



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

November 30, 2020

Via Electronic Filing

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
I&E Reply Comments

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's ("I&E") **Reply Comments** in the above-referenced matter.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

Kayla L. Rost
Prosecutor
Bureau of Investigation and Enforcement
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KLR/ac
Enclosures

cc: Per Certificate of Service
Matthew C. Fallings, (via email: mfallings@pa.gov)

**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.	:	

**REPLY COMMENTS
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

TO ADMINISTRATIVE LAW JUDGE CHRISTOPHER P. PELL:

The Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”) files this Reply Comments to the Office of Consumer Advocate’s (“OCA”) Comments dated November 9, 2020 in accordance with Administrative Law Judge (“ALJ”) Christopher P. Pell’s September 25, 2020 Order Denying the Office of Consumer Advocate’s Request for Sixty Day Abeyance.

I. HISTORY OF THE PROCEEDING

On June 30, 2020, I&E and Verde Energy USA, Inc. (“Verde”) filed a Joint Petition for Approval of Settlement (“Joint Petition” or “Settlement Agreement”) resolving all issues raised in the Complaint, Docket No. C-2020-3017229. Additionally, Verde filed an Answer to I&E’s Complaint generally denying the allegations set forth in the Complaint but noting that I&E and Verde had nevertheless reached an amicable

settlement regarding all allegations set forth in I&E's Complaint resulting in the filing of a Joint Petition for Approval of Settlement.

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

On July 24, 2020, Secretary Chiavetta referred the matter to the Commission's Office of Administrative Law Judge ("OALJ").

On July 31, 2020, a Call-in Telephone Pre-Hearing Conference Notice was issued, scheduling a telephonic prehearing conference for August 27, 2020 before Administrative Law Judge Christopher Pell. Additionally, on July 31, 2020, a Prehearing Conference Order was issued, instructing the parties to file and serve prehearing memoranda on or before Friday, August 21, 2020.

On August 21, 2020, I&E, Verde, and the OCA each filed a prehearing memorandum in accordance with the Prehearing Conference Order.

On August 27, 2020, the parties attended the prehearing conference and restated their respective positions.

On September 25, 2020, ALJ Pell issued an Order Denying the Office of Consumer Advocate's Request for Sixty Day Abeyance and directed I&E and Verde to file stipulated facts in support of their Joint Petition. The Order also allowed "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." The stipulation of facts was due in 20 days, the OCA's comments were due in 40 days, and I&E's and Verde's reply comments were due in 60 days.

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

On November 9, 2020, the OCA filed a 300-page document that it designed as “Comments 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” (“Comments”).

On November 18, 2020, Verde filed a Motion to Strike Portion of OCA Comments. On November 19, 2020, I&E filed a Letter in Support of Verde Energy USA Inc.’s Motion to Strike.¹

II. I&E’S PROPER USE OF PROSECUTORIAL DISCRETION

The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities. *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(a)(11). Accordingly, I&E has the authority and ability to conduct investigations and file complaints or other enforcement actions as it deems appropriate. Simply stated, I&E has the prosecutorial discretion to determine the scope of an informal investigation, initiate an investigation, terminate an investigation, enter into

¹ I&E avers that the majority of OCA’s comments and all of the attachments should be rejected, as set forth in Verde’s pending Motion to Strike, to which I&E has indicated its support. The instant Reply Comments are being filed in the event that the pending Motion to Strike is denied or granted in part, wherein reply comments would still apply.

settlement discussions or agreements, and/or take formal enforcement action, including to file formal complaints.

In its Comments, the OCA attempts to argue, *inter alia*, that the Joint Petition is not sufficient because it does not address or provide recourse for customers in the service territories of other electric distribution companies (“EDC”), specifically West Penn Power Company,” Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and PECO Energy Company. However, this comment or argument has no merit. I&E, based on its informal investigation and exercising its prosecutorial discretion, elected to limit the scope of its complaint to the PPL Electric Utilities, Inc. (“PPL”) service territory based upon the volume of complaints received and information provided by PPL.²

Moreover, while the Complaint and refund provisions are limited to PPL customers, other non-monetary relief reached in the settlement, including the implementation of the modification to business practices and compliance plan, will occur in all EDC service territories in Pennsylvania within which Verde operates or provides services and will benefit all customers who have the ability to switch their electric

² It is well-established that the exercise of prosecutorial discretion cannot be compelled, nor is it subject to judicial review. See *Commonwealth v. Sanico, Inc.*, 830 A.2d 621, 629 n.14 (Pa. Cmwlth. 2003), *Lerro ex rel. Lerro v. Upper Darby Township*, 798 A.2d 817, 820-21 (Pa. Cmwlth. 2002)(citing *Commonwealth v. Malloy*, 450 A.2d 689 (Pa. Super. 1982)). The doctrine of prosecutorial discretion also applies to enforcement actions by administrative agencies. *Sanico*, 830 A.2d at 629 n.14 (citing *In re Frawley*, 364 A.2d 748 (Pa. Cmwlth. 1976)). It is the agency’s sole province to assess whether a violation has occurred and whether to expend resources on one particular enforcement action as opposed to another. *Sanico*, 830 A.2d at 629 n.14 (citing *Heckler v. Chaney*, 470 U.S. 821, (1985)). An agency’s decision not to enforce “often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.” *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

generation service to Verde. Thus, the customers in other EDC territories *will* benefit from the multitude of provisions provided in the settlement terms which are aimed to protect the potential and existing customer(s) and ensure compliance with the Commission's regulations and procedures.

The OCA also argued that the civil penalty is not sufficient, citing to *Pa. P.U.C., Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Opinion and Order entered Dec. 3, 2015) and *Commonwealth of Pa., Attorney General Kathleen Kane and Acting Consumer Advocate Tanya McCloskey v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Opinion and Order entered July 11, 2019) to support this proposition.

First, the *HIKO* case was litigated, not settled, and was a result of the 2014 Polar Vortex. *HIKO*, Docket No. C-2014-2431410 (Opinion and Order entered Dec. 3, 2015). The Commission imposed a \$1, 836,125.00 civil penalty, noting that HIKO acted knowingly, deliberately, and “effectively treated its own customers as the financial guarantors of its own business plan, which backed contracts offering customers guaranteed savings with what was essentially a speculative supply portfolio based exclusively on spot market purchases.” *Id.* at 44. To calculate the civil penalty, the Commission determined the average amount the customers were overbilled and multiplied that amount by the number of invoices. *Id.* at 5, 33-34. Not only are the facts in *HIKO* clearly distinguishable from the instant matter, but the total number of customers affected is also vastly different (i.e., 339 PPL customers with multiple complaints in this matter versus 5,708 HIKO customers overcharged on approximately

14,689 invoices.) *Id.* at 44. Thus, the \$1,000,000.00 civil penalty agreed to by I&E and Verde is reasonable and on par with the civil penalty and allegations raised in the *HIKO* case.

Second, the *Blue Pilot* case was also a litigated matter resulting from the 2014 Polar Vortex. *Blue Pilot*, Docket No. C-2014-2427655 (Opinion and Order entered July 11, 2019). The Commission imposed a civil penalty of \$1,066,900.00, noting that 2,516 residential and small business customers were impacted by Blue Pilot's conduct resulting in 7,861 overbilling occurrences. *Id.* at 6; *see also Blue Pilot*, Docket No. C-2014-2427655 (Opinion and Order entered June 14, 2018) at 63-63, 89 (calculating the civil penalty as \$125 per-violation for 4,490 occurrences of overbilling of residential customers and \$150 per-violation for the 3,371 occurrences of overbilling of small business customers). Thus, noting the difference in affected customers and overbilled occurrences, the agreed upon civil penalty of \$1,000,000.00 in this matter is reasonable and consistent.

Third, the *Public Power* matter provides a better comparison to this matter. *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. M-2012-2257858 (Opinion and Order entered December 19, 2013). In *Public Power*, I&E instituted an informal investigation upon a referral from the Commission's Office of Competitive Market Oversight related to erroneous customer enrollments in PECO's service territory. *Id.* at 2. Specifically, Public Power initiated the enrollment of 2,937 customers without authorization, i.e., slamming, and PECO rescinded all but 263 of those enrollments. *Id.* at 8-10. I&E and Public Power entered into a settlement agreement

which included a civil penalty of \$64,450.00, customer refunds in the amount of \$22,161.68, and the implementation of operational safeguards and a quality control department. *Id.* at 4. The Commission approved the settlement without modification. *Id.* at 11-13.³

Accordingly, as explained above, the civil penalty of \$1,000,000.00 is reasonable and consistent with prior Commission decisions and is proportionate to the conduct alleged in the Complaint and the facts agreed upon in the Joint Stipulation. Furthermore, the civil penalty is a carefully negotiated compromise between I&E and Verde to further the Commission's encouragement of settlements and to save the time and expense of a fully litigated matter. Again, I&E properly used its prosecutorial discretion in limiting the scope of the investigation and Complaint to the PPL service territory and by negotiating and reaching a settlement that includes both monetary and non-monetary relief and is clearly in the public interest. Thus, the OCA's comments regarding the inclusion of other EDCs and monetary value of the civil penalty as a basis to undermine the Joint Petition should be rejected.

III. THE COMMISSION DOES NOT MICRO-MANAGE UTILITIES

Throughout its comments, the OCA makes multiple arguments against the compliance plan provided in the settlement terms, specifically that it lacks detail and an in-depth analysis of Verde's internal operations moving forward. This comment lacks merit because the modification to business practices and compliance plan consisted of

³ I&E notes that the OCA filed Comments in this matter commending I&E's investigation and supporting the settlement. *Public Power*, Docket No. M-2012-2257858, at 5.

over eight (8) pages of provisions which Verde has agreed to implement to address all the allegations raised in the Complaint. The settlement terms provide details on:

- (1) Verde's marketing moratorium;
- (2) Specific limitation on sales activities;
- (3) Limitations on the number of vendors Verde may use for in-person marketing;
- (4) A commitment to follow all Pennsylvania laws, including the Public Utility Code, the Consumer Protection Law, the Telemarketer Registration Act, and all Commission regulations, orders, and policies;
- (5) A commitment to complete internal reviews of all third-party vendors to ensure compliance;
- (6) Implementation of a new third-party verification platform which will include an internal audit system and bilingual individuals;
- (7) The creation and implementation of a new detailed sales training and sales quality assurance program;
- (8) A review all physical and paper marketing tools;
- (9) The issuance of a uniform to all door-to-door salespersons and other in-person marketers;
- (10) The creation and implementation of a compliance program for door-to-door salespersons and other in-person marketers;

- (11) The implementation an internal call system to ensure that all service calls, solicitations, and marketing are transmitted through a phone number bearing Verde’s name on the Caller-ID;
- (12) Verde’s increased internal quality control efforts for sales calls in addition to a limitation on solicitations, recording each sales call, and completing an internal audit of the calls; and
- (13) Verde’s ongoing reporting requirements to ensure compliance.

Thus, the settlement terms more than adequately explain the business modifications and compliance plans that Verde will implement upon the approval of the settlement. Notably, the Commission is not in the business of micro-managing utilities absent a manifest abuse of discretion or a showing of an arbitrary action by the utility, which is not present in this matter.⁴

Furthermore, while the OCA has written “brief-like” comments to the Joint Petition nit-picking every aspect of the settlement’s terms, I&E gently reminds Your Honor that the OCA intervened in this matter in February 2020 and had been provided multiple opportunities to express these concerns or comments prior to the submission of

⁴ Recognizing the Commission’s duty to the public and a utility's right of self-management, the courts have adopted the further proposition that it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown. *Lower Chichester Township v. Pennsylvania Public Utility Commission*, 119 A.2d 674, 678 (Pa. Super. 1956); *Pittsburgh v. Pennsylvania Public Utility Commission*, 95 A.2d 555, 558 (Pa. Super. 1953); *see also Pennsylvania R.R. v. Pennsylvania Public Utility Commission*, 152 A.2d 422, 425-26 (Pa. 1959)(Bell, J., dissenting); *Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission*, 331 A.2d 572, 575 (Pa. Cmwlth. 1975); *see also Coplay Cement Manufacturing Co. v. Public Service Commission et al.*, 114 A. 649 (Pa. 1921)(“It was not intended by the legislature that the commission should be a board of managers to conduct and control the affairs of public service companies”). In determining whether management has abused its discretion in operating a utility, the Commission cannot fall prey to judging management action by hindsight. Instead, management’s actions must be judged on what it knew or should have known at the time in question. *Pittsburgh v. Pennsylvania Public Utility Commission*, 88 A.2d 59 (Pa. 1952); *National Fuel Gas Distribution Corp. v. Pennsylvania Public Utility Commission*, 464 A.2d 546 (Pa. Cmwlth. 1983).

the Joint Petition, but the OCA continually declined to do so. Even after the Joint Petition was filed on June 30, 2020, the OCA continued to refuse to discuss the settlement and its concerns with I&E and Verde. The OCA's comments regarding the alleged lack of detail in the settlement terms is another baseless attempt to sideline an agreement they had an opportunity to address months ago.

IV. THE COMMISSION'S AUTHORITY TO REGULATE AND ENFORCE

Finally, the OCA makes various arguments that are frankly misguided and ignore the Commission's authority in regulating electric generation suppliers. For example, the OCA attempts to argue that the settlement does not contain any provisions for repercussions for failing to follow the settlement terms, the Public Utility Code, and/or Commission's regulations, in general. Pursuant to 52 Pa. Code § 5.591, any party who is "required to do or perform an act by a Commission order, permit or license provision shall file with the Secretary a notice stating that the requirement has or has not been met or complied with." Additionally, the proposed order attached to the settlement expressly provides that Verde shall file a sworn certification with the Commission showing its compliance with the settlement terms within a specified time upon entry of a Final Order.

If Verde does not complete/implement the settlement provisions and file the required certification within the prescribed time-frame, then Verde's noncompliance will be considered a breach of the agreement (and of the Commission's Order adopting Your Honor's Recommended Decision approving the settlement) and I&E will have the ability to act accordingly (i.e., file a complaint for non-compliance.) Moreover, should the settlement be approved without modification and Verde continues to violate the Public

Utility Code and/or Commission regulations, then I&E will have the authority and ability to complete another investigation and/or file a complaint. Contrary to the OCA's belief, the settlement does not ban or remove I&E's ability to enforce the settlement or investigate Verde for conduct completed after the settlement is implemented. However, I&E is confident that the settlement terms will fully address the issues raised in the Complaint and that Verde will continue to be cooperative and fully committed to addressing those issues and making the necessary corrections to ensure compliance.

V. CONCLUSION

Wherefore, the Bureau of Investigation and Enforcement respectfully requests that Your Honor reject the Office of Consumer Advocate's Comments and approve the Joint Petition for Approval of Settlement without modification as being in the public interest.

Respectfully submitted,



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Dated: November 30, 2020

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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Verde Energy USA, Inc.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Reply Comments** dated November 30, 2020, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail Only

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