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
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

(PUBLIC VERSION)

MEMORANDUM CONTRA VERDE ENERGY'S MOTION FOR PROTECTIVE ORDER BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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For the accountability of government and bad-actor corporations like Verde Energy that are regulated by government, the Ohio public has a right to know about the issues between its government and the entitles that interact with it. But Verde Energy wants to hide information—from the public it harmed—about the Plan it submitted with its claimed reforms for the PUCO to allow its continued operation in Ohio. Verde's Plan for its redemption as a marketer should be made public to the Ohioans that it disserved.

Subject to limited exceptions for trade secrets, the public's right to know is a legal right. R.C. 4901.12 provides that all PUCO documents and records are public records. And R.C. 4905.07 similarly provides that all facts and information in the PUCO's possession are open to the public. These laws are consistent with Ohio's public records statute, R.C. 149.43. Under that statute, records held by public offices are considered public records subject to public disclosure. There are limited exceptions to these public disclosure laws. In general, information held by public agencies can only be withheld from the public if the party seeking to withhold it proves

that the information falls under one of the delineated exceptions to the public records law (found under R.C. 149.43).

After the PUCO identified numerous transgressions by Verde Energy against the Ohio public, Verde wants to keep secret its so-called Compliance Plan for reforming its business model. The Plan is what the PUCO required Verde to file as part of the notion that it is OK for Verde to resume its marketing to Ohio consumers. Verde is wrong about claiming secrecy from the public that it harmed.

Verde has not satisfied its burden of proof that the information it has redacted from the Compliance Plan (the "concealed information") includes trade secrets and should therefore be protected from public disclosure. The concealed information is not a trade secret under R.C. 1333.61 because Verde derives no value from keeping it secret and Verde's competitors would not obtain any value from knowing it. Verde's trade secret claim also fails the Supreme Court of Ohio's six-factor *Plain Dealer* test. Verde prefers secrecy from the public but not because of trade secrets. Thus, the PUCO should deny Verde's motion for a protective order.

I. BACKGROUND

In April 2019, the PUCO opened a case (the "Investigation Case") "to investigate alleged unfair, deceptive, or unconscionable acts or practices in this state by Verde Energy USA Ohio LLC d/b/a Verde Energy."[1] Following its investigation, the PUCO Staff filed a 30-page report outlining unfair, deceptive, misleading, and unconscionable marketing and sales practices by Verde.[2] The PUCO Staff concluded that "Verde (1) is in probable non-compliance with multiple provisions of the Ohio Administrative Code, (2) has not demonstrated its ability to comply with

[1] Case No. 19-958-GE-COI, Entry ¶ 1 (Apr. 17, 2019).

[2] Investigation Case, Staff Report (May 3, 2019; updated May 29, 2019) (the "Investigation Case Staff Report").

Commission rules; and (3) does not have the managerial capability to be certified as a [competitive retail electric service] or [competitive retail natural gas service] provider in the state of Ohio."[3]

In an Order approving a settlement between Verde and the PUCO Staff—a settlement that OCC opposed and continues to oppose in the Investigation Case—the PUCO adopted portions of the Staff Report, ruling that 17 violations were proven by a preponderance of the evidence.[4]

One requirement under the settlement was that Verde would submit an "action plan" for compliance prior to resuming marketing and customer enrollment in Ohio.[5] Verde finalized the action plan (now referred to as the "Compliance Plan") in June 2020. It is this compliance plan that Verde attempts to shield from the public's view by claiming it is a trade secret. It is not. The PUCO should so find and order it to be released into the public domain.

II. LEGAL STANDARD

A. A strong presumption exists that information should be made public.

To prevail on its Motion, Verde must overcome a "strong presumption" that citizens have a right to access information and documents involving governmental proceedings.[6] By law (R.C. 4901.12), "all proceedings of the public utilities commission and all documents and records in its possession are public records," with limited exceptions (as found in R.C. 149.43). R.C. 4905.07 similarly says that "all facts and information in the possession of the public utilities commission

[3] Investigation Case Staff Report at 25.

[4] Investigation Case, Opinion & Order ¶ 60 (Feb. 26, 2020).

[5] Investigation Case, Stipulation at 3-4 (Sept. 6, 2019).

[6] *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc. for Approval of the Transfer of Certain Assets*, No. 89-365-RC-ATR, 1990 Ohio PUC LEXIS 1138, at *5 (Oct. 18, 1990).

shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys," again, subject to limited exceptions (as found in R.C. 149.43). To overcome the strong presumption in favor of public disclosure, the party that seeks to keep information private (here, Verde) bears the burden of proving that "state or federal law prohibits release of the information."[7] Here, Verde claims that because the concealed information is a trade secret, state law prohibits its release.

B. Only information that fits under an exception to the public records law, such as a trade secret, may be protected from disclosure.

The public records laws in Ohio set forth the state policy that all records held by public agencies shall be considered public records. Only those records that qualify as an exception to the public records law may be withheld from the public. One of the exceptions under Ohio law is for documents whose release is prohibited by state or federal law. Verde alleges that state law establishing and protecting "trade secrets" (R.C. 1333.61(D)) provides reason for the PUCO to withhold the public records related to the Compliance Plan. But the government's regulation of corporations like Verde is generally to be an open matter for the public's consideration.

Under that law, information is a trade secret only if it satisfies two conditions: "(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

[7] Ohio Adm. Code 4901-1-24(D) (PUCO may redact documents "to the extent that state or federal law prohibits release of the information, including where the information is deemed ... to constitute a trade secret under Ohio law"). *See also In re Application of Jay Plastics Div. of Jay Indus., Inc. for Integration of Mercantile Cust. Energy Efficiency or Peak-Demand Reduction Programs with the Ohio Edison Co.*, Case No. 13-2440-EL-EEC, 2015 Ohio PUC LEXIS 139, at *6 ("an entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy") (Feb. 11, 2015).

value from its disclosure or use," and "(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[8]

In attempting to provide that the information in question has value to the party seeking to keep it secret and to its competitors (as is required by the statute), the Supreme Court of Ohio has ruled that a party claiming trade secret status must do more than provide "conclusory affidavits."[9] Other Ohio courts have consistently done the same, rejecting trade secret claims where the party relied only on conclusory statements and vague assertions about the potential value of the claimed trade secret.[10]

Ohio courts and the PUCO sometimes consider the following factors when evaluating a utility's trade secret claim: (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.[11] Accordingly, information is not a trade secret if the party holding the information

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[8] R.C. 1333.61(D).

[9] *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 404 (2000) ("reliance on conclusory affidavit statements is insufficient to satisfy [the] burden to identify and demonstrate that the records withheld and portions of records redacted are included in categories of protected information under R.C. 1333.61(D).").

[10] *See, e.g., Buduson v. City of Cleveland*, 2019-Ohio-963 (rejecting trade secret claim where party relied "only on speculative and conclusory statements" and failed to show *how* a competitor could derive value from the information claims to be a trade secret); *Arnos v. MedCorp., Inc.*, 2010-Ohio-1883, ¶ 28 ("Conclusory statements as to trade secret factors without supporting factual evidence are insufficient to meet the burden of establishing trade secret status.").

[11] *See State ex rel Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 524-25 (1997) (establishing the six-part test); *In re Application of Windstream Ohio, Inc.*, Case No. 15-950-TP-ATA, 2016 Ohio PUC LEXIS 487, at *15 (May 17, 2016) (applying the six-factor test for trade secrets set forth in *Plain Dealer* and denying motion for protective order).

derives no independent economic value from keeping it secret *or* if competitors would gain no advantage if the information were disclosed to them.

A party claiming trade secret status must also prove that the alleged trade secrets are novel or unique. Common, typical business information does not become a trade secret by virtue of a company trying to keep such information a secret. The United States Supreme Court, in *Kewanee v. Bicron*,[12] interpreted Ohio's trade secret law (as codified in R.C. Chapter 1333). The Court ruled that a trade secret need not meet the stringent novelty requirements for a patent, but that "some novelty will be required if merely because that which does not possess novelty is usually known; secrecy, in the context of trade secrets, thus implies at least minimal novelty."[13] Ohio courts have followed *Kewanee* in requiring a party to demonstrate some degree of novelty for a trade secret claim.

Moreover, parties making trade secret claims have a duty to minimize the scope of those claims by redacting from public view only the information that is a trade secret. The PUCO's rules prohibit a party from broadly marking documents as "confidential" when only some limited information constitutes a trade secret. They require that any protective order "minimize the amount of information protected from public disclosure."[14] This is consistent with R.C. 149.43(B) regarding public records. Under R.C. 149.43(B), if a document contains trade secrets, the governmental entity in possession of the document must still disclose those portions of the document that are not trade secrets.[15]

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[12] 416 U.S. 470 (1974).

[13] *Id.* at 476.

[14] Ohio Adm. Code 4901-1-24(D).

[15] R.C. 149.43(B) ("If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.").

Thus, when evaluating a party's claim that a document contains confidential information, the PUCO must consider *each redaction* on an individual basis to determine whether that specific information is a trade secret.[16] The party seeking to hide information from the public must demonstrate that each and every piece of redacted information is a trade secret, not just that the document generally contains the type of information that might be considered a trade secret in some context. Verde might complain that this is an onerous task. But any burden is of Verde's own creation, resulting from its overbroad trade secret claims and attempts to deprive the public of information. And that burden does not outweigh the greater harm that is done to the public when it is denied access to information.

III. ARGUMENT FOR MAKING VERDE'S PLAN PUBLIC

Verde's concealed information does not satisfy the requirements of R.C. 1333.61(D). It is not novel or unique. It does not pass the six-part *Plain Dealer* test. These are not trade secrets, and this information should be able to be utilized in public proceedings and be publicly disclosed. The public has a right to know the Plan that Verde will allegedly implement to reform its misconduct, and what the government's resolution of the matter actually means in the context of the public Plan.

A. Verde's Motion to make much of its Plan secret from the public relies on the precise type of "conclusory statements" that Ohio courts, including the Supreme Court of Ohio, have ruled are insufficient to prove a trade secret claim.

Verde's Compliance Plan is a 50-page, single-spaced document. Of those 50 pages, 42 contain redactions, and some pages are redacted in their entirety. By OCC's count, more than

[16] *See Naymik v. Ne. Ohio Areawide Coordinating Agency*, 2018-Ohio-1718 (requiring party to identify the specific portions of a document that it claimed were trade secrets rather than designating the entire document confidential).

800 lines in this document have been redacted in part or in whole. In support of its claim that these 800 lines contain trade secrets, Verde submitted the Affidavit of Kira Jordan.[17]

The Jordan Affidavit is all of 11 sentences long for justifying secrecy from the public. Three of those 11 sentences are devoted to Ms. Jordan's name, address, and identifying the case numbers. The remaining eight sentences are the epitome of "conclusory statements," which Ohio Courts, including the Supreme Court of Ohio, have ruled are insufficient to demonstrate that information can be protected as a trade secret.[18]

To demonstrate that Verde's concealed information includes trade secrets, the law requires Verde to prove that each part of the concealed information "derives independent economic value, actual or potential, from not being generally known to, and not readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use."[19] The critical part of this requirement is that some other person (*e.g.,* another marketer) must be able to use the information to make money ("obtain economic value").

The entirety of Ms. Jordan's affidavit on this issue is the following: "Verde Energy would be competitively harmed if the Confidential Information was publicly [sic] and made available to Verde Energy's competitors."[20] This is a textbook "conclusory statement" that Ohio courts have overwhelmingly ruled is insufficient to meet the burden of proving a trade secret.[21]

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[17] Motion, Affidavit of Kira Jordan.

[18] *See supra* § II.B.

[19] R.C. 1333.61(D)(1).

[20] Jordan Affidavit ¶ 9.

[21] *See Naymik*, 2018-Ohio-1718 (rejecting trade secret claim where party relied exclusively on "speculative and conclusory statements regarding the economic value of keeping the [] information secret from the public"); *Wengard v. E. Wayne Fire Dist.*, 2017-Ohio-8951 ¶ 27 (rejecting trade secret claim where party offered "only conclusory affidavit statements").

In its Motion (which is not evidence), Verde similarly offers bare platitudes about the alleged value of the concealed information: things like disclosing the concealed information would provide "valuable insight" to competitors, that the concealed information "articulates the principles, policies, procedures, and technical capabilities used to manage and operate Verde Energy," that the concealed information relates to "vendor training programs, audit and compliance practices, and marketing programs," and that the concealed information constitutes "basic building blocks and proprietary information."[22] Verde also included a table, "[f]or illustrative purposes," that is essentially a shorter version of the Compliance Plan's table of contents. That is all that Verde can muster in its defense of redacting 42 pages and 800 lines of information. These broad, conclusory statements say nothing whatsoever about how a competitor could use the particular information that Verde seeks to prevent from public disclosure.

Verde falls well short of overcoming the "strong presumption" that this information is to be made public.[23] And it has fallen well short of proving that it has "minimize[d] the amount of information protected from public disclosure," as required by PUCO rules.[24] Based on this alone, the PUCO should find that Verde has not met its burden of proof that the concealed information can remain redacted.

B. The concealed information does not derive independent economic value from not being known to Verde's competitors and cannot legally be kept secret from the public.

Verde Energy's claims for secrecy from the public are balderdash. Verde's Plan should not be a blueprint with competitive value for any marketer. Verde got caught by the PUCO for

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[22] Verde Motion at 8.

[23] *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc. for Approval of the Transfer of Certain Assets*, No. 89-365-RC-ATR, 1990 Ohio PUC LEXIS 1138, at *5 (Oct. 18, 1990).

[24] Ohio Adm. Code 4901-1-24(D).

ripping off Ohioans. And now it has to submit a Plan for *not* ripping off Ohioans. Verde's approach to marketing is such a low bar as to not be a business model with economic value for other marketers.

As explained herein, Verde has the burden of proving that its competitors could derive value from knowing the concealed information. Verde has not satisfied its burden, offering vague and conclusory statements about the alleged value of the concealed information. But even if Verde had attempted to meet its burden (rather than offering a single, conclusory sentence in the Jordan Affidavit), it would be unable to prove that the concealed information is valuable to competitors. Because it is not.

The concealed information consists largely of basic information about how Verde will conduct its operations going forward to avoid violating the law and the PUCO's rules, something it has been unable to do in the past. Upon closer scrutiny, there is little basis to conclude that there is anything proprietary about the concealed information or that a competitor could possibly use it to its advantage.

Verde must establish that each piece of concealed information is a trade secret. When examining the concealed information itself—as opposed to the broad descriptions of the concealed information that Verde provided in its Motion—it is apparent that the concealed information does not include trade secrets. The following is a representative sample of the many instances in which the concealed information is not a trade secret:

1. On page 3 of the Compliance Plan, Verde redacted the following sentence: [redacted] If a Verde competitor became aware that Verde will [redacted] what could the competitor possibly do to derive economic value from knowing this? Nothing.

2. Verde also redacted the following on page 3: [redacted]

[redacted][25] The mere fact that Verde will submit [redacted] possibly be of value to a competitor. Nor that such [redacted] will include information about [redacted], and [redacted]. These statements are so generic as to be useless to competitors.

3. On page 4, Verde redacted the following: [redacted][26] The fact that Verde will require its vendors to [redacted] cannot be a trade secret. That is obvious, basic information that all marketers are required to do to be certified as marketers in Ohio.[27]

4. Also on page 4, Verde redacted the following: [redacted][28] This sentence says nothing of substance at all, yet Verde redacted it. This demonstrates Verde's failure to attempt to minimize the amount of information redacted from public view.

5. On page 6 of the Compliance Plan, Verde redacted the following: [redacted] The PUCO's rules *require* Verde to do this.[29] Verde stating its intent to follow the PUCO's rules is not a trade secret.

6. On page 7, Verde redacted that it [redacted] The mere existence of [redacted] process is not unique to Verde, and the knowledge that Verde will [redacted] is of no value to competitors.

[25] Compliance Plan at 3.

[26] Compliance Plan at 4.

[27] R.C. 4928.08 (electric marketers must show that they have the "managerial, technical, and financial capability" to operate as a marketer in Ohio); R.C. 4929.20 (same for natural gas marketers); Ohio Adm. Code 4901:1-24-10(C)(2) (electric marketers are required to show that they are capable of complying with all PUCO rules and orders); Ohio Adm. Code 4901:1-27-10(C)(2) (same for natural gas marketers).

[28] Compliance Plan at 4.

[29] Ohio Adm. Code 4901:1-21-11(C); Ohio Adm. Code 4901:1-29-10(B).

7. On page 11, Verde redacted the fact that its [redacted]" A simple statement that Verde will [redacted] to follow laws and regulations derives no independent economic value by not being disclosed and is not a trade secret.

8. On page 12, Verde redacted the following: [redacted] Verde did not invent the concept of having a [redacted]. It is also ironic that Verde has gone out of its way to reduce visibility throughout the Compliance Plan, including redacting a statement about [redacted]."

9. On page 14, Verde redacted the following: "[redacted] Again, this is a generic statement that Verde will not [redacted] Verde cannot demonstrate that such a fundamental position regarding [redacted] is a trade secret.

10. On page 17, Verde redacted the following: [redacted]." This sentence reveals nothing about the substance of Verde's process for [redacted] third-party vendors. It does not derive independent economic value by not being disclosed. It is not a trade secret.

11. On page 18-19, Verde redacted this sentence: [redacted]" This is generic information about [redacted] that Verde [redacted] the PUCO Staff. Verde has not proven that this generic information derives independent economic value to competitors, so it is not a trade secret.

12. On page 23, Verde redacted the following: [redacted] Essentially, here Verde is saying that its [redacted] for following the law is somehow a trade secret. It is not.

13. On page 29, Verde redacted the following: [redacted]" Again, this says nothing of substance. Verde did not invent the idea that [redacted] should follow laws and regulations and be punished for not doing so.

14. On page 32, Verde redacted the following: [redacted] The only information here is that Verde will conduct [redacted]. And again, Verde did not invent the concept of an [redacted] It is inconceivable that the only way a competitor would find out that [redacted] can be done is by learning it from Verde's Compliance Plan. This is not a trade secret.

15. On page 33-34, Verde redacted the following: [redacted]." Marketers—and everyone else who has ever used a smart phone or tablet—is aware that [redacted] exist. The mere fact that Verde will use one is not a trade secret.

16. On page 34, Verde redacted the fact that its door-to-door agents will be required to [redacted]." Does Verde truly believe that it has a trade secret on [redacted]? This highlights the absurdity of Verde's view on trade secret law.

17. On page 34, Verde redacted various bullet points pertaining to its door-to-door "do's and don'ts." Many of these bullet points simply memorialize things that are required by the PUCO's rules. For example, Verde redacted a statement that its agents shall [redacted] But this does nothing more than restate the PUCO's rule found in Ohio Adm. Code 4901:1-21-05(E). Requiring agents to follow the law is not a trade secret because it is not a secret. All marketers and their agents are required to know this information and follow the PUCO's rules.

18. On page 44, Verde redacted the following: [redacted]" The existence of [redacted] is not a trade secret. It is common knowledge that customers can call the PUCO to

register complaints against marketers. Therefore, this information derives no independent economic value by not being disclosed.

19. On page 47, Verde redacted the following: [redacted] Verde's failure to comply with regulations is not a trade secret. Verde may be embarrassed to admit it, but that is no basis for redacting this statement from public view.

To be clear, OCC has no burden to prove that every redacted line in the Compliance Plan is *not* a trade secret, so this representative list describes just some of the many ways that Verde's trade secret claims are overbroad and unreasonable. Verde, in contrast, does have the burden of proving that each and every redacted line in the Compliance Plan is a trade secret, because it is Verde who is seeking to keep this information from being disclosed in the public domain. Verde has not even attempted to do so, and it could not meet that burden if it tried. The concealed information is not the type of information that is entitled to protection under Ohio's trade secret laws. As such, the PUCO should deny Verde's motion for protection from disclosure.

C. There is nothing novel or unique about the concealed information, so it is not a trade secret that can be kept secret from the Ohio public.

Whether Verde has kept the concealed information from its competitors is irrelevant if the information is not novel or unique. In interpreting Ohio's trade secret law (R.C. 1333.61), Ohio courts—following the United States Supreme Court[30]—have consistently held that information cannot be considered a trade secret if it lacks novelty or uniqueness.

In *Westco Group, Inc. v. City Mattress*,[31] for example, the plaintiff claimed that because it developed sales training techniques and manuals over a period of eight years, those training techniques and manuals were valuable to the plaintiff and would be valuable to its competitors.[32]

[30] *Kewanee v. Bicron,* 416 U.S. 470 (1974).

[31] 1991 Ohio App. LEXIS 3878 (Ohio Ct. App. Aug. 15, 1991).

[32] *Id.* at *3-5.

The trial court ruled, and the Court of Appeals affirmed, that despite the effort involved over a long period of time, the training techniques and manuals were not trade secrets because "[n]either the sale techniques and manuals nor the budgetary and financial information involved new or unique techniques or methods that are not known to others in the sales field."[33] The Ohio Court of Appeals in *Tomaydo-Tomahhdo L.L.C. v. Vozary*[34] similarly affirmed a lower court ruling that a company's "training techniques," among other things, were not trade secrets.

In *Buduson v. City of Cleveland*,[35] the City of Cleveland claimed that information related to potential Amazon.com headquarters locations (particularly, state and local financial incentives offered to Amazon) were trade secrets and thus not subject to public disclosure.[36] The Court of Claims ruled against the City's trade secret claim on the grounds that it failed to show that the incentives were "so unique, compelling, or otherwise valuable that competitors would gain a cognizable economic benefit from [their] disclosure."[37]

In, *Oriana House, Inc. v. Montgomery*,[38] the Court of Appeals again found that information must be "both unique and competitively advantageous" to be a trade secret. Applying that rule to financial records and bank account information, the court found that "[a]ll businesses maintain financial records and most individuals have personal bank accounts."[39]

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[33] *Id.* at *7-8.

[34] .2017-Ohio-4292.

[35] 2019-Ohio-963.

[36] *Id.* ¶ 7.

[37] *Id.* ¶ 37.

[38].2004-Ohio-4788

[39] *Id.* ¶ 43.

Thus, there was "nothing unique about maintaining bank records," and they were not trade secrets.[40]

And as the Court of Appeals concluded in *Murray v. Bank One*,[41] "[i]f information is generally known in the industry, it is not 'secret' and 'cannot qualify as a trade secret.'"[42]

Applying this precedent, the concealed information cannot be deemed to be a trade secret because there is nothing unique or novel about it. A substantial portion of the Compliance Plan is devoted to the ways in which Verde will monitor third parties that it hires to perform door-to-door sales and telemarketing.[43] This includes, among other things, a vetting process for third-party vendors, training door-to-door and telemarketing agents, dialing technology, tracking agents, auditing third-party vendor interactions, welcome calls to customers, vendor onboarding, auditing telemarketing and third party verification calls, door-to-door audits, and holding vendors accountable for noncompliance.[44] The Compliance Plan also devotes attention to improving Verde's records retention policies.[45] The Compliance Plan likewise discusses customer enrollment and consent procedures, as well as how Verde will handle customer complaints.[46] And it includes provisions related to customer contract administration and renewals.[47]

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[40] *Id.*

[41] 99 Ohio App. 3d 89 (1994).

[42] *Id.* at 98 (citing *Wiebold Studio Inc. v. Old World Restorations, Inc.*, 19 Ohio App. 3d 246 (1985)).

[43] Compliance Plan (Table of Contents).

[44] *See* Compliance Plan § IV.

[45] *See* Compliance Plan § V.

[46] *See* Compliance Plan §§ VI-VII.

[47] *See* Compliance Plan § VIII.

None of these processes are unique to Verde. Every marketer that wants to solicit customers through door-to-door sales or telemarketing must have a process for vetting third-party vendors, training those vendors, and holding the vendors accountable. Every marketer is required to maintain customer records, as required by the PUCO's rules. Every marketer must have a process in place to ensure that customers are not enrolled without their informed consent about what they are signing up for. Every marketer must follow the PUCO's rules regarding customer consent and enrollment. Every marketer must address customer complaints. Every marketer must have a process for administering customer contracts and renewals.

By drafting the Compliance Plan, Verde has not created some new or innovative way of doing business that other marketers are itching to get their hands on. To the contrary, with some exceptions, other marketers in Ohio have seemingly demonstrated a general ability to vet and hire third-party vendors, train vendors and employees, maintain customer records, protect customers from nonconsensual enrollment, handle customer complaints, and administer customer contracts and renewals. Verde's Compliance Plan would be useless to them because they already have processes in place to try to avoid the types of consumer abuse that Verde has committed in the past.

The processes that Verde proposes are (at least in theory[48]) designed to make it more likely that Verde will follow the law and the PUCO's rules in the future. There is nothing novel or unique about following the law and the rules. These are not trade secrets.

[48] OCC does not concede that the Compliance Plan is adequate in substance to address the many violations of law and rule that Verde has committed.

D. The *Plain Dealer* factors do not support Verde's claim that the concealed information includes trade secrets to be kept secret from the Ohio public.

In considering the *Plain Dealer* factors, the PUCO should conclude that the concealed information does not include trade secrets.

Regarding the first factor—the extent to which the information is known outside the business—OCC concedes that there appears to be no evidence that Verde has shared the Compliance Plan with anyone other than the PUCO Staff and OCC. But the contents of the Compliance Plan, including hiring and training third-party vendors and compliance with regulatory requirements and Ohio law, are generally known outside the business.

Regarding the second and third factors—the extent to which it is known to those inside the business, and the precautions taken by the holder of the trade secret to guard the secrecy of the information—Verde has failed to establish that distribution of the Compliance Plan and the contents thereof has been kept to a minimum. The Jordan Affidavit says that "[o]nly employees with a business purpose for knowing the Confidential Information and with appropriate system credentials have access to such information" and that "Verde Energy does not disseminate the Confidential Information publicly."[49] But there is no indication of how many people this could be. Given the vagueness of this description, it could be 10, or 100, or 1,000. Thus, it is impossible for the PUCO to conclude that Verde has properly limited access to the Compliance Plan internally. Further, Verde did not provide any information on the specific steps it takes to guard the secrecy of the concealed information. Are employees required to sign an agreement not to disclose the information? Are they prevented from accessing the concealed information from personal devices? Are they able to print the concealed information and remove it from Verde's

[49] Jordan Affidavit at 2.

offices? Are they able to send it by email to other Verde employees or outsiders who are not intended to access it? Is the document password protected when saved on Verde's servers? Are all printed copies of the Compliance Plan locked when not being used? Verde leaves all these questions unanswered, thus making it unclear whether Verde has taken reasonable steps to guard the secrecy of the concealed information.

Regarding the fourth factor—the savings effected and the value to the holder in having the information as against competitors—Verde provides nothing but conclusory statements. The Jordan Affidavit says only that "Verde Energy would be competitively harmed if the Confidential Information was publicly [sic] and made available to Verde Energy's competitors."[50] Verde made no attempt to quantify the value of the concealed information or to explain *how* Verde's competitors might use it to derive any value. This factor therefore weighs against a finding that the concealed information includes trade secrets.

Regarding the fifth factor—the amount of effort or money expended in obtaining and developing the information—Verde adds another conclusory statement: "Verde Energy spent months working with its outside counsel at BakerHostetler drafting the Compliance Plan in cooperation with the Public Utilities Commission of Ohio Staff."[51] Verde says nothing about the cost, the number of hours spent on the plan, the number of people required to complete it, the difficulty in preparing it, the process for developing it, or any other information that would allow the PUCO to give weight to this factor. The amount of time spent does not alone satisfy this factor.[52]

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[50] Jordan Affidavit at 2.

[51] Jordan Affidavit at 2.

[52] *Westco Group, Inc. v. City Mattress*, 1991 Ohio App. LEXIS 3878, *3-5 (Ohio Ct. App. Aug. 15, 1991) (information was not a trade secret even though it was created over a period of eight years).

Regarding the sixth factor—the amount of time and expense it would take for others to acquire and duplicate the information—the Jordan Affidavit says nothing at all. In the Motion, however, Verde makes the audacious claim that "there is no amount of time or expense that would allow others to acquire and duplicate the Confidential Information."[53] This cannot be true. As Verde itself stated in the Jordan Affidavit, Verde created the Compliance Plan after several months in conjunction with its counsel. In effect, Verde is suggesting that it and BakerHostetler are the only businesses in existence with the ability to create a similar plan. Further, given that most marketers in Ohio have not been investigated by the PUCO for repeated violations of statutes and rules, it stands to reason that those marketers already have hiring, training, and compliance procedures in place. Thus, Verde cannot reasonably claim that no one else is capable of creating processes and procedures to comply with Ohio statutes and rules. This factor, therefore, also supports a conclusion that the concealed information does not include trade secrets.

In sum, Verde has failed to demonstrate that the concealed information includes trade secrets under the *Plain Dealer* test.

IV. CONCLUSION

The public (that Verde Energy mistreated) has a right to know what steps Verde plans to take to avoid violating laws, violating PUCO rules, and harming consumers. The concealed information found in Verde's Compliance Plan does not include trade secrets. Ohio's public records law serves the public's strong interest in transparency about its government and corporations like Verde that interact with government, in PUCO proceedings, the PUCO, as a

[53] Verde Motion at 9.

public agency, must disclose public records (the Compliance Plan) in its entirety and without redactions, allowing such information to be utilized in public testimony, comments, or the public hearing in this public proceeding. The public has a right to know.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra (Public Version) was served on the persons stated below via electronic transmission, this 21st day of July 2020.

/s/ Christopher Healey
Christopher Healey
Assistant Consumers' Counsel

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Summary: Memorandum Memorandum Contra Verde Energy's Motion for Protective Order (Public Version) by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher