

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	§	Case No. 11-5886-EL-CRS
Verde Energy USA Ohio, LLC for	§	
Certification as a Competitive Retail	§	
Electric Service Supplier	§	
	§	
In the Matter of the Application of	§	Case No. 13-2164-GA-CRS
Verde Energy USA Ohio, LLC for	§	
Certification as a Competitive Retail	§	
Natural Gas Service Supplier	§	

VERDE ENERGY USA OHIO, LLC'S
MOTION FOR PROTECTIVE ORDER

Verde Energy USA Ohio, LLC (“Verde Energy”), by and through its attorneys, and pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code, hereby moves the Public Utilities Commission of Ohio (the “Commission”) for a protective order to keep confidential certain information produced to the Ohio Consumers’ Counsel (“OCC”) as part of Verde Energy’s responses to OCC’s discovery requests that OCC now seeks to file publicly, specifically an Excel spreadsheet marked as confidential, which contains rate and customer information that was produced to OCC in the two certification dockets, Case Numbers 11-5886-EL-CRS and 13-2164-GA-CRS (the “Certification Cases”), as Verde-OCC-Cert-016289 (the “Confidential Information”).¹

¹ The Confidential Information was previously produced to OCC as Verde-OCC-Cert-016119, and OCC’s notice to Verde Energy of OCC’s intent to publicly file the Confidential Information referred to that Bates number. As of July 8, 2020, Verde Energy is reproducing the Confidential Information in identical form and content under the Bates number Verde-OCC-Cert-016289, due to an earlier error in Bates numbering. Moving forward, Verde Energy

Verde Energy seeks to maintain confidentiality over the Confidential Information because it contains Verde Energy's trade secrets – confidential, commercially sensitive, and/or proprietary information that will harm Verde Energy and give its competitors insight into Verde Energy's management, operations, and business if made public. Accordingly, as set forth in the attached Memorandum in Support, Verde Energy seeks a protective order preventing public disclosure of the Confidential Information.

July 8, 2020

Respectfully submitted,

/s/ David F. Proaño

David F. Proaño (0078838)

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*Counsel for Verde Energy USA Ohio,
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will refer to Verde-OCC-Cert-016289 when discussing the Confidential Information, as Verde-OCC-Cert-016119 refers to a different document.

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VERDE ENERGY USA OHIO, LLC'S MEMORANDUM IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER

As required under the Protective Agreement², Verde Energy USA Energy Ohio, LLC ("Verde Energy") files this Motion for Protective Order and Memorandum in Support to protect Verde Energy's confidential, commercially sensitive, and/or proprietary information contained in an Excel spreadsheet produced to the Ohio Consumers' Counsel ("OCC") in the two certification dockets, Case Numbers 11-5886-EL-CRS and 13-2164-GA-CRS (the "Certification Cases") as Verde-OCC-Cert-016119 (the "Confidential Information").

The Ohio Supreme Court protects customer information. *See e.g., State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258 (1992). OCC seeks to de-designate Verde Energy's customer list, *which includes the*

² A Protective Agreement was executed between Verde Energy and OCC, which is attached hereto and incorporated herein as Exhibit A (the "Protective Agreement").

rates paid by thousands of customers, in direct contravention of Ohio's long recognized protection of customer information as confidential. This motion concerns sensitive, proprietary information of the first order, and should be granted.

I. PROCEDURAL HISTORY

On April 17, 2019, the Commission opened an investigation into the practices of Verde Energy in Case Number 19-0958-GE-COI. Following months of serious negotiations, on September 6, 2019, Staff and Verde Energy agreed to and filed the Joint Stipulation. On February 26, 2020, the Commission approved the Joint Stipulation.

Verde Energy filed renewal applications for its competitive retail natural gas service (CRNGS) and competitive retail electric service (CRES) certificates on November 7, 2019 and February 27, 2020, respectively. Verde Energy filed amended renewal applications for both its CRNGS and CRES certificates on April 24, 2020. The renewal applications were both suspended by the Commission in order to allow the Commission and Staff additional time to review the applications.

On March 3, 2020, the Commission issued an Entry to, among other things, extend both the CRNGS and CRES certificates to November 1, 2020, and to consolidate the two Certification Cases. On March 6, 2020, OCC filed a motion to intervene in the Certification Cases. On June 15, 2020, the Staff filed their Review and Recommendation stating that the "Staff believes that

appropriate steps have been taken to help prevent future issues of non-compliance with Commission rules,” and recommending renewal of both Verde Energy’s CRNGS and CRES certificates.

In the Certification Cases, OCC has propounded 108 interrogatories with subparts and 30 requests for production. Verde Energy produced the Confidential Information containing customer information and rates. OCC challenges this confidential designation.

II. VERDE ENERGY’S CUSTOMER INFORMATION
CONSTITUTES PROTECTED TRADE SECRETS

Rule 4901-1-24(D) provides that the Commission may issue any order necessary to protect the confidentiality of the information contained in a document filed with the Commission’s docketing division when disclosure of the information is prohibited by state or federal law, and where nondisclosure is not inconsistent with the purposes of Title 49 of the Ohio Revised Code. Rule 4901-1-24(D) specifically notes that trade secrets under Ohio law are a type of confidential information intended to be protected by the Rule, and the Commission and Ohio law have long protected trade secret information.

Similarly, Section 4905.07 of the Revised Code, which provides that facts and information in the possession of the Commission shall be made public, includes an exception for “[r]ecords the release of which is prohibited by state or federal law.” R.C. 4905.07; R.C. 149.43(v). The Ohio Supreme Court has confirmed that trade secrets fall within this exception. *State ex rel. Besser v.*

Ohio State, 89 Ohio St. 3d 396, 399 (2000) (“Trade secrets are exempt from disclosure under the ‘state or federal law’ exemption of R.C. 149.43.”).

Section 1333.61(D) of the Revised Code defines “trade secret” as:

[I]nformation, including the whole or any portion or phrase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61(D). The Ohio Supreme Court has also identified six factors to consider when determining if information constitutes trade secrets:

1. The extent to which the information is known outside the business;
2. The extent to which it is known to those inside the business, i.e., by the employees;
3. The precautions taken by the holder of the trade secret to guard the secrecy of the information;
4. The savings effected and the value to the holder in having the information as against competitors;
5. The amount of effort or money expended in obtaining and developing the information; and
6. The amount of time and expense it would take for others to acquire and duplicate the information.

State ex rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St. 513, 524-525 (Ohio 1997).

The Ohio Supreme Court recognizes that “listings of names, addresses, or telephone numbers that have not been published or disseminated, or otherwise become a matter of general public knowledge, constitute trade

secrecy if the owner of the list has taken reasonable precautions to protect the secrecy of the listing to prevent it from being made available to persons other than those selected by the owner to have access to it in furtherance of the owner's purposes." *Fred Siegel Co. L.P.A. v. Arter & Hadden*, 85 Ohio St. 171, 707 N.E.2d 853, 862 (1999) (protecting a client list). A customer list constitutes an intangible asset that is presumptively a trade secret when the owner of the list takes measures to prevent its disclosure in the ordinary course of business to persons other than those selected by the owner. *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 264, 602 N.E.2d 1159, 1163 (1992).

Even if the information is publicly accessible, that does not disqualify it from trade secret consideration. "When documents already in the public domain are combined to form a larger document, a trade secret may exist if the unified result would afford a party a competitive advantage." *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 724 N.E.2d 411 (2000). So, even if certain Verde Energy rates are known to the public, that does not prevent the protection of the customer information and rates contained in the spreadsheet.

That is especially true when, as here, the Confidential Information encompasses all of Verde Energy's Ohio CRES and CRNGS customers and the pricing information for those customers. In essence, OCC seeks to publicly release the identity and pricing information of thousands of Ohio CRES and

CRNGS customers. This is highly sensitive and propriety information, and OCC should not be permitted to de-designate it. The reasons why such disclosure would severely and unfairly prejudice Verde Energy hardly need to be spelled out. Even if OCC were to merely summarize such data on the public docket, it would provide competitors an unparalleled glimpse into the operations and strategy of Verde Energy. That is not a proper use of these proceedings, and OCC should not be permitted to allow its negative views of Verde Energy to override the clear command of *Plain Dealer* and its progeny.

Applying the relevant *Plain Dealer* factors, the definition of “trade secrets” contained in Section 1333.61(D), and applicable Ohio precedent, it is clear that the Confidential Information constitutes protected trade secrets. The Confidential Information as it is presented is not known outside the business and it is protected inside Verde Energy. (*Kira Jordan Affidavit*.) The value of retaining the confidential nature of customer information is crucial to Verde Energy. (*Id.*) Moreover, this customer list and the data it includes essentially represent the sum total of Verde Energy’s years of investment in the Ohio market. Verde Energy’s competitors would need to engage in years of similar effort to compile such data. That is why it was produced subject to the Protective Agreement, as OCC is well aware. OCC is wildly off-base in attempting to release it for public consumption.

OCC seeks to publish the Confidential Information to the public, which would harm and punish Verde Energy. Protection of customer information is long recognized as confidential trade secrets under Ohio law.

III. CONCLUSION

For the foregoing reasons, Verde Energy requests that the Confidential Information be placed under a protective order to prevent it from being disclosed publicly, that the Commission prohibit OCC from filing the Confidential Information publicly, and that the Commission maintain such information under seal.

July 8, 2020

Respectfully submitted,
/s/ David F. Proaño
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*Counsel for Verde Energy USA Ohio,
LLC*

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by electronic mail upon the persons listed below this 8th day of July, 2020.

SERVICE LIST

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July 8, 2020

/s/ David F. Proaño

David F. Proaño (0078838)

AFFIDAVIT OF KIRA JORDAN

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	§	Case No. 11-5886-EL-CRS
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Verde Energy USA Ohio, LLC for	§	
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Natural Gas Service Supplier	§	

AFFIDAVIT OF KIRA JORDAN

I, Kira Jordan, being first duly cautioned and sworn, deposes and states as follows:

1. My name is Kira Jordan. I am above the age of eighteen (18) years old, and competent to make this affidavit.
2. This affidavit is provided in support of Verde Energy's Motion for Protective Order filed on July 8, 2020 in Case Numbers 11-5886-EL-CRS and 13-2164-GA-CRS.
3. I am the Vice President of Portfolio Management & Business Insights, Verde Energy USA Ohio, LLC. I have personal knowledge of the facts stated herein.
4. The Confidential Information produced as Verde-OCC-Cert-016289 (formerly Verde-OCC-Cert-016119), as defined in the Motion for Protective Order, is competitively sensitive, highly confidential, and proprietary business information.

5. Specifically, the Confidential Information includes non-public and proprietary information reflecting Verde Energy's customer lists that not only provides the name, but also the pricing information, for Verde Energy's CRES and CRNGS customers. This information is central to Verde Energy's operations and its public disclosure would place Verde Energy at a severe competitive disadvantage.

6. In the ordinary course of Verde Energy's business, the Confidential Information is treated as highly confidential and proprietary. Only employees with a business purpose for knowing the Confidential Information and with appropriate system credentials have access to such information.

7. Verde Energy does not disseminate the Confidential Information publicly, and it is not known outside Verde Energy's company.

8. Verde Energy would be competitively harmed if the Confidential Information was publicly made available to Verde Energy's competitors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of July, 2020.


Kira Jordan

EXHIBIT A

Protective Agreement Between Verde Energy and OCC

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Renewal Application of)	
Verde Energy USA Ohio, LLC for)	Case No. 13-2164-GA-CRS
Certification as a Retail Natural Gas)	
Marketer.)	

PROTECTIVE AGREEMENT

This Protective Agreement (“Agreement”) is entered into by and between Verde Energy USA Ohio, LLC (“Verde” or “Company”) and the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “the Parties”). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this “Proceeding” is defined herein. It reflects agreement between the Company and OCC as to the manner in which “Protected Materials,” as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. “Proceeding” as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

3. “Protected Materials” means documents and information furnished subject to the terms of this Agreement and so designated by the Company by conspicuously marking each

document or written response as confidential. Protected Materials do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term “Authorized Representative” includes OCC’s counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC’s Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC’s Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized

Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a

motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Company notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Company will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Company files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Company does not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret and not subject to this Agreement. Alternatively,

the Company may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement

precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

Verde Energy USA Ohio, LLC
BY:


Counsel

March 11, 2020
Date

Office of the Ohio Consumers' Counsel
BY:


Counsel

12-12-19
Date

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Renewal Application of)
Verde Energy USA Ohio, LLC for)
Certification as a Retail Natural Gas)
Marketer.)

Case No. 13-2164-GA-CRS

NON-DISCLOSURE CERTIFICATE

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed 12-12 2019, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from protected materials will not be voluntarily disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in paragraph two of the Protective Agreement.

Name: Angela O'Brien
Company: OCC
Address: _____
Telephone: _____
Date: _____

This foregoing document was electronically filed with the Public Utilities

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in

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

Summary: Motion for Protective Order electronically filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC