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 MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S APPLICATION FOR REHEARING

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INTRODUCTION

Verde Energy is in the process of implementing the largest Commission settlement involving a competitive retail energy supplier in Ohio history. On March 12, 2020, Verde Energy paid a $675,000 forfeiture to the Commission. On March 27 and 30, 2020, Verde Energy sent notices to over 8,500 electricity and natural gas customers in Ohio, notifying them of this investigation and of their right to cancel their supply contracts with Verde Energy at any time and without penalty. And now, Verde Energy is preparing to implement a record-setting re-rating process involving 21,000 current and former customers that will cost the company more than $1.3 million.[1] In addition to all of these remedial efforts, Verde Energy is preparing a comprehensive compliance plan for PUCO Staff's review and approval in order to re-start marketing in Ohio.

OCC claims that these severe settlement terms are somehow insufficient. But instead of establishing why the Commission's approval of the settlement should be reconsidered, OCC's application for rehearing largely focuses on a misguided argument that the Commission unfairly shifted the burden of proof to OCC. This argument is both incorrect and irrelevant. The ultimate issue in this case is whether the Joint Stipulation was reasonable. OCC argued that the settlement was not reasonable because of the number of alleged rule violations by Verde Energy,

[1] This $1.3 million re-rate amount represents a current estimate of the cost to Verde Energy of implementing the re-rate required by the Joint Stipulation, not counting Verde Energy's administrative costs for implementing the re-rate. The final sum may be substantially more. At the time of the Joint Stipulation, the re-rate amount was estimated at $1,068,000. (Joint Stipulation, Sept. 6, 2019, III(3).)

but instead of submitting the evidence necessary to demonstrate those violations, OCC in large measure asked the Commission to simply assume that all of those violations had occurred. Basic due process requires some measure of proof and verified evidence of a violation if OCC wanted the Commission to take established violations into account in assessing the reasonableness of the proposed settlement. The Commission did not shift the burden of "proof" onto to OCC, in the sense that OCC argues, and it properly weighed the evidence that OCC did submit in finding that the settlement was reasonable under the Commission's long-established three-prong test.

The standard for a rehearing is whether the Commission's decision to approve the Joint Stipulation was itself "unreasonable or unlawful." Ohio Adm.Code 4901-1-35(A). OCC fails to establish these grounds for rehearing. The product of serious bargaining, the settlement combined restitution, penalties, and incentives for future compliance in a package that, taken as a whole, benefits consumers and the public interest and does not violate any important regulatory principle. That resolves this case. Now is the time to get refunds to customers as quickly as possible, not for further litigation. The Commission should reject OCC's assignments of error and deny the application for rehearing.

PROCEDURAL HISTORY AND JOINT STIPULATION TERMS

Verde Energy received CRES and CRNGS certificates on March 28, 2012, and December 9, 2013, respectively. *See* Case No. 11-5886-EL-CRS; Case No. 13-2164-GA-CRS. Those certificates were renewed every two years and are currently extended through November 1, 2020, pending the Commission's review of Verde

Energy's renewal applications. *Id.* On April 17, 2019, the Commission opened this investigation, set a procedural schedule, and directed the filing of a Staff Report detailing Staff's investigation into contacts involving Verde Energy customers and alleged violations of the Ohio Administrative Code. On April 24, 2019, and May 1, 2019, respectively, OCC and IGS Energy moved to intervene. On May 3, 2019, the Staff Report was filed, detailing Staff's allegations against Verde Energy and recommending corrective action, with an amended Staff Report filed on May 29, 2019. The procedural schedule was extended several times to allow the parties to pursue settlement negotiations. After months of intensive negotiations between experienced counsel, on September 6, 2019, Staff and Verde Energy agreed to and filed the Joint Stipulation under Ohio Adm.Code 4901-1-30.

A two-day hearing on the proposed settlement was held on October 16 and 17, 2019, with post-hearing briefing submitted on December 2 and 17, 2019, regarding whether the Commission should approve the Joint Stipulation. Verde Energy and Staff submitted that the Commission should approve the Joint Stipulation as a reasonable compromise that fairly resolved the allegations in the Staff Report.

In recognition of the issues raised in the Staff Report, under the settlement Verde Energy agreed to continue its ongoing voluntary stay of marketing and customer enrollment in Ohio through October 30, 2020 (a total of 18 months) and to withdraw from the now-substantially modified Dominion MVR program for one year. (Joint Stipulation, Sept. 6, 2019, III(1) & (2).) It also agreed to re-rate all

residential electric customers enrolled by Verde Energy between October 1, 2018, and April 30, 2019, a process that will involve approximately 21,000 current and former Verde Energy customers and was estimated (at the time) to cost $1,068,000.[2] (*Id.*, III(3).) In addition, under the Joint Stipulation, Verde Energy may not transfer customer contracts to another entity except in connection with any settlement with IGS Energy, must submit an action plan for compliance at least ninety days before resuming marketing in Ohio, and was required to notify all electric and natural gas customers enrolled in Ohio since June 1, 2018 (four months before the period studied by the Staff Report) of their right to cancel their Verde Energy contracts without penalty and of Staff's allegations in this investigation. (*Id.*, III(4), (5), & (6).) Finally, Verde Energy agreed to pay a forfeiture of $675,000—the largest-ever such payment by a competitive supplier in Ohio history. (*Id.*, III(7).)

Applying the standard three-prong test governing the adoption of settlement stipulations, the Commission entered an Opinion and Order approving the Joint Stipulation on February 26, 2020. The purpose of this stringent and unprecedented package of terms is to settle the allegations made in the Staff Report and create conditions under which Verde Energy can continue to operate in Ohio. But OCC has consistently opposed the Joint Stipulation, arguing that it does not go far

[2] As noted in footnote 1, the actual re-rate is expected to cost Verde Energy in excess of $1.3 million.

enough to punish Verde Energy. To that end, OCC filed an application for rehearing on March 27, 2020.

STANDARD OF REVIEW

Within thirty days of any Commission order, any party "may apply for a rehearing in respect to any matters determined in the proceeding." R.C. 4903.10. The application for rehearing "must set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful." Ohio Adm.Code 4901-1-35(A). "Under R.C. 4903.10(B), if the [C]ommission determines upon rehearing that its 'original order or any part thereof is in any respect unjust or unwarranted, or should be changed,' it can abrogate or modify the order." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 15 (2006). If "an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met." *Harris Design Services v. Columbia Gas of Ohio, Inc.*, 154 Ohio St.3d 140, 2018-Ohio-2395, 112 N.E.3d 858, ¶ 20 (2018) (citation and internal quotation marks omitted).

OCC has failed to meet its burden for a rehearing of the Commission's decision approving the Joint Stipulation under R.C. 4903.10 or Ohio Adm.Code 4901-1-35(A). OCC has not established that the Commission's decision was "unjust" or "unwarranted" in any respect. As a package, the approved stipulated settlement, which Verde Energy has already begun implementing, is reasonable and benefits

Ohio consumers. As discussed below, the Commission should reject OCC's arguments to the contrary.

ARGUMENT

I. The Commission Considered All Relevant Evidence and Material Facts When It Approved the Joint Stipulation, Making Rehearing Unnecessary.

The issue for the Commission's review is whether its decision approving the Joint Stipulation was somehow unjust or unwarranted. While OCC takes every opportunity to attack Verde Energy, it fails to establish that the Commission's decision was flawed. The core question is whether the Joint Stipulation is reasonable. *See Ohio Consumers' Counsel v. Pub. Util. Comm.*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, ¶ 16 (2006). Staff submitted testimony establishing that the Joint Stipulation was reasonable, and the record developed through discovery and the hearing showed that the Joint Stipulation met the three-prong test. Verde Energy will thus first address OCC's second, third, and fourth assignments of error, which deal with the three-prong test. OCC's first assignment of error does not, and is therefore addressed last.

OCC identifies myriad ways that it thinks the Joint Stipulation could be better—but that is a fundamentally different exercise than saying why the Joint Stipulation is unreasonable. The same problem can have more than one "reasonable" outcome. In fact, in the real world, it almost always will. OCC's refusal to acknowledge that, and its insistence that OCC's desired solutions are the only reasonable ones, are not grounds for rehearing. After extensive and comprehensive briefing and argument by the parties, the Commission deemed the

Joint Stipulation reasonable. Rehearing is only appropriate if that finding of reasonableness was *itself* unreasonable or unlawful. *See* R.C. 4903.10; Ohio Adm.Code 4901-1-35. While these general points largely dispose of OCC's criticisms, Verde Energy responds to each of OCC's assignments of error below.

A. The Commission's Finding that the Joint Stipulation Benefits Consumers and the Public Interest Was Reasonable.

Though OCC appears to oppose every aspect of the Joint Stipulation, its second assignment of error singles out three provisions as showing why it believes the Joint Stipulation does not benefit consumers and the public interest. Each will be addressed in turn.

1. Re-Rating

OCC claims that the Joint Stipulation fails to meet the second prong of the Commission's three-prong test because it does not require that Verde Energy re-rate every natural gas customer enrolled during the period covered by the Staff Report. But there are multiple problems with this argument. For one thing, the Commission examines settlements "as a package," not by viewing individual terms in isolation. *Consumers' Counsel*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, at ¶ 16. For another, the test is whether the settlement benefits Ohio consumers and the public interest. The approved settlement provides a substantial benefit to Ohio consumers, in the form of re-rates that will total more than $1.3 million. The re-rate required by the Joint Stipulation has little or no precedent in terms of scope and magnitude for competitive suppliers operating in Ohio. The

Joint Stipulation clearly provides a substantial “benefit” to Ohio consumers, on a historic level.

OCC quibbles with the agreed and approved re-rate mechanism by insisting that *all* customers enrolled between October 2018 and April 2019 should be re-rated. But this assumes that each and every one of those customers experienced violations and was harmed. The evidence presented in this case does not support such a finding, and it is not entirely clear whether even OCC really believes that. Verde Energy is mindful of the seriousness of the allegations in this case, but even so, settlements inherently involve compromise. Verde Energy strongly disputes the idea that every single electric customer enrolled during the period covered by the Staff Report experienced a violation of the Commission’s rules and suffered harm as a result. Yet Verde Energy is re-rating them anyway. It has already sent a right-to-cancel notice to all electric *and* natural gas customers enrolled since June 1, 2018—months before the period studied by Staff—once again without regard to whether there were even any allegations of harm, much less proof. As part of a package, these are reasonable compromises, and they further confirm that the Joint Stipulation benefits consumers and the public interest.

2. Action Plan

OCC argues that the settlement cannot benefit consumers or the public interest because it allows Verde Energy to continue operating in Ohio. Verde Energy recognizes that this investigation has raised serious issues, and it has worked hard—with no constructive input from OCC—to address them. Staff’s testimony in this case (including the Staff Report), and the very fact that it is Staff

that will be monitoring Verde Energy's continued operations in Ohio, make clear that Verde Energy has every incentive to comply. Verde Energy, having litigated this contentious and costly case, is committed to submitting an action plan that will meet with Staff's approval and avoid future litigation. OCC may not like that outcome, but it is hardly unreasonable or unlawful for the Commission to use a mix of sticks and carrots to resolve cases. This point is especially important to highlight here, because OCC mischaracterizes Staff witness Nedra Ramsey's testimony as conclusory and lacking in substance, (OCC Br. at 7), when in reality, Ms. Ramsey explained in detail in her sworn testimony that Staff has an established process for developing compliance plans and will not hesitate to use the possibility of future enforcement actions as a tool to ensure Verde Energy's continued cooperation. (*See* Hearing, Vol. I, at 272:13-24, 281:16–282:23.)

This analysis is not changed by OCC's belated attempt to inject new issues into this case, such as the product rates charged by Verde Energy. Setting aside the question of whether Verde Energy's rates are proper target of regulation in and of themselves, *see* R.C. 4928.05(A), 4928.10(E), 4929.20(B), OCC's post-hearing briefing said little about this issue and provided virtually no specific allegations. That makes it impossible for Verde Energy to respond effectively, except to deny OCC's accusations, and to point out that Verde Energy's services are 100 percent renewable, which makes it unfair (or at least misleading) to compare Verde Energy's prices with the default rates offered by the utilities.

OCC's attempt to raise a product pricing issue at this late stage in the process is perhaps part of an effort to compare Verde Energy to PALMco. But the comparison is highly misleading. In contrast to PALMco, rather than claiming credit for $440,000 in past refunds, (PALMco Opinion and Order at ¶¶ 17–18, Case No. 19-957-GE-COI), Verde Energy is beginning to implement a re-rating process involving 21,000 current and former customers that will cost the company more than $1.3 million. That goes well beyond the restitution actually paid by PALMco, even though PALMco was permitted to operate through the end of its certificates. (*See id.* at ¶ 19.) These differences further underscore why it would not be appropriate to grant rehearing due to this new issue, especially since it does not relate squarely to whether the Joint Stipulation reasonably resolves the allegations in the Staff Report.

3. Civil Forfeiture

OCC also complains that the largest civil forfeiture ever assessed against a competitive supplier is too small. Why? Though OCC denies it, the only real reason appears to be because the Staff Report recommended more. To be sure, OCC tries to argue that there was evidence of more violations than those found by the Commission's Opinion and Order. But OCC also insists that it does not have to support such assertions with any real specificity as to the nature or number of the violations, because that would unfairly shift the burden of proof to OCC. (*E.g.*, OCC Br. at 20.) That is unfair, and it also comes far too late.

Next, OCC adds that the Commission declined to take notice of cases against Verde Energy affiliates in other states. That is true—but it does nothing to explain

how the $675,000 that Verde Energy has already paid to the State of Ohio fails to "benefit" the public interest. *See Harris Design Services*, ¶ 20 (clarifying that the requirement that applicants set forth specific grounds for rehearing is strictly construed). Even if it were advisable or necessary to reassess the right size of the forfeiture (and it is not), administrative notice of other cases in other states against other companies is not required as a matter of law and would not support the idea that the forfeiture in *this* case should be higher. *See Allen v. Pub. Utilities Comm'n of Ohio*, 40 Ohio St.3d 184, 185, 532 N.E.2d 1307, 1309 (1988) ("This court has previously recognized neither an absolute right to nor prohibition against the commission's authority to take administrative notice. Each case has been resolved based on the particular facts presented."). In any event, the forfeiture is only one part of the Joint Stipulation—viewing that one term by itself misses the point of the Commission's three-prong test, which calls for a holistic analysis.

OCC faces the burden of proving the need for rehearing. *See* R.C. 4903.10; Ohio Adm.Code 4901-1-35; *see also Apple v. Dimons, Inc.*, 8th Dist. Cuyahoga No. 79482, 2002-Ohio-3241, ¶ 11 ("As with any motion for relief, the proponent has the burden of proof."). OCC's arguments about how the forfeiture could be bigger, or how any of the other terms could be more stringent, do not even speak to that burden. The Commission found that the Joint Stipulation was reasonable. OCC's argument appears to be that the Joint Stipulation could be better. That is not the test, and OCC's arguments to the contrary should be rejected.

B. The Commission's Finding that the Joint Stipulation Does Not Violate Any Important Regulatory Principles Was Reasonable.

OCC's third assignment of error argues that the Joint Stipulation violates important regulatory principles, chiefly by undermining Ohio policies requiring competitive suppliers to have adequate managerial capacity. But once again, the Commission's decision on the Joint Stipulation was neither unreasonable nor unlawful. The mix of penalties, restitution, and incentives in the Joint Stipulation is designed to ensure that Verde Energy has the managerial capacity to operate in Ohio. OCC fails to demonstrate (as is its burden on an application for rehearing), how that violates any regulatory principle such that the Commission's adoption of the Joint Stipulation was unreasonable. *See Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957, ¶ 59 (explaining that when movants "fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met."). In essence, OCC seems to equate any alleged violation with a lack of managerial capacity. Put another way, OCC's argument would effectively mean that any settlement of alleged violations, be it for spoofing or slamming or anything else, would always fail the third prong. OCC cites no authority for this novel contention.

As for OCC's arguments regarding Verde Energy's rates, largely the same analysis applies here as applied under the second prong of the Commission's test. (*See* Section I.A.2, *supra*.) Verde Energy strongly disputes the premise that generalized and unsubstantiated allegations of unconscionable rates raised in an application for rehearing provide any semblance of due process. Such allegations,

which were not the focus of the Staff Report or the case as a whole, do not warrant rehearing. In fact, virtually no detailed and supported testimony was submitted by the OCC at the administrative hearing in this investigation on the issue of comparative rates. OCC, clearly, is trying to claim after the fact that this case is like the PALMco investigation, when it is not. (*Compare* May 10, 2019 PALMco Staff Report, Case No. 19-957-GE-COI, *with* May 29, 2019 Verde Energy Staff Report, Case No. 19-958-GE-COI.)

C. OCC's Proposed Modifications to the Joint Stipulation, Some of Which Are Being Raised for the First Time, Are Unnecessary.

In its fourth assignment of error, OCC presents a list of ways that it believes the Joint Stipulation should have been modified by the Commission. Once again, OCC fails to address the basic issue in this application for rehearing—is the Commission's decision not to modify the Joint Stipulation unreasonable or unlawful? It is clear that OCC thinks that this settlement could be better. But pointing out putative improvements does not explain why a settlement is unreasonable, much less demonstrate why a decision-maker was unreasonable to deem it reasonable. *See Discount Cellular*, ¶ 59. That is especially true when *OCC is making many of these recommendations for the very first time*.

Specifically, OCC's application argues apparently for the first time, that the Joint Stipulation should—must—be modified to require (1) a separate verification protocol outside the Commission's orders and rules to govern and monitor the re-rating process, (2) direct regulation of some of the rates that Verde Energy can charge, (3) automatic suspension for any instances of slamming or spoofing

(whether such allegations would need to be proven is left unsaid), (4) audits of Verde Energy's outbound telemarketing vendors, (5) a ban on door-to-door marketing campaigns by Verde Energy, and (6) a ban on Verde Energy obtaining consumer information from utilities. Not a single one of these proposed settlement modifications were mentioned in OCC's post-hearing briefing. It is therefore unclear how the Commission could have acted unreasonably or unlawfully by not incorporating them into a modified Joint Stipulation.

In reality, the same goes for proposals that OCC did previously mention—like re-rating natural gas customers and requiring specific business reforms as part of the Joint Stipulation rather than through the action plan (which is part of the Joint Stipulation anyway). OCC never explained, before or after the Commission's adoption of the Joint Stipulation, why the Joint Stipulation is unreasonable or unlawful without the proposed modifications. *Id.* At the end of the day, they are just additional conditions that OCC wants.[3] Even if its proposed modifications were worthwhile—and on balance, they are largely duplicative or unduly onerous—that is beside the point. The fact that OCC believes the Joint Stipulation could be improved does not make the Joint Stipulation unreasonable. Rehearing will not change that.

[3] Verde Energy takes no position on some of the more outlandish and speculative arguments OCC makes, such as those regarding the now-defunct OCC call center and OCC's proposed reforms to Commission hearing procedures. Those issues go far beyond the scope of this proceeding.

II. OCC's Application Improperly Invites the Commission to Ignore the Three-Prong Test and Hold a Full Show-Cause Hearing.

Turning back to OCC's first assignment of error reveals that OCC is largely focused on issues with little or no relevance to resolving this case. Most of OCC's 32-page brief does little except reiterate that OCC thinks the Joint Stipulation should go further and do more. But rather than make that the focus of its argument, OCC leads off its application by trying to conjure up a series of imagined procedural shortcomings to bolster its weak substantive case. These arguments fail even on their own terms, but they are irrelevant when considered in context, because they are not related to the reasonableness of the Joint Stipulation.

A. The Evidence and Testimony Proved that the Joint Stipulation Was Reasonable, Rendering OCC's Burden-Shifting Argument Irrelevant.

OCC's application for rehearing begins and ends with a categorical error. In OCC's view, the burden of proof was wrongly shifted to OCC. Much, if not all, of OCC's analysis flows from this concept. And therein lies the problem. The ultimate issue for decision in this case is not whether there were violations. The ultimate issue in this case is the reasonableness of the Joint Stipulation. *See Consumers' Counsel*, 110 Ohio St.3d 394, 2006-Ohio-4706, 853 N.E.2d 1153, at ¶ 16. The Commission was entitled to place substantial weight on the terms of the Joint Stipulation. *See Indus. Energy Consumers of Ohio Power Co. v. Pub. Utilities Comm'n*, 68 Ohio St.3d 559, 1994-Ohio-435, 629 N.E.2d 423 (1994). Consistent with Ohio Adm.Code 4901-1-30(D), the evidence and testimony presented showed that the Joint Stipulation met the three-prong test. As a party opposing the Joint

Stipulation, OCC's role under the Ohio Administrative Code was to "*offer evidence* and/or argument in opposition." Ohio Adm.Code 4901-1-30(D) (emphasis added). There has been no confusion or disagreement on that point throughout this entire case.

Until now. OCC's last-ditch argument is to declare that the process was unfair to OCC. But contrary to OCC's arguments, nothing frees OCC of the need to support OCC's own assertions with credible, admissible evidence, and then to link that evidence to specific reasons why the other side's case should not succeed. *See Ohio Valley Radiology Assoc., Inc. v. Ohio Valley Hosp. Ass'n*, 28 Ohio St.3d 118, 122, 502 N.E.2d 599, 602 (1986) (emphasis in original) (holding that a party without the initial burden of proof must still "refute the claimant's case *after* the latter has established a prima facie case by proper evidence."). As required under the Ohio Administrative Code, evidence and testimony was presented proving that the Joint Stipulation was reasonable. Ohio Adm.Code 4901-1-30(D). OCC cannot rebut Verde Energy and Staff's evidence and testimony by simply making blanket assertions, citing the Staff Report as though it were conclusive, and posting thousands of pages of correspondence filled with hearsay on the docket without specific and verifiable evidence of wrongdoing.

The Commission rejected OCC's attempt to do just that, because it correctly recognized (1) that Verde Energy did not bear the burden of disproving alleged violations, (Opinion and Order, ¶ 60 (citing *Grossman v. Pub. Util. Comm.*, 5 Ohio St. 2d 189, 214 N.E.2d 666 (1966))), and (2) that the evidentiary basis for many of

the alleged violations in this case was circumspect at best, resting largely in almost all cases on hearsay, settlement offers, or other disputed, unauthenticated, or inadmissible evidence. (Opinion and Order, ¶¶ 60–63.) Even now, despite OCC's arguments regarding Verde Energy's purported admissions of violations, OCC still, in the Commission's words, "has not even completed the rudimentary task of describing, based upon the Staff's case reports, which specific rules were violated, [or] how many counts of each violation allegedly occurred[.]" (*Id.* at ¶ 61.) Moreover, the Commission should continue to be wary of OCC's attempts to weaponize Verde Energy's offers of settlement—this line of thinking punishes providers for trying to be proactive and cooperative in their dealings with Staff and customers.

There is a deeper problem with OCC's arguments. The aim of the Joint Stipulation was not to litigate customer complaints, but to identify conditions under which Verde Energy could address the concerns raised in the Staff Report and continue to operate in Ohio. OCC still refuses to acknowledge that the Joint Stipulation changed the nature of this case, and as a result, much of OCC's application for rehearing is not only wrong, but also irrelevant. It simply has no bearing on the question the Commission really has to answer here—was it unreasonable or unlawful for the Commission to find that the Joint Stipulation met the three-prong test? OCC's arguments about burden-shifting do not address that question, and OCC does not even really try to link the two. That is the end of the matter.

In essence, OCC invites the Commission to engage in counterfactual history and speculate about what would have happened if this case had been litigated on the merits. In such an alternative universe, the Commission's show-cause order might have required the parties to litigate the details of each customer complaint one by one. In part to avoid that situation and to resolve the Staff Report's allegations in a fair and economical manner, Verde Energy and Staff settled the case. By definition, that decision means that there is not the same evidentiary record as there might have been otherwise. That does not make the adoption of the Joint Stipulation unreasonable. To argue otherwise, as OCC does, amounts to arguing that parties can only settle a case after it has been fully tried—which defeats the purpose of settlement.

B. OCC Has Been Heard Repeatedly on the Out-of-State Witness Subpoenas, Which the Commission Properly Quashed.

Another component of OCC's first assignment of error is the Commission's decision to quash OCC's out-of-state witness subpoenas. For all of the reasons explained in Verde Energy's motion to quash and post-hearing briefing, OCC's arguments regarding its witness subpoenas are fundamentally flawed and do not merit rehearing. This issue has been argued three times already—in the motion to quash briefing, at the hearing, and during post-hearing briefing. Further rehearing is unnecessary.

As Verde Energy has consistently argued, the most analogous cases are *Burgess v. Prudential Ins. Co. of America*, 1st Dist. Hamilton No. C-870225, 1988 WL 68686, *5, and *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.*, 4th Dist.

Highland No. 01CA21, 2002-Ohio 6170, ¶ 106. In those cases, the appellate courts held that statutes compelling foreign regulated entities to submit to Ohio jurisdiction, including for service of process, did not extend personal jurisdiction to out-of-state employees. Unlike *A.O. Smith Corp. v. Perfection Corp.*, 10th Dist. Franklin No. 03AP-266, 2004-Ohio-4041, ¶ 17, where the subpoena directed an out-of-state corporation to identify a witness for a deposition, OCC wanted to compel a Texas citizen (Kira Jordan) to travel to Ohio for an administrative law hearing to testify on behalf of her employer. In all the briefing and argument that this issue has generated, OCC has yet to identify a single case where something even close to that has happened.

There is no basis for rehearing on this issue.[4] The Commission's decision to allow OCC to follow the established route in Commission practice and obtain testimony from Ms. Jordan in a full-day deposition was reasonable and lawful. Given this procedural history, the Commission should not spend any more resources entertaining OCC's quest for civil subpoena powers greater than those available in a federal district court or a court of common pleas in Ohio—with all the potential due process and other constitutional questions that would likely raise.

[4] That is true whether OCC obtained proper service on Ms. Jordan or not, and in any event, Verde Energy does not understand improper service of process to be the actual basis for the Commission's decision. In reality, the Commission's decision rests on the recognition that there is an established path in Commission practice for obtaining testimony from out-of-state witnesses, and where OCC suffered no harm from following those procedures, quashing those subpoenas is reasonable and lawful. (*See* Opinion and Order, ¶ 82.)

In addition to being wrong on the law, OCC's argument that it was somehow prejudiced by the quashing of its witness subpoenas is simply not credible. OCC claims that "the deposition of Ms. Jordan occurred before the Attorney Examiner quashed OCC's subpoenas and before OCC knew that it would be unable to cross-exam Ms. Jordan at the evidentiary hearing" and that the Commission therefore "unfairly changed the rules of the game." (OCC Br. 8–9.) That is incorrect. Ms. Jordan was deposed on October 10, 2019. Eight days earlier, on October 2, the deadline for direct testimony passed without any submissions from Verde Energy. OCC could hardly have expected to cross-examine a witness that did not testify. Then, three days before the deposition, on October 7, 2019, Attorney Examiner Price stated bluntly that Verde Energy was "going to win" its forthcoming motion to quash. (Oct. 7, 2019 Tr. 80:10-14.) As if that were not enough, on September 19, 2019, several weeks before the deposition, the Commission had also quashed OCC's out-of-state witness subpoenas on similar grounds in the PALMco case. (PALMco Hearing, Vol. I 99:8-12, Case No. 19-957-GE-COI.) OCC was on more than ample notice that the deposition of Ms. Jordan was going to be its only opportunity to develop testimony from a Verde Energy witness. If OCC has complaints about how that deposition (or any other aspect of this proceeding) panned out, the blame does not rest with the Commission's interpretation of OCC's discovery rights or some non-existent shift of the burden of proof. The blame rests with OCC.

CONCLUSION

Verde Energy and Staff met the burden of showing that the Joint Stipulation was reasonable under the three-prong test. OCC failed to rebut that showing, and it has now failed to explain why rehearing is necessary. OCC's laundry list of complaints (some being raised for the very first time) is meritless—and in some cases, it includes clear factual errors, such as the idea that OCC suffered unfair surprise regarding its ability to obtain witness testimony. The Commission should reject OCC's assignments of error and deny the application for rehearing.

Dated: April 6, 2020

Respectfully submitted,

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Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Application for Rehearing electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC