**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :

Bureau of Investigation and Enforcement :

: v. : C-2020-3017229

:

Verde Energy USA, Inc. :

**INTERIM ORDER GRANTING**

**THE MOTION TO STRIKE**

**OF VERDE ENERGY USA, INC.**

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.

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.

By Order dated September 25, 2020, I denied the OCA’s request for a 60-day abeyance. In addition to denying the OCA’s request for the 60-day abeyance, I directed: that the Settling Parties would be permitted to file stipulated facts in support of the Joint Petition for Settlement with the Commission within 20 days of the date of the order; that the OCA would be permitted to file Comments with the Secretary’s Bureau regarding the Joint Petition for Approval of Settlement within 40 days of the date of the order; and that I&E and Verde would be permitted to file Reply Comments in response to the OCA’s Comments within 60 days of the date of the order.

On November 10, 2020, the OCA filed with the Commission its Comments in Opposition of the Joint Petition for Approval of the Non-Unanimous Settlement Filed by Verde Energy USA, Inc. and the Bureau of Investigation and Enforcement. Included with the OCA’s Comments were the Affidavit of Barbara R. Alexander, and the OCA’s proposed findings of fact.

On November 18, 2020, Verde filed with the Commission its Motion to Strike Portions of Comments of the Office of Consumer Advocate (Motion). In the Motion, Verde requests that the following portions of the OCA’s Comments be stricken:

1. The affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2;
2. The OCA’s proposed findings of fact;
3. The OCA’s discussion of Verde ownership structure, affiliates and operations in other states, and vendors; and
4. All citations to “Affidavit” and/or its Exhibits, and Ms. Alexander’s opinions throughout the comments.

Verde endorsed its Motion with a Notice to Plead advising the OCA that it had twenty days to file a written response to the Motion.[[1]](#footnote-1) The OCA’s response to the Motion was due on or before December 8, 2020.

On November 19, 2020, I&E filed its Letter in Support of Verde Energy USA Inc.’s Motion to Strike. In the letter, I&E emphasized that the true intent of the comment and reply period afforded to the parties after the filing of the Settlement is to provide interested parties the opportunity to provide remarks or differing positions on the settlement. I&E further emphasized that the intent is not for interested parties to attempt to introduce evidence, submit testimony, and essentially partake in paper litigation. I&E asserted that the OCA is attempting to impermissibly litigate a settled matter through its comments and disregard my September 25, 2020, Order, and that this attempt should not be allowed.

On December 3, 2020, the OCA filed its response to Verde’s Motion.

For the reasons set forth below, Verde’s Motion is granted.

DISCUSSION

Verde’s Position

Verde argues that the OCA’s attempt to introduce evidence and testimony in the form of the Alexander Affidavit and its two exhibits violates my September 25, 2020, Order and basic principles of due process. Verde asserts that the Affidavit and its two exhibits go far beyond the scope of the limits established for the OCA’s Comments on the Joint Petition, since my Order provided the OCA with the 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.” Verde asserts that while the OCA provided some substantive comments on the Settlement, the inclusion of the Affidavit and Exhibits goes far beyond “delineating” the issues that OCA would raise if the Settlement was rejected, or “outlining” how the OCA’s interests would be affected if the Settlement is accepted. Verde notes that the express purpose of the Alexander Affidavit, as stated in paragraph 11 of the Affidavit, was to “provide additional facts and evidence.” Verde maintains that the attempted submission of the Alexander Affidavit shows a clear disregard for the proper scope of comments in response to a Settlement Petition, and is essentially an attempt by the OCA to improperly expand the record in the proceeding and develop a one-sided “parallel” record without affording any due process to Verde or I&E.

Verde further argues that the inclusion of additional “evidence and facts” in the OCA’s Comments is prejudicial to Verde. As noted in the Joint Stipulation of Facts submitted with the Settlement Petition, had this proceeding not settled, Verde indicated it would have challenged the accuracy of the statements, opinions and conclusions of witnesses through evidence and testimony.[[2]](#footnote-2)

Verde notes that no litigation procedure was established for the case because the Complaint was fully resolved via a Settlement between the Complainant and the Respondent. Verde maintains that inclusion of the Alexander Affidavit in the record in this matter would violate Verde’s and I&E’s due process rights because with no procedural schedule or hearings, Verde and I&E had no opportunity to cross examine Ms. Alexander, serve discovery on her, or submit testimony to rebut her allegations. Verde argues that expanding the procedural schedule to allow for such cross-examination and testimony is not the appropriate remedy to the situation, and that to do so would effectively reverse my prior ruling regarding the appropriate process for evaluating the Joint Petition, and reward the OCA for its disregard of that ruling in its attempt to “force” litigation of a proceeding that has been fully resolved.

Additionally, Verde argues that the Alexander Affidavit and Attachment BA-2 are inadmissible hearsay. Verde notes that the Commission, as an administrative body, is bound by due process provisions of constitutional law and by principles of common fairness.[[3]](#footnote-3) Among the requirements of due process are notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.[[4]](#footnote-4) Verde maintains that unauthenticated written statements such as Ms. Alexander’s Affidavit constitute inadmissible hearsay. The Affidavit is a statement, other than one made by a declarant while testifying at trial, that is being offered into evidence to prove the truth of the matters asserted therein. As such, it constitutes hearsay under Pennsylvania Rule of Evidence 801.[[5]](#footnote-5)

Verde asserts that the OCA is attempting to use the Alexander Affidavit to create a factual record that it wants the Commission to rely upon to reject a Settlement, and force I&E and Verde to litigate a Complaint that they have satisfactorily resolved. It is Verde’s position that even if the prior procedural rulings in the case would allow for submission of testimony and evidence, the Alexander Affidavit would be inadmissible hearsay evidence, constructed on a foundation of still more hearsay statements, that were compiled well after the statements were made.

Verde maintains that Exhibit BA-2 also cannot be included in the record in this matter because it was prepared by a third party, and it summarizes prior phone discussions between call representatives and various unnamed individuals about alleged discussions between those unnamed individuals and unnamed sales agents. Ms. Alexander did not observe any of those alleged interactions, which raises serious foundation, authentication, and due process issues. Moreover, neither Verde nor I&E have the ability to cross-examine Ms. Alexander, the preparer of the report, or any of the individuals who were alleged to have participated in the underlying discussions.

Additionally, Verde asserts that the body of the OCA’s Comments contains statements that go well beyond the scope of the proceeding and factual record and therefore should be stricken. Verde notes that the Complaint in this matter relates solely to 1) alleged conduct by vendors of Verde that violated the Commission’s regulations in connection with 339 customer interactions; 2) alleged deficient notification of door-to-door sales activity; and 3) alleged improper account access by agents acting on behalf of Verde. Verde further notes that the allegations in a Complaint are not established facts but rather mere allegations that need to be proven by substantial evidence before they can be relied upon. The Stipulated Facts in Support of the Joint Petition for Approval of Settlement constitutes the factual record in this case and delineates that scope of the alleged violations, the factual foundation for the alleged violations, and material facts on which the Settlement is based.

In addition to the attachments challenged by Verde in its Motion, Verde maintains that the following portions of the OCA’s Comments contain statements that go well beyond the scope of the proceeding and factual record and therefore should be stricken, specifically:

1. All references to the Alexander Affidavit and/or its Exhibits;
2. Discussion of Verde’s affiliates, who are not parties to this proceeding;
3. Discussion of Verde’s operations in other states, which are not within the Commission’s jurisdiction; and
4. Discussion of Verde’s ownership, and vendors, which are not raised in the Complaint or the Stipulation of Facts.

Moreover, Verde argues that the OCA’s proposed “findings of fact” should be stricken because the September 25, 2020 Order did not permit the expansion of the factual record in this case. Verde submits that the OCA’s proposed “findings of fact” are based entirely on information that is not in the record in this case, which is limited to the Stipulation of Facts submitted by Verde and I&E. Moreover, the OCA’s proposed “findings of fact” rely upon and seek to amplify hearsay (i.e. the Alexander Affidavit and Exhibits). Lastly, Verde argues that the OCA’s proposed “findings of fact” seek to address issues that go well beyond the scope of the proceeding, including allegations regarding Verde operations in other states, Verde’s affiliates, and Verde’s operations that were not part of the Complaint.

OCA’s Position

The OCA responds that its presentation does not violate my September 25, 2020 Order, is not an impermissible expansion of the proceeding, and does not include impertinent allegations. The OCA maintains that the comments, Affidavit of Barbara Alexander and attached exhibits do not violate Verde’s due process rights.

The OCA notes that in my September 25, 2020 Order, I permitted it to file substantive Comments on the Settlement. The OCA argues that my order did not prohibit it from introducing its own facts and evidence upon which it based its substantive Comments in opposition to the proposed Settlement. As the Order sought substantive comments from the OCA, the OCA maintains that the substance of its comments was based on the facts that the OCA had been able to develop through the discovery it was permitted to conduct. To file substantive comments without factual support would have led to dismissal of the OCA’s comments as unsupported. The OCA submits that Verde’s narrow interpretation of the September 25, 2020, Order would create a Catch-22 where the OCA would face dismissal for failure to support its position, but is precluded from presenting that support by Verde’s Motion to Strike.

The OCA asserts that Ms. Alexander’s Affidavit and the Findings of Fact provide relevant background information on Verde’s ownership structure, Verde’s and its affiliate’s history of similar allegations and proceedings in other jurisdictions, and Verde’s use and management of third-party vendors in Pennsylvania. The information cited by the OCA in its Comments involves the allegations and functions of Verde’s management which are necessary to understanding the OCA’s substantive issues with the Settlement and its potential implementation. The OCA believes that this information is vital to support its position that the proposed Settlement does not serve the public interest.

The OCA’s identification of specific deficiencies in the Settlement in Section V of its Comments are based on the facts it was able to develop. The purpose of the Affidavit and proposed Findings of Fact are to allow the OCA to make informed, substantive Comments permitted by the September 25, 2020, Order. The OCA’s concerns identified in the Comments needed to be supported with facts, and the information developed from the discovery responses was critical to understanding and supporting the OCA’s substantive Comments.

The OCA argues that the only position rejected in the September 25, 2020, Order was OCA’s request that the matter be held in abeyance for 60 days in order to allow the OCA to conduct further discovery. OCA further notes that the September 25, 2020, Order did not address the substance of the OCA’s issues identified in its Statement of Opposition or its Prehearing Memorandum but asked for the OCA to specifically delineate the substance of those issues in its Comments. The OCA maintains that Ms. Alexander’s Affidavit and attached Exhibits are not an attempt to create a “one-sided” parallel record. Instead, the OCA’s Comments and Affidavit are presented to show the deficiencies the OCA has found to date in the proposed Settlement.

Additionally, the OCA argues that the September 25th Order did not limit it to only the facts presented by Verde and I&E, and that it would not be proper to expect that a party contesting the settlement must rely solely on those limited facts. The OCA maintains that the facts presented in its Comments are necessary for an evaluation of the allegations raised by I&E’s Formal Complaint and the proposed Settlement proffered by Verde and I&E to resolve these allegations.

Regarding the Affidavit of Barbara Alexander and attached exhibits, the OCA submits that this information and related allegations are presented to demonstrate the potential deficiencies of the Settlement and identify the issues that the OCA has identified with the Settlement. Moreover, the OCA has identified in its Comments and Affidavit of Barbara Alexander the facts that the Verde and I&E Settlement and Stipulation of Facts do not address.

Regarding Verde’s hearsay concerns, the OCA counters that Verde’s request to strike the entirety of Ms. Alexander’s Affidavit because it constitutes hearsay is inaccurate, overly broad, and should be rejected. Many of the statements within the Affidavit were derived from Verde’s verified responses to OCA and I&E data requests, PPL’s verified responses to I&E data requests, and Ms. Alexander’s first-hand knowledge and own research as an expert in the field. Additionally, the PPL Report and the portion of the Affidavit and Comments which rely upon the allegations found within it, do not constitute hearsay in light of the purpose of the statements contained in them. Ms. Alexander’s Affidavit and the PPL Report are offered here to alert the Commission that these are the full and detailed allegations which are to be considered by the Commission in deciding whether the proposed Settlement is in the public interest.

OCA further argues that under Pennsylvania law, there is an exception to the rule against hearsay for records of a regularly conducted activity at 225 Pa. Code Section 803(6). This exception permits documents, including memorandums and reports, into the record if it was made at or near the time—or from information transmitted by—someone with knowledge, the record was kept in the course of regularly conducted activity of a “business,” making the record was a regular practice of that activity, the aforementioned conditions can be shown by the testimony of the custodian or another qualified witness, and the opponent does not show any indication of a lack of trustworthiness.[[6]](#footnote-6) The PPL Report is a confidential memorandum in response to I&E data requests served to PPL. It provides records of alleged conversations between PPL personnel and Verde customers and was the basis for I&E’s Formal Complaint. The Commission recognizes this exception to the hearsay rule when commonly used in consumer complaint proceedings and only requires a copy of a business record and its appropriate authentication by a witness qualified to provide testimony on the subject matter.[[7]](#footnote-7) Similarly here, even if the document contained hearsay for the purpose of showing the truth of the statements made within it, the document would still be admissible under the exception for records of a regularly conducted activity. The PPL Report constitutes a report created by PPL to keep record of contacts between PPL employees and customers regarding alleged discrepancies and complaints, mostly alleged unauthorized switches, throughout the time period of the allegations of this Formal Complaint. The PPL Report also includes a signed verification from a project manager at PPL.[[8]](#footnote-8)

Regarding Verde’s arguments concerning impertinent information and the scope of this proceeding, the OCA responds that its Comments and Findings of Fact are fully within the parameters set forth by my September 25th Order. In accordance with the Order, the OCA filed substantive Comments with supporting facts and information developed from Verde responses to OCA and I&E discovery as well as PPL responses to I&E data requests. Far from being “impertinent allegations,” the OCA’s position is fully supported by the facts it has developed to date. The Affidavit, written and sworn to by OCA witness Barbara Alexander, was compiled using: I&E’s Formal Complaint in this matter; Verde’s verified responses to interrogatories and data requests made by I&E and the OCA in this matter; and Ms. Alexander’s own research on Verde and its parent Company, Spark, and verified data request responses provided by PPL Electric to I&E data requests upon which the allegations in I&E’s Formal Complaint were based. The information contained in the Affidavit relates to facts and findings developed by the OCA during discovery and are the basis of the OCA’s substantive opposition to the proposed Settlement. It provides the necessary information for the ALJ and the Commission to conduct a full and complete analysis of the allegations, the proposed Settlement, and whether the proposed Settlement serves the public interest given this background information developed in discovery.

Disposition

When I&E and Verde filed their settlement on June 30, 2020, no presiding officer had been assigned to this case. Regarding the review of a settlement petition by the Commission when no presiding officer has been assigned, Commission Regulations provide the following:

When no presiding officer has been assigned, the Commission will review the settlement. Parties not joining in the settlement may submit objections to the Commission within 20 days of the filing of the petition unless another time period is set by the Commission.

52 Pa.Code § 5.232(g). As previously noted, the OCA filed its Statement in Opposition to the Joint Petition on July 20, 2020. The OCA’s Statement in Opposition to the Joint Petition largely challenged the Settlement on procedural grounds because the OCA maintained that it had not fully conducted discovery.

In its Prehearing Memorandum and during the August 27, 2020, Prehearing Conference, the OCA 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 were possible modifications to the settlement that would address the OCA’s concerns. The OCA further proposed that at the end of that 60-day period, the parties could each evaluate their 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.

By Order dated September 25, 2020, I denied the OCA’s request for a 60-day abeyance. In my September 25, 2020 Order, I went into considerable detail explaining why the OCA had sufficient time to conduct discovery (a period of six months) and why I denied their request. However, in the interest of fairness, I wanted to provide the OCA with another opportunity to provide substantive comments on the Settlement since their July 20, 2020, Statement in Opposition largely challenged the Settlement on procedural grounds. With that in mind, I offered the OCA the opportunity 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. I did not invite the OCA to provide an affidavit with accompanying exhibits from the witness it proposed in its Prehearing Memorandum, to provide proposed findings of fact, or to attempt to expand the scope of this proceeding.

My expectation was for the OCA to provide comments based upon the allegations raised by I&E in the Complaint and the information obtained through discovery. Comments based solely upon this information would have been proper since the comments would have been based upon information available to all parties throughout the course of this proceeding. It would be improper for me to rely upon this affidavit or the accompanying exhibits, or any information contained within the comments that is derived from or references these materials, since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony. Moreover, I agree that the comments provided by the OCA regarding the Company’s dealings in other states is beyond the scope of this proceeding and should be stricken.

As I said in my September 25, 2020, Order regarding intervenor’s rights, 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) 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, and ultimately settling the Complaint. The Settling Parties did ask for the OCA’s input prior to filing the Settlement with the Commission, and the OCA declined the Settling Parties’ request. My role at this point is simply to determine whether the Settlement should be approved as being in the public interest.

Accordingly, the Motion to Strike filed by Verde is granted in its entirety, and the identified items will be stricken from the record.

THEREFORE,

IT IS ORDERED:

1. That the Motion to Strike Portions of Comments of the Office of Consumer Advocate filed by Verde Energy USA, Inc. in this matter is granted;
2. That the following portions of the Office of Consumer Advocate’s Comments are stricken from the record:
3. The affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2;
4. The OCA’s proposed findings of fact;
5. The OCA’s discussion of Verde ownership structure, affiliates and operations in other states, and vendors; and
6. All citations to “Affidavit” and/or its Exhibits, and Ms. Alexander’s opinions throughout the comments; and
7. That the record in this matter is now closed.

Date: January 15, 2021 /s/

Christopher P. Pell

Deputy Chief Administrative Law Judge

**C-2020-3017229 Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Verde Energy USA, Inc.**

**Revised on 9-25-20**

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1. A party has 20 days from the date of service within which to answer or object to a motion unless the period of time is otherwise fixed by the Commission or the presiding officer. 52 Pa.Code § 5.103(c). [↑](#footnote-ref-1)
2. *See* Stipulation Facts in Support of the Joint Petition for Approval of Settlement, at ¶ 46. [↑](#footnote-ref-2)
3. *Hess. v. Pa. Pub. Util. Commission*, 107 A.3d 266 (Pa. Cmwlth. 2014)(*Hess*); *Bridgewater Borough v. Pa. Pub. Util. Commission*, 124 A. 2d 165 (Pa. Super. 1956); *McCormick v. Pa. Pub. Util. Commission*, 30 A.2d (Pa. Super. 1943). [↑](#footnote-ref-3)
4. *Hess*. [↑](#footnote-ref-4)
5. 225 Pa. Code §801. [↑](#footnote-ref-5)
6. *Id*.  
    [↑](#footnote-ref-6)
7. *See Sanchez* *v. PPL Electric Utilities Corporation,,* Docket No. C-2015-2472600 (Order entered July 21, 2016) at 12-13. [↑](#footnote-ref-7)
8. *See OCA Comments (Confidential Version)*, Affidavit Attachment BA-2, p. 125 of PDF. [↑](#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)