

**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.)

**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 30, 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) the Supplemental Affidavit and (ii) the following statements in the Reply, all of which rely on the Supplemental Affidavit: (a) page 15, the last sentence beginning with "This Confidential" and ending with "information," (b) page 16, the first sentence beginning with "Analyzing" and ending with "do," (c) page 17, the last sentence of the first partial paragraph beginning with "There are over" and ending with "charts,"

(d) page 17, the sentence beginning with “No single” and ending with “spreadsheet,” (e) page 18, the last sentence in the first partial paragraph beginning with “With the Confidential” and ending with “all of that,” (f) page 18, the last sentence in the first full paragraph, beginning with “It is not just” and ending with “business,” (g) page 18-19, the sentence beginning with “The data was” and ending with “sales and pricing.” In the alternative, OCC moves for leave to file surreply instantner.

Everything Verde included in the Supplemental Affidavit, and all of the various arguments made in the Reply that rely on the Supplemental Affidavit, 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. In the alternative, if the Supplemental Affidavit and supporting arguments are allowed to stand, the PUCO should grant OCC leave to file surreply comments instantner. 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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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND BACKGROUND

Serving consumers in Ohio should be viewed a privilege. A privileged that Verde has abused, as was established by the PUCO Staff’s investigation. Despite the misleading and deceptive marketing practices that Verde engaged in, it has been allowed to continue serving customers. Now, Verde is trying to hide from public disclosure the rates that it has continued to charge customers following the PUCO’s investigation. Verde should not succeed.

In its July 8, 2020 motion for protective order,¹ Verde asked the PUCO for permission to prevent public disclosure of a Microsoft Excel file (the “Rate Sheet”) that includes information about the rates that Ohio customers pay to Verde and other related information. OCC disputes Verde’s claim that the Rate Sheet includes trade secrets and thus seeks public disclosure of the entire Rate Sheet, with the exception of customer account numbers, which should not be disclosed.

¹ Verde Energy USA Ohio, LLC’s Motion for Protective Order (July 8, 2020) (the “Motion for Protective Order”).

Under the terms of a protective agreement between Verde and OCC (the “Protective Agreement”),² OCC gave Verde notice on June 30, 2020 of its intent to publicly disclose the contents of the Rate Sheet.³ 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.”⁴

Verde timely filed such a motion (the Motion for Protective Order) on July 8, 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.⁵ Verde then filed a reply in support of its motion.⁶ 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 (i) violated the Protective Agreement with OCC, which requires 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

² Verde attached a copy of the Protective Agreement as Exhibit A to its July 8, 2020 motion for protective order in these cases.

³ 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.”).

⁴ Protective Agreement ¶ 9.

⁵ Memorandum Contra Verde Energy’s Motion for Protective Order by the Office of the Ohio Consumers’ Counsel (July 23, 2020) (the “Memo Contra”).

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

relied upon...” and an affidavit of counsel, and (iii) unfairly prejudiced OCC’s right to be heard by making substantive arguments on reply where OCC had no right of response.

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.⁷

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.⁸

⁷ Protective Agreement ¶ 9.

⁸ Protective Agreement ¶ 9.

Verde filed a motion for protective order within five business days, as required, and it attached the Original Affidavit to its motion, as required.⁹ OCC then filed a memorandum contra the Motion for Protective Order, consistent with the PUCO's rules for motions. In its 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.¹⁰

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 30, 2020—21 business days after OCC's June 30, 2020 notice. The Supplemental Affidavit is, therefore, improper by 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

⁹ See Motion for Protective Order.

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 PUCO should expect to be honored. The PUCO should not allow Verde to defy the agreement and gain an advantage by withholding 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 allow all parties to be heard.¹¹ 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 the motion, under the PUCO's

¹⁰ OCC Memorandum Contra at 7-9.

rules. And then Verde includes them in its reply when other parties no longer have an opportunity to respond and refute the claims.

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.¹² The PUCO cited its concern that other parties would not then have any opportunity to reply, so it disregarded Aqua's reply comments.¹³ 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.¹⁴ 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.¹⁵ The PUCO struck the attachment to the complainants' reply brief.¹⁶

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 made available to Verde Energy's

¹¹ Ohio Adm. Code 4901-1-12.

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

¹³ *Id.*

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

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

¹⁶ *Id.*

competitors.”¹⁷ The Motion is similarly light on details, spending less than a single page on all six *Plain Dealer* factors combined.¹⁸

In contrast, the Supplemental Affidavit is twice as long as the Original Affidavit, and Verde’s Reply is triple the length of its Motion.¹⁹ 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, and the Supplemental Affidavit and portions of the Reply 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.

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

¹⁷ Original Affidavit at 2.

¹⁸ Motion at 6.

¹⁹ See Reply at 15-32.

for surreply.²⁰ Similarly, in *In re Complaint of McLeodUSA Telecomm.*, the PUCO allowed parties to file surreply comments when another party introduced new facts in its reply.²¹ 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.²²

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.”²³ 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.²⁴ (The same cannot be said here, where the new issues and facts raised in Verde’s Reply and Supplemental Affidavit *could* have been included in its Motion.)

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 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.

²⁰ Case No. 02-796-TP-CSS, Opinion & Order (Nov. 10, 2004).

²¹ Case No. 11-3407-TP-CSS, Entry ¶¶ 27-31 (Oct. 12, 2011).

²² Case No. 99-130-CT-ZCO, Entry ¶ 5 (Mar. 5, 1999).

²³ *In re Application of Vectren Energy Delivery of Ohio, Inc.*, Case No. 19-2084-GA-UNC, Entry (Apr. 28, 2020).

²⁴ *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). The public has been denied the right to see the Rate Sheet 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.

III. CONCLUSION

The rates that Verde is charging its consumers should not be hidden from the public eye. 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**

The Public Utilities Commission of Ohio (“PUCO”) should deny Verde Energy’s July 8, 2020 Motion for Protective Order (“Motion”) because Verde has failed to demonstrate that the information contained in a Microsoft Excel spreadsheet regarding rates (the “Rate Sheet”) constitutes trade secrets under Ohio law and should be protected from public disclosure. Verde’s Reply²⁵ and the Second Affidavit of Kira Jordan (the “Supplemental Affidavit”) attached thereto change nothing: Verde has still not proven that the public should be denied access to the contents of the Rate Sheet, and the rates being charged. Nor has Verde proven, in the alternative, that a summary containing limited data from the Rate Sheet would also itself constitute a trade secret.

²⁵ Reply in Support of Verde Energy USA Ohio, LLC’s Motion for Protective Order (July 30, 2020).

I. ARGUMENT

A. The Supplemental Affidavit fails to establish that the Rate Sheet data constitutes trade secrets under the *Plain Dealer* factors.

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

Verde states in the Supplemental Affidavit that the Rate Sheet “has only been shared with Staff ... and OCC.”²⁶ OCC has no basis to dispute Verde’s statement that it has not shared the Rate Sheet in its entirety with anyone other than OCC and the PUCO Staff. But the first *Plain Dealer* factor requires the PUCO to evaluate the *extent* to which the information is known outside the business. Thus, to evaluate the factor, it is not enough to simply say that this specific Microsoft Excel file has not been provided to others outside the company in its current form. Instead, the PUCO must look at the specific information and data contained within the file and determine the *extent* to which this information and data is known outside of Verde’s business. The Supplemental Affidavit fails to address this issue because Verde cannot argue that its rates made publicly available to customers over various time periods for various products have not been known outside of its business.

Indeed, as OCC explained in its Memorandum Contra, (i) there is publicly available data about the rates that Verde has offered over the past five years in Ohio, (ii) Verde and its affiliates publicly disclose their rates on Verde’s website, and (iii) numerous individual customer rates have been publicly disclosed in this proceeding (as attached to OCC’s comments) and in the PUCO’s earlier investigation of Verde (as admitted into the record as Exhibit 7). While it may be true that not each rate paid by each Verde customer is publicly available, it is equally true that many of the rates that Verde has charged *are* publicly available.

²⁶ Supplemental Affidavit ¶ 6.

Moreover, it stands to reason that Verde would need to give access to rate information to internal or external customer service employees to discuss rates with customers if they have questions. It also stands to reason that external sales employees and third-party vendors would need access to rate information when marketing and enrolling customers. And, Verde would need to share rate information with third party verification agents when verifying enrollments and consent to an enrollment at a given rate.

Because there is substantial publicly-available data regarding the information and data found in the Rate Sheet, the PUCO should conclude that the information and data contained in the Rate Sheet has been generally, if not specifically, known outside the business, a factor that favors public disclosure. Moreover, Verde failed to demonstrate that its compilation of the publicly available, historic rate data was somehow unique and added independent economic value that would afford its competitors an advantage.²⁷

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 Rate Sheet “is only shared within Verde Energy with those that need to know about the program as part of performing their jobs.” First, it is unclear what “program” Verde refers to here. The Rate Sheet is a Microsoft Excel file with information about customer rates; it does not relate to a “program.”

²⁷ *In re Application of The Ohio Bell Telephone Co.*, Case No. 93-487-TP-ALT, Entry ¶ 7 (Nov. 25, 2003) (“The question turns on whether this compilation of information already in the public domain or readily ascertainable, when combined, would afford another with a competitive advantage. We find that the compilation of names and addresses is something that can be readily ascertained by proper means by others and does not derive independent economic value from not being generally known by other persons. Thus, we do not believe that the address listing constitutes a ‘trade secret.’”).

Second, this statement says nothing about the precautions it takes to guard the secrecy of the Rate Sheet data internally. How many employees “need to know” this information? How does Verde make such a determination? What steps does Verde take to protect it from disclosure? What instructions are given to these need-to-know employees about maintaining secrecy regarding this information? If Verde provides the Rate Sheet or other rate documents only to these need-to-know employees but provides no instructions to them about the importance of its secrecy, then those employees could share it with non-need-to-know employees without realizing that the information is secret. Verde has given the PUCO no real basis to evaluate the *extent* to which the Rate Sheet is kept secret. Nor has Verde provided any information about the precautions it takes to guard the alleged secrecy of the Rate Sheet. At a minimum, it stands to reason that Verde would need to give access to rate information to internal customer service employees to discuss rates with customers if they have questions. It also stands to reason that internal and external sales employees would need access to rate information when marketing and enrolling customers.

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.

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

In support of *Plain Dealer* factor 4, the Supplemental Affidavit states that “a competitor would be able to use the Confidential Information to study and target Verde Energy’s businesses and customers in Ohio, and it would give Verde Energy’s competitors a detrimental competitive advantage.”²⁸ It is not clear what it would mean for a competitor to “target Verde Energy’s businesses.” Competitors compete for customers; saying that competitors would “target” Verde’s

²⁸ Supplemental Affidavit ¶ 9.

“businesses” is a meaningless statement. There is also no evidence that any competitor could use the Rate Sheet to “target Verde Energy’s ... customers in Ohio,” as the Supplemental Affidavit claims. The Rate Sheet does not include any customer contact information—it does not have names, addresses, phone numbers, or email addresses. So, there is no way for any competitor to “target” a particular Verde customer that is being charged a high rate or any of Verde customers. Likewise, OCC agrees that customers’ account numbers found in the Rate Sheet should not be disclosed, so no competitor could attempt to identify customers based on their account number. Nothing in the Rate Sheet would allow competitors to identify Verde customers to poach them, despite Verde’s insinuation that this would be possible.

The Supplemental Affidavit also says that if competitors had access to the Rate Sheet, they would see “how many people have purchased at a given price, at what time, for how long, in what quantities, in what regions of the state, and delivered by whom.”²⁹ This is a factual description of the data contained in the Rate Sheet. Based on this description, Verde offers the conclusory remark about this information that competitors could “use it to enhance their competitive strategy.”³⁰ Once again, Verde omits the critical step of explaining *how* competitors could use this information to “enhance their competitive strategy.” Suppose a competitor were to learn, for example, that in March 2020, Verde charged 150 Dayton Power and Light customers a rate of \$0.1174 per kWh, and these customers used an average of 850 kWh in March 2020.³¹ So what? How can a competitor take this historic information and then use it to unfairly compete with Verde? *That* is the question that Verde needs to answer to prove that the information would

²⁹ Supplemental Affidavit ¶¶ 12.

³⁰ Supplemental Affidavit ¶¶ 12.

³¹ This is illustrative only and the numbers were picked at random. They are not to be interpreted as in any way representative of data in the Rate Sheet.

be valuable to competitors. Without an explanation of *how* this information could be used by a competitor, Verde has failed to prove that the information has any value to competitors.

Additionally, it is well accepted that a trade secret can cease to be a trade secret because it loses value over time.³² The Supreme Court of Ohio and the PUCO have determined that historic information tends to lose value and, thus, weakens claims of confidentiality over time. In *In re Review of the Alternative Energy Rider*, the Court determined that AEP Ohio's information about its renewable energy credit (REC) suppliers and auction process was not a trade secret because neither AEP Ohio nor the PUCO articulated how the information could affect future REC auctions in light of changing market conditions.³³ Similarly, in *In re Commission-Ordered Investigation of Ameritech Ohio*,³⁴ the PUCO ruled in 2004 that recent financial information from 2002 and 2003 was historical and thus not a trade secret.³⁵ And in *In re Application of Vartec Telecom, Inc.*, the PUCO stated this policy succinctly: "It is not the Commission's policy to protect historical information."³⁶

Rather than attempt to meet its burden of proof, Verde relies on bare conclusions that the information is valuable and that competitors want it to "enhance their competitive strategy." This

³² See, e.g., *Murray Energy Holdings Co. v. Mergermarket USA, Inc.*, 2016 U.S. Dist. LEXIS 79183, at *9-10 (S.D. Ohio June 17, 2016) ("Courts have generally held that a trade secret law does not protect 'information that is merely momentary or ephemeral because it quickly becomes stale.'" (quoting *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513 (1997))); *In re Application of Stand Energy Corp. for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 02-2549-GA-CRS, Entry (Nov. 22, 2016) (denying trade secret claim because the information in question was "outdated" and therefore could "no longer be considered sensitive").

³³ *In re Review of the Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, 153 Ohio St.3d 289, ¶ 36 (2018).

³⁴ Case No. 99-938-TP-COI, Entry on Rehearing ¶¶ 71-72 (June 9, 2004).

³⁵ *Id.* See also *In the Matter of the Application of SBC Ohio (formerly Ameritech Ohio) for Approval of an Alternative Form of Regulation*, Case No. 02-3069-TP-ALT, Entry at ¶¶ 2-3 (June 30, 2004) ("over time, and because of changes in circumstances, it should be expected that the information that SBC seeks to protect would lose its worth to competitors.").

³⁶ Case No. 01-2536-TP-ACE, Finding & Order ¶ 12.

falls well short of demonstrating that the Rate Sheet or data contained therein constitutes trade secrets.

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

The Supplemental Affidavit provides virtually no information about the amount of effort or money that Verde expended in developing the Rate Sheet or data contained therein. Instead, Verde offers a single remark: “Verde energy developed that data, which is not replicable anywhere else, at significant cost and resources to Verde Energy.”³⁷ This is a textbook conclusory remark that the Supreme Court of Ohio has ruled insufficient to prove that a trade secret exists.³⁸ It provides no information about the amount of effort or money that Verde spent creating the Rate Sheet. *Plain Dealer* factor 5 supports public disclosure of the Rate Sheet. Moreover, OCC is not asking Verde to disclose its cost or rate formulas. Even if Verde had taken significant time and incurred significant cost developed the formulas, listing and identifying the resulting data—rates or prices for electric and natural gas service that Verde elected to charge customers at various times over a period of time in a Rate Sheet—should not have caused Verde to incur additional “significant cost and resources.” Verde has failed to explain what additional expenditures it has made in identifying the rates or when deciding which rates to charge which customers. And the compilation of those rates into one document in no unique form, the Rate Sheet, certainly should not have been a significant cost to the company either.

³⁷ Supplemental Affidavit ¶ 8.

³⁸ *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).”).

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

Verde makes no real attempt to address the amount of time and expense it would take for others to acquire and duplicate the information in the Rate Sheet. Presumably in support of the sixth *Plain Dealer* factor, the Supplemental Affidavit says that the information in the Rate Sheet “is not replicable anywhere else,” that “[n]o competitor could possibly compile this kind of information about Verde Energy’s operations without the spreadsheet,” and that “[n]o other single entity could create the spreadsheet.”³⁹

While it is true that competitors could not replicate the Rate Sheet entirely and in its precise form or recreate the specific formulas or formula inputs to determine the costs associated with Verde’s business, Verde ignores the fact that OCC is not seeking to disclose the underlying formulas embedded in the rates or ascertain how the rates were established. OCC is merely trying to disclose the actual, historical rates that have been charged to customers. In making its claims, Verde also ignores the extent to which there is already publicly available information about its rates. As explained above, (i) there is publicly available data about the rates that Verde has offered for the past five years in Ohio, (ii) Verde and its affiliates publicly disclose their rates on Verde’s website, and (iii) numerous individual customer rates have been publicly disclosed in this proceeding (as attached to OCC’s comments) and in the PUCO’s earlier investigation of Verde (as admitted into the record as 7). With this publicly available data, competitors could create a spreadsheet with all publicly known information about Verde’s rates, which would recreate some of the information found in the Rate Sheet. Thus, Verde’s blanket claim that competitors could not recreate the historic Rate Sheet is therefore misleading because it suggests that the entirety of the Rate Sheet is completely inaccessible to them, which is not true.

³⁹ Supplemental Affidavit ¶¶ 8, 11.

B. Even if the PUCO concludes that some or all of the Rate Sheet includes trade secrets (which it should not), Verde has failed to demonstrate that a limited summary of the information would itself be a trade secret.

Even if a document contains trade secrets, it does not necessarily follow that a summary of that document would itself be a trade secret. In *State ex rel. Plain Dealer v. Ohio Department of Insurance*, for example, the Supreme Court of Ohio ruled that an index providing a “generalized description” of a document containing trade secrets was not itself a trade secret.⁴⁰ This was because the generalized description would not “yield economic value to a competitor.”⁴¹ Similarly, in *State ex re. Besser v. Ohio State University*, the Court ruled that a summary document describing another document that included trade secrets was not itself a trade secret, again because the summary document did “not disclose any information that retains any potential economic value for either OSU or its competitors.”⁴²

Under this precedent, even if Verde proves that some or all of the Rate Sheet is a trade secret, it must separately prove that a summary of the rate sheet, as proposed in OCC’s Memorandum Contra is also a trade secret. Verde has failed to do so.

In its Memorandum Contra (and previously in discussions with Verde when attempting to resolve the confidentiality issues related to the Rate Sheet), OCC proposed that a limited summary of the information in the Rate Sheet be made publicly available, even if the PUCO rules that the Rate Sheet itself contains trade secrets. In particular, public information would include, for each distribution utility and for a single month, the highest rate charged to a residential customer by Verde, the lowest rate charged to a residential customer by Verde, the

⁴⁰ 80 Ohio St.3d 513, 527 (1997).

⁴¹ *Id.*

⁴² 89 Ohio St.3d 396, 400 (2000).

median rate charged to a residential customer by Verde, and the average rate for all residential customers.

In the Supplemental Affidavit, the only thing Verde says about this issue is that “even releasing a summary of key data points from the spreadsheet, broken down by distribution utility service territory, would be damaging to Verde Energy’s business.”⁴³ Consistent with Verde’s other arguments, it again relies on this conclusory remark and ignores explaining *how* a competitor could use this information, some of which has already been publicly disclosed and is publicly available, to its advantage.

All of Verde’s arguments for why the Rate Sheet is a trade secret rely on Verde’s claims that the Rate Sheet includes a large amount of information that competitors could use to their advantage. Verde argues that the Rate Sheet has “over 400,000 liens of data,” is “an incredibly rich source of analytics about the past and present state of Verde Energy’s business and pricing strategies,” is a “comprehensive, multi-year picture of Verde Energy’s pricing strategies,” and would provide competitors with an “unparalleled look at Verde Energy’s operational performance over time.”⁴⁴ Even if true, none of these arguments apply to the limited summary of information that OCC proposed, which would reveal just four data points for each distribution utility.

These summary data points are not an “incredibly rich source of analytics about the past and present state of Verde Energy’s business and pricing strategies,” they do not provide a “comprehensive, multi-year picture of Verde Energy’s pricing strategies,” and they would not provide competitors with an “unparalleled look at Verde Energy’s operational performance over time.” All they would do is publicly reveal the extent to which Verde continues to charge

⁴³ Supplemental Affidavit ¶ 13.

customers unconscionable rates for retail electric and natural gas service, which justifies rejection of Verde's applications to renew its certifications as a marketer in Ohio.⁴⁵

Because Verde has failed to prove that summary data of the Rate Sheet, as OCC proposed, would itself have any value to competitors, such summary data is not a trade secret. Even if the PUCO rules in favor of Verde regarding the Rate Sheet in general (which it should not), the summary data, at a minimum, should be made available to the public.

II. CONCLUSION

The Rate Sheet does not constitute trade secrets. The Ohio public has a right to access the data. 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 Rate Sheet (other than customer account numbers).

Respectfully submitted,

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⁴⁴ Supplemental Affidavit ¶¶ 5, 8, 9, 11.

⁴⁵ See R.C. 4928.08(D); Ohio Adm. Code 4901:1-29-03(A); 4901:1-29-05(D); 4901:1-29-10(A); 4901:1-21-02(A)(2)(c); 4901:1-21-03(A); 4901:1-21-05(C); 4901:1-21-11(A).

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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 Verde's July 30, 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