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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
)	

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 entities that interact with it. But Verde Energy wants to hide information—from the public it harmed—about the rates that it has continued to charge Ohioans even after it was investigated by the PUCO. And given how marketers tend to promote consumer “education” as key to their business model, the rates that Verde seeks to keep secret may be some of the best “education” possible for consumers. In reality, Verde’s position is not grounded in the law of trade secrets but rather in avoiding disclosure of information that the public needs to protect itself from Verde. These rates should be made public to the Ohioans that Verde disserved.

Subject to limited exceptions for trade secrets, the public’s right to know is a legal right. Indeed, based on that legal right, the PUCO has a “strong presumption” in favor of disclosure in its proceedings.¹ R.C. 4901.12 provides that all PUCO documents and records are public records.

¹ See footnote 2 below.

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 the rates that it is continuing to charge customers for retail electric and natural gas service. Verde is wrong about claiming secrecy from the public that it harmed.

Verde has not satisfied its burden of proof that the customer rates found in a Microsoft Excel file (the "concealed information") are 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. In fact, the rates are already known by the consumers that Verde charges.

Thus, the PUCO should deny Verde's motion for a protective order.

I. 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.² By law (R.C.

² *In re Joint Application of the Ohio Bell Tel. Co. & Ameritech Mobile Servs., Inc.*, No. 89-365-RC-ATR, 1990 Ohio PUC LEXIS 1138, at *5 (Oct. 18, 1990) ("The public record statutes applicable to the Commission (Section 4901.12 and 4905.07, Revised Code) provide a strong presumption in favor of disclosure, which the party claiming protective status

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 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). The Supreme Court of Ohio has ruled that these exceptions are to be “strictly construed” in favor of disclosure.³

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.”⁴ Here, Verde claims that because the concealed information is a trade secret, state law prohibits its release.

Verde misunderstands the applicable standard, as it states in its Motion that “OCC seeks to de-designate Verde Energy’s customer list.”⁵ No—OCC does not seek to “de-designate” anything. The law *requires* the information to be made public unless *Verde* proves that it can be protected from public disclosure.⁶ By default, all documents in PUCO proceedings are publicly available, and it is *Verde* who is asking the PUCO to conceal the Rate Sheet from public

must overcome.”). *See also In re Application of the Cincinnati Gas & Elec. Co.*, Case No. 03-93-EL-ATA, Order on Remand at 14 (Oct. 24, 2007) (“the Commission has held that, pursuant to Sections 4901.12 and 4905.07, Revised Code, there is a strong presumption in favor of disclosure that the party claiming protective status must overcome”).

³ *State ex re. Williams v. Cleveland*, 64 Ohio St.3d 544, 547 (1992).

⁴ 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.*, 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).

⁵ Motion at 1.

⁶ *See In re Application of Western Union ATS, Inc.*, Case No. 92-1918-TP-ACE, 1993 Ohio PUC LEXIS 482, at *1-2 (May 21, 1993) (“In evaluating the need for a protective order, the Commission recognizes a presumption in favor of full disclosure, and places the burden on the party seeking protective status to overcome this presumption.”).

disclosure. The PUCO should reject Verde's insinuation that the status quo is that documents are protected, and there is some burden for OCC to justify making them public. The law says that it is precisely the opposite.

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 rates that it charges customers (found in a Microsoft Excel file, hereinafter referred to as the "Rate Sheet"). But the government's regulation of corporations like Verde is generally to be an open matter for the public's consideration.

Under R.C. 1333.61(D), 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 value from its disclosure or use," and "(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

In attempting to prove 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."⁷ Other Ohio courts have consistently done the same, rejecting trade secret claims

⁷ *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).").

where the party relied only on conclusory statements and vague assertions about the potential value of the claimed trade secret.⁸

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.⁹ Accordingly, information is not a trade secret if the party holding the information 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*,¹⁰ 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

⁸ 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.").

⁹ 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).

¹⁰ 416 U.S. 470 (1974).

usually known; secrecy, in the context of trade secrets, thus implies at least minimal novelty.”¹¹ Ohio courts have followed *Kewanee* in requiring a party to demonstrate some degree of novelty for a trade secret claim.¹²

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.”¹³ 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.¹⁴

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.¹⁵ 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

¹¹ *Id.* at 476.

¹² See section II.D below.

¹³ Ohio Adm. Code 4901-1-24(D).

¹⁴ 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.”).

¹⁵ 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).

of information. And that burden does not outweigh the greater harm that is done to the public when it is denied access to information.

II. THE PUBLIC INTEREST IN MAKING VERDE'S RATES PUBLIC

The public has a right to know about the unconscionable rates that Verde continues to charge its electric and natural gas customers, even after the PUCO's recent investigation into Verde's misconduct. Verde's concealed information does not satisfy the requirements of R.C. 1333.61(D) for keeping that information from the public. It does not pass the six-part *Plain Dealer* test. It is not novel or unique. These are not trade secrets, and this information should be able to be utilized in public proceedings and be publicly disclosed.

A. Verde's motion to keep its rates 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 Rate Sheet is a Microsoft Excel file with [REDACTED] of data points. It contains information about the rates that electric and natural gas customers paid from [REDACTED] to [REDACTED]

[REDACTED] with columns for [REDACTED]

[REDACTED] among other things. In its Motion, Verde apparently claims that every data point in this document is a trade secret, including the dates covered by the Rate Sheet, with no exceptions. In support of its claim that these [REDACTED] of data points constitute trade secrets, Verde submitted the Affidavit of Kira Jordan.¹⁶

¹⁶ Motion, Affidavit of Kira Jordan.

Ms. Jordan's Affidavit for Verde is all of 10 sentences long. Three of those sentences are devoted to Ms. Jordan's name, address, and identifying the case numbers. The remaining seven 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.¹⁷

To demonstrate that Verde's concealed information includes trade secrets, Ohio 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."¹⁸ 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: "This information is central to Verde Energy's operations and its public disclosure would place Verde Energy at a severe competitive disadvantage."¹⁹ This is a textbook "conclusory statement" that Ohio courts have overwhelmingly ruled is insufficient to meet the burden of proving a trade secret.²⁰

In its Motion (which is not evidence), Verde seemingly suggests that it is not required to prove that the concealed information is in fact a trade secret, claiming that the "reasons why such disclosure would severely and unfairly prejudice Verde Energy hardly need to be spelled out."²¹

¹⁷ See *supra* § II.B.

¹⁸ R.C. 1333.61(D)(1).

¹⁹ Jordan Affidavit ¶ 9.

²⁰ 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").

²¹ Verde Motion at 6.

And indeed, Verde proceeds to hardly spell them out, offering bare platitudes like, “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,” and “The value of retaining the confidential nature of customer information is crucial to Verde Energy.”²²

That is all that Verde can muster in its defense of withholding the entire Rate Sheet from public disclosure. These broad, conclusory statements say nothing whatsoever about how a competitor could use the particular information that Verde seeks to conceal from public disclosure.

And, as a threshold matter, Verde reveals—in stating concerns about giving others “an unparalleled glimpse” into its so-called “strategy”—that it has a highly misplaced view of the value of its business model for other marketers. Verde’s “strategy,” which landed it in a PUCO investigation and which was already aptly described by the PUCO Staff in a list of its transgressions against the public, is not valuable to other marketers; Verde has been a scourge on consumers and energy marketing in Ohio.

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.

²² Verde Motion at 6.

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).

B. Verde's rate information is not the type of "customer list" that is sometimes granted trade secret protection, and thus the information should not be kept secret from the Ohio public.

R.C. 1333.61 includes "listings of names, addresses, or telephone numbers" as the type of information that might be a trade secret, if it satisfies the other requirements of the statute (that it derives value from being kept secret from others who can obtain value from it, and it is subject to reasonable efforts to maintain secrecy). The Supreme Court of Ohio, in *Fred Siegel Co. L.P.A. v. Arter & Hadden*,²⁵ quoted the statute and confirmed that this type of customer list (one with names, addresses, or telephone numbers) is potentially eligible for trade secret protection. Based on this (and little else), Verde concludes that the Rate Sheet must be a trade secret because it contains information about customers.²⁶ Verde is wrong for several reasons.

First, the Rate Sheet does not contain customer names. It does not contain customer addresses. It does not contain customer telephone numbers.

Verde representative Kira Jordan makes a false representation in her affidavit when she says that "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."²⁷ This is simply not true. There are no customer names anywhere in the Rate Sheet.

Verde makes a similar claim in its Motion, stating that OCC seeks to "release the *identity* and pricing information of thousands of Ohio CRES and CRNGS customers."²⁸ Again, not true. The Rate Sheet includes columns for "[REDACTED]," "[REDACTED]," and

²⁵ 85 Ohio St. 171 (1999).

²⁶ Verde Motion at 5.

²⁷ Jordan Affidavit at 2 (emphasis added).

²⁸ Verde Motion at 5-6 (emphasis added).

Only a utility could identify a customer based on [REDACTED], and only Verde could identify a customer by [REDACTED] or [REDACTED] which appear to be internal Verde designations. There is therefore no risk of revealing a customer's identity to anyone who does not already know it. And regardless, there is a simple and reasonable solution: redact the [REDACTED] columns while allowing all other columns to be publicly disclosed. This would resolve any concern that a customer's personal information could be revealed publicly. All that is left would be data about [REDACTED] rates, [REDACTED] referenced, and the [REDACTED], with no ability to identify any particular customer.

Second, not all lists with customer information are trade secrets. In support of its claim that the Rate Sheet is a trade secret, Verde relies on two cases, neither of which supports Verde's claims. Verde first cites *Fred Siegel Co. L.P.A. v. Arter & Hadden*.²⁹ In *Fred Siegel*, however, the question was whether a client list was a trade secret where the list included client names and addresses.³⁰ Verde's Rate Sheet, in comparison, does not include any such information, as explained above.

Further, Verde claims in its motion that the *Fred Siegel* court issued an opinion "protecting a client list."³¹ This is false. The *Fred Siegel* case was an appeal of a trial court ruling granting summary judgment on a claim of trade secret misappropriation.³² The court of appeals reversed, and the Supreme Court of Ohio affirmed the court of appeals ruling.³³ In other words, the Court merely remanded the case to the trial court to address the trade secret claim as a factual

²⁹ 85 Ohio St.3d 171 (1999).

³⁰ *Id.* at 181.

³¹ Verde Motion at 5.

³² 85 Ohio St.3d at 183.

³³ *Id.*

issue. The Court did not make any ruling on whether the client list in question was or was not a trade secret, despite Verde's false claim that the Court ruling was "protecting a client list."

Verde also relies on *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*.³⁴

According to Verde, this case supports the proposition that 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."³⁵ But *Toledo Blade* says nothing of the sort. It says nothing about there being any presumption that a customer list is a trade secret. In fact, the *Toledo Blade* court made no ruling whatsoever on the issue of whether a customer list is a trade secret. *Toledo Blade* involved a list of donors to the University of Toledo Foundation, and the Ohio Supreme Court ruled that the list was *not* a trade secret.³⁶ It is unclear how Verde interpreted *Toledo Blade* to support its claim that a customer list is "presumptively" a trade secret.

Courts sometimes protect customer lists with names, addresses, and phone numbers because competitors could use the customer list to poach their competitors' customers without doing the work themselves of identifying potential customers.³⁷ There is no way for any Verde competitors to do the same here because the Rate Sheet does not include any customer contact information (especially if the [REDACTED] are redacted, which OCC does not oppose). Thus, the reasoning for protection of customer lists with customer contact information does not apply here, and the Rate Sheet is not a customer list entitled to trade secret protection.

³⁴ 65 Ohio St.3d 258 (1992).

³⁵ Verde Motion at 5 (citing *Toledo Blade*) (emphasis added).

³⁶ 65 Ohio St.3d at 264-66.

³⁷ See, e.g., *Columbus Bookkeeping & Business Services v. Ohio State Bookkeeping*, 2011 Ohio Misc. LEXIS 16346 (Feb. 8, 2011) (defendant misappropriated trade secret by using plaintiff's customer list to steal customers).

C. Marketer rate information is not a trade secret; thus, this information should not be held secret from the Ohio public.

The critical information in the Rate Sheet that OCC intends to disclose relates to the rates that Verde charges its customers for retail electric and natural gas service at a certain point in time. As explained above, the only explanation that Verde provides for why this information is a trade secret is a single conclusory sentence: “This information is central to Verde Energy’s operations and its public disclosure would place Verde Energy at a severe competitive disadvantage.”³⁸ But Verde has not established that this is true, nor could it.

There is no presumption that pricing information is a trade secret. For example, in *Columbus Bookkeeping & Business Services v. Ohio State Bookkeeping*,³⁹ the court found that the plaintiff’s customer list was a trade secret because it could be used by competitors to steal customers, but that plaintiff’s pricing matrix was not a trade secret.

In countless industries, pricing information is readily and publicly available. Anyone can walk into a store—grocery store, hardware store, big box store, electronics store, department store—and readily obtain the price of every single product. Likewise, online businesses readily publish all of their prices. Online price comparison information is a regular feature of online shopping. Walmart, for example, could not plausibly claim that its prices constitute trade secrets when they publicly announce those prices on their shelves and on their website for all to see.

The market for retail electric and natural gas service is similar. At any moment, anyone can consult the PUCO’s “Apples to Apples” website to obtain pricing information for electric and natural gas generation service, so that consumers presumably shop effectively. As of July 16,

³⁸ Jordan Affidavit at 2.

³⁹ 2011 Ohio Misc. LEXIS 16346 (Feb. 8, 2011).

2020, there are more than 800⁴⁰ offers for retail electric service for residential consumers in Ohio and more than 300⁴¹ different offers for retail natural gas service for Ohio residential consumers.

The Apples to Apples website also has historical rate information.⁴² Using this feature, one can find every offer published on the Apples to Apples website, every day going back to at least 2014. There are tens of thousands of data points, with information about the marketer, the applicable distribution utility, the term of the offer, the price per unit (kWh or MCF), monthly fees, early termination fees, and other information.

The Apples to Apples historical search function can also be used to obtain information about the prices that Verde itself has offered in the past.⁴³ For example, on January 1, 2019, Verde was offering the following options for AEP Ohio residential consumers: \$0.0749 per kWh for a 24-month fixed term (with month-to-month after 24 months); \$0.0759 per kWh for a 12-month fixed term (with month-to-month after 12 months); \$0.0899 per kWh for a 6-month fixed term; \$0.0925 per kWh for a 12-month term. On the same date, Verde was offering the following to Dominion residential customers: \$6.49 per MCF for a 12-month term, and \$9.25 per MCF for Dominion's MVR. The same exercise could be followed for other days, thereby identifying every offer that Verde has posted to Apples to Apples for every electric and natural gas distribution utility for the last several years.

Verde's website (www.verdeenergy.com) also includes rate information. Near the bottom of the main page of Verde's website, there are links for "Connecticut Electricity Rates,"

⁴⁰ 157 for AEP, 116 for DP&L, 175 for Duke, 130 for Ohio Edison, and 128 for each of Cleveland Electric and Toledo Edison.

⁴¹ 83 for Columbia, 89 for Dominion, 84 for Duke, and 47 for Vectren.

⁴² See <https://puco.ohio.gov/wps/portal/gov/puco/documents-and-rules/resources/a2a>.

⁴³ There are no current listings for Verde on Apples to Apples because Verde is currently prohibited from marketing in Ohio, other than a rate of \$9.25 per MCF that Verde identifies as its monthly variable rate.

“Massachusetts Electricity Rates,” “New Jersey Electricity Rates,” “New York Electricity Rates,” “Ohio Electricity Rates,” and “Pennsylvania Electricity Rates.” It does not appear that any information is currently available under the link for Ohio Electricity Rates, given that Verde is prohibited from marketing in Ohio at this time. But Verde’s affiliates in other states do provide pricing information.

As just one example, using the zip code 17025 (Pennsylvania), one learns that Verde’s Pennsylvania affiliate is currently offering \$0.0639 per kWh for a three-month fixed contract, \$0.0659 per kWh for a six-month fixed contract, \$0.0739 per kWh for a 24-month fixed contract, and \$0.0749 per kWh for a 12-month fixed contract.⁴⁴ Again, the exercise can be repeated to obtain rates that Verde’s affiliates offer throughout these states. And given that the website includes a link for Ohio Electricity Plans, such rate information must have been available for the public to see before Verde stopped marketing in Ohio.

Information about Verde’s rates is also publicly available in this docket and in the docket in the Investigation Case. Based on communications between Verde, Verde customers, and the PUCO Staff, numerous Verde rates have been publicly disclosed:

- On February 28, 2019, Verde enrolled an Ohio customer for natural gas service at a 12-month fixed rate of 69.90 cents per ccf.⁴⁵
- On March 21, 2017, Starion Energy (Verde’s predecessor) enrolled an Ohio customer for electric service at a 12-month fixed rate of 6.29 cents per kWh with a 24 cent daily account management fee and for natural gas service at an initial monthly variable rate of \$0.3677 per ccf.⁴⁶

⁴⁴ See <https://www.verdeenergy.com/get-rates/?UtilityID=116&z=17025>.

⁴⁵ See Initial Comments by the Office of the Ohio Consumers’ Counsel, Exhibit B at 8 (May 4, 2020).

⁴⁶ *Id.* at 24.

- On February 23, 2015, CenStar Energy (a Verde predecessor) enrolled an Ohio customer for electric service at a 24-month fixed rate of \$0.0799 cents per kWh with a \$25 early termination fee.⁴⁷
- On November 20, 2018, Verde enrolled an Ohio customer for natural gas service at a 12-month fixed rate of \$0.5250 cents per ccf.⁴⁸
- On January 2, 2019, Verde enrolled an Ohio customer for electric service at a 12-month fixed rate of 9.29 cents per kWh and for natural gas service at a rate of 67.5 cents per ccf.⁴⁹
- On April 20, 2019, Verde enrolled an Ohio customer for electric service at a 12-month fixed rate of 8.99 cents per kWh and for natural gas service at a rate of 64.9 cents per ccf.⁵⁰

These are just a few examples. There are dozens more included in Exhibit B to OCC's initial comments in this case and in Exhibit 7 in the record in the Investigation Case.⁵¹ They are publicly available for all to see, including Verde's competitors.

Because of the abundance of publicly available information about retail electricity rates in Ohio and elsewhere, Verde has not demonstrated that its competitors would gain any competitive advantage by knowing the rates found in the Rate Sheet. Using Verde's approach to marketing could actually be a disadvantage. The Rate Sheet does not include formulas showing *how* the various rates are derived—just what the rates are. A competitor gains no insight into how or why Verde charges any customer a particular rate. Thus, in a market flooded with public information about marketer rates, a competitor does not gain any advantage by knowing Verde's rates as found in the Rate Sheet.

⁴⁷ *Id.* at 32-33.

⁴⁸ *Id.* at 40.

⁴⁹ *Id.* at 51.

⁵⁰ *Id.* at 57.

⁵¹ Case No. 19-958-GE-COI, Exhibit 7 (filed Nov. 1, 2019).

D. There is nothing novel or unique about the concealed information, so it is not a trade secret, and this information should not 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 Court⁵²—have consistently held that information cannot be considered a trade secret if it lacks novelty or uniqueness.

In *Westco Group, Inc. v. City Mattress*,⁵³ 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.⁵⁴ 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.”⁵⁵ The Ohio Court of Appeals in *Tomaydo-Tomahhdo L.L.C. v. Vozary*⁵⁶ 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*,⁵⁷ 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.⁵⁸ The Court of

⁵² *Kewanee v. Bicron*, 416 U.S. 470 (1974).

⁵³ 1991 Ohio App. LEXIS 3878 (Ohio Ct. App. Aug. 15, 1991).

⁵⁴ *Id.* at *3-5.

⁵⁵ *Id.* at *7-8.

⁵⁶ 2017-Ohio-4292.

⁵⁷ 2019-Ohio-963.

⁵⁸ *Id.* ¶ 7.

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.”⁵⁹

In, *Oriana House, Inc. v. Montgomery*,⁶⁰ 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.”⁶¹ Thus, there was “nothing unique about maintaining bank records,” and they were not trade secrets.⁶²

And as the Court of Appeals concluded in *Murray v. Bank One*,⁶³ “[i]f information is generally known in the industry, it is not ‘secret’ and ‘cannot qualify as a trade secret.’”⁶⁴

Applying this precedent, the concealed information cannot be deemed a trade secret because there is nothing unique or novel about it. Pricing information for retail electric and natural gas service is generally known in the industry. As explained above, hundreds of marketer rates are publicly disclosed, marketers routinely publish their rates, and Verde’s own rates are publicly disclosed in several ways. Verde has not provided any evidence that its rates are in any way novel in the industry. Thus, Verde cannot meet its burden of proving that the entire Rate Sheet constitutes a trade secret.

⁵⁹ *Id.* ¶ 37.

⁶⁰ 2004-Ohio-4788.

⁶¹ *Id.* ¶ 43.

⁶² *Id.*

⁶³ 99 Ohio App. 3d 89 (1994).

⁶⁴ *Id.* at 98 (citing *Wiebold Studio Inc. v. Old World Restorations, Inc.*, 19 Ohio App. 3d 246 (1985)).

E. The *Plain Dealer* factors do not support Verde's claim that the concealed information includes trade secrets; thus, this information should not 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—many of Verde's rates are known outside of Verde's business. As explained above, the PUCO's Apples to Apples website has extensive historical information about Verde's rates. Many of Verde's rates have also been disclosed in this case and in the Investigation Case. And Verde's website includes a page where customers can search for current rates offered by Verde's affiliates (and previously provided Ohio rates when Verde was actively marketing in Ohio). This factor weighs against Verde's trade secret claim.

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 Rate Sheet 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, and it is not known outside Verde Energy's company.”⁶⁵

But there is no indication of how many people have access to the Rate Sheet or how access is limited. Given the vagueness of this description, it could be 10, or 100, or 1,000 people that have access to the information. Thus, it is impossible for the PUCO to conclude that Verde has properly limited access to the Rate Sheet internally.

⁶⁵ Jordan Affidavit at 2.

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 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 Rate Sheet 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 the concealed information “is central to Verde Energy’s operations and its public disclosure would place Verde Energy at a severe competitive disadvantage.”⁶⁶ 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—the Jordan Affidavit says nothing. Verde’s Motion claims without further elaboration that the Rate Sheet “essentially represent[s] the sum total of Verde Energy’s years of investment in the Ohio market.”⁶⁷ Verde says nothing about the cost, the number of hours spent developing the Rate Sheet, the number of people required to complete it, the

⁶⁶ Jordan Affidavit at 2.

⁶⁷ Motion at 6.

difficulty in preparing it, the process for developing it, or any other information that would allow the PUCO to weigh this factor in Verde's favor.

Regarding the sixth factor—the amount of time and expense it would take for others to acquire and duplicate the information—the Jordan Affidavit again says nothing at all. In the Motion, Verde makes vaguely asserts that “Verde Energy’s competitors would need to engage in years of similar effort to compile such data.”⁶⁸ Verde cites nothing in support of this claim and provides no information about actual effort required. 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.

F. If the PUCO does not require Verde’s entire Rate Sheet to be publicly disclosed, it should allow OCC to make public summaries of information found in the Rate Sheet.

For the reasons stated above, the entire Rate Sheet should be released and not protected from public disclosure (with the exception of customer [REDACTED]). But if the PUCO disagrees and instead concludes that some or all of the Rate Sheet should be prohibited from public disclosure, then at a minimum, then the PUCO should allow treatment as public information summaries of the information found in the Rate Sheet. Allowing treatment as public information summaries of information in the Rate Sheet would more than address any interest that Verde might have in protecting alleged trade secrets.

⁶⁸ Motion at 6.

And importantly, it would be consistent with Ohio law. In *State ex rel. Plain Dealer v. Ohio Department of Insurance*,⁶⁹ parties disputed whether certain memoranda constituted trade secrets. One party also argued that the indexes to the disclosure memoranda were trade secrets as well on the grounds that they “summarize the contents of the Disclosure Memoranda.”⁷⁰ The Supreme Court of Ohio disagreed. As the Court reasoned, the indexes included only “a highly generalized description of the Memoranda” and did not “reveal the substance of any business information which might yield economic value to a competitor.”⁷¹

Accordingly, as an alternative to revealing the entire Rate Sheet (if the PUCO declines to make it all public), the PUCO should allow treatment as public information the following summary data derived from the Rate Sheet. For each distribution utility in [REDACTED], public information would include the highest rate charged to a residential customer by Verde, the lowest rate charged to a residential customer by Verde, the median rate charged to a residential customer by Verde, and the average rate for all residential customers. The following summarizes Verde information that should be publicly disclosed to OCC (and anyone else), all of which relates to residential customer rates charged by Verde in [REDACTED]:⁷²

⁶⁹ 80 Ohio St.3d 513 (1997) (superseded in part on other grounds).

⁷⁰ *Id.* at 527.

⁷¹ *Id.* See also *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400 (2000) (memorandum describing an asset purchase agreement without disclosing its terms was not itself a trade secret because it did “not disclose any information that retains any potential economic value for either OSU or its competitors”); *Thayer v. Diver*, 2011 Ohio Misc. LEXIS 13503 at *7-8 (Mar. 15, 2011) (summarizing data would “allay trade secret concerns”).

⁷² Standard Choice Offer, Gas Cost Recovery, and Price to Compare information taken from the PUCO’s Apples to Apples website as of June 2020.

Gas (MCF)	High	Low	Avg.	Median	SCO/GCR
Columbia	██████	██████	██████	██████	2.792
Dominion	██████	██████	██████	██████	1.944
Duke	██████	██████	██████	██████	2.731

Elec (kWh)	High	Low	Avg.	Median	PTC
AEP	██████	██████	██████	██████	0.0471
DP&L	██████	██████	██████	██████	0.0460
Duke	██████	██████	██████	██████	0.0547
Ohio Edison	██████	██████	██████	██████	0.0545
Cleveland Elec.	██████	██████	██████	██████	0.0551
Toledo Edison	██████	██████	██████	██████	0.0554

If the PUCO permits the release of the data in this table publicly, there would be no chance of identifying specific customers. Only three current rates (highest, lowest, and median) out of thousands would be publicly disclosed for each distribution utility's service territory or service area. Based on this extremely limited subset of data, Verde's alleged competitors would gain no detailed information. They would not know how many customers are charged each rate, they would not know whether or how many customers were charged any rate in between the highest and lowest rate, they would not know how Verde decided to charge customers any of these rates, they would not know the terms of any customer's contract, they would not know whether these are variable or fixed rates, and they would not know whether those rates will change in the future.

What Verde is really drawing the PUCO into here is to be complicit in Verde's attempt to shield from public awareness its rates that could bring it disfavor to the extent they are unconscionable. The PUCO should not go there.

As the table shows, ██████ Dominion customer enrolled with Verde was paying ██████
████████████████████, and some customers were paying Verde ██████
█████ the Dominion standard choice offer. Some Columbia customers were paying Verde ██████

██████████ the Columbia standard choice offer. Some Duke gas customers were paying Verde ██████████
██████████ the Duke standard offer (gas cost recovery). And the highest paying customers
of every electric distribution utility were paying Verde ██████████ their
utility's price to compare.

It is not surprising, therefore, that Verde would not want these rates to consumers
publicly disclosed. It would be surprising, however, if the state regulator would condone Verde's
attempt at such as anti-consumer outcome. The PUCO should rule consistent with its preference
for public disclosure and for transparency in its processes that greatly affect Ohio consumers.

III. CONCLUSION

The public (that Verde Energy mistreated) has a right to know what rates Verde has been
charging customers since it was investigated by the PUCO. The concealed information found in
Verde's Rate Sheet 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. The PUCO should avoid becoming part of Verde's plan to hide otherwise
public information from the very consumers that so sorely need it in their dealings with Verde.
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 23rd day of July 2020.

/s/ Christopher Healey

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