

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Verde )  
Energy USA Ohio, LLC for Certification as ) Case No. 11-5886-EL-CRS  
a Competitive Retail Electric Supplier. )

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. )

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**MOTION TO STRIKE  
OR, IN THE ALTERNATIVE,  
MOTION FOR LEAVE TO FILE SURREPLY INSTANTER  
AND  
REQUEST FOR AN EXPEDITED RULING  
AND  
SURREPLY  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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August 14, 2020

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Verde Energy abused the PUCO’s motion process and violated its protective agreement with the Office of the Ohio Consumers’ Counsel (“OCC”) when it filed its so-called “Reply” on July 28, 2020 in support of its original and inadequate motion for protective order. The Reply included yet another Verde affidavit, a “Second” Affidavit of Kira Jordan (the “Supplemental Affidavit”), which was filed *after* OCC’s opportunity for opposing Verde’s arguments. Verde violated PUCO rules and due process for OCC.

Accordingly, OCC moves the PUCO to strike (i) Verde’s Supplemental Affidavit and (ii) Verde’s Reply beginning on page 15 with the heading “Sections IV(B), IV(B)(1)(a), IV(B)(1)(b), and IV(B)(2)” and continuing through the end of page 32. In the alternative, OCC moves for leave to file surreply instanter.

Everything Verde included in the Supplemental Affidavit, and all of the various arguments Verde made on pages 15 through 32 of the Reply, could and should have been filed by Verde in the first instance with its motion. That's the fair process in Ohio Adm. Code 4901-1-24(B)(1)—requiring Verde to make its arguments in its original filing (which it ultimately didn't), and Ohio Adm. Code 4901-1-24(B)(3)—requiring Verde to attach an affidavit of counsel (which it didn't). Had Verde complied with that process, OCC would have had an opportunity to respond. But Verde didn't and OCC doesn't.

Instead, Verde filed a minimal, inadequate motion and affidavit to deny Ohioans the transparency they should have at the PUCO about Verde's bad acts. Under the PUCO's rules, Verde had its chance for advocacy. But Verde doesn't play by the rules and it filed aggressive (and wrong) new anti-transparency arguments on reply. Verde's approach of augmenting its factual case with a second affidavit also violates its protective agreement with OCC about how claims of confidentiality would be handled.

The PUCO should rule on Verde's motion for protective order without giving any weight to the Supplemental Affidavit or the arguments in Verde's reply that rely on that Supplemental Affidavit. If the PUCO allows Verde's Supplemental Affidavit and supporting arguments to stand (which it shouldn't), the PUCO should grant OCC leave to file surreply comments *instanter*. OCC's surreply comments (attached hereto) are limited to responding to the Supplemental Affidavit and Verde's new arguments that are based on the Supplemental Affidavit.

OCC also respectfully requests that the PUCO grant this Motion under Ohio Adm. Code 4901-1-12(C) on an expedited basis to minimize any further delay in making public the information that Verde has improperly withheld from public disclosure.

Respectfully submitted,

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*/s/ Christopher Healey*

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION AND BACKGROUND**

In its July 6, 2020 motion for protective order,<sup>1</sup> Verde asked the PUCO for permission to keep secret from the public certain information found in Verde’s “Compliance Plan.” Verde believes the Plan demonstrates its managerial capability and supports the renewal of its certificates to continue providing electric and natural gas service to Ohioans. The information that Verde redacted from its Compliance Plan is primarily information about how Verde allegedly plans to comply with applicable laws and PUCO rules after having miserably failed the public interest in the past. Verde is wrong in its claim that the redacted information in the Compliance Plan includes trade secrets, and thus there should be public disclosure of the entire plan as part of the process in this case about Verde’s violations of the public trust.

Under the terms of a protective agreement between Verde and OCC (the “Protective Agreement”),<sup>2</sup> OCC gave Verde notice on June 26, 2020 of its intent to publicly disclose the

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<sup>1</sup> Verde Energy USA Ohio, LLC’s Motion for Protective Order (July 6, 2020) (the “Motion for Protective Order”).

<sup>2</sup> Verde attached a copy of the Protective Agreement as Exhibit A to its July 6, 2020 motion for protective order in these cases.

contents of the Compliance Plan.<sup>3</sup> At that point, the Protective Agreement required Verde, within five business days, to file “a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials.”<sup>4</sup>

Verde filed such a motion (the Motion for Protective Order) on July 6, 2020, and it included the Affidavit of Kira Jordan (the “Original Affidavit”) to support its claims of confidentiality, as the Protective Agreement requires. OCC filed a memorandum contra.<sup>5</sup> Verde then filed a reply in support of its motion.<sup>6</sup> But that is not all that Verde filed. Verde (in an attempt to correct the Original Affidavit deficiencies) attached to its Reply a second Kira Jordan affidavit (the “Supplemental Affidavit”), which it used to bolster its motion for protective order.

By including the Supplemental Affidavit and new arguments on reply based on that affidavit, Verde did some important things wrong. Verde (i) violated its Protective Agreement with OCC, which require all factual support to be filed in an affidavit or affidavits within five business days of OCC’s notice, (ii) violated Ohio Adm. Code 4901-1-24(B)(1) and (3), which require Verde’s motion for protection to have included “the specific basis of the motion and citations of any authorities relied upon...” and an affidavit of counsel, and (iii) unfairly prejudiced OCC’s right to be heard by making substantive arguments on reply when OCC had no right of response.

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<sup>3</sup> See Protective Agreement ¶ 9 (“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 ... to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain.”).

<sup>4</sup> Protective Agreement ¶ 9.

<sup>5</sup> Memorandum Contra Verde Energy’s Motion for Protective Order by the Office of the Ohio Consumers’ Counsel (July 21, 2020) (the “Memo Contra”).

<sup>6</sup> Reply in Support of Verde Energy USA Ohio, LLC’s Motion for Protective Order (July 28, 2020) (the “Reply”).

Verde's Supplemental Affidavit should be struck, as should the portions of the Reply that rely on the Supplemental Affidavit (as identified above).

## II. ARGUMENT

### A. **Verde Energy's Supplemental Affidavit and all arguments in its Reply based on the Supplemental Affidavit should be struck because the Protective Agreement does not authorize Verde's filing of the Supplemental Affidavit.**

The Protective Agreement between OCC and Verde provides for a specific process in instances like these. OCC must first give Verde notice of its desire to publicly disclose information that Verde has marked as protected:

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 ... to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain.<sup>7</sup>

Following such notice, Verde has five business days to file a motion and any supporting affidavits:

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.<sup>8</sup>

Verde filed a motion for protective order within five business days, as required, and it attached the Original Affidavit to its motion, as required.<sup>9</sup> OCC then filed a memorandum contra the Motion for Protective Order, consistent with the PUCO's rules for motions. In its

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<sup>7</sup> Protective Agreement ¶ 9.

<sup>8</sup> Protective Agreement ¶ 9.

<sup>9</sup> See Motion for Protective Order.

memorandum contra, OCC explained, among other things, that the Original Affidavit was insufficient for Verde to meet its burden of proof because it relied on “conclusory statements,” which Ohio courts (including the Supreme Court of Ohio) have ruled are insufficient to prove the existence of a trade secret.<sup>10</sup>

Seemingly in recognition of the Original Affidavit’s shortcomings, Verde filed not only a Reply in support of its motion (which is allowed under the PUCO’s rules), but a new affidavit, the Supplemental Affidavit. This is not allowed under the Protective Agreement or the PUCO’s rules.

The Protective Agreement provides that the motion for protective order and all supporting affidavits must be filed with the motion. That is, any affidavits supporting Verde’s trade secret claim were required to be filed within five business days of OCC’s notice. But Verde filed its Supplemental Affidavit on July 28, 2020—21 business days after OCC’s June 26, 2020 notice. The Supplemental Affidavit is, therefore, improper under the plain language of the executed Protective Agreement.

OCC and Verde negotiated the terms of the Protective Agreement so that OCC could gain access to information that Verde deemed confidential and to ensure that a process was in place for OCC to challenge such confidentiality claims. Part of that bargain was that Verde would have an opportunity to file a motion and affidavit to support any trade secret claims within five business days and that OCC would have a fair and reasonable opportunity to respond to such motion and arguments to support Verde’s claims. The PUCO expects and encourages parties to resolve their discovery differences without PUCO involvement (per Ohio Adm. Code 4901-1-16(A)), and the Protective Agreement is a key part of that process between the parties that the

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<sup>10</sup> OCC Memorandum Contra at 7-9.

PUCO should expect to be honored. The PUCO should not allow Verde to defy the agreement and gain an advantage by withholding substantially all relevant facts until its reply.

- B. The PUCO should find that Verde Energy violated Ohio Adm. Code 4901-1-24(B)(1) and (3) by its filing of a minimalist motion and affidavit (without the required affidavit of counsel) followed by a more substantive Reply and Supplemental Affidavit that sandbagged OCC without an opportunity to reply.**

Independent of the Protective Agreement, Verde's approach of filing a minimalist motion and Original Affidavit and then substantially expanding both on reply (which sandbags OCC out of a reply) is unjust and unreasonable. The fair process in the PUCO's rules should be enforced. Ohio Adm. Code 4901-1-24(B)(1) required Verde to make its arguments in its original filing (which it ultimately didn't). And Ohio Adm. Code 4901-1-24(B)(3) required Verde to attach an affidavit of counsel (which it didn't).

Further, the PUCO's motion rule and industry practice allows all parties to be heard.<sup>11</sup> The moving party files a motion. Any other party may file a memorandum contra within 15 days. Then the moving party has seven days to file a reply that addresses the arguments made in the memorandum contra. This process is just and reasonable because it allows the moving party to make a request, for other parties to rebut that request, and for the moving party to have the last word regarding its motion.

The process becomes unjust and unreasonable, however, when Verde withholds facts and arguments that could have and should have been included in its motion, under the PUCO's rules. And then Verde includes the facts and arguments in its reply when OCC no longer has an opportunity under the rules to respond and refute the claims.

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<sup>11</sup> Ohio Adm. Code 4901-1-12.

In analogous situations, the PUCO has struck or disregarded information raised on reply when that same information should have and could have been included in the original filing. For example, in *In re Review of Chapter 4901:1-15*, Aqua Ohio, Inc. declined to file initial comments and then filed reply comments addressing issues that could have been included in initial comments.<sup>12</sup> The PUCO cited its concern that other parties would not then have any opportunity to reply, so it disregarded Aqua’s reply comments.<sup>13</sup> In *In re Review of Ameritech Ohio’s Economic Costs for Interconnection*, the PUCO similarly struck rebuttal testimony where the testimony “repeat[ed] or expand[ed] upon positions previously taken” in direct testimony, rather than rebutting other parties’ positions.<sup>14</sup> Likewise, in *In re Complaint of Jean Hails and Mary Higgins*, the complainants attached new evidence to their reply brief, thus giving other parties no opportunity to respond to that evidence.<sup>15</sup> The PUCO struck the attachment to the complainants’ reply brief.<sup>16</sup>

For the same reasons, the PUCO should strike the Supplemental Affidavit and the portions of the Reply that rely on it. As OCC explained in its Memorandum Contra, Verde’s Original Affidavit contains little substance. It is just two pages long and primarily includes conclusory statements with little or no substance, like “Verde Energy would be competitively harmed if the Confidential Information was publicly [sic] and made available to Verde Energy’s competitors.”<sup>17</sup> The Motion is similarly light on details, spending less than three pages on all six *Plain Dealer* factors combined.

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<sup>12</sup> Case No. 07-292-WS-ORD, Finding & Order ¶ 4 (Mar. 19, 2008).

<sup>13</sup> *Id.*

<sup>14</sup> Case No. 96-922-TP-UNC, Opinion & Order (Jan. 29, 2001).

<sup>15</sup> Case No. 95-826-GA-CSS, Opinion & Order at n. 11 (Mar. 12, 1998).

<sup>16</sup> *Id.*

<sup>17</sup> Original Affidavit at 2.

In contrast, the Supplemental Affidavit is six times as long as the Original Affidavit, and Verde's Reply includes 17 pages of argument tied to the Supplemental Affidavit.<sup>18</sup> This is not Verde merely responding to arguments that OCC made in its Memorandum Contra. This is textbook sandbagging.

The PUCO should strike Verde's Reply, in the portions that OCC identified. What Verde did is not fair. That (unfairness) is not unusual for Verde. But it should not be tolerated by the PUCO.

- C. As a secondary alternative, the PUCO should grant OCC's motion to file surreply comments instanter and consider such surreply comments when ruling on the Motion. But the appropriate approach is to strike Verde's reply.**

As explained above, Verde should not get a second chance at making its case. Its Supplemental Affidavit and portions of its Reply (on pages 15 to 32) should be struck as inconsistent with the Protective Agreement and the PUCO's rules.

If the PUCO declines to grant OCC's motion to strike, then in the alternative, OCC should be allowed to file surreply comments addressing Verde's new evidence (the Supplemental Affidavit) and the arguments based on the Supplemental Affidavit (Reply pages 15 to 32).

In past cases, the PUCO has allowed parties to file surreply comments when fairness requires it. For example, in *In re Complaint of Time Warner Telecom of Ohio, L.P.*, one party devoted two sentences to a particular issue in its initial brief and then expanded that issue substantially in its reply brief, so the PUCO ruled that other parties should have an opportunity for surreply.<sup>19</sup> Similarly, in *In re Complaint of McLeodUSA Telecomm.*, the PUCO allowed

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<sup>18</sup> See Reply at 15-32.

<sup>19</sup> Case No. 02-796-TP-CSS, Opinion & Order (Nov. 10, 2004).

parties to file surreply comments when another party introduced new facts in its reply.<sup>20</sup> The PUCO also allowed a surreply in *In re Application for Approval of a Change in Ultimate Ownership of Air Touch Paging* where a party filed a motion and then raised new issues on reply that were not raised in its initial motion.<sup>21</sup>

Most recently, in a case involving OCC, the PUCO found that it was reasonable to allow parties to file surreply comments so that each party would have an “equal voice.”<sup>22</sup> In that case, OCC introduced new coronavirus-related arguments in reply comments because circumstances had changed between the time of filing initial comments and reply comments. The PUCO found that under the circumstances and in light of new information, allowing surreply comments was more appropriate than striking OCC’s reply comments.<sup>23</sup> (The same cannot be said here, where the new issues and facts raised in Verde’s Reply and Supplemental Affidavit did not involve the emergence of a pandemic and *could* have been included in its Motion—thus, granting OCC’s motion to strike is the right result.)

To be clear, the PUCO should strike the Supplemental Affidavit and portions of the Reply based on it. But if the PUCO does not do so, then in the alternative, it should grant OCC leave to file the surreply instantler. And based on OCC’s Memorandum Contra and surreply, it should deny Verde’s motion for protective order in the interest of open and transparent PUCO processes for the public.

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<sup>20</sup> Case No. 11-3407-TP-CSS, Entry ¶¶ 27-31 (Oct. 12, 2011).

<sup>21</sup> Case No. 99-130-CT-ZCO, Entry ¶ 5 (Mar. 5, 1999).

<sup>22</sup> *In re Application of Vectren Energy Delivery of Ohio, Inc.*, Case No. 19-2084-GA-UNC, Entry (Apr. 28, 2020).

<sup>23</sup> *Id.*

### III. REQUEST FOR AN EXPEDITED RULING

The PUCO should grant this motion on an expedited basis under Ohio Adm. Code 4901-1-12(C). Verde finalized its Compliance Plan months ago, and the public has yet to see most of it because of Verde's overbroad trade secret claims. OCC respectfully requests that the PUCO rule on this motion on an expedited basis so that the public interest in transparency can be fulfilled as soon as possible.

### IV. CONCLUSION

When ruling on Verde's Motion, the PUCO should give no weight to the improperly filed Supplemental Affidavit. Nor should it consider the arguments in Verde's Reply based on that Supplemental Affidavit. The Protective Agreement, the PUCO's rules, and fairness in process support this result. If the PUCO does give any weight to the Supplemental Affidavit and related arguments in the Reply, then it should also consider OCC's surreply, attached to this motion.

Respectfully submitted,

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**Attachment of Referenced OCC Surreply**

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**SURREPLY IN OPPOSITION TO VERDE’S MOTION FOR PROTECTIVE ORDER  
BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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The Public Utilities Commission of Ohio (“PUCO”) should deny Verde Energy’s July 6, 2020 Motion for Protective Order (“Motion”) because Verde has failed to demonstrate that the information redacted (the “Concealed Information”) in its “Compliance Plan” constitutes trade secrets under Ohio law and should be protected from public disclosure. Verde’s Reply<sup>24</sup> and the Second Affidavit of Kira Jordan (the “Supplemental Affidavit”) change nothing: Verde has still not proven that the public should be denied access to the contents of the Compliance Plan.

**I. ARGUMENT**

**A. The Supplemental Affidavit fails to establish that the Concealed Information constitutes trade secrets under the *Plain Dealer* factors.**

**1. *Plain Dealer* Factor 1: The Extent to which the Information is Known Outside the Business**

OCC concedes that it has no evidence to contradict Verde’s claims that Verde has not shared the redacted portions of the Compliance Plan externally other than with the PUCO Staff and OCC. But as OCC explained in its Memorandum Contra, the contents of the Compliance

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<sup>24</sup> Reply in Support of Verde Energy USA Ohio, LLC’s Motion for Protective Order (July 28, 2020).

Plan, including hiring and training third-party vendors and compliance with regulatory requirements and Ohio law, are common, not unique to Verde, and, therefore, are generally known outside of Verde.

**2. Plain Dealer Factors 2 and 3: The Extent to which the Information is Known to those Inside the Business and the Precautions Taken by Verde to Guard the Secrecy of the Information.**

Regarding the second and third factors, Verde still offers little more than conclusory statements. For example, in paragraph 7 of the Supplemental Affidavit, Verde states that the Concealed Information in sections III(C), III(D), III(E), and IV(B)(3) is “kept secret within the company.” Verde provides no details on what this actually means or how it is accomplished. How many employees have access to it? What steps does Verde take to protect it from disclosure? How does Verde determine which employees need to see it and which ones do not? A conclusory statement that information is “kept secret” is insufficient to identify the *extent* to which the information is known inside Verde’s business, which is what the second *Plain Dealer* factor requires. It likewise says nothing about the precautions that Verde has taken to keep the information secret and protect it from disclosure inside the company.

Verde later notes that Section IV(D)(2) of the Compliance Plan is “only shared within Verde Energy with those that need to know about the program as part of performing their jobs”<sup>25</sup> and that information related to Section IV(D)(3) is “only known within Verde Energy by those who need to know as part of their jobs.”<sup>26</sup> The Reply also states that certain redacted information “is only shared within Verde Energy with those that need to know about the technology to perform their duties.”<sup>27</sup> While these statements are marginally better than saying that the

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<sup>25</sup> Supplemental Affidavit ¶ 11.

<sup>26</sup> Supplemental Affidavit ¶ 13.

<sup>27</sup> Reply at 20.

information is “kept secret within the company,” they still do little to describe the extent to which the information is known inside the business and how the information is protected from disclosure inside the company. Again, how many employees “need to know” this information? How does Verde make such a determination? What instructions are given to these need-to-know employees about maintaining secrecy regarding this information?

Later in the Supplemental Affidavit, Verde again resorts to conclusory remarks. In reference to Section IV(D)(7) of the Compliance Plan, Verde States that “Verde Energy has maintained the secrecy of this accountability program.”<sup>28</sup> In reference to Section VIII(A) of the Compliance Plan, Verde says only that it is “kept secret within the company.”<sup>29</sup>

Finally, Verde adds what appears to be a catch-all type statement about secrecy, stating that the Compliance Plan “has been seen and is known by only those that needed to weigh in to create the compliance plan or those responsible for implementing it.”<sup>30</sup> And Verde reiterates its earlier statement that the redacted information in the Compliance Plan is “only shared within Verde Energy with those that need to know about the program as part of performing their jobs.”<sup>31</sup> Again, Verde provides no information about how broadly it interprets the “need to know,” nor does it provide any information about the precautions it has taken to protect the secrecy of the information and keep it away from those employees that do not need to know it.

Without more details, the PUCO lacks a factual basis to conclude that Verde has taken the necessary precautions to maintain the secrecy of this information within its business.

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<sup>28</sup> Supplemental Affidavit ¶¶ 19.

<sup>29</sup> Supplemental Affidavit ¶¶ 25.

<sup>30</sup> Supplemental Affidavit ¶¶ 26.

<sup>31</sup> Supplemental Affidavit ¶¶ 27.

**3. Plain Dealer Factor 4: The Savings Effected and the Value to the Holder in Having the Information as Against Competitors.**

In support of *Plain Dealer* factor 4, Verde’s approach in the Supplemental Affidavit is to summarize various sections of the Compliance Plan and then, after each summary, offer a single conclusory sentence that the information allegedly would have value to Verde’s competitors. In 13 separate paragraphs, Verde offers the following conclusory remark: “Verde Energy’s competitors would be given a competitive advantage over Verde Energy if they were permitted access to this confidential and proprietary information.”<sup>32</sup> This statement says nothing of substance at all—it is a mere rephrasing of the legal standard under R.C. 1333.61, which requires Verde to prove that there are “other persons who can obtain economic value from” the “disclosure or use” of the information. Verde does not explain *how* competitors would gain a competitive advantage—it simply says that they will and nothing more.

Near the end of the Supplemental Affidavit, Verde adds another conclusory remark: “If filed publicly, competitors would be handed a windfall without expending any time or resources developing the procedures set forth within the Verde Energy’s Ohio compliance plan.”<sup>33</sup> All Verde has done here is replaced the phrase “would be given a competitive advantage” with “would be handed a windfall.” In its original affidavit, Verde offered a single conclusory comment regarding the alleged value to its competitors: “Verde Energy would be competitively harmed if the Confidential Information was publicly [sic] and made available to Verde Energy’s competitors.”<sup>34</sup> Verde’s approach in the Supplemental Affidavit was to paraphrase that conclusory remark and repeat it more than a dozen times. Conclusory statements do not become any less conclusory, no matter how many times they are uttered.

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<sup>32</sup> Supplemental Affidavit ¶¶ 7, 8, 10, 11, 13, 15, 16, 17, 21, 22, 23, 24, 25.

<sup>33</sup> Supplemental Affidavit ¶ 29.

In both affidavits, Verde failed to offer any explanation as to how or why competitors would be handed a windfall. Verde also failed to explain how or why its Compliance Plan and training materials are unique from its competitors' training materials and compliance plans. How does Verde's materials and plan derive independent value that would create a competitive advantage if disclosed to others, particularly those competitors that already have in place training materials and compliance plans? The fourth factor favors public disclosure because Verde has offered nothing more than conclusory statements, which Ohio courts do not accept as proof that a trade secret exists.<sup>35</sup>

**4. Plain Dealer Factor 5: The Amount of Effort or Money Expended in Obtaining and Developing the Information.**

The Supplemental Affidavit explains some of the steps Verde took over a period of months to develop the Compliance Plan.<sup>36</sup> According to Verde, it created the Compliance Plan "with attorneys and consultants over numerous months and at a cost of tens of thousands of dollars to the company."<sup>37</sup> The Reply similarly refers to the "significant time and resources" that Verde says it took to create the Compliance Plan.<sup>38</sup> Despite Verde's alleged drafting efforts, the PUCO should conclude that this factor favors disclosure.

First, the amount of time spent does not, in and of itself, create a trade secret. In *Westco Group, Inc. v. City Mattress*, for example, the court ruled that information was not a trade secret

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<sup>34</sup> Original Affidavit ¶ 9.

<sup>35</sup> See OCC Memorandum Contra at 7-9.

<sup>36</sup> See Supplemental Affidavit ¶¶ 7-24.

<sup>37</sup> Supplemental Affidavit ¶ 28.

<sup>38</sup> See, e.g., Reply at 25.

even though it was developed over a period of eight years<sup>39</sup>—far longer than the couple of months that Verde spent developing the Compliance Plan.

And the fact that Verde spent “tens of thousands of dollars” should be viewed in comparison to the harm that Verde has inflicted on Ohioans, which led to the necessity of drafting a Compliance Plan. That harm to consumers is counted in terms of millions, not tens of thousands.<sup>40</sup> Verde implies that tens of thousands of dollars is a lot of money to draft a plan to demonstrate how it is attempting to get into compliance with the PUCO’s rules and Ohio law. Compared to the harm inflicted on consumers requiring the necessity of a Compliance Plan, the fact that Verde spent tens of thousands of dollars shows just how *inexpensive* it was to develop the Compliance Plan, given the context.

**5. Plain Dealer Factor 6: The Amount of Time and Expense it would Take for Others to Acquire and Duplicate the Information**

In support of the sixth *Plain Dealer* factor, Verde again relies on conclusory statements. The Supplemental Affidavit repeatedly states that it would “cost a competitor of Verde Energy significant time and resources” to develop something similar to the Compliance Plan.<sup>41</sup> Verde similarly offers that a “competitor would have to expend time and resources researching and vetting potential retention options and vendors before being able to develop a similar program.”<sup>42</sup> The Reply includes similarly bland statements like, “Replicating anything resembling this

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<sup>39</sup> 1991 Ohio App. LEXIS 3878, at \*3-5 (Ohio Ct. App. Aug. 15, 1991).

<sup>40</sup> See *In re the Commission’s Investigation into Verde Energy USA Ohio, LLC’s Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI, Joint Stipulation and Recommendation (Sept. 6, 2019) (requiring Verde to pay refunds to customers, estimated at more than \$1 million).

<sup>41</sup> Supplemental Affidavit ¶¶ 7, 10, 11, 12, 15, 23 See also Supplemental Affidavit ¶ 19 (“To evaluate, develop, amend, and finalize an accountability program like Verde Energy did, a competitor would have to expend significant time (likely months) and resources.”).

<sup>42</sup> Supplemental Affidavit ¶ 21.

information independently would require a considerable investment by a competitor.”<sup>43</sup> Again, Verde offers virtually nothing of substance. Of course, any task requires *some* amount of time and *some* amount of resources. All Verde has done is insert the word “significant” in front of these words. If the sixth factor just required a party to offer up any witness willing to make a claim that the information takes “significant time and resources” to develop, then the bar for trade secrets would be set so low as to be meaningless.

Further, Verde provided no evidence of what it considers to be “significant.” According to the Original and Supplemental Affidavits, it appears that Verde spent several months and “tens of thousands” of dollars developing the Compliance Plan. Tens of thousands of dollars is a very small price to pay for the privilege of serving Ohio retail electric consumers. For sake of comparison, Verde’s parent company, Spark Energy, Inc., had revenues of more than \$800 million in 2019 and more than \$1 billion in 2018.<sup>44</sup> When considered in context, tens of thousands of dollars is not a significant amount of money for a marketer to spend on compliance.

Finally, Verde suggests that it would take “a number of years” for a competitor to develop a complaints handling process similar to the one Verde has developed.<sup>45</sup> The PUCO should reject this claim for two reasons. First, as Verde has already said, the Compliance Plan was developed over a period of months, not years. Second, if Verde is referring to the “years” it may have spent developing a complaints handling process, then it would be referring to the very complaints handling process that led to the many consumer contacts and complaints identified in the PUCO’s investigation of Verde.<sup>46</sup> Certainly, Verde’s competitors would not be looking to

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<sup>43</sup> Reply at 16.

<sup>44</sup> See Spark Energy, Inc. Annual Report at 39, *available at* <https://www.sec.gov/Archives/edgar/data/1606268/000160626820000008/spke1231201910k.htm>.

<sup>45</sup> Supplemental Affidavit ¶ 24.

<sup>46</sup> See Case No. 19-958-GE-COI.

emulate Verde's pre-investigation complaint handling process. Additionally, given that few competitors have been investigated by the PUCO to the extent Verde has, it is fair to assume that those competitors already have compliance plans and complaint handling processes in place that have been more successful than Verde's as those competitors appear to be more compliant with the PUCO's rules and do not have excessive complaints filed that require new training materials to be put into place. It is unlikely that a competitor would modify its existing plan that is working just to imitate Verde's recently created Compliance Plan.

In sum, while the Supplemental Affidavit is certainly longer than the Original Affidavit, its increased length is attributed largely to (i) factual summaries of the Compliance Plan and (ii) repetitive, conclusory statements that parrot back the legal standard. It adds little of substance and still fails to establish that the redacted information in the Compliance Plan constitutes trade secrets that should be protected from disclosure.

**B. The Reply and Supplemental Affidavit rely on broad generalizations of the Concealed Information, which is insufficient to prove that *each* piece of Concealed Information is a trade secret.**

The law requires Verde to prove that each piece of Concealed Information is in fact a trade secret. Under R.C. 149.43(B), if a document contains trade secrets that are exempt from public disclosure, the governmental entity in possession of the document "shall make available all of the information within the public record that is not exempt."<sup>47</sup> The PUCO's rules likewise require any protective order to "minimize the amount of information protected from public disclosure."<sup>48</sup> Taken together, this means that the PUCO must evaluate trade secret claims, line by line, and redact only those lines that have been proven to be exempt from public disclosure. It is simply not enough for a party claiming trade secret status to redact broad swaths of a

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<sup>47</sup> R.C. 149.43(B).

document based on generalized claims that the document contains different categories of trade secrets.

Yet that is precisely what Verde has done here. In the Reply and Supplemental Affidavit, Verde summarizes the general nature of the Concealed Information. It then uses these generalized descriptions as the basis for its claim that each of the 800 redacted lines in the Compliance Plan is a trade secret.<sup>49</sup> It is telling that Verde filed the Reply and the Supplemental Affidavit without redacting *any* information. The descriptions of the Concealed Information are so high-level and vague that Verde can make those descriptions without even mentioning any of the alleged trade secrets. This highlights just how imprecise Verde's analysis is—and how deficient it therefore is in proving that the information constitutes a trade secret. To comply with the law, the PUCO cannot endorse Verde's approach of making wholesale redactions based on categorical descriptions of information. Verde must prove that all of the Concealed Information is a trade secret—a burden that it cannot meet.<sup>50</sup>

## **II. CONCLUSION**

The Concealed Information in the Compliance Plan does not constitute trade secrets and it should be disclosed. The Ohio public has a right to access the information. Verde failed to demonstrate otherwise in its Motion and Original Affidavit, and it failed to prove otherwise in its Reply and Supplemental Affidavit. The PUCO should order full, public disclosure of the entire Compliance Plan.

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<sup>48</sup> Ohio Adm. Code 4901-1-24(D).

<sup>49</sup> See Reply at 15-32.

<sup>50</sup> See OCC Memorandum Contra at 10-14 (providing numerous examples of instances in which Verde's trade secret claims are indefensible).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion and Surreply was served on the persons stated below via electronic transmission this 14th day of August 2020.

*/s/ Christopher Healey* \_\_\_\_\_  
Christopher Healey  
Assistant Consumers' Counsel

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Summary: Motion Motion to Strike July 28, 2020 Reply Or, In The Alternative, Motion For Leave To File Surreply Instanter and Request For An Expedited Ruling and Surreply by The Office of The Ohio Consumers' Counsel electronically filed by Mrs. Tracy J Greene on behalf of Healey, Christopher