying to make it as clear as possible, but you know, that's --
>
> EXAMINER SANYAL: I think the issue that you are having is the foundation with regard to profiting. And I just don't think you are going to get there at this point, so I will sustain that objection.

(Hearing, Vol. I, at 269:2-12, 271:2-18.) The testimony and other record evidence, along with the terms of the Joint Stipulation, make clear that restitution is a significant component of the

Joint Stipulation. Thus, the Joint Stipulation is in harmony with this important regulatory principle and should be approved.

CONCLUSION

For the reasons identified above, the Commission should approve the Joint Stipulation.

Dated: December 2, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by e-mail upon the persons listed below this 2nd day of December, 2019.

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Summary: Brief in Support of Joint Stipulation and Recommendation electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC