**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement :

: v. : C-2020-3017229

:

Verde Energy USA, Inc. :

**ORDER DENYING**

**THE OFFICE OF CONSUMER ADVOCATE’S**

**REQUEST FOR SIXTY DAY ABEYANCE**

On January 30, 2020, the Pennsylvania Public Utility Commission’s (Commission) Bureau of Investigation and Enforcement (I&E) filed a formal Complaint against Verde Energy USA, Inc. (Verde) with the Commission. In the Complaint, I&E alleged that from February 2017 through the date of the Complaint, Verde, and/or a third-party marketing agent acting on Verde’s behalf, conducted deceptive and misleading sales tactics, enrolled customers without authorization, and accessed customer accounts without authorization while participating in Pennsylvania’s competitive supplier retail market.

Shortly thereafter, Verde and I&E began to engage in settlement discussions.

On February 14, 2020, Verde filed a Motion for Extension of Time to Answer or Respond to Complaint. Verde’s Motion was granted by Secretarial letter dated February 14, 2020.

On February 24, 2020, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement.

On March 30, 2020, Verde filed a second Motion for Extension of Time to Answer or Respond to Complaint. Verde’s Motion was granted by Secretarial email issued on March 30, 2020.

On May 15, 2020, Verde filed a third Motion for Extension of Time to Answer or Respond to Complaint.

On May 20, 2020, the OCA contacted I&E about accessing the confidential data requests and responses in this matter in order to initiate its review of the available information and to begin drafting its own discovery.

On May 22, 2020, the OCA received the confidential responses to I&E data requests.

On May 26, 2020, the OCA learned that Verde and I&E had been engaged in settlement negotiations dating back to before I&E filed the formal Complaint. Verde’s counsel urged the OCA to hear the details of the proposed settlement, but OCA declined, maintaining that the settlement was premature and negotiated before the OCA was able to conduct discovery into the allegations in the Complaint.

On May 27, 2020, Verde’s counsel provided the OCA with a draft of the settlement and requested that the OCA provide its position and any input on the settlement.

On June 1, 2020, the OCA served its Set I interrogatories to Verde. The OCA served follow up discovery on Verde on July 6, 2020 (OCA Set II) and on August 3, 2020 (OCA Set III).

On June 30, 2020, I&E and Verde (Settling Parties) filed a Joint Petition for Approval of Settlement (Joint Petition or Settlement). Also on June 30, 2020, Verde filed an Answer to the Complaint, generally denying the allegations set forth in the Complaint and noting that the parties filed a Settlement.

On July 10, 2020, the OCA filed a letter stating its intention to file a Statement in Opposition to the Joint Petition and requested that the Commission assign the matter to an Administrative Law Judge (ALJ).

On July 20, 2020, the OCA filed its Statement in Opposition to the Joint Petition.

By Call-In Telephonic Hearing Notice dated July 31, 2020, an Initial Call-In Telephonic Prehearing Conference was scheduled for August 27, 2020 and the matter was assigned to me.

In accordance with my Prehearing Conference Order issued on July 31, 2020, Verde, I&E, and the OCA filed Prehearing Memoranda on August 21, 2020. Verde, in its Prehearing Memorandum, maintained that no further discovery is needed in this matter, that hearings are not necessary, that no testimony or hearings are required, and that no litigation schedule is necessary because the Complainant, I&E, and the Respondent, Verde, have reached a complete and final resolution of this proceeding which effectively addresses the issues that were the subject of the Complaint.

I&E, in its Prehearing Memorandum, maintained that providing a position regarding a proposed plan or schedule for discovery is not necessary, that proposing a litigation schedule is not necessary, that providing a list of witnesses is not necessary, and that the only issues to be considered are whether the Joint Petition for Approval of Settlement should be approved in its entirety without modification and if it is in the public interest.

OCA, in its Prehearing Memorandum, identified three issues, identified a witness, and requested that this matter be held in abeyance for 60 days in order for the OCA to conduct additional discovery and to engage in further settlement discussions with I&E and Verde to see if there are possible modifications to the settlement that would address OCA’s concerns. OCA further proposed that at the end of 60 days, the parties could each evaluate the respective positions and collectively determine whether there is a need to establish a litigation schedule to address the allegations in I&E’s Complaint, and to determine whether the Settlement signed by Verde and I&E is in the public interest.

The August 27, 2020 Prehearing Conference took place as scheduled. Counsel for Verde, I&E and the OCA participated. During the Prehearing Conference, Counsel for Verde, I&E and OCA restated their respective positions as laid out in their Prehearing Memoranda. For the reasons stated below, OCA’s request for a 60-day abeyance is denied.

DISCUSSION

The OCA filed a Notice of Intervention in this matter on February 24, 2020. The OCA acknowledges that “[f]ollowing the OCA’s intervention, on March 30, 2020 and again, on May 15, 2020, Verde requested an extension of time to file its Answer” and that “[p]rior to each request, Verde notified the OCA of the planned request and asked if there were any objections on behalf of OCA.”[[1]](#footnote-1) The OCA also acknowledged that it did not object to these requests, and that “[a]s no Answer had yet been filed to the Complaint, the OCA refrained from conducting its own discovery in this matter.”[[2]](#footnote-2)

On May 20, 2020, the OCA contacted I&E to gain access to “the confidential data requests and responses in this matter in order to initiate its review of the available information and begin drafting its own discovery.”[[3]](#footnote-3) OCA stated as follows:

The OCA received the confidential responses to I&E data requests on May 22, 2020 and began its review and drafting of additional discovery. In the process of gaining access to an online data room to examine the complete responses from Verde to I&E data requests, the OCA was notified for the first time during a call with Verde’s counsel on May 26, 2020 that Joint Petitioners had been engaged in settlement negotiations dating back to before the Complaint filing on January 30, 2020 and that Joint Petitioners had reached a near complete settlement. While Verde’s Counsel urged the OCA to hear the details of the proposed settlement, the OCA declined because it was the OCA’s view that the settlement was premature and negotiated before the OCA was able to conduct discovery into the allegations in the Complaint. The OCA was not notified of any meetings or discussions concerning the development of this settlement prior to the oral notice on May 26, 2020 and was not included in any settlement negotiations that led up to the proposed settlement. The draft of the settlement was provided to the OCA in an email attachment on May 27, 2020 and counsel for Verde requested that the OCA provide its position and any input on the settlement. Per the email, Joint Petitioners had agreed to nearly all of the terms except for the civil penalty amount.[[4]](#footnote-4)

The OCA then served Set I Interrogatories on June 1, 2020 and Set II on July 6, 2020.[[5]](#footnote-5)

It is the OCA’s position that the Joint Petition for Settlement is not ripe for review. The OCA maintains that it has been denied the opportunity to investigate this case and to present its own investigation of the facts underlying the formal Complaint. The OCA proposes that it should be allowed to further investigate this matter, and that the parties should be allowed to negotiate and decide whether further amendment to the Settlement is necessary, or if the Settlement is sufficient to address the OCA’s concerns.[[6]](#footnote-6)

It is Verde’s position that the Settling Parties reached out to the OCA with a draft of an outline of terms that I&E and Verde put together based on their discussions, and that they actively invited the OCA’s input on the Settlement, which OCA declined. Verde notes that the Settling Parties provided these terms to the OCA over three months prior to the prehearing conference, and that they filed the Settlement with the Commission two months prior to the prehearing conference. Verde maintains that the OCA has had more time than I&E had to review the Settlement prior to agreeing to its terms. Verde further maintains that, since the Complainant (I&E) and Respondent (Verde) have reached a full, robust and detailed Settlement, to which it invited the OCA to evaluate and suggest alterations, there is no need to litigate this case going forward.[[7]](#footnote-7)

I&E agreed with Verde’s assessment, adding that the Settling parties asked for the OCA’s feedback on the Settlement on multiple occasions. I&E maintains that the OCA had every opportunity to receive the information that they were requesting and to provide comment on the Settlement. I&E further maintains that there is nothing to be litigated at this time because there is a settlement agreement. I&E believes the Settlement should be reviewed to determine if it should be approved because it is in the public interest. I&E notes that the Settling Parties are open to any comments the OCA may provide or any modifications they may have to the Joint Petition, but they do not feel this matter should be delayed any longer.[[8]](#footnote-8)

Regarding an intervenor’s rights, it is important to note that the Commission has determined that “[a]n intervenor’s role in proceedings before this Commission is on a non-party basis, meaning that the initiating and responding parties can drive the outcome without regard to the alleged interests of would-be intervenors.”[[9]](#footnote-9) Clearly, I&E and Verde, the initiating and responding parties in this matter, acted within their rights by engaging in discussions to resolve I&E’s Complaint.

Regarding sequence and timing of discovery, Commission regulations provide, in pertinent part, the following:

 (a)  A party to the Commission proceeding may conduct discovery.

 (b)  A party shall initiate discovery as early in the proceedings as reasonably possible. In a proceeding, the right to discovery commences when a complaint, protest or other adverse pleading is filed or when the Commission institutes an investigation or on the record proceeding, whichever is earlier.

 (c)  Commission staff may initiate discovery at an earlier time. Commission staff discovery prior to formal Commission action to initiate a proceeding shall be designated as ‘‘Staff data requests’’ and shall be answered fully and completely by the utility within the time periods specified in §  5.342(d) (relating to answers or objections to written interrogatories by a party). Unless a presiding officer has been designated, objections and motions to compel shall be ruled upon by the Chief Administrative Law Judge.

52 Pa.Code §§ 5.331(a)-(c).

OCA contends that the Settlement is premature as it was negotiated before the OCA was able to conduct discovery into the allegations in the Complaint. As previously noted, Commission regulations provide that “[a] party shall initiate discovery as early in the proceedings as reasonably possible,” and that “the right to discovery commences when a complaint, protest or other adverse pleading is filed.” I&E filed its Complaint in this matter on January 30, 2020. Pursuant to Commission regulations, the OCA could have commenced discovery upon the filing of its Notice of Intervention on February 24, 2020.

I&E went into considerable detail with its allegations in the Complaint, breaking it up into subsections including: misleading and deceptive telemarketing conduct; misleading and deceptive door-to-door sales conduct; slamming/unauthorized switch; releasing private customer information/unauthorized account access; and failure to maintain verification records. I&E also went into great detail regarding Verde’s alleged violations of Commission regulations. There was sufficient information contained within the Complaint, as well as from earlier discovery conducted by I&E, for the OCA to begin conducting its own discovery. This is evidenced by the fact that the OCA ultimately began to draft discovery in May 2020 before it learned of the potential settlement, and well before Verde filed an Answer to I&E’s Complaint. Moreover, the OCA had three additional months after Verde provided it with a copy of the draft settlement (May 27th) to conduct discovery prior to the scheduled prehearing conference (August 27th). In total, by the date of the prehearing conference, the OCA already had six months to conduct discovery into this matter.

Under the circumstances, I am not persuaded by the OCA’s argument that it was not able to conduct discovery into the allegations in the Complaint. The OCA clearly had sufficient time to conduct discovery into this matter and to evaluate the terms of the Settlement. I&E and Verde invited the OCA to weigh in on the Settlement over one month before it was filed, and the OCA opted not to do so. Since the OCA had the opportunity to conduct discovery and to weigh in on the Settlement, I will deny the OCA’s request to hold this matter in abeyance for 60 days. Instead, I will issue a recommended decision addressing whether the Settlement is in the public interest and should be approved.

The OCA raised a valid point during the prehearing conference, that the Commission’s standards for reviewing a non-unanimous settlement are the same as those for deciding a fully contested case, and that substantial evidence consistent with statutory requirements must support the proposed settlement.[[10]](#footnote-10) The OCA notes that no facts have been entered into the record in this matter.[[11]](#footnote-11) There must be a record to support the terms of the Settlement in this matter. As there has not been any pre-served testimony, evidentiary hearings or stipulated facts in this case, there is currently no record to support the terms of the Settlement. However, this deficiency is not without remedy. Accordingly, the Settling Parties will be permitted to file stipulated facts in support of the Joint Petition for Settlement with the Commission’s Secretary within twenty (20) days of the date of issuance of this Order.

Since the OCA’s Statement in Opposition to the Joint Petition largely challenged the Settlement because it had not fully conducted discovery, I will allow the OCA an opportunity to provide substantive comments on the Settlement and to delineate the issues they would raise if the Settlement is rejected and to outline how the OCA’s interests would be affected if the Settlement is accepted. My decision will consider comments/reply comments and will be issued for exceptions. Since the Settling Parties have twenty (20) days from the date of this order to file stipulated facts in support of the Joint Petition for Settlement, the OCA will have forty (40) days from the issuance date of this Order to file comments in support of, or in opposition to, the Joint Petition for Approval of Settlement filed on June 30, 2020. Verde and I&E will be permitted to file Reply Comments in response to any Comments filed by OCA within sixty (60) days of the issuance date of this Order.

THEREFORE,

IT IS ORDERED:

1. That the Office of Consumer Advocate’s request that this matter be held in abeyance for 60 days is denied;
2. That the Settling Parties will be permitted to file stipulated facts in support of the Joint Petition for Settlement with the Commission’s Secretary within twenty (20) days of the date of issuance of this Order;
3. That the Office of Consumer Advocate will be permitted to file Comments with the Secretary’s Bureau regarding the Joint Petition for Approval of Settlement filed in this proceeding on June 30, 2020 within forty (40) days of the date of the issuance of this Order; and
4. That the Bureau of Investigation and Enforcement and Verde Energy USA, Inc. will be permitted to file Reply Comments in response to the Office of Consumer Advocate’s Comments within sixty (60) days of the date of issuance of this Order.

Date: September 25, 2020 /s/

Christopher P. Pell

Deputy Chief Administrative Law Judge

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1. OCA Prehearing Memo at 2. [↑](#footnote-ref-1)
2. *Id*. [↑](#footnote-ref-2)
3. *Id*. [↑](#footnote-ref-3)
4. *Id*. at 2-3. [↑](#footnote-ref-4)
5. *Id*. at 3. [↑](#footnote-ref-5)
6. Tr. at 10-11. [↑](#footnote-ref-6)
7. Tr. at 12-13. [↑](#footnote-ref-7)
8. Tr. at 15-17. [↑](#footnote-ref-8)
9. *Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 at 10 (Order entered May 3, 2018) (citing 52 Pa. Code § 5.75(c)) (“Rights upon grant of petition. Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding. Intervenors are granted no rights which survive discontinuance of a case.”). [↑](#footnote-ref-9)
10. Tr. at 18; *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520, A-2176520 at 17 (Order entered March 8, 2011) (citing *Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code and Joint Petition for Partial Settlemen*t, Docket Nos. R-00973953 and P-00971265, 1997 Pa. PUC LEXIS 51, \*17-\*18 (Order entered December 23, 1997); *Popowski v. Pa.PUC*, 805 A.2d 637 (Pa. Cmwlth. 2002); and *ARIPPA v. Pa.PUC*, 792 A.2d 636 (Pa. Cmwlth. 2002)). [↑](#footnote-ref-10)
11. Tr. at 18. [↑](#footnote-ref-11)