

COMMONWEALTH OF PENNSYLVANIA



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July 20, 2020

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement

v.  
Verde Energy USA, Inc.  
Docket No. C-2020-3017229

Dear Secretary Chiavetta:

Attached for electronic filing please find the Statement of the Office of Consumer Advocate 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 in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Laura J. Antinucci  
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Assistant Consumer Advocate  
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E-Mail: [LAntinucci@paoca.org](mailto:LAntinucci@paoca.org)

Enclosures:

cc: Office of Administrative Law Judge (**email only**)  
Certificate of Service

\*292450

## CERTIFICATE OF SERVICE

Re: Pennsylvania Public Utility Commission, :  
Bureau of Investigation and Enforcement : Docket No. C-2020-3017229  
v. :  
Verde Energy USA, Inc. :

I hereby certify that I have this day served a true copy of the following document, the Statement of the Office of Consumer Advocate 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, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 20<sup>th</sup> day of July 2020.

### **SERVICE BY E-MAIL ONLY**

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Dated: July 20, 2020  
\*292449

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, :  
Bureau of Investigation and Enforcement :  
: :  
v. : Docket No. C-2020-3017229  
: :  
Verde Energy USA, Inc. :

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**STATEMENT OF THE OFFICE OF CONSUMER ADVOCATE 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**

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Pursuant to 52 Pa. Code Section 5.232(g), the Pennsylvania Office of Consumer Advocate (“OCA”) hereby respectfully requests that Pennsylvania Public Utility Commission (Commission) refer the Petition for Approval of the Non-unanimous Settlement filed by Verde Energy USA, Inc. (Verde) and the Bureau of Investigation and Enforcement (I&E) (collectively, Joint Petitioners) to the Office of Administrative Law Judge for the development of a record in this matter. The OCA, at this time, opposes the Non-Unanimous Settlement Petition filed on June 30, 2020 and negotiated without including the OCA in the discussions despite the OCA intervening in this matter on February 21, 2020. Based on the seriousness of the allegations and the information the OCA has been able to obtain and review to date, the OCA cannot agree with this proposed Settlement. The OCA respectfully submits that the Commission should allow this matter to proceed so that the alleged violations can be assessed in greater detail and the reasonableness of the proposed remedies in the Settlement can be determined. In addition to the statements above, the OCA states in opposition as follows:

## **I. INTRODUCTION**

### **A. Background.**

On January 30, 2020, the Pennsylvania Public Utility Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a Formal Complaint against Verde Energy alleging, *inter alia*, that from February 2017 up to the date of the Complaint, Verde engaged in deceptive and misleading tactics while conducting door-to-door and telemarketing sales, enrolled customers without authorization (i.e., slamming) and accessed customer accounts without authorization.<sup>1</sup> The allegations stemmed from an initial informal investigation by I&E of Verde during which PPL Electric Utilities (PPL Electric), in response to I&E-served data requests, identified and provided 339 customer accounts allegedly affected by Verde’s alleged conduct.<sup>2</sup> The group of customers impacted by Verde’s alleged improper conduct included some of Pennsylvania’s most vulnerable populations: forty-one (41) customers identified as senior citizens, twelve (12) customers identified as infirmed, disabled or unwell, and three (3) enrolled customers were deceased.<sup>3</sup> I&E requested, as relief, a total civil penalty of \$8,883,000.00, license revocation, refunds in the amount of the first two billing periods to customers whose electricity supply was changed without their consent, and refunds in the amount of any cancellation fees charged to customers for switching suppliers as a result of an unauthorized switch.<sup>4</sup>

On February 14, 2020, Verde was granted an extension of time to file an Answer to the Complaint. The Office of Consumer Advocate (OCA) filed a Notice of Intervention on February 21, 2020 to protect the interests of consumers in this proceeding before the Commission.

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<sup>1</sup> See I&E’s Non-Proprietary Formal Complaint at 4-5.

<sup>2</sup> Id.

<sup>3</sup> Id. at 6.

<sup>4</sup> Id. at 18-19.

Following the OCA’s intervention, on March 30, 2020 and again, on May 15, 2020, Verde requested an extension of time to file its Answer. Prior to each request, Verde notified the OCA of the planned request and asked if there were any objections on behalf of the OCA. The OCA was not provided a reason for the request for extensions of time, but nonetheless stated no objection to Verde’s requests given the occurrence of the COVID-19 pandemic. As no Answer had yet been filed to the Complaint, the OCA refrained from conducting its own discovery in this matter.

On May 20, 2020, the OCA—given the further extension to file and answer and potential delay—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 begin drafting its own discovery. 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 the 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.

The OCA served Set I interrogatories to the Verde on June 1, 2020. Many of the OCA's interrogatories and requests for documents sought to explore further the information reviewed in Verde's responses to I&E's data requests. Other questions sought to explore information that had not yet been the subject of I&E's discovery. The OCA requested information and documentation from Verde in order to examine how 339 customer accounts were allegedly affected by Verde's alleged improper conduct<sup>5</sup> over the course of almost three (3) years.<sup>6</sup> On June 11, 2020, Verde filed a Written Objection<sup>7</sup> to every question posed in OCA Set I. In its response to this discovery, Verde stated objections to Questions 1 through 10 and 14, but agreed to provide an answer to some of these data requests. Verde did not state whether the answer would be full and complete. One of Verde's primary objections to the OCA discovery was that Joint Petitioners had entered into a settlement making the OCA's discovery irrelevant. Verde later decided to provide the written responses to the OCA Set I discovery and waive the OCA's June 22, 2020 deadline to file a Motion to Compel. Between June 19th and June 30th, 2020, Verde provided the OCA with responses to all discovery except for two questions which remain incomplete. On June 30, 2020, Verde filed its long delayed Answer to I&E's Complaint and, shortly after, I&E filed the Joint Petition for Settlement between Verde and I&E in this proceeding. After examination of the responses provided to OCA Set I and the Answer to the Complaint, the OCA served follow-up discovery, OCA Set II, on July 6, 2020.

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<sup>5</sup>        Id.

<sup>6</sup>        Id.

<sup>7</sup>        Prior to filing the Written Objection, Counsel for Verde provided informal objection to OCA Set I to the OCA and discussions ensued as to informally resolving this issue, but without any resolution satisfactory to the OCA.

B. Summary of Opposition.

The OCA submits that the allegations in the Complaint are of an extremely serious nature. The allegations are not just of deceptive or unfair advertising, but involve switching of customer's accounts without permission (slamming) and unauthorized access to accounts using personal information of the consumer. The Commission has been eminently clear on numerous occasions that it has a zero-tolerance policy against slamming.<sup>8</sup> In particular, the Commission has stated, “[t]he Commission does not trivialize allegations of unauthorized enrollment of customers, or “slamming,” and seeks to deter such conduct by instituting firm retaliatory measures for violations of the Commission's regulations with respect to enrollment of customers.”<sup>9</sup> The allegations of the use of personal information to access customer accounts is one that the OCA has not heard of previously and raises significant issues and major unanswered questions including: which of Verde's third-party vendors was responsible for this conduct; what investigation has been undertaken regarding this conduct; where did the allegedly affected customers' personal information come from; was the conduct criminal in nature; what remedy was pursued by Verde; and what steps have been taken by Verde to prevent such conduct in the future. Any resolution of this Complaint would be far from satisfactory and complete without the OCA's ability to fully explore these allegations as well as Verde's management actions or inactions over the period in which the allegations occurred to monitor its third party vendors and to identify such improper conduct.

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<sup>8</sup> See Pa P.U.C. et al. v. AP Gas & Electric, Docket No. M-2013-2311811, 2013 Pa. PUC LEXIS 1169 (Order entered October 17, 2013) at \*20;

<sup>9</sup> See, Pa P.U.C. v. Total Gas & Electric Inc., Docket No. M-0011529 (Order entered September 26, 2001) at \*5.

The OCA's discovery seeks to explore Verde's management capabilities and technical capabilities<sup>10</sup> in light of these serious allegations and the requested relief in the Complaint of license revocation.<sup>11</sup> The OCA has also sought to explore the scope of the potential problems in all areas where Verde has been actively marketing. The OCA has conveyed on multiple occasions that it is not reasonable for the OCA to discuss the settlement prior to receiving the pertinent information it requested in discovery. The OCA has begun to receive some responses and, in evaluating those responses, has determined that additional information is necessary for a full and complete assessment of this Complaint. Based on the OCA's preliminary analysis of the discovery responses to date, the OCA remains concerned that the Settlement is deficient in response to the serious allegations in the Complaint and therefore cannot be found to be in the public interest.

Accordingly, the OCA files this Statement in Opposition of Non-unanimous Settlement. The OCA respectfully requests that Commission assign this matter to an ALJ to establish a formal

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<sup>10</sup> Under 66 Pa.C.S. § 2809(b), “[a] license shall be issued to any qualified applicant, authorizing the whole or any part of the service covered by the application, if it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission's regulations regarding standards and billing practices, and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter; otherwise, such application shall be denied.

<sup>11</sup> See 52 Pa. Code § 54.43. Standards of conduct and disclosure for licensees.

To protect consumers of this Commonwealth, licensees shall adhere to the following principles in the provision of electric generation service:

(1) A licensee shall provide accurate information about their electric generation services using plain language and common terms in communications with consumers. When new terms are used, the terms shall be defined again using plain language. Information shall be provided in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service.

...

(f) A licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employe[e]s, agents or representatives. Licensee shall inform consumers of state consumer protection laws that govern the cancellation or rescission of electric generation supply contracts. See section 7 of the Unfair Trade Practices and Consumer Protection Law (73 P. S. § 201-7).

schedule for the gathering of evidence and taking of testimony to fully evaluate and consider these allegations, as well as consider the proper remedies.

For the reasons above, and in more detail below, the OCA respectfully requests that this matter be referred to the Office of Administrative Law Judge for further proceedings.

## **II.     LEGAL STANDARD**

While it is the Commission's policy to encourage settlements between the parties, 52 Pa. Code § 5.231, the terms and conditions of any settlement must nevertheless be in the public interest.<sup>12</sup> 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.<sup>13</sup>

## **III.    ARGUMENT**

The OCA submits that the Settlement Petition filed on June 30, 2020 is premature, insufficient, and incomplete for this Complaint proceeding raising such serious allegations. The OCA is currently in the process of conducting the necessary discovery to assess this matter fully and determine a resolution that is in the public interest. The information requested by the OCA's discovery questions issued to date are crucial to a full examination of the allegations in I&E's Complaint and the appropriate remedy. A complete and accurate account of the Verde's actions or inactions over the 3-year period in which the allegations were reported is necessary to determine an appropriate penalty and the conditions to protect Pennsylvania customers in the future. The information regarding Verde's management, operations, training and supervision of its employees and agents as well as information regarding the potential scope of the alleged conduct across the

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<sup>12</sup>       Pa. PUC. v. York Water Co., Docket No. R-00049165 (Order entered Oct. 4, 2004).

<sup>13</sup>       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).

Commonwealth is necessary in determining the scope of the potential issues, the appropriate remedies for any found violations, and whether or not Verde should have its license revoked in Pennsylvania as was requested in the Complaint.

The Settlement does not recognize that there remains a large deficiency of information surrounding the degree of mismanagement at Verde to lead to the alleged egregious conduct and adverse impact on many consumers as set forth in the I&E Complaint. Moreover, the settlement does not reflect the Commission's zero-tolerance policy related to slamming, nor does it reflect a complete analysis of the harm that may have been incurred by customers across the Commonwealth, particularly those whose personal information may have been misused. Without a fair and complete examination of the degree of Verde's mismanagement of its licensing obligations in Pennsylvania, the scope of the problem, the interactions with the third party vendor, and Verde's prior enforcement history as well as that of its parent company, Spark Energy, the proposed Settlement cannot be found in the public interest.

The OCA, an intervener representing the interests of the customers who have been allegedly affected by the actions of Verde in Pennsylvania, was left out of the settlement negotiations and, thereafter, was requested to give input on a final settlement before it was given the opportunity to conduct crucial discovery in this matter. The OCA, as a party in this proceeding, has a right to conduct discovery before it is to engage in settlement negotiations and provide feedback on a settlement to resolve such serious allegations. Beyond this right to conduct discovery, the OCA would not be adequately representing the interests of its constituents if it entered into premature settlement negotiations or provided input on a settlement without accurate and complete information regarding the conduct of Verde that led to 339 PPL customer accounts

allegedly being affected by Verde's alleged improper conduct<sup>14</sup> over the course of almost three (3) years in a single service territory.<sup>15</sup> This remains troubling in that Verde has been the subject of a similar investigation in another state.<sup>16</sup>

Among the issues that the OCA seeks to explore is whether Verde Energy has been the subject of enforcement actions for similar violations in other jurisdictions and whether Verde's parent corporation, Spark Energy with its headquarters in Houston, TX, has a history of lack of supervision of its affiliated retail energy suppliers in Pennsylvania and elsewhere that should be taken into account in assessing penalties.<sup>17</sup> For example, in April of 2019, a Commission Ordered Investigation was initiated by the Staff of the Public Utility Commission of Ohio (PUCO) against Verde which uncovered "a pattern of misleading and deceptive practices used to enroll customers, a failure to maintain documents and other data as required, probable noncompliance with certain requirements of the third-party verification (TPV) rules, and violations of the noticing requirements" which "...appear to be systemic and demonstrate that the company cannot maintain the required management oversight of its marketing program to ensure that its agents are acting in

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<sup>14</sup> See I&E's Non-Proprietary Formal Complaint.

<sup>15</sup> Id.

<sup>16</sup> See In the Matter of the Commission's Investigation Into Verde Energy USA Ohio, LLC's Compliance With the Ohio Administrative Code and Potential Remedial Actions For Non-Compliance, Case No. 19-958-GE-COI, 2020 Ohio PUC LEXIS 232 (Opinion and Order entered Feb. 26, 2020).

<sup>17</sup> See Application of Spark Energy, L.P. For an Electric Supplier License - Investigation Into Marketing, State of Connecticut – Public Utilities Regulatory Authority, Docket No. 10-06-18RE02 (Decision entered July 17, 2019) (In July of 2019, the Public Utilities Regulatory Authority (PURA) in Connecticut determined that Spark Energy had violated Connecticut laws and regulations "by utilizing a pre-recorded message that (1) never identified that identifies Spark as the entity conducting the telemarketing, (2) represented to customers that the solicitation call is from an electric distribution company, (3) never explained the purpose of the sales call, which was to have customers enroll in a supply contract with Spark, (4) misstated the electric distribution company's current charges; and not directly training its third-party agents." PURA further found that "[t]hese violations were directly caused by Spark's intentional inaction and negligent failure to monitor, audit and oversee that its marketing agents' activities complied with the legal requirements set forth in the aforementioned statutes.").

a manner that is fair, honest, and in compliance with Ohio laws and rules.”<sup>18</sup> Here in Pennsylvania, Verde’s owner, Spark Energy, purchased Respond Power<sup>19</sup>, a licensed ESG in Pennsylvania, after that supplier entered into a settlement<sup>20</sup> in 2016 that reflected allegations associated with its failure to monitor the third party sales and marketing agents in Pennsylvania and included many of the same promises to reform that oversight that are reflected in this Non-Unanimous Settlement between Joint Petitioners. Verde’s and Spark Energy’s management has been an issue in other states before this Complaint was filed and it is possible that Verde did not take the appropriate steps to prevent or even mitigate the occurrence of similar—potentially more egregious—conduct in Pennsylvania. Through discovery, the OCA seeks to explore whether Spark or Verde have had supervisors, employees, or any type of personnel physically located in Pennsylvania to monitor compliance in the past and whether such in-state supervision will be conducted in the future. This information is crucial for the OCA to have a basis for its recommendations in this matter.

From the information provided to date by Verde in response to the OCA’s first set of discovery (as well as the information provided in response to I&E data requests) the OCA continues to have concerns as to whether Verde has conducted any demonstrable oversight of the conduct of its third party contractors authorized to market its products in Pennsylvania. While many of the provisions of the Settlement require Verde to implement oversight and management of its third party contractors who conduct telemarketing and door to door marketing in Pennsylvania, these requirements have been required to be implemented by licensed Electric

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<sup>18</sup> Re: In the Matter of the Commission's Investigation into Verde Energy USA Ohio, LLC's Compliance with the Ohio Administrative Code and Potential Remedial Actions for Non-Compliance, A Report by the Staff of the Public Utility Commission of Ohio, Case No. 19-0958-GE-COI (May 3, 2019).

<sup>19</sup> See Pa P.U.C. et al. v. Respond Power LLC, Docket No. C-2014-2438640 (Order entered August 11, 2016).

<sup>20</sup> See Letter Notifying of Change in Corporate Structure – Major Energy and Respond Power, Docket No. A-2010-2163898, (May 4, 2016), <http://www.puc.state.pa.us/pcdocs/1441947.pdf>.

Generation Suppliers for many years. Importantly, there appears to be no provision addressing Verde's use of the third party vendor whose agents were involved in these serious allegations.

The OCA is also concerned that the civil penalty and refunds to customers may be insufficient. The civil penalty initially requested was \$8.8 million while the settlement includes a civil penalty of \$1 million. Without further explanation, it is difficult to determine the reasonableness of the civil penalty in light of the seriousness of the alleged violations.

As to refunds to customers, the refunds are limited to two months of bills which may not be sufficient under the circumstances of this case for all affected customers. Furthermore, this Settlement, while initiated by means of customer complaints forwarded from PPL Electric, does not reflect exploration of the potential impact of Verde's conduct with regard to the residential customers of other Pennsylvania Electric Distribution Companies. Verde conducted marketing and sales throughout Pennsylvania and the full impact of its marketing campaigns is not known. As a result, the Settlement offers compensation only to those customers who previously filed complaints with PPL Electric.

For the OCA to fulfill its statutory duty to protect the interests of consumers<sup>21</sup> in this matter, it must conduct the proper discovery in order to evaluate the egregious conduct alleged in this Complaint. The actions of Joint Petitioners in this matter have prevented the OCA from conducting important discovery and providing informed suggestions and input into a prematurely requested resolution to this matter. The OCA submits that without the requisite information explored above in this statement in opposition, the Settlement proposed by Joint Petitioners should be rejected as not in the public interest. This matter should be assigned to an ALJ, undergo a full

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<sup>21</sup> 71 P.S. § 309-4 (2010).

and complete discovery phase, and if necessary, proceed to litigation to reach a resolution that is in the public interest.

#### **IV. CONCLUSION**

The lack of opportunity for discovery in this matter prevents the OCA and its expert from understanding and evaluating the full nature and extent of the allegations made against Verde, and properly evaluating its management as to its fitness to operate in Pennsylvania in accordance with Pennsylvania statutes and regulations. As an intervening party acting in its statutory capacity to protect the consumers of Pennsylvania, the OCA should not be denied the ability to conduct necessary and relevant discovery and present evidence before agreeing to a settlement that it had no part in negotiating. For the reasons discussed above, the OCA respectfully requests that the Commission assign this matter to an ALJ for further consideration.

Respectfully submitted,

/s/ Laura J. Antinucci  
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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, :  
Bureau of Investigation and Enforcement : Docket No. C-2020-3017229  
v. :  
Verde Energy USA, Inc. :

VERIFICATION

I, Barbara R. Alexander, hereby state that the facts above set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

DATED: July 20, 2020  
\*292435

DocuSigned by:  
Signature:   
Barbara R. Alexander

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