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November 18, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
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:

Enclosed for filing on behalf of Verde Energy USA Inc. is its Motion to Strike Portions of the Comments of the Office of Consumer Advocate in the above-referenced matter. A copy has been served in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Best Regards,

STEVENS & LEE



Michael A. Gruin

Enclosure

cc: Administrative Law Judge Christopher Pell  
Certificate of Service

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**CERTIFICATE OF SERVICE**

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I hereby certify that on this 18<sup>th</sup> day of November, 2020, a copy of the enclosed Motion to Strike has been served upon the persons listed below via electronic mail in accordance with the requirements of 52 Pa. Code Sections 1.54 and 1.55.

Kayla Rost, Prosecutor  
Pennsylvania Public Utility Commission,  
Bureau of Investigation & Enforcement  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
karost@pa.gov

Laura J. Antinucci  
Assistant Consumer Advocate  
Pennsylvania Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
LAntinucci@paoca.org



DATE: November 18, 2020

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Michael A. Gruin

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**NOTICE TO PLEAD**

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**To:** *Laura Antinucci and Christy Appleby, Counsel for the Office of Consumer Advocate*  
Verde Energy USA, Inc. (“Verde”) has filed a Motion to Strike Portions of the Comments filed by the Office of Consumer Advocate in Opposition to the Joint Petition for Approval of Settlement in the above-captioned matter, pursuant to the Pennsylvania Public Utility Commission’s regulations at 52 Pa. Code §5.103. You are hereby notified to file a written response to Verde’s Motion to Strike within twenty (20) days from the date of service of the Motion to Strike, consistent with 52 Pa. Code §5.61(a) and 5.103(c). If you do not file a written response to the Motion to Strike within twenty (20) days of service, the presiding officer may rule in favor of Verde without a hearing. All pleadings, such as Answers to Motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned counsel for Verde. Failure to respond to this Motion could result in an Order striking portions of the OCA’s Comments.

STEVENS & LEE



DATE: November 18, 2020

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COUNSEL FOR VERDE ENERGY USA, INC.



2. The Office of Consumer Advocate (“OCA”) filed a Notice of Intervention and Public Statement on February 24, 2020.

3. Uncontested Motions for Extension of Time of the deadline for the filing of the Verde’s Answer to the Formal Complaint were filed on February 14, 2020, March 30, 2020, and May 15, 2020.

4. Verde actively engaged with I&E to address the allegations, and ultimately Verde and I&E reached a full Settlement of the Formal Complaint.

5. On June 30, 2020, Verde filed its Answer to the Formal Complaint. On the same day, Verde and I&E filed a Joint Petition for Settlement of the Complaint (“Joint Petition”) and Statements in Support thereof.

6. The Joint Petition fully addresses all of the Formal Complaint’s allegations against Verde, provides for a significant civil penalty, provides refunds to those customers who were identified as being impacted by the conduct alleged in the Formal Complaint, provides a significant contribution’s to PPL’s hardship fund to assist customers with the payment of their electricity bills, establishes a lengthy prohibition on Verde’s marketing in Pennsylvania, and includes a requirement to implement a detailed compliance plan before the resumption of marketing, and ongoing monitoring and reporting requirements.

7. The civil penalty, refunds and hardship fund contributions, coupled with extensive changes to Verde’s sales and marketing practices, provide relief to customers who were alleged to have been harmed and ensures that future customers are not harmed by the actions alleged in the Complaint. The specific terms and conditions, as well as the corrective measures to be implemented by Verde, are addressed in full detail in the Joint Petition and in both I&E and Verde’s Statements in Support of the Joint Petition, respectively.

8. OCA declined to join in the Joint Petition, and on July 10, 2020, 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.

9. On July 20, 2020, OCA filed its Statement in Opposition stating that it cannot support the Joint Petition, if at all, until it has the opportunity to fully explore the allegations in the Formal Complaint while it seeks further discovery from Verde.

10. OCA then issued three (3) sets of discovery requests to Verde, to which Verde responded.

11. By Notice dated July 31, 2020, an Initial Call-In Telephonic Prehearing Conference was scheduled for August 27, 2020 and the matter was assigned to Administrative Law Judge Christopher Pell.

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

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

14. OCA, in its Prehearing Memorandum, identified three issues, identified a witness, and requested that this matter be held in abeyance for 60 days in order for the OCA to conduct

additional discovery and to engage in further settlement discussions with I&E and Verde to see if there are possible modifications to the settlement that would address OCA's concerns. OCA further proposed that at the end of 60 days, the parties could each evaluate the respective positions and collectively determine whether there is a need to establish a litigation schedule to address the allegations in I&E's Complaint, and to determine whether the Settlement signed by Verde and I&E is in the public interest.

15. The August 27, 2020 Prehearing Conference took place as scheduled, and during the Prehearing Conference, Counsel for Verde, I&E and OCA restated their respective positions as laid out in their Prehearing Memoranda.

16. By Order issued on September 25, 2020, ALJ Pell denied OCA's request to hold this matter in abeyance, and directed I&E and Verde to file stipulated facts in support of the Joint Settlement.

17. The September 25, 2020 Order also permitted OCA "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."

18. On October 19, 2020 Verde and I&E filed their Stipulated Facts in Support of the Joint Petition for Approval of Settlement.

19. On November 9, 2020, the OCA filed its Comments in Opposition to the Joint Petition.

20. OCA's Comments go far beyond the scope of Comments permitted by Judge Pell in his September 25<sup>th</sup> Order, and the filing that OCA refers to as its "Comments" is actually a hybrid of a legal brief, 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 are based almost entirely on information that is not in the record in the proceeding.

21. For the reasons set forth below in more detail, Verde respectfully requests that the following portions of the OCA’s Comments be stricken:

	<b>Description of Materials to be Stricken</b>	<b>Location in Comments</b>
1	Affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2	Attachment to Comments
2	OCA “Finding of Facts”	Appendix A to Comments
3	OCA discussion of Verde ownership structure, affiliates and operations in other states, and vendors	P. 2, last two lines, through the end of P. 3; P. 14, last paragraph, through end of P. 17; P. 29 (first 2 paragraphs); P. 32 (last paragraph); P. 40 (first full paragraph); P. 44 (starting with last sentence in first paragraph) through first sentence on P. 45
4	All citations to “Affidavit” and/or its Exhibits, and Ms. Alexander’s opinions throughout the Comments	P.9, 13,14, 15, 21, 22, 23, 26, 27, 28, P. 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 43, 45

## **II. ARGUMENT**

### **A. The OCA’s attempt to introduce evidence and testimony in the form of the Alexander Affidavit and its two Exhibits violates the September 25, 2020 Order and basic principles of due process**

22. The Affidavit of Barbara Alexander (“Alexander Affidavit”) and accompanying Exhibits attached to the Comments should be stricken for multiple reasons.

23. First and foremost, the Affidavit and its two Exhibits go far beyond the scope of ALJ Pell’s limits for the OCA’s Comments on the Joint Petition.

24. The September 25, 2020 Order provided 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.”

25. While the OCA provided some substantive comments on Settlement, the inclusion of the Alexander 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. **To the contrary, the express purpose of the Alexander Affidavit, as plainly stated in paragraph 11 of the Affidavit, was to “provide additional facts and evidence”.**

26. The attempted submission of the Alexander Affidavit shows a clear disregard for the proper scope of comments in response to a Settlement Petition.

27. Context is important here. It must be noted that the OCA's formal position in this matter was that the Complaint should not be settled and that the Complaint should be litigated even though both the Complainant and Respondent reached a full settlement of the Complaint. *See* OCA's Statement in Opposition to Joint Petition for Approval of Non-Unanimous Settlement, and the OCA's Prehearing Memorandum.

28. The presiding officer correctly rejected the OCA's position in the September 25, 2020 Order.

29. However, by now explicitly attempting to submit “evidence and testimony,” OCA completely ignored the presiding officer's ruling and the settled procedural posture of the case, which did not contemplate or establish any process for the taking of additional evidence and testimony in this case.

30. The attempted submission of the Alexander Affidavit and Exhibits is 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.

31. In evaluating the Settlement, the Commission must only consider the evidence that is in the record in this case, and it is inappropriate for OCA Comments to reference information which is not in the record, or seek to expand the record with new information.

32. While the Commission's regulations do not specifically address the inclusion of extra-record material in Comments, the Commission's regulation regarding briefs at 52 Pa. Code § 5.501(a)(2) is instructive. That regulation requires that briefs contain "[r]eference to the pages or record or exhibits where the evidence relied upon by the filing party appears" and the Commission has repeatedly struck portions of briefs that contain references to information that is not in the record. *See, e.g., Petition of PECO Energy Company for Approval of Its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of Its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order issued October 28, 2009) ("*PECO Act 129 Order*") ("The inclusion of extra-record evidence in a brief violates the principle of fundamental fairness and violates the due process rights of other parties who have no opportunity to cross examine a witness in a separate hearing"), and *Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, 2006 Pa.PUC LEXIS 22 (2006), *aff'd sub nom., Popowsky v. PA. Public Utility Commission*, 937 A.2d 1040 (2007).

33. If information is not in the record, it cannot be considered by the Commission in evaluating a Settlement. *See, e.g., Pennsylvania Public Utility Commission, et al. v. Equitable Gas Company*, Docket Nos. R-2009-2088072, C-2009-2091475, C-2009-2098330 and C-2009-2100312 (Order entered December 21, 2009), and *In re Pennsylvania-American Water-Company*, 95 Pa. P.U.C. 86 (Order entered February 13, 2001) (wherein the Commission upheld the Initial Decision of ALJ Cocheres in which he struck extra-record references from a Protestant's brief).

34. Furthermore, 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 would have challenged the accuracy of the statements, opinions and conclusions of witnesses through evidence and testimony. See Stipulation Facts in Support of the Joint Petition for Approval of Settlement, at ¶ 46.

35. No litigation procedure was established for the case, because the Complaint was fully resolved via a Settlement between the Complainant and the Respondent. Inclusion of the Alexander Affidavit in the record in this matter would therefore violate Verde’s and I&E’s due process right 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.

36. To be clear, expanding the procedural schedule to allow for such cross-examination and testimony is not the appropriate remedy to the situation. Doing so would effectively reverse the presiding officer’s 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.

37. The only appropriate remedy for the situation is to strike the improper materials submitted with the OCA’s Comments.

**B. The Alexander Affidavit and Attachment BA-2 are clearly inadmissible hearsay**

38. The Commission, as an administrative body, is bound by due process provisions of constitutional law and by principles of common fairness. *Hess. v. Pa. Pub. Util. Commission*, 107 A.3d 266 (Pa. Cmwlth. 2014); *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).

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. *Hess*.

39. Unauthenticated written statements such as Ms. Alexander's Affidavit constitute inadmissible hearsay, plain and simple. 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 (225 Pa. Code §801).

40. Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay into evidence. It has long been recognized in Pennsylvania that hearsay rules are not mere "technical rules of evidence" but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. See, e.g., *Loudon v. Viridian Energy*, PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012); *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, PA PUC No. C-2014-2408057 (Order entered July 30, 2014). A finding based solely on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d. 366 (Pa. Cmwlth 1976).

41. Rule 901 of the Pennsylvania Rules of Evidence (225 Pa. Code §901) provides for the necessity of authentication of documentary evidence.

42. Under the Commission's regulations, written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate the testimony as a witness with knowledge of the

authenticity of the document pursuant to P.R.E. 901(b)(1). Without such authentication, written statements such as the Alexander Affidavit are inadmissible.<sup>1</sup>

43. OCA may argue that the Commission is not bound by the technical rules of evidence. But the Commission has routinely and consistently rejected this interpretation. “[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence.” *Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, Docket No. No. 2012-2249031, 2013 WL 5912555 (Order entered. Oct. 8, 2013).

44. Here, 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.

45. Even if the prior procedural rulings in the case would allow for submission of testimony and evidence (which they do not), 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.

46. Verde’s position is not just a technical evidentiary objection. To the contrary, it must be recognized that the attempted inclusion of the Alexander Affidavit is a core due process concern, especially because the Alexander Affidavit implicates multiple layers of hearsay.

47. OCA is attempting to introduce an Affidavit that was prepared by a person with no first-hand knowledge of any of the allegations of the Complaint, who was engaged well after the Complaint was filed, to review a *second* party’s review of call records related to calls made

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<sup>1</sup> In some situations, Federal Courts permit the admission of the affidavits pursuant to Federal Rule of Evidence 807 (formerly F.R.E. 803(24)), which codifies the “residual exception” to the hearsay rule. However, the Pennsylvania Supreme Court has expressly chosen not to adopt F.R.E. 807 and its “residual exception” to hearsay. See P.R.E. 804(b)(5) and 807 and *Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001) (“Pennsylvania has not adopted...the residual exception). No court or administrative agency in Pennsylvania has ever held that the residual exception applies in Pennsylvania, even in informal administrative hearings.

by *third* parties, regarding what *fourth* parties allegedly said to them. Such a document cannot possibly be admissible under even the most extremely lenient interpretation of administrative evidentiary rules.

48. Exhibit BA-2 also cannot be included in the record in this matter. Exhibit BA-2, (which Ms. Alexander heavily relies upon), 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. Obviously, this raises serious foundation, authentication and due process issues, to put it mildly, and to make matters worse, 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.

**C. Other portions of the OCA's Comments contain impertinent information beyond the scope of the proceeding and should be stricken**

49. In addition to the improper attachments to the OCA Comments discussed elsewhere in this Motion, the body of the OCA's Comments also contains statements that go well beyond the scope of the proceeding and factual record and therefore should be stricken.

50. Verde is sensitive to the unique procedural posture of this case, and the OCA's status as a statutory advocate that has intervened in this proceeding.

51. Verde certainly does not object to filing of Comments by OCA that comport with the reasonable limits outlined in the September 25, 2020 Order, and Verde is only seeking to strike relatively small portions of the body of OCA's Comments, as reflected in the Table in Section I of this Motion.

52. To be clear, Verde disagrees with many of the OCA's characterizations in the body of its Comments and will be responding thereto with its Reply Comments, but Verde is not

requesting to strike the rest of the body of the Comments as long as references to the Alexander Affidavit and Exhibits are stricken.

53. 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.

54. It is axiomatic that 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.

55. 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.

56. In addition to the improper attachments to the OCA Comments discussed elsewhere in this Motion, 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:

- a. All references to the Alexander Affidavit and/or its Exhibits;
- b. Discussion of Verde's affiliates, who are not parties to this proceeding;
- c. Discussion of Verde's operations in other states, which are not within the Commission's jurisdiction; and
- d. Discussion of Verde ownership, and vendors, which are not raised in the Complaint or the Stipulation of Facts.

**D. The OCA’s “Findings of Fact” should also be Stricken**

57. For reasons similar to those discussed above, the OCA’s “Findings of Fact” should be stricken, because:

- a. The September 25, 2020 Order did not permit the expansion of the factual record in the case;
- b. The “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;
- c. The “Findings of Fact” rely upon and seek to amplify hearsay (i.e. the Alexander Affidavit and Exhibits); and
- d. The “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.

**III. CONCLUSION**

58. For the reasons set forth above, Verde respectfully requests the following portions of the OCA’s Comments be stricken and disregarded by the presiding Administrative Law Judge:

	<b>Description of Materials to be Stricken</b>	<b>Location in Comments</b>
1	Affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2	Attachment to Comments
2	OCA “Finding of Facts”	Appendix A to Comments
3	OCA discussion of Verde ownership structure, affiliates and operations in other states, and vendors	P. 2, last two lines, through the end of P. 3; P. 14, last paragraph, through end of P. 17; P. 29 (first 2 paragraphs); P. 32 (last paragraph); P. 40 (first full paragraph); P. 44 (starting with last sentence in first paragraph) through first sentence on P. 45

4	All citations to "Affidavit" and/or its Exhibits, and Ms. Alexander's opinions throughout the Comments	P.9, 13,14, 15, 21, 22, 23, 26, 27, 28, P. 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 43, 45
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Respectfully submitted,

STEVENS & LEE



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COUNSEL FOR VERDE ENERGY USA, INC.

DATE: November 18, 2020