STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

November 30, 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 please find the Reply Comments of Verde Energy USA Inc. in response to 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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2020, a copy of the enclosed Reply Comments 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 30, 2020

Michael A. Gruin

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY COMMENTS OF
VERDE ENERGY, USA, INC.
IN RESPONSE TO THE COMMENTS OF THE OFFICE OF CONSUMER ADVOCATE

Respondent, Verde Energy USA, Inc. ("Verde" or the "Company"), by its undersigned attorneys, hereby submits its Comments in Reply to the Office of Consumer Advocate's ("OCA") Comments in Opposition of the Joint Petition for Approval of Settlement ("Settlement") filed by Verde and the Bureau of Investigation & Enforcement ("I&E") filed in the above-captioned matter.

I. INTRODUCTION

The Comments of the OCA are predicated on several improper assumptions, which are repeated throughout the Comments and result in flaw characterizations of the Settlement's merits.

First, the OCA's Comments insist that the Settlement was negotiated without OCA's involvement. OCA ignores, however, that it was repeatedly asked to participate in settlement discussions and provide feedback on the proposed settlement, beginning in May 2020 and continuing up through the Pre-hearing Conference held in August 2020. OCA made it clear that it had no interest in evaluating or participating in the Settlement, and repeatedly declined the opportunity to provide any input on the Settlement's terms. OCA certainly has the right to

decline to participate in a settlement. However, the repeated insinuations that OCA was somehow prevented from joining the Settlement are not accurate. Having rejected the opportunity to craft the Settlement's terms, the OCA now criticizes the Settlement as not being to its liking and it therefore should be rejected. This directly contradicts the Commission's well-established policy promoting Settlements.[1]

Second, the OCA's Comments treat the allegations of I&E's Formal Complaint ("Complaint") as if they were conclusively proven. This is obviously not the case and the Settlement clearly states as such. *See* Settlement, ¶ 22. With the exception of the allegations regarding failure to provide proper notice of door-to-door sales and marketing activity (Complaint, ¶ 46) and the allegations regarding failure to maintain a record of a sales verification (Complaint, ¶ 62), all of the Complaint's allegations were based on an after-the-fact summary of customer contacts to PPL that was provided to I&E in response to a data request to PPL.[2] Verde was fully prepared to rebut the allegations with evidence and testimony, and in reaching a Settlement, both Verde & I&E recognized the inherent challenges of litigating a complaint that involved these types of issues and circumstances.[3] Had the Complaint been litigated, it must be recognized that the litigation could have resulted in failure to prove the number of violations alleged, and/or less severe financial penalties and injunctive relief. Verde and I&E recognized those potential outcomes and the challenges of litigating this matter, and reached a full settlement that is nearly unprecedented in the size of the civil penalty and the injunctive relief, and which fully addresses all of the allegations of the Complaint.

[1] "It is the policy of the Commission to encourage settlements." 52 Pa. Code § 5.231(a).
[2] Stipulated Facts in Support of Joint Petition for Approval of Settlement ("Stipulated Facts"), at par. 35
[3] Stipulated Facts, at par. 46-47

Third, OCA repeatedly criticizes the Settlement for lacking details about the Compliance Plan that Verde must implement before Verde resumes marketing in Pennsylvania. This criticism is misplaced. The intent of the settling parties was not to negotiate every last detail of a potential Compliance Plan that Verde must implement before resuming marketing sometime in 2021. Instead, the parties agreed that Verde would be required to develop a Compliance Plan that covered a variety of different operation aspects, with minimum requirements in multiple categories of operations including hard restrictions on number of sales vendors, detailed training program components, detailed sales audit procedures, verification and reporting requirements, recording of sales calls, and quality assurance sampling among others. Then, Verde is obligated to provide I&E with the specific details of the Plan and confirm that the Plan has been implemented before marketing can resume, and then continue to provide I&E with written notice of any changes to its marketing practices for a period of two years, and possibly longer. *See* Settlement, ¶¶ 30-37. It is completely reasonable for the Settlement to include a reasonable outline of the Compliance Plan's requirements while leaving the precise details for development over time in order to reach a full Settlement to present to the Commission for approval.

Verde will briefly respond to each of OCA's specific criticisms of the Settlement below.

II. Reply to OCA Criticisms of the Settlement

A. Civil Penalty Amount (¶¶ 24-25 of the Settlement)

Starting on page 19 of the OCA's Comments, OCA recites the cumulative potential violations alleged in the Complaint, and questions whether the $1,000,000 civil penalty is justified in light of those alleged violations. It must be noted the Complaint's number of alleged violations is based on the cumulative attribution of up to 10 violations for a single reported agent interaction, with many of those tabulated violations being exact duplicates. For example, the Complaint identifies 29 incidents of agents not prominently displaying an identification badge.

Those exact same 29 incidents are identified in both Paragraph 47/Exhibit C of the Complaint and Paragraph 48/Exhibit D of the Complaint, and counted as 58 separate violations: 29 violations of 52 Pa. Code § 111.9(c) and 52 Pa. Code § 111.8(a)(4). These two code sections do not set forth different requirements, rather, they state and re-state the exact same requirement for an agent to prominently display an identification badge. The same multiple-counting methodology applies to Paragraph 54/Exhibit I and Paragraph 56/Exhibit M (310 incidents of failure of agent to identify themselves counted twice), and Paragraph 58/Exhibit O, Paragraph 59/Exhibit P and Paragraph 60/Exhibit Q (several hundred agent interactions being counted as nearly two thousand alleged violations. Single agent interactions were also counted as multiple violations of the same catchall section of the Commission's regulations. Paragraph 57 of the Complaint identified 1422 violations of 52 Pa. Code 111.10(a). This section is the opening paragraph of the Telemarketing subsection of the Marketing and Sales Practices for the Retail Residential Energy Market. It does not include any precise requirements or restrictions, but rather reiterates and confirms that suppliers and their agents must comply with other marketing and consumer protections outlined in Chapters 54, 62, 56, 57 and 59 of the Commission's regulations. While the paragraph identifies 1422 violations, the accompanying Exhibit N only lists 288 customer interactions. Therefore, on average each one of those 288 interactions is being assigned 5 separate violations of Section 111.10(a). The issue is further exacerbated because most of these 288 interactions are also counted as having other violations, and the same interactions also appear on Complaint Exhibits M, O, P, and Q.

All of this could have been explained to OCA had OCA agreed to participate in settlement discussions, but OCA refused to do so. The bottom line, as confirmed in Paragraph 32 of the Stipulated Facts, is that I&E identified 339 customers for which improper agent

interactions were alleged. While the civil penalty is also meant to address a smaller number of other alleged violations that did not involve agents, the $1,000,000 civil penalty is clearly a substantial amount for 339 allegedly improper agent interactions (approximately $2900 per interaction). On a per-interaction basis, this amount far exceeds any prior civil penalty issued against a supplier by the Commission as part of a settlement.[4] See, for instance,

- *Clearview Electric, Inc.* ("Clearview"), in which Clearview agreed to pay a $250,000 civil penalty ($24.15 per violation) in a Settlement that was approved by the Commission by Order entered on June 30, 2017 in Docket No. C-2016-2543592 in a case involving 10,351 alleged violations of 52 Pa. Code § 54.4(a).

- *Great American Power LLC* ("Great American"), in which Great American agreed to pay a civil penalty of $13,500 civil penalty (an average of $346 per incident) under a Settlement that was approved by the Commission by Order entered on July 11, 2019 in Docket No. M-2018-2617335 in a case involving 22 alleged incidents.

- *Public Power LLC* ("Public Power"), in which Public Power agreed to pay a civil penalty of $72,500 (approximately $609 per instance) under a Settlement

[4] OCA's Comments reference the case of HIKO Energy, LLC ("*HIKO*"). First of all, at the time the HIKO case was resolved, HIKO was not an affiliate of Verde. The HIKO case was initiated in 2015. Secondly, the HIKO case was fully litigated and did not involve a Settlement. I&E alleged HIKO overbilled 14,780 customers in violation of 52 Pa. Code § 54.4(a). BIE sought a $1,000 penalty for each violation for a total civil penalty of $14,780,000, and it proposed rescinding HIKO's authority to operate as an electric generation supplier in Pennsylvania. The matter was fully litigated, and by Order entered on January 18, 2016 in Docket No. C-2014-2431410, the Commission ordered HIKO to pay a $1,836,125 civil penalty for intentionally violating the Commission's regulations on 14,689 separate occasions ($125 per violation). HIKO appealed the amount of the civil penalty to the Pennsylvania Commonwealth Court and ultimately to the Pennsylvania Supreme Court, but both appellate courts upheld the penalty in full.

approved by the Commission by Order entered on May 19, 2016 in Docket No. M-2015-2439492 in a case involved 119 alleged incidents.

- *Plymouth Rock Energy, LLC* ("Plymouth Rock") in which Plymouth Rock agreed to a civil penalty of $98,683 under a Settlement approved by the Commission by Order entered on April 19, 2018 in Docket No. C-2016-2579276 in a case involving 2437 incidents.

- *Vista Energy Marketing, L.P.* ("Vista"), in which Vista paid a civil penalty of $52,700 ($425 per incident) under a Settlement approved by the Commission by Order entered on March 14, 2019 in Docket No. M-2018-2624484 in a case involving 124 incidents.

While the Settlement address several other allegations that did not involve agents (such as failure to maintain verification records and failure to comply with door to door notice requirements), the large majority of the Complaint's allegations and proposed violations related to these 339 agent interactions.[5] As such, when viewed in the context of other EGS settlements, the $1,000,000 civil penalty coupled with the $75,000 hardship fund contribution is clearly a significant amount relative to the number of alleged improper interactions.

B. Customer Refunds (¶¶ 26-29 of the Settlement)

The OCA's Comments question the calculation and distribution of customer refunds under the Settlement. For each customer identified in the Complaint that actually enrolled with Verde, Verde will provide a refund equal to their first two months of electricity supply charges,

[5] The Complaint also included two paragraphs alleging improper customer account access. However, such account access was associated with vendors working for numerous EGSs in Pennsylvania and not limited to Verde.

less any amounts previously refunded to that customer. This methodology is fully consistent with the Commission's regulation at 52 Pa. Code § 57.177, which authorizes a refund of all supplier charges when a customer disputes an EGS enrollment within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent. As for the distribution of refunds, the OCA appears to argue that customers other than those whose enrollments were identified in the Complaint should be provided refunds, but obviously, it is not possible or appropriate to issue refunds to customers who have not disputed their enrollment and who were not identified in the Complaint that is the subject of this proceeding. The Settlement's refund provisions are appropriate and commensurate with the nature of the allegations in that they provide the full relief authorized by the Commission's regulations for each customer who was alleged to have been affected by actions set forth in the Complaint.

OCA's other concerns with the refund payments are not justified. I&E has already identified the 179 customers who were alleged enrolled without authorization and Verde has agreed to issue the refunds to each of those identified customers. OCA appears to argue that a larger group of customers may be entitled to refunds, but no such other customers are at issue in this proceeding. This proceeding and this Settlement are limited in scope by the specific allegations set forth in the Complaint. The refund component of the Settlement was meant to specifically address the allegation related to 179 unauthorized enrollments, and it does so in accordance with the Commission's regulation regarding unauthorized enrollment. It is common for refund payments to be accompanied by release of claims in order to bring closure to any potential dispute, and both Verde and I&E agreed it was appropriate for such a release to be included as a component of the Settlement.

C. Marketing Moratorium (¶ 31 of the Settlement)

OCA's Comments argue that the agreed-upon marketing moratorium is not reasonable because it supposedly does not contain a process to confirm implementation of quality assurance measures and because it does not extend to online enrollment or enrollments in response to inbound customer inquiries. OCA's concerns are not warranted. Paragraph 31 of the Settlement clearly states that Verde will not conduct any telemarketing or in-person marketing until the quality assurances measures discussed below have been fully implemented and Verde provides confirmation of such information to I&E in writing. In response to OCA's argument that the conditions that would allow Verde to resume marketing are not reasonable, Verde respectfully submits that OCA's position is not being reasonable. The Compliance Plan that Verde is required to develop will result in one of the strictest quality assurance and oversight regimes for any EGS operating in Pennsylvania. Before it resumes marketing, Verde must submit to I&E a detailed description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania, and then meet with I&E and designated Commission staff to review and discuss the training and quality assurance program.[6] Verde must then confirm its implementation to I&E, and then continually report the results of sales audits to I&E for two years, and must also report any changes in marketing policies to I&E. The extent of the restrictions and the multitude of quality assurance safeguards and ongoing auditing and reporting obligations demonstrate that the Settlement's Compliance Plan components are in fact reasonable and appropriate.

With respect to OCA's concerns about online enrollments, or customers who are contacted after submitting inbound requests for information, it must be noted that those sales

[6] *See* Settlement Paragraph 34.

channels were not at issue in the Complaint. No allegations of improper activity were alleged in connection with those sales channels, and those channels differ in significant ways in that they are much less susceptible to the types of improper sales agent actions than the sales channels at issue in the Complaint (i.e. door to door and outbound telemarketing). As such, it is reasonable and appropriate for those sales channels to be excluded from the agreed-upon marketing moratorium.

The length of the agreed-upon marketing moratorium is also appropriate. As discussed above, while the OCA treats every single allegation in the Complaint as having been conclusively proven, that is simply not the case. Verde and I&E recognized the inherent uncertainty of litigation and challenges associated with litigating a complaint of this nature, which involved third-party summaries of prior customer contacts rather than first-hand complaints or disputes. Settlements inherently involve compromises and the length of the moratorium in this case (February 2020 to May 2021) is significant and reasonable in the context of the broader settlement. In addition, it bears repeating that even upon expiration of the moratorium, marketing cannot resume until the new Compliance Plan is fully implemented. The Compliance Plan will incorporate all of the operational changes and controls required by I&E. Furthermore, the Settlement, in paragraphs 34-36, obligates Verde to perform continual sales monitoring and auditing, and take specific steps in response to identified improper behavior, and report the results of those audits to I&E quarterly. The required oversight and reporting in the Settlement provides extra assurances that once marketing resumes it will be conducted in a fully compliant manner.

D. Limitations on Sales Activities (¶32 of the Settlement)

OCA's Comments, at pages27-28, take issue with the scope of the sales limitations agreed to by Verde and I&E in Paragraph 32 of the Settlement. But these limitations are just one piece of the much larger Compliance Plan that Verde is obligated to implement before Verde can resume marketing. OCA is concerned that these limitations can be modified in the future, but Paragraph 32 of the Settlement expressly states that such modifications can only be made with the agreement of I&E after Verde demonstrates substantial compliance with the Settlement's provisions. Therefore, OCA is simply incorrect when it says that these restrictions can be modified at any time without notice or input. The restrictions in Paragraph 32 are meant to limit the extent of Verde's sales activities to protect against the types of behavior alleged in the Complaint and to better enable ongoing sales compliance. In that respect, the restrictions are reasonable and appropriate in scope, such that no modification is warranted.

E. General Marketing Commitments (¶ 33 of the Settlement)

OCA's criticism of Paragraph 33 of the Settlement highlights the unreasonable nature of its position. Paragraph 33 is a form of a standard paragraph that appears in nearly all settlements with EGSs, and reiterates the basic marketing regulations with which EGSs must comply in addition to highlighting some specific compliance obligations implicated by the Complaint. The OCA criticizes the paragraph for not addressing oversight requirements, but oversight requirements are addressed in separate paragraphs, specifically, Paragraphs 34-35. Rather than acknowledging this, OCA instead uses Paragraph 33 to disparage Verde and its management. Notably, as explained in the Stipulation at Paragraph 43, Verde has undergone significant changes in its executive leadership since I&E initiated its investigation, including the following: replacement of its Executive Vice-President of Sales; replacement of its Director of Mass Market

Sales in March of 2020; replacement of its General Counsel in January of 2020; and replacement of its Chief Executive Officer in March of 2020. In addition, Verde has hired a new regulatory compliance consultant in January of 2020 and a new Chief Operating Officer in March of 2020. In short, OCA's criticisms of its management oversight have already been addressed through these personnel changes, and the specific oversight components of the Compliance Plan are addressed in subsequent paragraphs of the Settlement.

F. Compliance Plan (¶ 34 of the Settlement)

OCA submits that the Compliance Plan is deficient because there is no approval process for the Plan and it does not allow for input from stakeholders. This is not correct. As set forth above, the intent of the settling parties was not to negotiate every last detail of a potential Compliance Plan that Verde would implement before resuming marketing sometime in 2021. Instead, the parties agreed that Verde would be required to develop a Compliance Plan that covered a variety of different operation aspects, with minimum requirements in multiple categories of operations including hard restrictions on number of sales vendors, detailed training program components, detailed sales audit procedures, verification and reporting requirements, recording of sales calls, and quality assurance sampling among others. Before it resumes marketing, Verde must submit to I&E a detailed description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania, and then meet with I&E and designated Commission staff to review and discuss the training and quality assurance program. Verde must then confirm its implementation to I&E, and then continually report the results of sales audits to I&E for two years, and must also report any changes in marketing policies to I&E. *See* Settlement, ¶¶ 30-37. Contrary to the OCA's comments, the Settlement specifically provides for review and input of the training

materials and program by I&E and Commission staff. *See* Settlement, ¶ 34(a)(i). In criticizing the framework developed by Verde and I&E to ensure ongoing compliance before marketing can resume, the OCA is now criticizing the Settlement as not being to its liking after having previously rejected the opportunity to help craft the Settlement's terms. This is not a valid reason to deny approval of the Settlement.

G. Compliance Monitoring (¶ 35 of the Settlement)

OCA submits that the compliance monitoring guidelines for the Compliance Plan are deficient. While not objecting to the very precise and thorough monitoring requirements or the percentage of calls that will be monitored, OCA does not believe there is enough detail about what the specific review process will look like. OCA then goes on to revive the allegations regarding the oversight of Verde's prior management team and essentially alleges that Verde will not be able to comply with the Compliance Plan once implemented. The OCA's concerns about whether or not Verde can or will comply with the Settlement is not a basis to reject the Settlement. OCA also alleges that the Settlement is not specific enough in outlining the remedial measures that Verde must take if it identifies a sale that is non-complaint. For instance, OCA criticizes the Settlement for incorporating the slamming dispute process at 52 Pa. Code § 57.177. However, in doing so, OCA misinterprets the regulations as triggering a "Commission dispute process" that a customer must go through in order to get a remedy. That is not what Section 52.177 says. The regulation actually requires that when an EGS learns of a slamming allegation, it must treat it as a customer dispute and initiate the investigation and dispute resolution requirements of 52 Pa. Code §§ 56.151 and 56.152, regarding utility company dispute procedures. Also contrary to the OCA's allegation, the regulation explicitly states that any customer who was switched without consent must be automatically switched back without any

fees. The OCA Comments also fail to recognize that the requirements of Settlement Paragraph 35 go beyond those of Section 57.177. For instance, under Paragraph 35(a)(iv)(3)(a), if Verde identifies a non-compliant call, Verde must provide the customer with a refund for the full length of the enrollment, not just the two billing cycles required by the regulation. With respect to the OCA recommendation to impose sales recording requirements that were recently enacted by the Connecticut Public Utilities Regulatory Authority, those regulations obviously are specific to Connecticut and were enacted after a multi-year rulemaking with numerous stakeholders and multiple rounds of testimony and comments. There is no similar requirement in Pennsylvania law or regulation and, therefore, there is no basis to suggest that the Settlement is somehow deficient because it does not include those Connecticut-specific requirements.

H. Reporting (¶ 36 of the Settlement)

OCA criticizes the reporting section of the Settlement because it does not call for OCA to be copied on the quarterly reports that Verde must submit to I&E with the results of its quality assurance monitoring. Again, OCA repeatedly declined to participate in any settlement discussions, so I&E and Verde crafted the Settlement without OCA's input. In any event, the reporting provisions of the Settlement are robust and require Verde to provide I&E with quarterly explanations of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof and also provide a summary of the number and type of customer complaints and disputes received by Verde during the reporting period. The purpose of the reporting provisions is to allow I&E to track compliance with the Settlement and to monitor the effectiveness of the Compliance Plan in eliminating non-compliant activity. By providing I&E with quarterly figures

on the number of both complaints and disputes received, I&E will be able to quickly gauge Verde's adherence to the Compliance Plan and the Plan's effectiveness.

I. Policy Changes (¶ 37 of the Settlement)

OCA makes some wordsmithing suggestions to the Settlement provision that requires Verde to provide written notice of any policy changes to its practices and procedures related to marketing in Pennsylvania. Both Verde and I&E felt the language had the appropriate level of specificity, and OCA provides no justification for any changes other than its own preferences. The language regarding changes to its practices and procedures provides a clear directive to Verde to provide written notice to I&E. It also should be noted that the Settlement mandates a high level of reporting and communication between Verde and I&E for at least two years after the Settlement is approved. To the extent that there is any misunderstanding between the parties as to the extent of reporting or notification required, I&E and Verde are more than capable of resolving any such misunderstandings. As such, there is no basis to modify the Settlement's terms on required notifications of policy changes.

J. Other Issues

OCA alleges that the Settlement does not address two issues that were touched upon in the Complaint regarding alleged unauthorized account access. However, these alleged issues were addressed during I&E's investigation of this matter and satisfactorily resolved as part of this Settlement. While the allegations related to that matter are certainly troubling, there is little to no information about the issue in the Complaint or from I&E's investigation which justifies making Verde responsible for the unauthorized account access. I&E's investigation materials indicate that the improper account access clearly seems to be the work of an unscrupulous actor

who was working for multiple suppliers. Verde was unaware of these alleged actions and certainly did not authorize them. Nevertheless, the Settlement includes remedial measures to address these allegations, including, but not limited to, the provisions of Paragraph 34(a)(ii)(4).

The OCA also argues that the Settlement should attempt to account for customers other than the ones involved in the 339 interactions underlying the Complaint. However, this proceeding and this Settlement are limited in scope by the specific allegations set forth in the I&E Complaint, and I&E and Verde both have agreed that the Settlement fully and finally resolves all of the allegations. There is no basis to reject the Settlement based on the speculation that there may additional improper interactions even though no other improper interactions were alleged. Nonetheless, it should be noted that even though the allegations arose in PPL territory only, the Settlement's marketing moratorium is statewide in scope. Therefore, in this respect the Settlement does include remedial measures and protections that goes beyond the geographic scope of the allegations in the Complaint.

It should also be noted that the OCA's Comments contain several other inaccurate characterizations and assumptions. For instance, the OCA Comments state on page 41 that the Settlement does not include any modifications to Verde's management, but as noted in the Stipulated Facts a major overhaul of Verde's management has already taken place. The OCA Comments on page 40 allege that Verde was unable to locate enrollment records for 110 of the 339 interactions underlying the Complaint. However, contrary to the OCA's characterization, the issue was not that Verde could not locate enrollment records for 110 customers, the reality is that 110 of the 339 customers never completed an enrollment with Verde to begin with. *See* Stipulated Facts, Paragraph 42. On Page 17 of its Comments, OCA also criticizes Verde for not conducting additional investigation or initiating any litigation regarding the 339 allegedly

improper interactions. What OCA fails to recognize is that Verde only learned of these 339 interactions upon the filing of the I&E Complaint which triggered this proceeding. In other words, by the time Verde learned of the alleged 339 improper interactions they were already the subject of an I&E Complaint. *See* Stipulated Facts, Paragraph 31. Verde immediately began investigating the allegations and cooperated with I&E to fully resolve the Complaint within several months of the Complaint being filed. It is unclear what additional steps the OCA would expect Verde to take under these circumstances.

III. THE OCA COMMENTS DO NOT PROVIDE ANY JUSTIFICATION TO REJECT THE SETTLEMENT

With respect to the OCA's *Rosi* analysis, Verde reiterates and restates its own *Rosi* analysis from its Statement in Support of Settlement. The Settlement Petition, the parties' Statements in Support of Settlement and the Stipulated Facts provide the factual and legal justification for approval of the Settlement as being in the public interest. It is the Commission's policy to encourage settlements because they decrease the time and expense the parties must expend litigating a case and, at the same time, conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. "The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a 'burden of proof' standard, as is utilized for contested matters." *Pa. Pub. Util. Comm'n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al*. (Order entered July 14, 2011) at p. 11. Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *See Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation*, M-2009-2058182 (Order entered November 23, 2009*); Pa. Pub. Util.*

Comm'n v. Philadelphia Gas Works, M-00031768 (Order entered January 7, 2004); 52 Pa. Code § 69.1201; *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Order entered April 1, 1996*); Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates*, 74 Pa. PUC 767 (1991).

Verde and I&E have demonstrated that that approval of the Settlement in this matter is consistent with the Commission's Policy for Litigated and Settled Proceedings Involving Violations of the Code and Commission Regulations at 52 Pa. Code § 69.1201. As set forth in Verde's Statement in Support, this Settlement is in the public interest because it is a complete and final resolution of this proceeding that effectively addresses the issues that were the subject of the Complaint, avoids the time and expense of litigation and possible appeals, and provides immediate, concrete benefits to Verde's current and former customers that would otherwise be unavailable in the near term. In this particular case, litigation would be particularly difficult because the Complaint's allegations are based on second-hand customer complaints received by a utility. Both I&E and Verde recognized that challenge. But rather than litigate every underlying allegation, which Verde has the right to do, Verde essentially agreed to take responsibility for each and every one of the alleged improper actions by its vendors. From I&E's perspective, a satisfactory settlement of this matter frees I&E's limited staff and resources to conduct investigations of other suppliers. That is another reason why protracted litigation of this matter makes no sense. The Settlement immediately and comprehensively resolves all of the allegations made in the Complaint, establishes a framework to immediately provide refunds to affected customers, and outlines detailed modifications to business practices to implement industry-wide best practices. The Settlement thus provides immediate, concrete benefits to the public that would otherwise be unavailable in the near term.

The Complainant and the Respondent in this case have reached a full and complete Settlement that satisfactorily addresses all of the Complainant's allegations and provides for both retroactive and prospective relief. By entering into the Settlement, Verde and I&E have established what nearly amounts to a strict liability standard for supplier marketing violations, as reflected in the amount of the civil penalty in relation to the number of customer interactions alleged. OCA repeatedly refers to the Settlement as a "non-unanimous" settlement that somehow requires a different analysis. But it must be recognized that this matter is a Formal Complaint with one Complainant and one Respondent. This is not a multi-party rate case or Application proceeding with a wide variety of interests and issues. The sole case that OCA cites to justify a different standard for evaluating a non-unanimous settlement involved a highly complex and contentious Application for Transfer of Control with over twenty parties, including multiple parties that did not join in the Settlement and who sought additional conditions for the Settlement.[7] This is far different from a Formal Complaint case in which both the sole Complainant and sole Respondent reached a full resolution of all issues raised in the Complaint, and an Intervenor that did not participate in settlement discussions wishes to force the Complainant and Respondent to litigate the matter against their wishes.

As explained in detail in Verde's Statement in Support, approval of this Settlement is consistent with the factors and standards for evaluating litigated and settled proceedings, as articulated in *Rosi* and codified in the Commission's Policy Statement at 52 Pa. Code § 69.1201, the Settlement is in the public interest, and OCA's request to reject or alter the Settlement should be rejected for the reasons set forth herein.

---

[7] *Joint Application of West Penn Power, et al,* Docket Nos. A-2010-217-6520 and A-2010-2176732 (Order entered March 8, 2011)

Respectfully Submitted,

STEVENS & LEE

_____

Michael A. Gruin, (I.D. No. 78625)
17 N. 2nd St., 16th Fl.
Harrisburg, PA 17101
Tel. (717) 255-7365
Fax (610) 988-0852
mag@stevenslee.com
COUNSEL FOR VERDE ENERGY USA, INC.

DATE: November 30, 2020