**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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|  | Public Meeting held October 7, 2021 |
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| Commissioners Present:  Gladys Brown Dutrieuille, Chairman, Statement, Dissenting  John F. Coleman, Jr.  Ralph V. Yanora | |
| Pennsylvania Public Utility Commission,  Bureau of Investigation and Enforcement  v.  Verde Energy USA, Inc. | C-2020-3017229 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Interlocutory Review and Answer to Material Question (Petition) filed on January 28, 2021, by the Office of Consumer Advocate (OCA or Petitioner),[[1]](#footnote-2) in the above-captioned proceeding.[[2]](#footnote-3) On February 5, 2021, the Bureau of Investigation & Enforcement (I&E) filed a Brief in Opposition to the Petition. On February 8, 2021, the Petitioner filed a Brief in Support of its Petition. On that same date, Verde Energy USA, Inc. (Verde) [[3]](#footnote-4) filed a Brief in Opposition to the OCA’s Petition.

The OCA seeks interlocutory review and an answer in the affirmative by the Commission to the Material Question, summarized as follows:

Whether the Administrative Law Judge’s (ALJ’s) Interim Order Granting the Motion to Strike of Verde Energy USA, Inc., dated January 15, 2021 (*Interim Order*), erred as a matter of law, by granting Verde’s Motion *In Limine* to strike the OCA’s factual materials presented in support of the OCA’s substantive comments contesting the settlement between the I&E and Verde in this proceeding, thereby denying the OCA a meaningful opportunity to be heard regarding its objections to the non-unanimous settlement?

OCA Pet. at 1-2; OCA Brief in Support at 3.

For the reasons discussed more fully below, we shall deny the Petition filed by the OCA, in the above-captioned proceeding, and answer the Material Question in the negative. Accordingly, we shall: (1) deny the Petition in its entirety; adopt the ALJ’s *Interim Order* granting the Motion to Strike of Verde Energy USA, Inc., dated January 15, 2021, issued by ALJ Christopher J. Pell in this proceeding; and (2) return the matter to the Office of Administrative Law Judge (OALJ) for further proceedings to promptly determine whether the Settlement proposed in this matter should be approved as reasonable and necessary and in the public interest, in accordance with this Opinion and Order.

# History of the Proceeding

On January 30, 2020, I&E filed a Formal Complaint against Verde with the Commission pursuant to the authority[[4]](#footnote-5) under Section 701 of the Code, 66 Pa. C.S. § 701. In the Complaint, I&E alleged that 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, from the period beginning February 2017 through the date of the Complaint.

On February 14, 2020, Verde filed an unopposed Motion seeking an extension of time to file an Answer to the Complaint, which was granted by the Secretary’s Bureau.

On February 24, 2020, the OCA filed a Notice of Intervention and Public Statement in this matter pursuant to its statutory authority under 71 P.S. § 309-4.

On March 30, 2020, and May 15, 2020, Verde filed two additional unopposed Motions seeking extensions of time to file an Answer to the Complaint, which were consecutively granted by the Secretary’s Bureau through and until June 30, 2020.

On June 30, 2020, Verde filed an Answer to the Complaint denying the allegations set forth in the Complaint. On that same date, I&E and Verde (Joint Petitioners) filed a Joint Petition for Settlement (Joint Petition, Joint Petition for Settlement, or Settlement).

On July 10, 2020, the OCA filed a letter stating its intention to file a Statement in Opposition to the Joint Petition and requesting that the Commission assign the matter to an ALJ.[[5]](#footnote-6) On July 20, 2020, the OCA filed its Statement in Opposition to the Joint Petition.

On July 31, 2020, the matter was assigned to ALJ Christopher P. Pell, who issued a Prehearing Conference Order. On the same date, a Call-In Telephonic Hearing Notice was served on the Parties scheduling an Initial Call-In Telephonic Prehearing Conference for August 27, 2020.

On August 21, 2020, Verde, I&E, and the OCA filed Prehearing Memoranda in accordance with ALJ Pell’s Prehearing Conference Order issued on July 31, 2020. The OCA, in its Prehearing Memorandum, identified three issues and a witness and requested that the matter be held in abeyance for sixty (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 the OCA’s concerns.[[6]](#footnote-7) The OCA further proposed that at the end of sixty (60) days, 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.

On August 27, 2020, the Call-In Prehearing Conference took place as scheduled, during which counsel for Verde, I&E, and the OCA participated and presented their respective positions as laid out in their Prehearing Memoranda.

In the Order Denying the OCA’s Request for Sixty Day Abeyance, dated September 25, 2020 (*Abeyance Order*), ALJ Pell denied the OCA’s request for a 60-day abeyance. The ALJ explained in detail why the OCA had sufficient time to conduct discovery, totaling a six month period of time and why the request was denied.[[7]](#footnote-8) In addition, ALJ Pell directed: that I&E and Verde 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 substantive comments within 40 days of the date of the order; and that I&E and Verde would be permitted to file reply comments within 60 days of the date of the order.

In accordance with ALJ Pell’s *Abeyance Order*: on October 19, 2020, I&E and Verde filed their Joint Stipulation of Facts (Joint Stipulation of Facts); on November 10, 2020, the OCA filed its Comments in Opposition of the Joint Petition, including the Affidavit of Barbara R. Alexander and the OCA’s proposed findings of fact; and on November 30, 2020, I&E and Verde each filed Reply Comments to the OCA’s Comments.

On November 18, 2020, Verde filed with the Commission its Motion to Strike Portions of Comments of the Office of Consumer Advocate (Motion to Strike).[[8]](#footnote-9) In the Motion to Strike, Verde requested that the following portions of the OCA’s Comments be stricken:

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

On November 19, 2020, I&E filed its Letter in Support of Verde Energy USA Inc.’s Motion to Strike. On December 3, 2020, the OCA filed its response to Verde’s Motion to Strike.

On January 15, 2021, the ALJ issued the *Interim Order* granting Verde’s Motion to Strike.

On January 28, 2021, the OCA filed the above-referenced Petition for Interlocutory Review and Answer to Material Question, seeking the Commission’s interlocutory review of the ALJ’s *Interim Order*. As noted above, in accordance with 52 Pa. Code § 5.302(b), on or before February 8, 2021, the Parties timely filed Briefs in response to the OCA’s Petition. Specifically, the OCA filed a Brief in Support of its Petition and I&E and Verde each separately filed a Brief in Opposition to the OCA’s Petition.

# Discussion

## Legal Standards

A party seeking the Commission’s interlocutory review of an issue which has arisen during the course of a proceeding may file a petition within fifteen days of the effective date of an order giving rise to the issue. *See* 52 Pa. Code § 5.302(a) (pertaining to petitions for interlocutory review and answer to material question); *see also* 52 Pa. Code § 5.572(c) (pertaining to petitions for relief). Section 5.302(a) provides as follows:

During the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition must be in writing with copies served on all parties and the presiding officer and state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

52 Pa. Code § 5.302(a).

Within 30 days on receipt of a petition for interlocutory review and answer to a material question, the Commission may either: (1) continue, revoke or grant a stay of the proceedings, if necessary; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question. 52 Pa. Code § 5.303(a)(1)-(4).

The standard for interlocutory review and answer to material question raised by a party requires the petitioner to “state…the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings.” 52 Pa. Code § 5.302(a). The pertinent consideration is whether such review is *necessary* in order to prevent substantial prejudice or expedite the conduct of the proceedings. *Commonwealth of Pennsylvania, et al. v. I**DT Energy, Inc*., 2014 Pa. PUC LEXIS 715, \*16 (Pa. P.U.C. December 18, 2014). The petitioner must prove that, without such interlocutory review, some harm would result which would not be reparable through the normal Commission review process and, therefore, that the relief sought should be granted now, rather than later. *Id*.; *see also* *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A‑310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R‑00984411 (Order entered February 11, 1999).

Petitions for interlocutory review are allowed only in the most extraordinary circumstances; the preferred approach being to permit proceedings to move forward in the normal course to provide all parties, the presiding officer, and the Commission, with a full opportunity to develop the record, brief issues, and present arguments at each stage. *See* *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3.

In a petition for interlocutory review involving the scope and admissibility of evidence in a proceeding, the Commission will consider the presiding ALJ’s authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in the statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and the Commission’s Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in non-rate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223 (pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223. The Commission has found that when an ALJ commits a reversible legal error relating to the admission of relevant evidence, “compelling reasons” exist for interlocutory review if the resulting substantial prejudice to a party’s right to present all relevant evidence cannot be rectified during the normal Commission review process. *P**a. PUC v. PGW*, Docket No. R-2020-3017206, *et al*. at 11‑12 (Opinion and Order entered Aug. 6, 2020).

Finally, as a general matter, any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC*,625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

## ALJ’s Interim Order

In the *Interim Order*, ALJ Pell concluded that the evidence found within the materials he struck was not available to all parties throughout the course of the proceeding and that it would not be proper for him to rely upon these materials or any references to them since I&E and Verde never had the opportunity to cross-examine this witness or to offer rebuttal testimony. *Interim Order* at 13. ALJ Pell also noted that the OCA’s evidence regarding Verde’s dealings in other states was beyond the scope of this proceeding. *Id*.

In the *Interim Order*, the ALJ explained that in his *Abeyance Order*, issued on September 25, 2020, he denied the OCA’s request for a 60-day abeyance to conduct further discovery in this matter. He stated that the OCA had sufficient time to conduct discovery (a period of six months) and why he denied the OCA’s request. However, the ALJ stated that, in the interest of fairness, he wanted to provide the OCA with another opportunity to provide substantive comments on the Settlement since the OCA’s July 20, 2020 Statement in Opposition largely challenged the Settlement on procedural grounds. With that in mind, he stated that he “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.” The ALJ explained that he “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.” *Interim Order* at 12-13.

Rather, the ALJ noted his expectations and explained his intent. Specifically, the ALJ explained his intent in directing I&E and Verde to file stipulated facts while directing the OCA to file Comments in the *Abeyance Order*:

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.

*Interim Order* at 13.

The ALJ explained that it would be improper to rely upon the OCA’s affidavit or the accompanying exhibits (or any information derived therefrom) since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony. Additionally, the ALJ found that the factual comments provided by the OCA regarding Verde’s corporate structure in other states was beyond the scope of this proceeding and should be stricken. *Id.*

The ALJ reasoned that because I&E and Verde asked for the OCA’s input prior to filing the Settlement with the Commission, and the OCA declined the request, that the ALJ’s role at that point was simply to determine whether the Settlement should be approved as being in the public interest*. Interim Order* at 13.

Based on the foregoing, the ALJ granted Verde’s Motion to Strike in its entirety, and struck the following portions of the OCA’s Comments from the record:

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; and

*Interim Order* at 13, 14.

## Positions of the Parties

**1. OCA**

The OCA argues that it was reversable legal error for the ALJ to grant Verde’s Motion to Strike. The OCA submits that its Comments referencing Ms. Alexander’s Affidavit, attachments, and the OCA’s Findings of Facts are relevant and admissible in this proceeding and due process requires the evidence to go before the ALJ and the Commission for consideration in determining whether the proposed Settlement should be approved. The OCA’s witness Barbara Alexander’s written and sworn Affidavit contains facts and findings developed by the OCA during discovery and are based on: (1) discovery responses provided by Verde; (2) the information obtained by I&E that formed the basis of the Formal Complaint; or (3) public documents concerning Verde, its parent, and its affiliates. OCA Brief in Support at 1-2, 6-12. All of the information was available to Verde and I&E.

The OCA submits that the information it presented supports the OCA’s substantive opposition to the proposed Settlement and provides the necessary information for the Commission to conduct a full and complete analysis of the proposed Settlement, and whether the proposed Settlement serves the public interest. Specifically, the Affidavit and the Findings of Fact, provide relevant background information, *inter alia*, 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 OCA submits that this information is necessary to understanding the OCA’s substantive issues with the Settlement and its potential implementation. Importantly, the OCA’s identification of specific deficiencies in the Settlement in Section V of its Comments is supported by the facts it was able to develop in the limited discovery it was able to conduct. OCA Brief in Support at 1-2, 6-12.

The OCA submits that the Stipulation of Facts jointly filed by I&E and Verde did not contain many of the pertinent facts which the OCA included with its Comments to demonstrate why the proposed Settlement falls short of serving the public interest or misstated other facts relating to this proceeding. Without the ability to present substantive Comments on the contested proposed settlement and the facts and evidence supporting those substantive comments, the OCA is not provided a meaningful opportunity to be heard in this proceeding in violation of its due process rights. The substantial prejudice stemming from the ALJ’s legal error in regard to the OCA’s stricken evidence cannot be cured during the normal Commission review process in the proceeding. OCA Brief in Support at 1-2, 6-12.

The OCA argues that in *P**opowsky v. Pa. PUC*, 805 A.2d 637, 643 (Pa. Cmwlth. 2002) (*Popowsky*), the Commonwealth Court found that the provisions of Section 703 “clearly envisioned a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings” and that “the allowance by the Commission to submit comments without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard as provided in Chapter 7 of the Public Utility Code or due process.” The OCA submits that although *P**opowsky* involved Section 703(g) of the Code regarding the rescission and amendment of orders, the provision refers to the “notice and opportunity to be heard” safeguard as provided in Chapter 7 entirely implying that the safeguard applies to all Complaints under Chapter 7. OCA Brief in Support at 6.

The OCA asserts that the Commission’s interlocutory review and Answer in the Affirmative to the Material Question is necessary to address this matter at this time as adequate due process is fundamental to all Commission decisions. If the Commission renders a decision without full consideration of the facts, the public interest will not be served, and the OCA will be substantially prejudiced in its representation of consumers. OCA Brief in Support at 12, 13.

**2. I&E**

I&E opposes the Petition and argues that the Commission should decline to answer the OCA’s Material Question because the OCA has failed to provide a necessary and compelling reason why interlocutory review is required to prevent substantial prejudice or expediate the conduct of the proceeding. Notably, according to I&E, the OCA’s Petition for Interlocutory Review will unnecessarily delay the current proceeding, which is ripe for a decision. I&E Brief in Opposition at 6.

In the alternative, the Commission could answer the OCA’s material question in the negative and find that ALJ Pell did not err in striking the OCA’s so-called “evidence” from the record. I&E argues that the affidavit and attachments are not evidence, especially since the Complaint has been resolved through the Joint Petition for Settlement and is fully supported by the Joint Stipulation of Facts. According to I&E, the OCA’s attempt to introduce the affidavit and attachments as evidence further showcases the OCA’s inability to accept that the Complaint has been settled and is not being litigated. Further, I&E argues it shows the OCA’s lack of understanding of the standard in settled matters, *i.e.,* whether the Settlement is in the public interest, and a continued lack of compliance regarding ALJ Pell’s Orders. I&E submits that ALJs have procedural avenues at their disposal to focus or narrow the issues in their cases, if necessary, including settlement, motions made by the parties, and the authority to exclude irrelevant or immaterial evidence and otherwise regulate the course of the proceeding pursuant to 52 Pa. Code § 5.483(a) and to control the receipt of evidence pursuant to 52 Pa. Code § 5.403(a). Thus, according to I&E, ALJ Pell properly granted Verde’s Motion to Strike and removed the OCA’s inappropriate “evidence” from the record. I&E Brief in Opposition at 6.

I&E submits that the OCA, as an intervenor, does not have the right or ability to force I&E and Verde to litigate a settled matter. I&E Brief in Opposition (citing *Sunoco End-of-Emergency Order* at 10). According to I&E, the intent of the comment period in the *Abeyance Order* is for the interested party to provide its position on the settlement or the settlement’s impact on that party, not attempt to litigate through the comment by attaching affidavits and documents or including references to alleged facts outside the scope of the proceeding. Thus, I&E argues the OCA overstepped its role as an intervenor by attaching the affidavit, findings of fact, and various refences to Verde that are unrelated and outside the scope of this proceeding to their comments. I&E Brief in Opposition at 8-9.

**3. Verde**

Verde opposes the Petition and argues that the Material Question should be answered in the negative. According to Verde, the ALJ correctly struck the additional materials included by the OCA in its Comments because the materials were not part of the evidentiary record in the case. Verde argues the OCA’s inclusion of the materials in its Comments went beyond the scope of the proceeding and the scope of allowable comments, and they raised serious due process concerns. Verde Brief in Opposition at 6. Verde argues that the Commission has made it clear that the role of an intervenor in a proceeding before the 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.” Verde Brief in Opposition at 8 (citing *Sunoco End-of-Emergency Order* at 10). Verde argues the OCA is simply disregarding the Commission’s policy to encourage settlements and has instead taken the formal position that the Complaint should be litigated despite that the Complainant and Respondent reached a full settlement of the Complaint. Verde Brief in Opposition at 8.

Verde argues that the premise of the OCA’s Material Question as stated is flawed. According to Verde, the OCA was in no way denied any meaningful opportunity to be heard regarding its objections to the Settlement. To the contrary, after the Settlement was filed, the OCA was given the opportunity to serve three sets of discovery requests, advocate its position at a Prehearing Conference, and submit written comments explaining its position on the Settlement. According to Verde, the OCA’s true position *is not* that it was denied an opportunity to be heard. Rather, the OCA’s true position, as it has stated explicitly, is that the OCA should be permitted to force a Complainant and a Respondent to litigate a case that they had already fully settled. Verde Brief in Opposition at 6, 8-9. Verde argues that the OCA, having been provided the opportunity to provide input on the Settlement Petition and refusing to do so, and then having the opportunity to submit comments on the Settlement, cannot reasonably argue that it was not given an opportunity to be heard regarding the Settlement. Verde Brief in Opposition at 9. In light of this, Verde submits that the OCA has not demonstrated any substantial prejudice to its interests as an intervenor, and therefore there is no compelling reason for the Commission to grant the OCA’s request for interlocutory review. Furthermore, Verde argues that addressing the OCA’s Material Question will not expedite the conduct of the proceeding, and in fact it will do just the opposite – it will delay the review of a full settlement that is fully supported by both the Complainant and the Respondent and that is ripe for review and disposition. Verde Brief in Opposition at 9.

According to Verde, ALJ Pell’s *Abeyance Order* explicitly permitted 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.” Verde submits that while the OCA did provide some substantive comments on the Settlement in its Comments in Opposition to the Joint Petition, the OCA’s “Comments” mostly attempted to interject additional proposed facts and evidence that went far beyond the scope of Comments permitted by ALJ Pell in his *Abeyance Order*. The filing that the OCA refers to as its “Comments” is tantamount to a hybrid of a legal brief, with impermissible written testimony, unauthenticated exhibits consisting entirely of hearsay, discussion of matters that are far outside the scope of the Complaint and the Settlement, and “Findings of Fact” that were based almost entirely on information that is not in the record in the proceeding. Verde contends the ALJ was entirely correct in striking those improper portions of the OCA’s Comments, and the striking of those improper portions did not deny the OCA any opportunity to be heard regarding the Settlement’s terms. Verde Brief in Opposition at 7, 9-15.

**D. Disposition**

For the reasons discussed more fully below, we shall deny the Petition, answer the Material Question in the negative, adopt the ALJ’s *Interim Order*, and return the matter to the OALJ for further proceedings to determine whether the proposed Settlement is reasonable[[9]](#footnote-10) and necessary and in the public interest[[10]](#footnote-11), as appropriate, in accordance with this Opinion and Order.

As previously noted, the ALJ explained in his *Interim Order* that he “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.” [[11]](#footnote-12) Rather, the ALJ noted that his “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.”[[12]](#footnote-13) The ALJ explained that it would be improper to rely upon the OCA’s affidavit or the accompanying exhibits (or any information derived therefrom) since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony. Additionally, the ALJ found that the factual comments provided by the OCA regarding Verde’s corporate structure in other states was beyond the scope of this proceeding and should be stricken.

We have considered the opposing arguments and rationale to the ALJ’s *Interim Order* presented in the OCA’s Petition, which we reject. We recognize that I&E and Verde have worked hard in negotiating and reaching a Settlement. We also recognize that the Commission has a long-standing policy to encourage settlements.[[13]](#footnote-14) 52 Pa. Code § 5.231(a) *see also* 52 Pa. Code § 69.401. We conclude that the OCA’s due process rights are protected by the opportunity to file comments. *See*, *i.e*., *ARIPPA v. Pa. PUC*, 792 A.2d 636, 661 (Pa. Cmwlth. 2002).

We agree with the ALJ that it would be improper to rely on the additional factual materials included in the OCA’s substantive comments for the reasons set forth in the *Interim Order*. Additionally, we point out that the OCA, because of its choice to proceed as an intervenor, does not have the ability to require I&E and Verde to litigate this matter. 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.”[[14]](#footnote-15) I&E and Verde acted properly by engaging in settlement discussions and ultimately settling the Complaint. In fact, I&E and Verde asked for the OCA’s input prior to filing the Settlement, but the OCA declined this request. We conclude the OCA then improperly attempted to use its role as an intervenor to introduce additional factual materials in its substantive comments.[[15]](#footnote-16) For these reasons, the Motion to Strike was properly granted by the ALJ and the Material Question presented in the OCA’s Petition should be answered in the negative.

In addition, we agree with I&E that we should answer the Material Question in the negative so that the current proceeding is not unnecessarily delayed. It is important to note that the Settlement before us today includes terms for the payment by Verde of refunds to affected customers. As such, the OCA’s Petition should be denied in its entirety and the matter should be returned to the ALJ to promptly determine whether the Settlement proposed in this matter should be approved as being in the public interest.

**III. Conclusion**

Based on our review of the Petition, the Positions of the Parties, and the applicable law, we shall deny the Petition and return this matter to the presiding ALJ, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

l. That the Petition for Interlocutory Review and Answer to Material Question filed on January 28, 2021, by the Office of Consumer Advocate, in the above-captioned proceeding is denied, and the Material Question:

Whether the Administrative Law Judge’s Interim Order Granting the Motion to Strike of Verde Energy USA, Inc., dated January 15, 2021, erred as a matter of law, by granting Verde’s Motion *In Limine* to strike the OCA’s factual materials presented in support of the OCA’s substantive comments contesting the settlement between the I&E and Verde in this proceeding, thereby denying the OCA a meaningful opportunity to be heard regarding its objections to the non-unanimous settlement?

is answered in the negative.

2. That the Interim Order Granting the Motion to Strike of Verde Energy USA, Inc., dated January 15, 2021, issued by Administrative Law Judge Christopher P. Pell in this proceeding, is adopted, consistent with this Opinion and Order.

3. That this matter shall be returned to the Office of Administrative Law Judge, for further proceedings, as deemed necessary, consistent with this Opinion and Order.

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Description automatically generated**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: October 7, 2021

ORDER ENTERED: October 26, 2021

1. The OCA is a statutory intervenor in this Formal Complaint proceeding representing the interest of consumers. *See* 52 Pa. Code §§ 5.72(a)(1), 5.74(b)(4); *see also*, 71 P.S. § 309-4 (“[T]he Consumer Advocate is authorized, and it shall be his duty, in carrying out his responsibilities under this act, to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission in any matter properly before the commission…”). Although the Commission regulates in the public interest which includes, among other things, the interests of consumers, and while the Commission has entrusted I&E, its independent prosecutory arm, with a degree of discretion in how it litigates and negotiates resolution of violations of the Public Utility Code (Code) and Commission Regulations and Orders, the General Assembly nevertheless has statutorily enabled the OCA to specifically represent the interest of consumers in Commission proceedings. [↑](#footnote-ref-2)
2. Procedurally, the material question is asserted by the Petitioner pursuant to a party’s right to seek interlocutory review and answer to a material question, under Section 5.302 of Commission Regulations. 52 Pa. Code § 5.302. [↑](#footnote-ref-3)
3. Verde is a Commission-licensed electric generation supplier (EGS), at Docket No. A-2010-2151038, authorized to operate in various service territories of Pennsylvania electric distribution companies (EDCs). The EDC service territories in which Verde is authorized to operate as an EGS include Allegheny Power, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, PPL Electric Utilities, Inc. (PPL), PECO Energy Company, and UGI Utilities, Inc. [↑](#footnote-ref-4)
4. The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities. *See Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa. C.S.§ 308.2(11). [↑](#footnote-ref-5)
5. As noted earlier, once an Answer is filed disputing the allegations, the matter becomes an adversarial proceeding and should be assigned to the OALJ for the purpose of fixing a hearing or other proceeding as necessary. 66 Pa. C.S. §§ 703(b)-(c). [↑](#footnote-ref-6)
6. 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. The OCA maintained 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 written 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 interrogatories to Verde (OCA Set I). The OCA served follow-up discovery on Verde on July 6, 2020 (OCA Set II) and on August 3, 2020, (OCA Set III). [↑](#footnote-ref-7)
7. The ALJ cited to the Commission Regulations, which 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.” 52 Pa. Code § 5.331(b). [↑](#footnote-ref-8)
8. Verde endorsed its Motion to Strike with a Notice to Plead advising the OCA that it had twenty days to file a written response to the Motion. 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-9)
9. The Commission will consider certain factors to determine whether a proposed settlement for a violation of Commission order, regulation, or statute is reasonable. 52 Pa. Code § 62.1201. [↑](#footnote-ref-10)
10. For a settlement to be approved by the Commission, it must serve the public interest and it must be supported by “substantial evidence.” *Pa. PUC v. PGW*, Docket No. R-2020-3017206 at 13-15 (Opinion and Order entered Nov. 19, 2020). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217. In the event of a non-unanimous settlement, the Commission’s standards for review are the same as those for deciding a fully contested case. *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp.*, Docket Nos. A-2010-2176520, and A-2010-2176732 (Opinion and Order entered March 8, 2011). [↑](#footnote-ref-11)
11. *Interim Order* at 13. [↑](#footnote-ref-12)
12. *Id*. [↑](#footnote-ref-13)
13. “The settlement of a case may reduce the expense of litigation, resolve regulatory uncertainty, and facilitate the prompt implementation of remedial measures intended to improve the safety, quality, or reliability of public utility service. The Commission has entrusted I&E, its independent prosecutory arm, with a degree of discretion in how it litigates and negotiates resolution of pending matters. It is common for I&E to agree to extensions of time to the filing of Answers to permit early resolution of cases. It is not uncommon for I&E to engage in lengthy settlement negotiations even after Answers in opposition to its Formal Complaint are filed, which convert the matter to an adversarial proceeding.” *Sunoco Complaint Order* at 16. [↑](#footnote-ref-14)
14. *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-15)
15. We note that the Settlement does not preclude the OCA from filing its own formal complaint against Verde. [↑](#footnote-ref-16)