

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of
Verde Energy USA Ohio, LLC for
Certification as a Competitive Retail
Electric Supplier

CASE NO.: 11-5886-EL-CRS
CASE NO.: 13-2164-GA-CRS

In the Matter of the Application of
Verde Energy USA Ohio, LLC as a
Competitive Retail Natural Gas
Supplier

(CONSOLIDATED)

**VERDE ENERGY'S BRIEF IN OPPOSITION TO OCC'S MOTION TO
INTERVENE IN THE ELECTRIC RECERTIFICATION CASE**

The issue in this consolidated recertification case is whether Verde Energy USA Ohio, LLC ("Verde Energy") has the "managerial, technical, and financial capacity" to serve as a CRES and CRNGS provider in Ohio and otherwise meets the requirements for certification. R.C. 4928.08(B). The Commission's Staff is more than capable of evaluating Verde Energy's applications and representing the public interest before the Commission. Far from being "impaired," any interest OCC has in this proceeding will be more than adequately represented by Staff. *See* Ohio Adm.Code 4901-1-11(A)(2). That distinguishes this case from *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, which OCC appears to read as giving it an unconditional right to intervene in any Commission proceeding. (*See* OCC Br. 4.) OCC does not have that right, because Staff will participate in this case, and Staff will oversee the submittal and implementation of a compliance plan that will address the arguments that OCC is likely to make.

Verde Energy therefore opposes OCC's motion to intervene, based on the adequacy of Staff's involvement in the case and the reality that OCC's putative intervention will unnecessarily consume the resources of the Commission and the parties. *See* R.C. 4903.221(B). Staff is more than capable of representing the public interest in this consolidated recertification case, and the Commission should therefore deny OCC's motion to intervene.

I. Because Staff Adequately Represents the Public Interest, OCC Should Not Be Permitted to Unduly Delay or Prolong These Proceedings.

The recently approved Joint Stipulation in the Commission-ordered investigation ("COI")¹ requires Staff to approve and oversee a compliance plan that Verde Energy must submit and follow in order to market electricity and natural gas in Ohio. Thus, Staff has a necessary role to play in these proceedings. OCC does not. And based on its recent conduct, OCC's overzealous litigation tactics will only distract the parties and waste public and private resources. Most importantly for its motion to intervene, OCC has no interest in this litigation that is not already adequately represented by Staff, which has an obligation to protect Ohio consumers, both as a general matter and under the Joint Stipulation that was approved in the COI.

OCC is clearly determined to oppose Verde Energy's application at all costs, and that apparently includes attempting to rewrite the history of the COI. For example, OCC should not be entitled to relitigate the underlying facts of the COI. But based on OCC's past record and a number of discovery requests it has already

¹ Case No. 19-958-GE-COI.

served on Verde Energy in this consolidated case to date, that is exactly what OCC appears to be doing. OCC opposed the Joint Stipulation in the COI that was adopted by the Commission, and is now advocating for the result that OCC did not achieve in the COI, namely the revocation of Verde Energy's ability to do further business in this state. Allowing OCC to intervene will only serve to allow OCC to reargue the underlying facts of the COI, including alleged violations of Commission rules by Verde Energy. While Verde Energy cannot anticipate all of the arguments that OCC intends to make or the discovery it will seek, the Commission has already heard and made findings on the evidence in the COI, and those findings must be respected. *See In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 20 (2015) ("Res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are of a judicial nature.").

The authority cited in OCC's own brief is the best illustration of the reason why OCC's motion to intervene should be denied. OCC argues that the Ohio Supreme Court has "confirmed OCC's right to intervene in PUCO proceedings," citing *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶¶ 13–20. (See OCC Br. 4.) But OCC misstates the holding of that case and ignores its key facts. In *Consumers' Counsel*, OCC sought to intervene in a consolidated pair of public-utility cases in which FirstEnergy and DP&L sought to change their accounting procedures in ways that would permit future rate increases. *Consumers' Counsel*, ¶ 1. The Commission denied OCC's motion to intervene, and the Court reversed, holding that the Commission "abused its

discretion when it denied the motions to intervene. The Consumers' Counsel's interests *were not represented by any other party to the proceedings, and there is no suggestion in the record that intervention would have unduly delayed the proceedings or caused prejudice to any party.*" *Id.* at ¶ 18 (emphasis added).

Here, on both counts, the opposite is true. First, in contrast to *Consumers'* Counsel, where neither the Supreme Court opinion nor the Commission docket² appear to show Staff as a participant in the litigation, Staff will capably represent the interests of residential consumers in this case. Second, OCC's contentious approach to litigation, and especially its voluminous discovery requests, will burden the parties and prejudice Verde Energy with unreasonable discovery costs, as explained further below. Given Staff's central role in protecting consumers pursuant to the Joint Stipulation, which the Commission approved, OCC's participation in this case is redundant, as the *Consumers' Counsel* case confirms.

II. OCC Should Not Be Permitted to Impose Disproportionate Discovery Costs on Verde Energy.

OCC's discovery practices are deeply problematic. They are at odds with usual practice in Ohio courts, and they appear to have more to do with punishing Verde Energy than with preparing a case about Verde Energy's applications. A brief discussion on each of these points is in order, because they explain why OCC's intervention will be prejudicial to Verde Energy and unhelpful to the resolution of this case.

² Case No. 04-1931-EL-AAM; Case No. 04-1645-EL-AAM.

First, OCC has already conducted discovery in this consolidated case without any evident regard for the massive administrative and financial burden imposed by serving, to date, 111 interrogatories (counting sub-parts) and 35 document requests on Verde Energy. If OCC were a litigant in a common pleas court, it would be limited to propounding 40 interrogatories (again, counting sub-parts) per party unless it sought leave of court. Ohio Civ.R. 33(A). And even if OCC could show “good cause,” it would still be “within the trial court’s discretion to grant leave to serve additional interrogatories.” *Chinnock v. Renaissance Ctr.*, 8th Dist. Cuyahoga No. 101442, 2015-Ohio-768, ¶ 21. Here, even though it currently has until May 22, 2020 to serve discovery requests, OCC is already on the verge of exceeding its hypothetical limit for a third time. At this rate, Verde Energy faces the very real possibility of having to sort through hundreds of discovery requests over the next two months or longer. That actually understates the likely burden of OCC’s discovery binge, because it does not account for deposition notices, which OCC can continue to serve even after May 22.

To be sure, there is no explicit limit on the number of interrogatories in the Commission’s rules. But Civil Rule 33(A) is persuasive authority in favor of *some* reasonable limit. *See, e.g., Doody v. Doody*, 11th Dist. Lake No. 2006-L-200, 2007-Ohio-2567, ¶ 61 (upholding an award of attorney’s fees in part because the losing party served “a total of 384 interrogatories”). In particular, OCC’s open-handed use of interrogatories should be reined in, regardless of how the Commission rules on the motion to intervene.

Second, even if the Commission does not impose some limit on the amount of discovery requests that parties can issue in these cases, there is a broader point to be made about the “full development and equitable resolution of the factual issues” in these applications. R.C. 4903.221(B)(4). An “equitable resolution of the factual issues” implies a sense of proportionality. Parties are entitled to liberal discovery—not unlimited discovery. And OCC should not be permitted to use its discovery rights to impose unfair, punitive costs on Verde Energy. Unfortunately, OCC seems unlikely to clear even that low bar, and that is yet another reason why its motion should be denied. OCC may respond to this point with name-calling or references to alleged misdeeds by Verde Energy. But that should not distract the Commission from the inherent potential for abuse through overly-burdensome discovery requests. While such discovery abuses may be addressed in the course of discovery in this consolidated case, they are illustrative of the OCC’s punitive approach to litigation, and underscores why intervention would serve no purpose other than to increase the litigation costs and burdens on Verde Energy.

CONCLUSION

For the foregoing reasons, the Commission should deny OCC’s motion to intervene because the interests of Ohio consumers are already adequately represented by Staff in this consolidated case, and Staff is more than capable of providing an informed recommendation regarding the renewal of Verde Energy’s CRES and CRNGS certifications.

Dated: March 23, 2020

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 23rd day of March, 2020.

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Summary: Memorandum MEMORANDUM CONTRA TO OCC'S MOTION TO INTERVENE
electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC