

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Verde  
Energy USA Ohio, LLC for Certification as a  
Competitive Retail Electric Supplier

CASE NO.: 11-5886-EL-CRS  
CASE NO.: 13-2164-GA-CRS

In the Matter of the Application of Verde  
Energy USA Ohio, LLC as a Competitive  
Retail Natural Gas Supplier

(CONSOLIDATED)

**VERDE ENERGY USA OHIO, LLC’S MEMORANDUM CONTRA THE OFFICE OF  
THE OHIO CONSUMERS’ COUNSEL’S MOTION TO UNSEAL TRADE SECRETS**

The Ohio Consumers’ Counsel (“OCC”) misinterprets the December 30, 2020 order in these certification cases by the Public Utilities Commission of Ohio (the “Commission”). In its ruling, the Commission approved the renewal of Verde Energy USA Ohio, LLC’s (“Verde Energy”) CRES and CRNGS certifications. The Commission found that its decision mooted the need to address the merits of arguments made by the parties in extensive briefing relating to the protection of Verde Energy’s trade secret information. (“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.”)<sup>1</sup>

More than three months after the Commission’s December 30, 2020 order, OCC filed a letter with the Commission seeking the public disclosure of Verde Energy’s trade secrets based on a misinterpretation of the Commission’s finding that Verde Energy’s motions for protective orders and the related motions to strike were moot. Said differently, even though the Commission considered no evidence or arguments with regard to the protection of Verde

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<sup>1</sup> Finding and Order, Case No. 11-5886-EL-CRS, *et al.*, ¶ 58 (Dec. 30, 2020) (emphasis added).

Energy's trade secrets, OCC twists a one sentence denial as "moot" into the unsupported proposition that the Commission determined that Verde Energy's trade secret information should be publicly released.

The Commission's denial of Verde Energy's protective order as moot as articulated in the December 30, 2020 order is understandable. With no hearing required in light of the Commission's renewal of Verde Energy's CRES and CRNGS certifications, there would be no testimony, briefing, or comments that would need to refer to Verde Energy's trade secret information. Therefore, the Commission could avoid wading into dozens of pages of briefing and arguments prompted by OCC's refusal to compromise to protect the confidentiality of Verde Energy's trade secret information. There is no indication in the Commission's order that it intended or anticipated the result that OCC is demanding. Releasing Verde Energy's sensitive trade secret information without a ruling on the merits of Verde Energy's motion would set a bad precedent, especially because the information at issue would be valuable for Verde Energy's competitors and also includes customer-specific rate plan information.

The Commission should deny OCC's request as inconsistent with the substance of the Commission's order. OCC has not articulated why it is now asking for the public release of this trade secret information more than three months after the Commission found that the motions for protective order were mooted, and OCC does not explain what purpose would be served by the release of this information without a determination by the Commission regarding the merits of Verde's arguments that the information is entitled to protection as trade secrets. If the Commission somehow determines that the circumstances have changed due to OCC's request or due to its Entry on Rehearing dated February 24, 2021, then the Commission should consider the

merits of Verde Energy's motions for protective order and render a full opinion on Verde Energy's motions for protective order based on the briefing filed to date.

## **I. FACTUAL BACKGROUND**

Verde Energy is a competitive retail supplier of electric and natural gas service, with a new senior management team comprised of individuals with significant experience in wholesale and retail energy supply. Verde Energy offers renewable energy products to Ohio consumers, allowing customers to choose electricity from 100 percent renewable sources and natural gas rendered carbon-neutral by the purchase and retirement of renewable energy credits.

Verde Energy received its CRES and CRNGS certifications on March 28, 2012, and December 9, 2013, respectively. *See* Case No. 11-5886-EL-CRS; Case No. 13-2164-GA-CRS. Those certifications were renewed every two years pursuant to Ohio Adm.Code 4901:1-24-09 and Ohio Adm.Code 4901:1-27-09, and automatically approved by the Commission pursuant to R.C. 4928.08 and R.C. 4929.20.

Verde Energy filed a CRES renewal application on February 27, 2020, which was superseded by an amended CRES renewal application on April 24, 2020. Verde Energy filed a CRNGS renewal application on November 7, 2019, which was superseded by an amended CRNGS renewal application on April 24, 2020. The Commission suspended automatic renewal of Verde Energy's CRNGS and CRES renewal applications for additional review on December 4, 2019, and March 3, 2020, respectively. The Commission also consolidated the CRES and CRNGS renewal applications and extended both certifications through November 1, 2020, pending the Commission's review of Verde Energy's renewal applications. On October 23, 2020, Verde filed a motion to extend the company's CRES and CRNGS certifications until the Commission entered 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.

One provision of the settlement in PUCO Case No. 19-0958-GE-COI (the "Investigation Case") was that Verde Energy would prepare a comprehensive Compliance Plan detailing how Verde Energy's operations in Ohio and interactions with Ohio consumers would comply with state law and the Commission's regulations. This Compliance Plan, as detailed in Verde Energy's July 6, 2020 motion for protective order, July 28, 2020 reply brief, and associated affidavits, contains highly confidential trade secret information protected from public disclosure by Ohio law.

Verde Energy submitted its Compliance Plan to Staff for review and comment, and Staff approved Verde Energy's Compliance Plan on or about June 12, 2020, after which the Plan was produced to OCC. Staff's recommendation in these certification cases specifically identified Verde Energy's Compliance Plan as a key reason why the Staff believed Verde Energy had sufficiently demonstrated it had the financial, managerial, and technical capabilities to operate in Ohio to support the renewal of its CRES and CRNGS certifications.

Separate and apart from the Compliance Plan, as part of discovery in these certification renewal cases, Verde Energy produced to OCC a highly confidential spreadsheet that contained a enormous volume of customer-specific pricing and other data relating to Verde Energy's entire book of business in the State of Ohio. As Verde Energy explained at length in its separate July 8, 2020 motion for protective order, July 30, 2020 reply, and related affidavits, this spreadsheet also contains highly confidential trade secret information protected from public disclosure by Ohio law.

On December 30, 2020, the Commission granted Verde Energy’s applications for renewal of its CRES and CRNGS certificates. In doing so, the Commission extensively documented the key factual and legal arguments made by OCC, (Finding and Order, Case No. 11-5886-EL-CRS, *et al.*, ¶¶ 19–25), Verde Energy (*id.* ¶¶ 26–40), and Staff (*id.* ¶¶ 41–44). The Commission then explained in detail its conclusions regarding the applications, the parties’ comments, and the evidence in the record. (*Id.* ¶¶ 45–50.) Importantly, the Commission held 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 . . . .” (*Id.* ¶ 45.) “Of particular importance,” the Commission noted, “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.” (*Id.*)

The Commission also ruled on Verde Energy’s motions for protective order (and OCC’s related motions to strike): “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.” (*Id.* at ¶ 58.)

OCC’s application for rehearing followed on January 29, 2021. On February 24, 2021, the Commission entered a brief Entry on Rehearing finding that the matters raised in OCC’s application for rehearing warranted further consideration. In a letter filed on the docket on April 7, 2021 in these matters—more than three months after the Commission’s December 30, 2020 Finding and Order—OCC asked the Commission’s Legal Director public release the confidential

versions of Verde Energy's motions for protective orders and related materials (including the unredacted Compliance Plan and confidential customer rate spreadsheet at issue).

## **II. LAW AND ARGUMENT**

As it relates to trade secrets, the Commission's December 30, 2020 Finding and Order reflected a decision not to waste administrative resources on what would amount to an advisory opinion. Unless the Commission decide to grant OCC's application for rehearing, there will be no further comments, testimony, or substantive filings in these cases that require the submission of evidence that Verde Energy claims constitutes trade secret information. Contrary to the suggestion made in OCC's April 7, 2021 request—which may be viewed as effectively a late-filed application for rehearing or perhaps a late-filed motion to compel—the Commission said nothing in its Finding and Order to suggest that any of Verde Energy's trade secrets would be released to the public. That would have made the issue ripe, not “moot.” Since the substance of Verde Energy's trade secret arguments were not addressed by the Commission, and thus Verde Energy was not adversely impacted by that decision, there was no reason to seek rehearing of the Commission's non-substantive decision on the issue.

If, on the other hand, the Commission no longer views the issue as “moot”—due to the February 24, 2021 Entry on Rehearing, for example—the logical next step is not to simply post Verde Energy's trade secrets on the docket, but to treat Verde Energy's motions for protective order as no longer moot, but ripe, and to render a decision based on all of the briefing that has been filed as to those motions. OCC cannot claim that such a decision would constitute a back-door application for rehearing, because OCC filed a late motion and instigated this process.

Regardless of whether the Commission stands on its prior finding of mootness or reaches the now potentially ripe merits of Verde Energy's motions for protective order, OCC's request should be denied.

**A. OCC's interpretation of the December 30, 2020 Finding and Order ignores the Commission's finding that the dispute over Verde Energy's trade secrets was "moot."**

R.C. 149.43 specifies that a record prohibited from release under state or federal law is not a "public record." R.C. 149.43(A)(1)(v). This exemption includes trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 737 (2000) ("Trade secrets are exempt from disclosure under the 'state or federal law' exemption of R.C. 149.43."). OCC frames its request as simply seeking to "implement" the Commission's prior decision regarding Verde Energy's motions for protective order. But in reality, OCC is trying to edit the word "moot" out of the December 30 Finding and Order. The Commission ruled that the motions on the issue of trade secrets were moot. That was the sole basis for the motions' denial. *See* Finding and Order, Case No. 11-5886-EL-CRS, *et al.*, ¶ 58. If the Commission had anticipated that any of Verde Energy's trade secrets would be filed publicly, then logically, the Commission would have deemed the issue ripe, not moot, and ruled on the merits. To read the Commission's Finding and Order any other way is read the word "moot" out of the opinion. The Commission should reject OCC's misconstrued reading of a one-sentence order that, in fact, declined to render a substantive decision on the trade secret issues. *See State ex rel. Eliza Jennings, Inc. v. Noble*, 49 Ohio St.3d 71, 74 (1990) (ruling that a tribunal is "not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it").

OCC may argue that Verde Energy should have filed an application for rehearing (or that the present filing amounts to a late application for rehearing in violation of R.C. 4903.10). That

is incorrect, because Verde Energy is not objecting to the Commission's Finding and Order, but rather to OCC's new, warped interpretation of it. Verde Energy did not file an application for rehearing for precisely the reason that the Commission identified: The issue was moot, because the case had been resolved, and therefore, there was no reason to release Verde Energy's trade secrets into the public sphere because no evidence would be submitted for a hearing in these cases. The Commission's December 30, 2020 Finding and Order made clear that there would be no hearing—and therefore no further testimony or comments—so there was no point in fighting over what testimony or comments *would* have been made public if the Commission had not decided against a hearing. The Commission does not appear to have anticipated that its decision would lead to OCC's attempt to release *all* of the disputed materials. That alone is reason for OCC's new request to be denied.

**B. In the alternative, if the Commission decides that circumstances have changed in light of the February 24, 2021 Entry on Rehearing, then the Commission should rule that Verde Energy's motions for protective order are no longer moot and are now ripe for decision based on the parties' briefs.**

Given the Commission's decision not to holding a hearing in these matters, it does not appear that the Commission expected or intended that its denial of the pending motions as "moot" would result in the public release of every trade secret at issue. Instead, it appears that the Commission concluded, as Verde Energy did, that further discussion of the matter was academic because the information would be needed as part of an evidentiary record for a hearing in these cases.

In the event that the Commission finds that it should address the merits of Verde Energy's prior motions for protective order, the Commission should do so on the extensive briefing already submitted by the parties, not on the OCC's misconstruction of the Commission's December 30, 2020 order.



### III. CONCLUSION

For the foregoing reasons, OCC's request to have Verde Energy's protected trade secret posted on the public dockets should be denied. In the alternative, the Commission should consider the substance of Verde Energy's motions for protective order for decision and render a full opinion on Verde Energy's motions for protective order based on all of the briefing filed to date.

Dated: April 28, 2021

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing document was served by e-mail upon the persons listed below on April 28, 2021.

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Summary: Memorandum MEMORANDUM CONTRA THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL'S MOTION TO UNSEAL TRADE SECRETS electronically  
filed by Mr. David F. Proano on behalf of Verde Energy USA Ohio, LLC