



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

BUREAU OF  
INVESTIGATION  
&  
ENFORCEMENT

February 5, 2021

**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 Brief in Opposition to the Office of Consumer Advocate's Petition  
for Interlocutory Review and Answer to Material Question**

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's ("I&E") **Brief in Opposition to the Office of Consumer Advocate's Petition for Interlocutory Review and Answer to Material Question** 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,

A handwritten signature in blue ink that reads 'Kayla L. Rost'.

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KLR/ac  
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Per Certificate of Service

**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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**BUREAU OF INVESTIGATION AND ENFORCEMENT’S  
BRIEF IN OPPOSITION TO  
THE OFFICE OF CONSUMER ADVOCATE’S  
PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO  
MATERIAL QUESTION**

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**TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:**

The Pennsylvania Public Utility Commission’s (“Commission”) Bureau of Investigation and Enforcement (“I&E”), by and through its prosecuting attorneys, files this Brief in Opposition to the Office of Consumer Advocate’s (“OCA”) Petition for Interlocutory Review and Answer to Material Question dated January 28, 2021 pursuant to 52 Pa. Code § 5.302(b). In opposition of the OCA’s Petition, I&E argues as follows:

**I. HISTORY OF THE PROCEEDING**

On January 30, 2020, I&E filed the Complaint in this matter based upon the 339 customer account complaints identified and provided by PPL Electric Utilities, Inc. (“PPL”) through its Informal Investigation.<sup>1</sup>

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<sup>1</sup> Verde requested and was granted an extension of time to file an Answer on February 14, 2020, March 30, 2020, and May 15, 2020, respectively.

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 a 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 (“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 (“ALJ”) 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 designated 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.

On November 30, 2020, I&E and Verde filed Reply Comments.

On December 3, 2020, the OCA filed an Answer to the Motion to Strike.

On January 15, 2021, ALJ Pell issued an Interim Order Granting the Motion to Strike of Verde Energy USA, Inc. In the Interim Order, ALJ Pell struck from the record the affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2; the OCA's

proposed findings of fact; the OCA’s discussion of Verde ownership, structure, and operations in other states, and vendors; and all citations to “Affidavit” and/or its Exhibits, and Mrs. Alexander’s opinions throughout the comments. ALJ Pell then ordered the record closed and ripe for decision.

On January 28, 2021, the OCA filed a Petition for Interlocutory Review and Answer to Material Question.

## **II. COUNTER-STATEMENT OF MATERIAL QUESTION**

A. Has the OCA met the standard for interlocutory review?

Suggested Answer: No.

B. Did the ALJ properly strike the affidavit, exhibits, findings of facts, and discussions to Verde’s ownership and operations in other states presented/attached in the OCA’s Comments?

Suggested Answer: Yes.

## **III. LEGAL STANDARD**

The standards for interlocutory review are well established. Section 5.302(a) of the Commission’s regulations, 52 Pa. Code § 5.302(a), require that the petition “state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice - that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, et al. (Order entered June 14, 1999); *Pa. PUC v.*

*Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009).

In a petition for interlocutory review involving the scope and admissibility of evidence in a proceeding, the Commission will consider the presiding ALJ's authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in the statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and the Commission's Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in non-rate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223 (pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223.

#### IV. SUMMARY OF ARGUMENT

The Commission should deny the OCA's Petition for Interlocutory Review as improper and should allow ALJ Pell to issue his decision. Moreover, the Commission should decline to answer the OCA's material question because the OCA has failed to provide a necessary and compelling reason why interlocutory review is required to prevent substantial prejudice or expediate the conduct of the proceeding. Notably, the OCA's Petition for Interlocutory Review will unnecessarily delay the current proceeding, which is ripe for a decision.

In the alternative, the Commission could answer the OCA's material question in the negative and find that ALJ Pell did not err in striking the OCA's so called "evidence"<sup>2</sup> from the record. ALJs have procedural avenues at their disposal to focus or narrow the issues in their cases, if necessary, including settlement, motions made by the Parties, and the authority to exclude irrelevant or immaterial evidence and otherwise regulate the course of the proceeding pursuant to 52 Pa. Code § 5.483(a) and to control the receipt of evidence pursuant to 52 Pa. Code § 5.403(a). Thus, ALJ Pell properly granted Verde's Motion to Strike and removed the OCA's inappropriate "evidence" from the record.

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<sup>2</sup> I&E does not agree that the affidavit and attachments are evidence, especially since the Complaint has been resolved through a Joint Petition for Settlement Agreement and is fully supported by a Joint Stipulation of Facts. The OCA's attempt to introduce the affidavit and attachments as evidence further showcases the OCA's inability to accept that the Complaint has been settled and is not being litigated. Further, this shows the OCA's lack of understanding of the standard in settled matters, i.e., whether the settlement is in the public interest, and a continued lack of compliance regarding ALJ Pell's Orders.

## V. ARGUMENT

### A. INTERLOCUTORY REVIEW

The OCA's request for interlocutory review and answer to material question should be denied or determined to be improper because the pending matter is in the final stages of litigation and the record is closed for decision. Thus, granting interlocutory review will not expediate the proceeding, but rather hinder and prevent the proceeding from concluding in a timely manner. The Commission has previously declined to answer material questions presented at later stages in the proceeding. *See James Quigley & Teresa Mendez-Quigley*, No. C-2017-2617558 (Order entered Sept. 20, 2018) ("The issuance of the ALJ's Initial Decision in this matter is the only procedure remaining before the Exceptions stage. We have previously declined to answer material questions presented at such a later stage in a proceeding."); *Petition of the Borough of Cornwall*, Docket No. P-2015-2505794 (Order entered November 19, 2015); and *Pa. PUC v. Duquesne Light Company*, Docket No. R-2013-2372129.

Furthermore, the OCA has failed to demonstrate either extraordinary circumstances or compelling reasons that would result in irreparable harm or prejudice necessary for the Commission to grant interlocutory review. If anything, reversing ALJ Pell's Interim Order and allowing the OCA's "evidence" into the record would cause irreparable harm by prejudicing I&E and Verde and violating their due process rights.

Contrary to the OCA's assertion, the OCA has been granted numerous opportunities to be heard in this matter - through the prehearing conference, the various



motions and pleadings, and its comments. Thus, the Petition for Interlocutory Review should be deemed improper and the matter returned to ALJ Pell for decision.

**B. ALJ PELL HAS THE AUTHORITY TO EXCLUDE “EVIDENCE” AND DEFINE THE SCOPE OF THE PROCEEDING**

As explained in the January 15, 2021 Interim Order, ALJ Pell granted Verde’s Motion to Strike and properly struck from the record the affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2; the OCA’s proposed findings of fact; the OCA’s discussion of Verde ownership, structure, and operations in other states, and vendors; and all citations to “Affidavit” and/or its Exhibits, and Mrs. Alexander’s opinions throughout the comments. In doing so, ALJ Pell’s September 25, 2020 Order explained how the OCA was provided sufficient time to conduct discovery in this matter, but, in the interest of fairness, provided the OCA the ability to provide substantive comments on the Settlement Agreement since the Statement in Opposition largely focused on procedural grounds. ALJ Pell clearly instructed the OCA to provide comments to the Settlement Agreement, not engage in paper litigation or submit their own set of facts or purported evidence.

As an intervenor, the OCA does not have the right or ability to force I&E and Verde to litigate a settled matter. *See Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 (Order entered May 3, 2018) (citing 52 Pa. Code § 5.75(c)) (“[a]n intervenor’s role in proceedings before this Commission is on a non-party basis, meaning that the initiating and responding parties

can drive the outcome without regard to the alleged interests of would-be intervenors.”) The intent of the comment period is for the interested party to provide its position on the settlement or the settlement’s impact on that party, not attempt to litigate through the comment by attaching affidavits and documents or including references to alleged facts outside the scope of the proceeding. Thus, the OCA overstepped its role as an intervenor by attaching the affidavit, findings of fact, and various references to Verde that are unrelated and outside the scope of this proceeding to their comments.

Moreover, ALJ Pell has the distinct authority to define the scope of the proceeding and rule on any evidentiary matters. *See* 52 Pa. Code § 5.48(a) (“The presiding officer will have the authority specified in the act, subject to this title. This authority includes, but is not limited to, the power to exclude irrelevant, immaterial or unduly repetitive evidence, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding.”); 52 Pa. Code § 5.403(a).<sup>3</sup>

Therefore, ALJ Pell properly found that the inclusion of the OCA’s “evidence,” which contained unverified discovery and an affidavit that was not subject to cross examination or objections, should be stricken from the record.

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<sup>3</sup> “The presiding officer shall have all necessary authority to control the receipt of evidence, including the following:

- (1) Ruling on the admissibility of evidence.
- (2) Confining the evidence to the issues in the proceeding and impose, where appropriate:
  - (i) Limitations on the number of witnesses to be heard.
  - (ii) Limitations of time and scope for direct and cross-examinations.
  - (iii) Limitations on the production of further evidence.
  - (iv) Other necessary limitations.”

52 Pa. Code § 5.403(a).

## VI. CONCLUSION

Wherefore, for the above listed reasons, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny the Office of Consumer Advocate's Petition for Interlocutory Review and Answer to Material Question as improper.

Respectfully submitted,



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Dated: February 5, 2021

**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.	:	

**CERTIFICATE OF SERVICE**


I hereby certify that I have this day served a true copy of the foregoing **Brief in Opposition to the Office of Consumer Advocate’s Petition for Interlocutory Review and Answer to Material Question** dated February 5, 2021, 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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