

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's)	
Investigation into Verde Energy USA)	Case No. 19-958-GE-COI
Ohio, LLC's Compliance with the Ohio)	
Administrative Code and Potential)	
Remedial Actions for Non-Compliance.)	

**MEMORANDUM CONTRA VERDE ENERGY'S MOTION FOR LEAVE TO
FILE A REPLY (THAT IS UNAUTHORIZED)
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

After being found by the PUCO Staff to have “failed to meaningfully modify its business practices to bring itself into compliance with the [PUCO’s] rules” for consumer protection,¹ Verde Energy is demonstrating a similar failure to comply with the PUCO’s rules and rulings on PUCO practice. It would take a scorecard to follow Verde’s various filings, but here is where we are. On December 23, 2019, Verde filed a “Reply” (to OCC’s memorandum contra Verde’s Motion for a Protective Order). But Verde’s Reply was barred by the May 6th ruling of the Attorney Examiners that “*a reply memorandum to any memorandum contra will not be accepted.*”² Under that PUCO ruling, OCC moved to strike Verde’s unauthorized Reply. Verde then *missed* the deadline for filing a memorandum contra OCC’s motion to strike. Apparently undaunted, Verde then apparently re-thought its approach to its earlier unauthorized Reply and, on January 10,

¹ *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, Staff Report (May 29, 2019) (“Staff Report”), at 27.

² May 6, 2019 Entry by Attorney Examiners (“May 6th Entry”), at ¶ 9 (emphasis added).

2020, filed a Motion for Leave to File *Instantly* the Reply (as a second attempt to register a reply to OCC's memorandum contra Verde's Motion for a Protective Order).

II. ARGUMENT

The core issue in Verde's filings is its Motion for a Protective Order to keep information about Verde's bad business practices from the public that was harmed, all under the guise of a trade secret.³ OCC timely filed a memorandum contra on December 16, 2019⁴ that explained why Verde's concealed information is not a trade secret under Ohio law and how Verde had failed to demonstrate that disclosure of the concealed information would competitively harm it.⁵

Despite the Attorney Examiner's directive (May 6th Entry prohibiting replies), Verde filed an unauthorized Reply⁶ to OCC's memorandum contra on December 23, 2019. At that time, Verde did not seek leave from the PUCO to file the Reply. OCC then filed a Motion to Strike Verde's unauthorized Reply on December 27, 2019.

Under the PUCO's rules and the PUCO's May 6th Entry, Verde could have opposed OCC's Motion to Strike by following the convention of filing a memorandum contra on or before January 6, 2020. But Verde missed that deadline. It did not file a

³ This information, hereinafter referred to as the "concealed information," is fully described in OCC's Memorandum Contra Verde's Motion for Protective Order that OCC filed in this case on December 16, 2019.

⁴ The May 6th Entry by the Attorney Examiners in this case specifically states (at ¶ 9): "Finally, in light of the time frame for this proceeding, the attorney examiner requires that, in the event that *any motion is made in this proceeding*, any memorandum contra shall be filed within five business days after the service of such motion, *and a reply memorandum to any memorandum contra will not be accepted.*" (emphasis added).

⁵ OCC's December 16, 2019 memorandum contra is incorporated herein by reference.

⁶ Verde Motion, at 1 ("OCC is correct that Verde Energy's reply brief in support of its motion for protective order was not permitted by the attorney examiner's May 6, 2019 order, which still governs this proceeding.").

memorandum contra. Having missed the filing of a memorandum contra, Verde then decided to try filing a Motion for Leave to file a reply to OCC's memorandum contra Verde's Motion for a Protective Order. Verde's Motion for Leave to file a reply is nothing more than a late-filed and improper response to OCC's Motion to Strike.

Verde admits its Reply would be a violation of the PUCO's May 6th Entry.⁷ But Verde asserts that the PUCO should accept the Reply anyway. According to Verde, "[c]onsideration of the reply will not prejudice any parties."⁸

But that is not true. First, the PUCO's May 6th Entry has no such standard as Verde proposes. So, giving Verde an exception does prejudice OCC (that filed according to the ruling).

Moreover, Verde's noncompliance interferes with the faster track for this case that the PUCO Attorney Examiners instituted. OCC complied with the PUCO's timetable, filing its memorandum contra in less than half the usual time allowed. And, given that the PUCO's May 6th Entry timeline expressly disallowed replies, OCC forewent trying to address in its filing an anticipation of new or embellished arguments that might otherwise be expected from Verde if it was permitted a reply.

⁷ *Id.*

⁸ *Id.* "No prejudice" has unfortunately become Verde's recurring excuse for not complying with the PUCO's rules in Case No. 13-2164-GA-CRS. *See e.g.* Case No. 13-2164-GA-CRS, Verde Energy Reply Memorandum in Support of the Motion to Extend (December 30, 2019), at 3 (Verde admitted that it filed its renewal application to provide natural gas service late but that the delay "prejudiced no one, and OCC cannot plausibly claim otherwise."); Verde Energy's Memorandum in Opposition to OCC's Motion to Compel (January 10, 2020) at 4 ("OCC will suffer no prejudice" from Verde's failure to respond to discovery within the 20 day timeframe required by the PUCO's rules); and Verde Energy's Motion for Extension of Time to Respond to OCC's Discovery, Memorandum in Support (December 19, 2019), at 3, 4-5 (Although Verde admits that "[i]t is true that OCC is currently considered a party under the Commission's rules for discovery purposes" "OCC will not be prejudiced" by Verde's refusal to respond to discovery until 14 days after the date the PUCO officially grants OCC's Motion to Intervene.).

Further, Verde's vexatious approach to litigation, in its disregard for the rules, prejudices OCC and the PUCO by wasting administrative resources. As noted, Verde could have filed a memorandum contra to OCC's Motion to Strike in accordance with the procedure directed by the Attorney Examiners in the May 6th Entry. And that would/should have been the last pleading on this issue until a ruling. But Verde missed the deadline to file a memorandum contra and instead initiated a new unnecessary pleading cycle with its new Motion for Leave.

Verde also argues that the May 6th Entry's expedited pleading cycle prohibiting replies is no longer necessary because "[t]here are no deadlines" in this case.⁹ However, the Attorney Examiners have not modified the expedited pleading schedule. And Verde did not take an interlocutory appeal to challenge the ruling by seeking a different timeline. So, the expedited pleading schedule in the PUCO's May 6th Entry is applicable.

III. CONCLUSION

The PUCO should not be accepting of Verde's disregard for the PUCO's rules and rulings. Contrary to Verde's claims, Verde's refusal to follow simple PUCO procedures prejudices everyone except Verde. To protect the integrity of the PUCO's rules and rulings, and in basic fairness to parties who followed the rules, the PUCO should deny Verde's Motion for leave to file a reply. The PUCO should grant OCC's Motion to Strike, and it should deny Verde's Motion for Protective Order.

⁹ Verde Motion, at 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Verde Energy's Motion For Leave To File A Reply (That Is Unauthorized) was served via electronic transmission upon the parties this 17th day of January 2020.

/s/ Angela D. O'Brien

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This foregoing document was electronically filed with the Public Utilities

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Case No(s). 19-0958-GE-COI

Summary: Memorandum Memorandum Contra Verde Energy's Motion for Leave to File A Reply (That Is Unauthorized) by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of O'Brien, Angela D