

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF  
VERDE ENERGY USA OHIO, LLC FOR  
CERTIFICATION AS A COMPETITIVE  
RETAIL ELECTRIC SERVICE SUPPLIER.

CASE NO. 11-5886-EL-CRS

IN THE MATTER OF THE APPLICATION OF  
VERDE ENERGY USA OHIO, LLC FOR  
CERTIFICATION AS A COMPETITIVE  
RETAIL NATURAL GAS SERVICE  
SUPPLIER.

CASE NO. 13-2164-GA-CRS

### FINDING AND ORDER

Entered in the Journal on December 30, 2020

#### I. SUMMARY

{¶ 1} The Commission approves the renewal applications of Verde Energy USA Ohio, LLC d/b/a Verde Energy for certification as a competitive retail electric and gas service provider in Ohio.

#### II. DISCUSSION

##### A. *Procedural History*

{¶ 2} Verde Energy USA Ohio, LLC d/b/a Verde Energy (Verde or Company) is an electric services company as defined in R.C. 4928.01 and a retail natural gas supplier as defined in R.C. 4929.01, is certified to provide competitive retail electric service (CRES) under R.C. 4928.08 and to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20 and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16 and R.C. 4929.24. Accordingly, Verde is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21, as well as the minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 3} R.C. 4928.08 states that no electric services company shall provide a CRES to a consumer in this state without first being certified by the Commission regarding its managerial, technical, and financial capability to provide such service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from

default. Similarly, R.C. 4929.20 states that no retail natural gas supplier shall provide a CRNGS to a consumer without first being certified by the Commission regarding its managerial, technical, and financial capability to provide such service and providing reasonable financial assurances sufficient to protect customers and natural gas companies from default.

{¶ 4} On March 28, 2012, the Commission granted Verde's application for certification as a CRES provider in this state. *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Service Provider*, Case No. 11-5886-EL-CRS. Verde timely filed renewal applications for certification as a CRES provider every two years pursuant to Ohio Adm.Code 4901:1-24-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4928.08. Verde's most recent renewal application as a CRES supplier in this state was filed on February 27, 2020.

{¶ 5} Additionally, on December 9, 2013, the Commission granted Verde's application for certification as a CRNGS supplier in this state. *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Natural Gas Supplier*, Case No. 13-2164-GA-CRS. Verde timely filed renewal applications for certification as a CRNGS provider every two years pursuant to Ohio Adm.Code 4901:1-27-09, and each renewal application was automatically approved by the Commission pursuant to R.C. 4929.20. Verde's most recent renewal application as a CRNGS supplier in this state was filed on November 7, 2019, and was suspended on December 4, 2019, in order to permit the Commission to review the matter further.

{¶ 6} On April 16, 2019, Staff of the Commission's Service Monitoring and Enforcement Department (Staff) filed a letter in Verde's certification dockets, stating that, after reviewing customer contacts from October 1, 2018, to April 12, 2019, as well as Verde's responses, Staff believed that Verde had engaged in misleading and deceptive practices to market and enroll customers, as well as violating several requirements of Ohio Adm.Code Chapter 4901:1-21 and 4901:1-29. Staff stated that it had received 481 customer contacts

regarding Verde's provision of CRES and CRNGS. Of the 481 customer contacts, 231 customer contacts (approximately 57 percent) were related to enrollment disputes, misleading information, and false representations wherein Verde allegedly purported to be another utility. Further, as reported by Staff, 18 percent of supplier-related investigations open for review and resolution with Staff were in reference to Verde as of April 15, 2019.

{¶ 7} By Entry dated April 17, 2019, the Commission opened an investigation into alleged unfair, deceptive, or unconscionable acts or practices in this state by Verde and issued a procedural schedule which set the matter for hearing. Subsequently, on February 26, 2020, the Commission approved a joint stipulation and recommendation entered by Staff and Verde (Stipulation). *In re Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the OAC and Potential Remedial Actions for Non-Compliance*, Case No. 19-958-GE-COI (*Investigation Case*), Opinion and Order (Feb. 26, 2020). The Stipulation purported to resolve all outstanding issues presented in Case No. 19-958-GE-COI. According to the Stipulation, Verde voluntarily ceased all marketing and customer enrollment activities in Ohio, and Staff and Verde agreed that this suspension by Verde of all marketing activities and customer enrollment in Ohio would continue until October 30, 2020, for a total of 18 months. *Id.* at ¶¶ 17-18.

{¶ 8} Both R.C. 4928.08 and 4929.20 allow the Commission to suspend, rescind, or conditionally rescind the certification of any electric services company or retail natural gas supplier issued under these sections if the Commission determines, after reasonable notice and opportunity for hearing, that the electric services company or retail natural gas supplier has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in this state.

{¶ 9} By Entry issued March 3, 2020, the attorney examiner, among other things, set a procedural schedule in the above matters and suspended Verde's February 27, 2020 renewal certification application filed in Case No. 11-5886-EL-CRS. Additionally, the

attorney examiner extended Verde's current CRES and CRNGS certifications to November 1, 2020.

{¶ 10} On March 9, 2020, the Governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety.

{¶ 11} As a result of the Executive Order, beginning March 13, 2020, the Commission reduced on-site staffing, and most employees began working from home to reduce exposure to COVID-19.

{¶ 12} On March 24, 2020, the attorney examiner granted a joint motion for extension of time for all case deadlines filed by Verde, the Ohio Consumers' Counsel (OCC), and Staff, and set a new procedural schedule, including a hearing to be held on July 23, 2020, if deemed necessary following a review of the comments and Staff's recommendation.

{¶ 13} On April 24, 2020, Verde filed amended applications for both its CRES and CRNGS certification applications in the respective dockets, which were intended to account for substantial changes and updates to Verde's managerial and technical personnel.

{¶ 14} Subsequently, on May 4, 2020, OCC filed initial comments on Verde's amended applications. Verde filed its reply to OCC's initial comments on May 18, 2020.

{¶ 15} On June 15, 2020, Staff filed its review and recommendation (Staff Report).

{¶ 16} By Entry issued July 16, 2020, the attorney examiner continued the tentative July 23, 2020 evidentiary hearing to a date to be established by future entry given the current

state of emergency with respect to the COVID-19 pandemic and to allow the Commission additional time to review the comments filed in these proceedings.

{¶ 17} On July 20, 2020, Verde filed a notice of a material change to its CRES and CRNGS applications. Therein, Verde represents that it received a notice from the Ohio Attorney General's Office that it decided to close its consumer protection investigation into Verde. This investigation was disclosed to the Commission in Exhibit B-4 of Verde's amended renewal application for CRNGS certification and Exhibit B-3 of Verde's amended renewal application for CRES certification.

{¶ 18} On October 23, 2020, Verde filed a motion to extend the Company's current CRES and CRNGS certification until the Commission enters a decision on Verde's applications to renew those certifications. By Entry issued October 30, 2020, the attorney examiner granted, in part, Verde's motion, which permitted the Company to continue service to existing customers until December 31, 2020.

***B. Summary of OCC's Initial Comments on Verde's Amended Applications***

{¶ 19} OCC filed initial comments on May 4, 2020. Therein, OCC contends that the Commission should deny Verde's renewal applications and require Verde to exit the state of Ohio permanently. OCC alleges that the Company has failed to satisfy regulatory standards for renewing its CRES and CRNGS certifications.

{¶ 20} OCC argues that Verde's history does not support a showing that it complied or can comply with regulations for consumer protection. First, OCC refers to the circumstances surrounding the *Investigation Case* and subsequent adopted Stipulation, which OCC opposed. Second, OCC infers that, because of the *Investigation Case* and the fact that the Commission suspended the current renewal applications, Verde has not shown that it satisfied the regulatory standards for renewing its CRES and CRNGS certifications. Third, OCC points out that Verde is under investigation by the Ohio Attorney General. OCC

represents Verde's affiliates are currently being investigated for similar "bad acts" against consumers in Texas, Connecticut, Illinois, Maine, New York, and Pennsylvania.

{¶ 21} OCC offers several comments and recommendations concerning Verde's current CRES and CRNGS renewal applications and relies on the *Investigation Case* record to support its position. OCC opines Verde failed to show that it has the managerial, technical, and financial capability to provide retail electric and natural gas services to Ohio consumers, as required by R.C. 4928.08(B) and 4929.20(A), because the Company has demonstrated a consistent and widespread inability or unwillingness to follow Commission rules. Specifically, OCC points to the Commission's finding in the *Investigation Case* that Verde violated 17 Commission rules to prove Verde failed to show it qualifies for certificate renewals. See *Investigation Case*, Opinion and Order (Feb. 26, 2020) at ¶ 60. Additionally, OCC cites to the staff report in the *Investigation Case* as support for no fewer than ten instances of how Verde violated the Commission rules. OCC believes that the violations demonstrate a consistent pattern of rule violations and prove that Verde is not managerially, financially, and technically fit and capable of complying with all applicable Commission rules and orders. OCC points to Verde's spoofed caller ID information when calling customers as another example of how Verde fails to show that it qualifies for certificate renewals. OCC argues that the Commission should have a zero-tolerance policy for spoofing, and any spoofing should be grounds for revocation of the right to serve Ohio consumers.

{¶ 22} OCC believes that, while the Commission found that approximately 17 violations were proved by a preponderance of the evidence in the *Investigation Case*, a reasonable interpretation of the staff report from the *Investigation Case* is that more than 17 violations occurred. OCC believes that Verde violated Commission statutes and rules over 100 times. OCC alleges that, in the vast majority of the OCC-identified instances, the relevant admission of a violation occurred after the staff report was filed in the *Investigation*

*Case.* According to OCC, these alleged additional violations are sufficient to show that Verde lacks the managerial and technical capability of serving as a marketer in Ohio.

{¶ 23} As further evidence of Verde's alleged failure to show that it qualifies for certificate renewals, OCC contends that the Company repeatedly engaged in unfair, deceptive, and unconscionable acts and practices against Ohio consumers, in violation of consumer protection laws and rules. OCC reiterates its arguments above regarding the 17 violations and states that there should be zero-tolerance for marketers who are continuously abusing consumers through unfair, misleading, deceptive, and unconscionable acts. OCC believes that Verde is a marketer who has done precisely the types of things that require consumer protection. According to OCC, these violations, which relate to misleading and deceiving customers, include making false promises of savings; spoofing customers by pretending to be the Internal Revenue Service or the local distribution utility; providing inaccurate information about customers' rights under the Commission's rules; enrolling customers without their consent; enrolling customers despite discrepancies in the third-party verification; failing to notify the customer that the contract would renew at a monthly variable rate, and renewing customers' contracts without sending them the required notice of expiration.

{¶ 24} OCC argues several additional reasons for why it believes Verde has failed to demonstrate that the Company qualifies for certificate renewals. First, OCC suggests that Verde violated Ohio Adm.Code 4901:1-21-05(C)(4) and 4901:1-29-05(D)(4) because the Company did not produce copies of the do-not-call list, as requested by OCC. Second, OCC concludes that Verde failed to perform the requisite criminal background checks because Verde did not provide documentation to OCC showing that it hired an independent contractor to perform background checks on each of the 500 individuals who solicited consumers door-to-door in Ohio. Third, OCC opines that allowing Verde to continue serving retail electric and natural gas customers in Ohio would violate state policy under R.C. 4928.02 and 4929.02. Fourth, OCC asserts that there is no reason to believe Verde's

action plan will adequately protect consumers. OCC claims that the Commission-approved Stipulation leaves many unanswered questions about Verde's action plan, such as what will be included in the action plan, who will draft the action plan, how will the action plan be enforced, and what penalties will be implemented if Verde fails to comply with the action plan. OCC identified 122 marketers currently serving electric consumers and 99 marketers currently serving natural gas consumers on the Commission's Apples-to-Apples webpage. OCC states that Verde will not be missed if the Commission denies its renewal certificates. OCC believes that the only way to protect consumers from future abuse is for the Commission to deny Verde's applications to renew its CRES and CRNGS certificates and require Verde to exit the state.

{¶ 25} As a final matter, if the Commission approves Verde's renewal certifications, OCC proposes several recommendations for the Commission's consideration. Specifically, OCC recommends the following:

- Verde should be prohibited from using automatic contract renewals (known as evergreen contracts) to extend contracts with consumers without the customer's affirmative consent;
- Verde's CRES and CRNGS certificates should be revoked in the first instance of spoofing caller ID information or slamming (stealing customers);
- Verde should be prohibited from conducting door-to-door sales with customers. If the Commission does allow Verde to conduct door-to-door marketing, Verde's marketing should be limited;
- Verde should be prohibited from accessing the utilities' customer contact information for marketing purposes;



- Verde should be required to conduct regular audits by an independent auditor of its third-party marketing vendors to ensure the Company complies with the Commission's rules for consumer protection, and the audits should be shared with the Staff and OCC for review; and
- To obtain renewal of its certifications, Verde should not charge customers more than a designated percentage of the applicable gas utility's standard offer or gas cost recovery rate, as applicable. The applicable electric utility's price to compare and that percentage limit should be no more than 150 percent of the applicable comparison rate that consumers could otherwise obtain from their utility.

**C. Summary of Verde's Reply Comments**

{¶ 26} Verde submitted reply comments on May 18, 2020. Therein, Verde asserts that the Company has the managerial, technical, and financial capability of providing competitive retail electric and natural gas service to Ohio consumers, as required by R.C. 4928.08 and 4929.20, as well as Ohio Adm.Code 4901:1-24-05 and 4901:1-27-05, and addresses OCC's allegations and recommendations.

{¶ 27} Specific to Verde's managerial capability, Verde avers that, since the filing of the staff report in the *Investigation Case*, Spark Energy (the ultimate parent company of Verde) has appointed a new chief executive officer, chief operating officer, chief financial officer, general counsel, and deputy general counsel. Additionally, as part of the compliance plan under the Stipulation, the Company will appoint an Ohio Compliance Representative responsible for coordinating Verde's compliance activities in the Ohio market. Verde believes that these changes in the aforementioned positions are significant and signal a commitment to accountability and reform.

{¶ 28} The Company states that its financial capacity is unquestioned in these cases. Verde points out that OCC did not question the financial capabilities reflected in Verde's

applications. Verde opines that its applications reflect a company whose ultimate parent company is well-capitalized, financially healthy, and publicly traded – all of these factors present a low risk of default to utilities and consumers. Verde represents that, because of Spark Energy’s financial strength, the Company has the flexibility to make necessary investments to improve its service offerings and continue to evaluate and invest in reforming its compliance practices to operate lawfully in Ohio.

{¶ 29} Lastly, Verde states that it has established through its CRES and CRNGS renewal applications that it has the technical capability to operate in Ohio. To support this assertion, Verde states that its upper-level management has a combined total of more than 60 years of relevant technical industry experience, as well as additional personnel with the technical capability to operate in Ohio successfully. Verde notes that it has provided CRES and CRNGS in Ohio since being certified in 2012 and 2013, respectively, and it has received renewals of its applications until now. While OCC refers back to the compliance issues alleged in the *Investigation Case*, Verde contends that OCC does not account for the significant post-investigation changes to the Company’s management reflected in its CRES and CRNGS applications. Furthermore, Verde believes that OCC is dismissive of the compliance plan that Verde has committed to developing under Staff’s close supervision. Verde represents that any compliance-related concerns arising from the *Investigation Case* have either already been resolved as new management attempts to reform Verde’s business practices or will be addressed with Staff as part of the compliance plan process. As a final point, Verde opines that it is dedicated to regaining the opportunity to restart marketing and enrollment activities in Ohio. Specifically, the Company’s parent company plans to spend over \$1 million on compliance initiatives this year by funding salaries, new processes, new technology, and other major changes.

{¶ 30} Verde believes that OCC is taking a punitive and backward-looking approach to Verde’s renewal applications instead of analyzing the applicable standard of review for certification cases. Specifically, Verde believes that OCC is attempting to use its comments

as an opportunity to re-litigate and seek retribution for past conduct by Verde that was resolved by the Stipulation in the *Investigation Case*. Verde opines that OCC cannot continue to re-litigate past cases by raising new factual and legal arguments that could have been raised during the *Investigation Case*. Additionally, Verde insists that a supplier should not face automatic expulsion when there is a reasonable alternative – such as rehabilitation under close Staff supervision as contemplated in the Stipulation approved by the Commission in the *Investigation Case*. Verde posits that granting OCC's demands would set a bad precedent for future suppliers in Ohio that seek to resolve Staff's concerns. Verde believes OCC's approach would signal that there is no room in Ohio for companies willing to significantly reform their business practices to continue participating in Ohio's markets in a compliant manner.

{¶ 31} Verde takes issue with the additional, OCC-identified violations. Verde believes that the purported evidence cited by OCC, which may have been relevant to an investigation of Verde's past conduct, has little probative value in this certification process. Specifically, Verde opines that the Stipulation comprehensively resolved those allegations and provided a plan for future compliance. Additionally, Verde asserts that only three factors, Verde's managerial, financial, and technical capacity, are relevant to these certification cases. Verde concludes that OCC's failure to raise these issues or submit appropriate evidence in the *Investigation Case* is not the Company's fault. Verde concludes that it should not be penalized for OCC's lack of diligence in prior proceedings before the Commission.

{¶ 32} Verde asserts that the Company's compliance plan enhances its managerial, technical, and financial capacity. Specifically, Verde represents that, over the past months, the Company has worked to develop a plan that not only meets the minimum standards for CRES and CRNGS suppliers in Ohio but also addresses any specific issues that Staff alleged in its staff report in the *Investigation Case*. Contemporaneously with the submission of its reply comments, Verde submitted a working draft of the compliance plan to Staff for review

and comment. Verde represents that the Company will follow Staff's guidance on the finalization and implementation of that compliance plan.

{¶ 33} To show its dedication to the rehabilitation process, Verde created a new position for an Ohio Compliance Representative to coordinate the Company's interactions with Ohio consumers and regulators and oversee Ohio compliance matters. Verde explains that the Ohio Compliance Representative will be required to have experience and expertise with the Ohio electric and natural gas retail market and Ohio's legal requirements for CRES and CRNGS suppliers. Verde represents that the Ohio Compliance Representative will report directly to Spark Energy's legal department and work closely with its chief operating officer, compliance team, and regulatory team. To support the Ohio Compliance Representative, Verde states that the Company will also be dedicating a support team to oversee its Ohio operations. Verde explains that the support team will be trained in Ohio regulations and certified to work on Ohio regulatory issues related to CRES and CRNGS suppliers. Additionally, Verde states that this support team will conduct audits of Verde's Ohio operations, which include monitoring the Company's telemarketing, door-to-door, and third-party verification programs. Verde believes that most critical to the Company's long-term success is that it is dedicated to working with Staff in implementing its compliance plan.

{¶ 34} Verde believes that the Company's compliance plan meets or exceeds many of OCC's recommendations. In addition to the new Ohio Compliance Representative, Verde states that the Company will be revamping its marketing programs. For example, the Company will be limiting the number of third-party vendors it uses for telemarketing and door-to-door marketing programs. Furthermore, Verde represents that, instead of using multiple vendors for the same geographic area, the Company will only use one vendor in each area to ensure that there is no overlap in vendors. Verde explains that the Company will also be renewing its training and oversight of marketing agents by working directly

with the agents of third-party vendors to provide specific training on the Company's policies, Ohio regulations, and the do's and don'ts of interacting with potential customers.

{¶ 35} Concerning telemarketing calls, Verde states that it will now be using an outside telemarketing and third-party verification vendor to evaluate all sales calls using artificial intelligence technology. However, Verde explains that, to ensure the technology provides accurate results, the Company will also have human auditors review randomized calls. Specific to door-to-door sales, Verde agents will be using an app that provides the Company with tracking capabilities to ensure that the agents work within their sales territory.

{¶ 36} In response to OCC's allegations regarding spoofing caller ID information and slamming customers, Verde states that its compliance plan addresses these issues by requiring all telemarketers to use a single, centralized dialer program. Verde explains that it will be using its parent company's new dialing system, which will allow Verde to control all aspects of dialing for its sales calls (for example, what numbers can be dialed, what numbers will show up on a customer's caller ID, how often numbers can be called, when numbers can be called, and how records of all calls are kept). Additionally, Verde asserts that this new technology will also provide the benefit of addressing concerns about telemarketers dialing consumers on the federal Do-Not-Call (DNC) registry. Verde states that the Company will directly monitor and control which numbers can be dialed by third-party vendors, ensuring that these vendors do not contact persons on the DNC list.

{¶ 37} Verde points out that OCC did not participate in the formation of the Stipulation in the *Investigation Case*, and OCC is not tasked with enforcing the compliance plan. To support the Company's belief that OCC has little, if any, basis for complaining that the Stipulation does not do what OCC wants it to do, Verde points out that the Commission determined that OCC failed to demonstrate its expertise is necessary to supplement Staff's review of the action plan. *Investigation Case*, Opinion and Order (Feb. 26, 2020) at ¶ 68.

Verde represents that it continues to take steps to implement the Stipulation. For example, on March 12, 2020, Verde paid a \$675,000 forfeiture to the Commission. On March 27 and 30, 2020, Verde sent notices to over 8,500 electricity and natural gas customers in Ohio, notifying them of the *Investigation Case* and their right to cancel their supply contracts with Verde at any time and without penalty. And now, Verde is in the process of working with Staff to implement a re-rating process involving 21,000 current and former customers that will cost the Company more than \$1.7 million.

{¶ 38} Verde believes OCC's recommendations have little connection to advancing Ohio's policy objectives for creating an open marketplace for energy supply. Verde cites R.C. 4928.02(C), which states, in pertinent part, that it is Ohio policy that consumers should have a "diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers." According to the Company, its removal from the market would deny consumers the option of 100 percent renewable, carbon-neutral retail energy supply and be counter to R.C. 4928.02(C).

{¶ 39} Concerning OCC's remarks about the Ohio Attorney General's investigation, Verde avers that it would be premature and inconsistent with due process standards to base a denial of certification on an investigation in which no allegations of unlawful conduct have been asserted and which appears to involve many of the same factual issues already addressed in the staff report in the *Investigation Case*. Similarly, Verde argues that the Commission should not take administrative notice of different proceedings against different entities in different states, as OCC suggests, because there are distinct facts, time periods, and legal issues in each of those cases. Verde believes its CRES and CRNGS renewal applications in these cases should be decided on their own merits relating to Verde's managerial, financial, and technical capacity. Additionally, Verde represents that the Commission agrees with the Company on this issue given that, in the *Investigation Case*, the Commission "decline[d] to take note of the forfeitures and other penalties assessed by other jurisdictions on Spark affiliates because these proceedings involve facts and evidence

different from this proceeding.” *Investigation Case*, Opinion and Order (Feb. 26, 2020) at ¶ 70. Additionally, Verde avers that the Commission’s CRES and CRNGS renewal application forms require that the applicant, not the applicant’s affiliates, disclose any liabilities and investigations that could adversely impact the applicant’s ability to provide service to Ohioans. Verde believes that the focus is and should be on the applicant and not its extended corporate family.

{¶ 40} As a final matter, Verde takes the position that flexibility, fairness, and diversity of energy supply all counsel a more sophisticated approach than the all-or-nothing method advocated by OCC. Verde represents that the Company focuses on reform and believes that its renewal applications reflect that focus, while permitting Verde to demonstrate compliance with Ohio law is in the public interest. Accordingly, Verde submits that its CRES and CRNGS renewal applications should be granted.

#### ***D. Summary of the Staff Report***

{¶ 41} The Staff Report was filed on June 15, 2020, and details Staff’s recommendations concerning Verde’s CRES and CRNGS renewal applications. Within its report, Staff illustrates Verde’s applications’ procedural history, including the Commission’s investigation into Verde’s practices and the suspension of Verde’s current CRES and CRNGS renewal applications.

{¶ 42} During its review, Staff determined whether Verde is managerially, financially, and technically fit to continue to provide CRES and CRNGS in Ohio. Staff states that the financial sections of both renewal applications have been reviewed by Staff and comply with the Ohio Administrative Code. Staff represents that, while it previously expressed concerns with the managerial and technical capabilities of Verde as part of the *Investigation Case*, Staff’s concerns have been addressed through the resolution of the *Investigation Case* with the Commission-approved Stipulation. Staff further notes that circumstances have not changed since the Commission approved the Stipulation. Staff

represents that it is unaware of any new facts that would merit a change in Staff's opinion that the Stipulation adequately addresses Verde's previous compliance issues.

{¶ 43} Staff notes that Verde has implemented numerous changes to its operating procedures in response to the *Investigation Case*. Of particular note, Staff states that there have been at least three changes to Verde's upper management personnel. Staff believes that the compliance plan Verde provided for Staff's review, under the Stipulation, is comprehensive and proposes several significant measures that Staff and Verde believe will address Staff's previous concerns. Staff notes that the compliance plan includes information on new and improved methods for vendor audits, trainings, marketing programs, Ohio compliance representatives, and operational changes that focus on ensuring compliance with Commission rules. Additionally, Staff represents that Verde's compliance plan proposes modifications to Verde's records retention program, which Staff believes will alleviate any past issues with the Company's inability to access or retain certain records and further improve Verde's responses to any future Staff investigations. Staff notes that it has, therefore, approved Verde's compliance plan for implementation.

{¶ 44} Staff states that, with all of Verde's changes, it believes that the appropriate steps have been taken to help prevent future issues of non-compliance with Commission rules. After reviewing and evaluating Verde's certification applications, accompanying exhibits, and amendments, Staff believes that Verde has demonstrated it has the financial, managerial, and technical capabilities to continue to provide CRES and CRNGS in Ohio. Accordingly, Staff recommends that the Commission approve Verde's renewal applications.

#### **E. Commission Conclusion**

{¶ 45} With our adoption of the Stipulation in the *Investigation Case* requiring multiple corrective actions by Verde and significant oversight by Staff, the Commission finds that the only relevant issues in these certification proceedings are whether Verde has the managerial, technical, and financial capability to be a CRES and CRNGS supplier in this



state, as required by R.C. 4928.08 and 4929.20. Staff has thoroughly reviewed Verde's managerial, technical, and financial capability and has recommended that Verde's applications should be approved. Of particular importance, Staff determined that, with all of the changes implemented by Verde in response to the *Investigation Case*, appropriate steps have been taken to help prevent future issues of non-compliance with Commission rules. Ultimately, Staff believes that its concerns have been addressed, and to Staff's knowledge, the circumstances have not changed since the Commission approved the Stipulation.

{¶ 46} Upon reviewing the applications for certification renewal, as supplemented, and Staff's recommendation, we find that Verde appears managerially, financially, and technically fit and capable of performing as a CRES and CRNGS supplier in compliance with all applicable regulations adopted under R.C. Chapter 4928 and 4929. Accordingly, Verde's renewal applications for certification as a CRES and CRNGS supplier in this state should be approved for two years.

{¶ 47} After reviewing the many motions, memoranda, and comments filed in these cases, we find that no party has raised material issues or concerns regarding Verde's managerial, technical, and financial capability that were not already resolved through the *Investigation Case*. To the extent that an argument or recommendation has not been addressed below, it has been rejected.

{¶ 48} We specifically reject OCC's arguments that were previously raised in the *Investigation Case*. OCC's initial comments demonstrate that its focus is to re-litigate the *Investigation Case* rather than assess, based on current circumstances, Verde's managerial, technical, and financial capability concerning the CRES and CRNGS renewal applications at hand. OCC relies exclusively on the record in the *Investigation Case* to support its claims that Verde does not have the managerial, financial, or technical capabilities to operate as a CRES and CRNGS supplier in this state. To that end, OCC has not provided the Commission with any new evidence of alleged violations of the Commission-approved Stipulation, rules, or

regulations. Moreover, Staff is unaware of any new facts that would merit a change in its opinion that the Stipulation adequately addresses Verde's prior compliance issues.

{¶ 49} The Commission again denies OCC's request to take note of the forfeitures and other penalties assessed by other jurisdictions on Spark affiliates because these proceedings involve facts and evidence different from these proceedings. Furthermore, as we found in the *Investigation Case*, OCC has not demonstrated that its expertise is necessary to supplement Staff's review of the compliance plan. Notwithstanding, we acknowledge OCC's concern and agree that Verde must thoroughly comply with the Stipulation and Commission rules. Accordingly, we direct Staff to continue monitoring Verde to ensure the Company's compliance with the Commission's rules, the Stipulation, and the compliance plan.

{¶ 50} It appears as though OCC's participation, in these cases, was intended to cast doubt regarding Verde's potential to comply with the Commission-approved Stipulation, which OCC already litigated in the *Investigation Case*. We also note that OCC filed an application for rehearing in the *Investigation Case*, which is currently pending before the Commission. To permanently banish Verde from this state after our approval of the Stipulation in the *Investigation Case*, without first giving the Company a chance to rectify and rehabilitate itself, would conflict with state policy pursuant to R.C. 4928.02 and 4929.02, as well as violate a basic standard of equity. We agree with Verde that OCC's "all-or-nothing" approach is against the public interest and would deter other CRES and CRNGS suppliers from operating in Ohio's marketplace. We believe such an approach would not only undermine Ohio's competitive market, it would also run counter to Ohio laws and regulations governing competitive electric and gas suppliers and send the signal that any allegations of non-compliance will result in automatic certificate revocation. That said, any future issues brought to the attention of this Commission concerning alleged non-compliance with the Ohio Administrative Code requirements will have inferential value regarding the efficacy of the remedial actions undertaken by Verde, and the probative value

more generally concerning the managerial and technical capabilities of Verde will also be taken into account.

***F. Motions for Protective Orders and Motions to Strike***

{¶ 51} On July 6, 2020, Verde filed a motion for a protective order. In its motion, Verde contends that its compliance plan, supplied to Staff, should remain confidential. On July 8, 2020, Verde filed a second motion for a protective order. In its second motion, Verde seeks to keep confidential an Excel spreadsheet that contains rate and customer information that was produced to OCC in these proceedings. Verde contends that its compliance plan and Excel spreadsheet containing rates and customer information should be deemed confidential because both documents include trade secrets shared with Staff for the sole purpose of complying with the Stipulation. If disclosed, Verde believes the aforementioned information would give the Company's competitors insight into its management, operation, and business. Additionally, the compliance plan relates to vendor training programs, audit and compliance practices, and marketing programs.

{¶ 52} Subsequently, on July 21, 2020, OCC filed a memorandum contra Verde's July 6, 2020 motion and contemporaneously filed its own motion for a protective order to preserve certain portions of the compliance plan's confidentiality until the Commission rules on Verde's motion. Similarly, on July 23, 2020, OCC filed a memorandum contra Verde's July 8, 2020 motion and contemporaneously filed its own motion for a protective order to preserve the confidentiality of certain portions of the Excel spreadsheet until the Commission rules on Verde's motion. By filing the aforementioned motions for protective orders, OCC does not concede that the information constitutes trade secret information; however, OCC acknowledges that it has obtained this information under a protective agreement with Verde that provides for such information to be treated as confidential and protected unless and until the Commission rules that the information must be publicly disclosed under Ohio law.

{¶ 53} Concerning its memorandum contra Verde’s July 6, 2020 motion, OCC argues that Verde’s compliance plan should be made public because Verde has not satisfied its burden of proof that the information redacted in the compliance plan includes trade secrets. Specifically, OCC argues that the information concealed is not a trade secret because Verde allegedly derives no value from keeping it secret; Verde’s competitors would not obtain any value from knowing it; and Verde’s trade secret claim fails the Ohio Supreme Court’s *Plain Dealer* test. *State ex rel. the Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

{¶ 54} Within its memorandum contra Verde’s July 8, 2020 motion, OCC avers that Verde’s rates should be public, arguing that the Excel spreadsheet with rates and customer information does not pass the *Plain Dealer* test, is not novel or unique, and, therefore, is not trade secret. OCC argues that the rate sheet does not contain customer names, addresses, and telephone numbers. OCC states that there is no risk of revealing a customer’s identity to anyone who does not already know it. OCC believes that there is no way for Verde’s competitors to poach Verde’s customers without doing the work themselves of identifying potential customers. OCC further argues that the information in the rate sheet that OCC intends to disclose is related to the rates that Verde charges its customers at a certain point in time.

{¶ 55} Verde filed its replies to OCC’s memoranda contra on July 28, 2020, and July 30, 2020, respectively. Therein, Verde argues that the compliance plan and Excel spreadsheet should be protected from public disclosure under the *Plain Dealer* test. Verde believes that OCC has downplayed the *Plain Dealer* factors. Additionally, Verde contends that OCC erroneously read an overly stringent novelty requirement into Ohio trade secret law – stating that what constitutes trade secret is secrecy, not novelty.

{¶ 56} Verde believes that the Company has adequately explained the need to protect certain categories of confidential information that appear throughout the compliance plan.

In its reply, Verde details the time and expense that went into creating the compliance plan and Excel spreadsheet, the value of the plan and the Excel spreadsheet, how the compliance plan and spreadsheet have been guarded with secrecy, and how no competitor would be able to put together such a detailed explanation of processes and procedures to be compliant with Ohio laws and regulations without itself spending extensive time and resources in developing such a plan or detailed, analytical picture of Verde's business operations in Ohio. Taken as a whole, Verde represents that the compliance plan is effectively a blueprint of how to ensure a CRES or CRNGS provider's operations are compliant with Ohio laws and regulations. Furthermore, Verde believes that it would be a massive windfall for competitors to conduct extensive analytics of such a comprehensive data set within the Excel spreadsheet when Verde would have no corresponding access to data on its competitors. Verde asserts that the Excel spreadsheet is more than a simple price list. Rather, Verde represents that this information places numerous data points about pricing in context with customer information, service area information, timing information, and usage information. As a final matter, Verde alleges that the need for the Company to justify its claims for trade secret protection does not mean that Verde must individually justify each and every word that it redacts or predict every specific potential harm that might result from disclosure. Verde believes that, read in context, its concerns are warranted.

{¶ 57} On August 14, 2020, OCC filed a motion to strike Verde's July 28, 2020 reply and a motion to strike Verde's July 30, 2020 reply. Verde filed its response to these motions on August 21, 2020.

{¶ 58} In light of our determination that Verde has the managerial, technical, and financial capability to serve as a CRES and CRNGS supplier in this state and our determination that no hearing is necessary in these proceedings, we find that the motions for a protective order and motions to strike filed by Verde and OCC, respectively, are moot and should be denied.

**G. *Motion for Admission Pro Hac Vice***

{¶ 59} On July 10, 2020, Verde filed a motion for Rachel Palmer Hooper to appear pro hac vice. Verde also submitted a certificate of pro hac vice registration with the Supreme Court of Ohio with its motion.

{¶ 60} Gov. Bar R. XII, Section 2(A), provides rules governing eligibility to practice pro hac vice in Ohio. Pursuant to Gov. Bar R. XII, Section 2(A)(7), motions for admission pro hac vice must be accompanied by a certificate of pro hac vice registration furnished by the Supreme Court Office of Attorney Services.

{¶ 61} Upon review, the Commission finds that Verde's motion is reasonable and should be granted.

**H. *Second Motion to Extend Verde's CRES and CRNGS Certifications***

{¶ 62} As a final matter, on December 10, 2020, Verde filed a second motion to extend the Company's current CRES and CRNGS certifications until the Commission enters a decision on Verde's applications to renew those certifications. Given that Verde's current CRES and CRNGS certifications expire on December 31, 2020, and this Finding and Order approves Verde's renewal applications before their expiration, we find that Verde's motion is moot and should be denied.

**III. ORDER**

{¶ 63} It is, therefore,

{¶ 64} ORDERED, That Verde's renewal applications be approved. It is, further,

{¶ 65} ORDERED, That the motions for protective orders filed by Verde and OCC be denied as moot. It is, further,

{¶ 66} ORDERED, That the motions to strike filed by OCC be denied as moot. It is, further,

{¶ 67} ORDERED, That the motion for Rachel Palmer Hooper to appear pro hac vice filed on July 10, 2020, be granted. It is, further,

{¶ 68} ORDERED, That the motion to extend Verde's CRES and CRNGS certifications be denied as moot. It is, further,

{¶ 69} ORDERED, That a copy of this Finding and Order be served upon all interested persons and parties of record.

COMMISSIONERS:

*Approving:*

M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

LLA/hac

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

Summary: Finding & Order approving the renewal applications of Verde Energy USA Ohio, LLC d/b/a Verde Energy for certification as a competitive retail electric and gas service provider in Ohio. electronically filed by Kelli C. King on behalf of The Public Utilities Commission of Ohio