

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 Service Supplier and
Competitive Retail Natural Gas
Supplier

CASE NO.: 11-5886-EL-CRS

CASE NO: 13-2164-GA-CRS

(CONSOLIDATED)

**VERDE ENERGY USA OHIO, LLC'S REPLY TO THE OFFICE OF
THE OHIO CONSUMERS' COUNSEL'S MEMORANDUM CONTRA
VERDE'S MOTION FOR GUIDANCE FROM THE PUCO REGARDING
H.B. 197 OR TO EXTEND THE TIME PERIOD TO RESPOND TO
OCC'S THIRD SET OF DISCOVERY REQUESTS**

This is an unprecedented time in our country – a time when much of the country is working from home (if they are still employed). Those working are forced to balance ongoing work obligations, often from a remote environment, while unexpectedly homeschooling children in a shelter zone while also fearing an unknown disease.

Based on this extraordinary atmosphere, Verde Energy USA Ohio, LLC (“Verde Energy”) seeks guidance from the Public Utilities Commission of Ohio (“Commission”) regarding case deadlines in light of the coronavirus disease 19 (“COVID-19”) pandemic, and the tolling provisions of Am.Sub. H.B. 197 (the “Tolling Legislation”).

In this consolidated recertification case, the issue is whether 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). Verde Energy welcomes the opportunity to

defend its commitment to Ohio in this consolidated recertification, including responding to relevant discovery requests as permitted by the Ohio Adm. Code 4901-1-16, *et seq.*

The Ohio Consumers' Counsel's ("OCC") ad hominem attacks are ill suited to Verde Energy's practical request for guidance in the midst of the global outbreak of COVID-19. Verde Energy seeks to resolve this case as expeditiously as possible considering the severe constraints placed on businesses and employees throughout the country. OCC tries to attribute improper motives to Verde Energy's request. But it is not unreasonable for Verde Energy to seek guidance on the applicability of the Tolling Legislation.

Moreover, notwithstanding the Tolling Legislation and belying OCC's arguments, Verde Energy has continued to provide OCC with the discovery it seeks. On Friday April 10, 2020, Verde Energy served OCC with its responses to OCC's third set of discovery requests, totaling more than 60 pages of written responses to over 100 discrete interrogatories and document requests. That same day, Verde Energy produced to OCC and PUCO Staff more than 1,200 responsive documents totaling more than 5,000 pages.

Verde Energy plans on continuing to respond to OCC's discovery requests as promptly as practicable under the current circumstances, and it will continue to supplement responses and productions. In the meantime, Verde Energy respectfully submits that guidance is necessary to help the

parties move this case forward in light of the practical constraints imposed by the pandemic and the government's response to protect public health.

I. THE TOLLING LEGISLATION IS DESIGNED TO PROVIDE SWEEPING DEADLINE RELIEF IN THE MIDST OF THE COVID-19 PANDEMIC

On March 27, 2020, Governor DeWine signed Am.Sub. H.B. 197, an emergency response to the COVID-19 pandemic. Am.Sub. H.B. 197 immediately tolled, retroactive to March 9, 2020, all statutes of limitation, time limitations, and deadlines in the Ohio Revised Code and Ohio Administrative Code until the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner.

Also on March 27, 2020, the Supreme Court of Ohio signed a similar tolling order pertaining to all rules promulgated by the Court, including the Ohio Rules of Civil Procedure.¹ On April 2, 2020, the Supreme Court of Ohio published a document outlining the impact of Am.Sub. H.B. 197 and the Supreme Court's tolling order.² In this document, the Court states that the "legislation applies to any criminal, civil, or administrative time limitations imposed by the Ohio Revised Code or the Ohio Administrative Code."³ The

¹ See 03/27/2020 *Administrative Actions*, 2020-Ohio-1166.

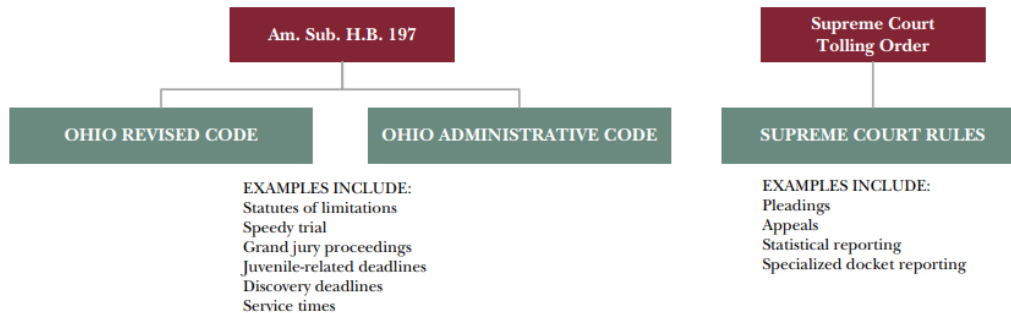
² Assessing Impact of Tolling Legislation and Supreme Court Order upon Specific Time Requirements, The Supreme Court of Ohio (supremecourt.ohio.gov/coronavirus/resources/tollingAnalysis040220.pdf).

³ *Id.*

Supreme Court order was “designed to compliment the legislation, applying to all time requirements imposed by Supreme Court rules.”⁴

**ASSESSING IMPACT OF TOLLING LEGISLATION AND SUPREME COURT ORDER
UPON SPECIFIC TIME REQUIREMENTS**

STEP 1: Determine whether it is the legislation or the Supreme Court order that applies. The legislation applies to statutorily established time requirements. The order applies to Supreme Court rule established time requirements.



II. THE PLAIN LANGUAGE OF THE TOLLING LEGISLATION TOLLS DISCOVERY DEADLINES AND ANY OTHER ADMINISTRATIVE TIME LIMITATION

The plain language of Am.Sub. H.B. 197 is clear:

Section 22. (A) The following that are set to expire between March 9, 2020, and July 30, 2020, shall be tolled:

(7) The time within which discovery or any aspect of discovery must be completed;

*** * * ***

(10) Any other criminal, civil, or administrative time limitation or deadline under the Revised Code.

OCC claims that the Supreme Court of Ohio has issued an opinion interpreting the Tolling Legislation. But the OCC cites instead the March 27,

⁴ *Id.*

2020 tolling order issued by the Supreme Court of Ohio pertaining to all rules promulgated by the Court, including the Ohio Rules of Civil Procedure.⁵

OCC also mistakenly concludes that “Section 22(A)(10) refers only to limitations or deadlines ‘under the Revised Code.’”⁶ This interpretation is against the plain language of the statute – “Any other criminal, civil, or administrative time limitation or deadline under the Revised Code.” Am.Sub. H.B. 197 (emphasis added).

OCC also focuses on the word “other” as it is used in Section 22(A)(10) claiming that the term precludes application to the Administrative Code. But, again, this application ignores the plain reading of the law. OCC relies on an unreported case to stand for the proposition that the concept of *ejusdem generis* – of the same kind – is typically applied when a catch-all word like other is used in a list.⁷ However, courts do not apply such principles of construction when the statutory language is unambiguous.⁸ Here, there is no need to apply OCC’s tortured reading of the Tolling Legislation because the language is clear.

⁵ See 03/27/2020 *Administrative Actions*, 2020-Ohio-1166.

⁶ OCC Memorandum Contra Verde’s Motion for Guidance from the PUCO Regarding H.B. 197 or to Extend the Time Period to Respond to OCC’s Third Set of Discovery Requests by the Office of the Ohio Consumers’ Counsel at 3.

⁷ *Carey Elec. Co. v. ABF Freight System, Inc.* (Aug. 13, 1999), Montgomery App. No. 17335, 1999 WL 958476 (1999).

⁸ *State v. Hooper*, 57 Ohio St.2d 87, 386 N.E.2d 1348 (1979).

III. OCC MISCHARACTERIZES THE INTENT AND OBJECTIVE OF THE TOLLING LEGISLATION

OCC improperly characterizes statements made in the Tolling Legislation Fiscal Note & Local Impact Statement (the “Fiscal Note”) as representative of the “objective of the law.” OCC cites to a portion of the Fiscal Note to assign an incomplete purpose to the Tolling Legislation. The purpose of the Fiscal Note is to highlight the financial impact to Ohio and local governments. This explains the reference recited and adopted by OCC (“These provisions will allow actions to be delayed during the emergency period, the intended outcome of which is to decrease temporarily the volume of work handled by certain state and local governmental entities (criminal and civil justice systems, boards, and commissions) involved in matters related to criminal, civil, and administrative actions.”).⁹ This does not represent the entirety of the purpose of this legislation. OCC’s misinterpretation of the purpose of the Tolling Legislation should not be used to deny tolling in this consolidated case. The purpose of this legislation rests in its plain language.

IV. OCC MISCHARACTERIZES THE GOVERNOR’S VETO – THE VETO DOES NOT PRECLUDE APPLICATION OF THE TOLLING LEGISLATION TO ADMINISTRATIVE CODE DEADLINES

OCC wrongly interprets the Governor’s veto that removes the term “or deadline.” OCC uses an incomplete citation, which fails to include the important phrase: “this provision does not apply to statutory tax deadlines of

⁹ Fiscal Note & Local Impact Statement, H.B. 197 (March 31, 2020).

due dates.” Evaluating the complete veto message clarifies the purpose of the veto and emphasizes that the Tolling Legislation does not preclude application to Administrative Code deadlines.

V. VERDE ENERGY DID NOT WAIVE ITS RIGHTS UNDER THE TOLLING LEGISLATION

OCC wrongly claims that Verde Energy’s professional and cooperative approach to these cases amounts to waiver of any claim under the Tolling Legislation. Specifically, OCC states that “Verde waived its right to wait until July 30 by agreeing to provide discovery responses to OCC’s third set by April 1, 2020.” In reality, Verde Energy “agreed” only in the sense that OCC refused to acquiesce to Verde Energy’s request for additional time beyond April 1, 2020 to respond to OCC’s voluminous discovery requests. Verde Energy had no choice but to seek the relief sought through the pending motion by April 1.

As OCC recognizes, waiver only occurs upon a clear, unequivocal, decisive act by the other party, demonstrating the intent to waive.¹⁰ Verde Energy never demonstrated a “clear” and “unequivocal” intent to waive its rights under the Tolling Legislation. It is nonsensical to allege that Verde Energy waived its rights under the Tolling Legislation by stating in its motion an agreement to an April 1 response deadline when Verde Energy sought

¹⁰ *Mike McGarry & Sons, Inc. v. Constr. Resources One, LLC*, 6th Dist. Sandusky, 2018-Ohio-528, 107 N.E.3d 91, ¶103, quoting *Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. Franklin No. 08AP-487, 2009-Ohio-2164, 2009 WL 1263065, ¶27.

guidance from the Commission on its rights under the Tolling Legislation *in that very same motion*.

In support of its waiver arguments, OCC cites to four cases, none of which have any corollary to the procedural facts in this consolidated case.¹¹ OCC cites two criminal cases regarding waiver of speedy trial rights, a declaratory judgment action regarding defense and indemnification where waiver did not apply, and a child support claim against an estate where a waiver claim was made against the mother making the claim.¹² These cases recite the underlying principles regarding waiver, but none apply waiver principles to the situation presented here.

To reiterate, OCC's entire "waiver" argument rests on one sentence in Verde Energy's April 1, 2020 motion, which states, "Currently, under an agreement between OCC and Verde Energy, responses to those requests are due April 1, 2020." (Motion at 1-2.) To effectuate a waiver under Ohio law, the intent to waive a right must be "clear" and "unequivocal." Here, the opposite is true. The very purpose of Verde Energy's motion was not to "waive" its rights under the Tolling Legislation, but to expressly preserve them by timely seeking

¹¹ *State v. Lucas* (Mar. 20, 1986), Athens App. No. 1259, unreported ("a defendant may waive his statutory right under R.C. 2945.71 to a speedy trial"); *State v. Gonzalez*, 10th Dist. No. 08AP-716, 2009-Ohio-3236, ¶12 ("An accused may waive speedy trial rights . . ."); *Glidden Co. v. Lumbeermens Mut. Ca. Co.*, 112 Ohio St.3d 470 (2006) (declaratory judgment where waiver did not apply); *Pollard v. Elber*, 123 N.E.3d 359, 2018-Ohio-4538 ¶35 (Ohio Ct. App. 2018) ("Generally speaking, all personal rights and privileges – whether contractual, statutory, or constitutional – are subject to waiver.").

¹² *Id.*

guidance of the application of this new law to this current administrative proceeding. This type of “gotcha” gamesmanship by OCC should not be tolerated, particularly when the Commission encourages parties to work cooperatively in good faith on discovery issues.

VI. OCC HAS NO GENUINE REASON TO OBJECT TO VERDE ENERGY'S ALTERNATIVE REQUEST FOR AN EXTENSION OF TIME

OCC's onerous discovery requests require a reasonable extension of time, especially in light of this pandemic. If the Commission finds that Am.Sub. H.B 197 does not toll Verde Energy's deadline to respond to OCC's third set of discovery requests, Verde Energy has moved under Ohio Adm. Code 4901-1-19(A) and Ohio Adm. Code 4901-1-20(C) for a three-week extension of time to respond to those requests. Verde Energy does not object to the tolling of other deadlines in this case consistent with the Tolling Legislation.

VII. CONCLUSION

Verde Energy requests guidance from the Commission regarding the effect of Am.Sub. H.B 197 on the schedule in this case. Alternatively, if the Commission finds that Am.Sub. H.B 197 does not toll the deadline for Verde Energy to respond to OCC's third set of discovery requests, Verde Energy hereby moves under Ohio Adm. Code 4901-1-19(A) and Ohio Adm. Code 4901-1-20(C) for a three-week extension of time to respond to those requests, though to and including April 21, 2020.

Dated: April 14, 2020

Respectfully submitted,

/s David F. Proaño

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by email upon the persons listed below this 14th day of April, 2020.

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This foregoing document was electronically filed with the Public Utilities

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4/14/2020 5:20:37 PM

in

Case No(s). 11-5886-EL-CRS, 13-2164-GA-CRS

Summary: Reply to OCC's Memorandum Contra Verde Energy's Motion for Guidance Regarding H.B. 197 or to Extend the Time Period to Respond to OCC's Third Set of Discovery Requests electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC