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February 8, 2021

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

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 8th day of February, 2021, a copy of the enclosed Brief 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.

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DATE: February 8, 2021

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	:	

**BRIEF OF VERDE ENERGY USA, INC.
IN RESPONSE TO THE PETITION FOR INTERLOCUTORY REVIEW AND ANSWER
TO MATERIAL QUESTION OF THE OFFICE OF CONSUMER ADVOCATE**

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DATE: February 8, 2021

PRELIMINARY STATEMENT

Pursuant to 52 Pa. Code § 5.302, Verde Energy USA, Inc. (“Verde”) hereby submits this Brief in Response to the Petition for Interlocutory Review and Answer to a Material Question (“Petition”) filed by the Office of Consumer Advocate (“OCA”). For the reasons set forth below, Verde requests that the Pennsylvania Public Utility Commission (“Commission”) issue an Order that:

- 1) Denies the OCA’s Petition; and
- 2) Upholds the Administrative Law Judge’s (“ALJ”) Interim Order striking the following portions of OCA’s Comments from the record:
 - a. The affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2;
 - b. The OCA’s proposed findings of fact;
 - c. The OCA’s discussion of Verde ownership structure, affiliates and operations in other states, and vendors; and
 - d. All citations to “Affidavit” and/or its Exhibits, and Ms. Alexander’s opinions throughout the comments.

Denial of the OCA’s Petition is warranted because Administrative Law Judge (“ALJ”) Pell correctly determined that the extraneous affidavit and portions of the Comments submitted by the OCA in opposition to the Petition for Settlement went beyond the scope of this proceeding, were improperly prejudicial, and should be stricken. The record in this case reflects that the OCA was provided with a meaningful opportunity to be heard regarding the Petition for Settlement, and the striking of its attempted expansion of the record in the case and reference to material not in the record was the proper decision. The OCA’s Petition provides no basis to grant interlocutory review or to overturn the ALJ’s well-reasoned decision, and granting the Petition would run directly contrary to the Commission’s policy encouraging the settlement of contested proceedings.

I. INTRODUCTION AND STATEMENT OF THE CASE

On January 30, 2020, the Commission’s Bureau of Investigation and Enforcement (“I&E”) filed a Formal Complaint against Verde, alleging various conduct by vendors of Verde

that violated the Commission's regulations in connection with 339 customer interactions by marketing representatives acting on behalf of Verde, as well as violations associated with vendors obtaining access to customer accounts without authorization, and failure to provide required notices of door to door marketing activity. Shortly thereafter, Verde and I&E actively engaged in discussions to address the allegations, and ultimately reach a full Settlement of the Formal Complaint.

The OCA filed its Notice of Intervention and Public Statement on February 24, 2020.

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 ("Settlement Petition") and Statements in Support thereof. The Settlement Petition fully addressed all of the Formal Complaint's allegations against Verde, provided for a significant civil penalty, provided for refunds to those customers who were identified as being impacted by the conduct alleged in the Formal Complaint, provided a significant contribution to PPL's hardship fund to assist customers with the payment of their electricity bills, established a lengthy prohibition on Verde's marketing in Pennsylvania, and included a requirement to implement a detailed compliance plan before the resumption of marketing, and ongoing monitoring and reporting requirements. The civil penalty, refunds, and hardship fund contributions, coupled with extensive changes to Verde's sales and marketing practices, would 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 Settlement Petition and in both I&E and Verde's Statements in Support of the Settlement Petition, respectively.

Despite intervening on February 24, 2020, and despite being offered the opportunity to provide input on the Settlement Petition, OCA declined to join in the Settlement Petition.

Instead, on July 10, 2020, OCA filed a letter stating its intention to file a Statement in Opposition to the Settlement Petition and requested that the Commission assign the matter to an Administrative Law Judge. On July 20, 2020, OCA filed its Statement in Opposition stating that it cannot support the Settlement 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. Following the filing of its Statement in Opposition, OCA then issued three (3) separate sets of discovery requests to Verde, to which Verde responded.

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. OCA, in its Prehearing Memorandum, requested that the litigation schedule 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. Verde and I&E, in their Prehearing Memoranda, maintained that no litigation schedule was necessary at all because the Complainant, (I&E), and the Respondent, (Verde), had already reached a complete and final resolution of this proceeding which fully addressed the issues that were the subject of the Complaint. As Verde and I&E explained, the only issue that remained to be decided at that point was whether the Joint Petition for Approval of Settlement should be approved in its entirety without modification and if it is in the public interest.

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.

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 Settlement Petition. 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.”

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

On November 9, 2020, the OCA filed its Comments in Opposition to the Settlement Petition (“Comments”). OCA's Comments went far beyond the scope of Comments permitted by ALJ Pell in his September 25th Order, and the filing that OCA referred to as its “Comments” was 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 Petition, and “Findings of Fact” that are based almost entirely on information that is not in the record in the proceeding.

On November 18, 2020, Verde filed a Motion to Strike Portions of Comments of the OCA (“Motion to Strike”). Specifically, Verde requested that the following portions of OCA's Comments be stricken:

1. The affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2;
2. The OCA's proposed findings of fact;
3. The OCA's discussion of Verde ownership structure, affiliates and operations in other states, and vendors; and
4. All citations to “Affidavit” and/or its Exhibits, and Ms. Alexander's opinions throughout the comments.

On November 19, 2020, I&E filed a Letter in Support of Verde's Motion to Strike. I&E emphasized that the true intent of the comment period provided to parties after a Joint Petition for Approval of Settlement has been filed is to allow interested parties the opportunity to provide remarks or offer differing positions on the settlement, *not to* attempt to introduce evidence, submit testimony, or attempt to engage in paper litigation. I&E stated that OCA was “attempting to impermissibly litigate a settled matter through its comments and disregard ALJ Christopher Pell's September 25, 2020 Order – an attempt that should not be allowed.”

On December 3, 2020, OCA filed its response to Verde's Motion.

On January 15, 2021, Judge Pell issued an Interim Order Granting the Motion to Strike of Verde Energy USA, Inc. ("Interim Order"). The Interim Order granted Verde's Motion in its entirety and the requested items were ordered stricken from the record.

On January 28, 2021, OCA filed its Petition for Interlocutory Review and Answer to Material Question ("Petition").

II. LEGAL STANDARD FOR INTERLOCUTORY REVIEW

The standards for interlocutory review of a material question are set forth in 52 Pa. Code §§ 5.302 and 5.303. Section 5.302(a) requires that the petitioner 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, that the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process.¹

III. SUMMARY OF ARGUMENT

In its Petition, OCA requested that the Commission consider the following Material Question:

Did the ALJ err in striking OCA's factual evidence presented in support of OCA's substantive comments, thereby denying OCA a meaningful opportunity to be heard regarding its objections to the non-unanimous settlement?

Verde's Suggested Response: No. The ALJ correctly struck the additional materials included by the OCA in its Comments because the materials were not part of the evidentiary record in the case, they went beyond the scope of the proceeding and the scope of allowable comments, and they raised serious due process concerns.

¹ *Joint Application of Bell Atlantic Corporation and GTE Corporation*, Docket Nos. A-310200F0002, et al. (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pennsylvania Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. PUC v. C.S. Water and Sewer Associates*, 74 Pa. P.U.C. 716 (1991); *Re Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

At the outset, the premise of the OCA's Material Question as stated is flawed. The OCA was in no way denied any meaningful opportunity to be heard regarding its objections to the Settlement Petition. To the contrary, after the Settlement Petition was filed, OCA was given the opportunity to serve three sets of discovery requests, advocate its position at a Pre-hearing Conference, and submit written comments explaining its position on the Settlement Petition. OCA's true position *is not* that it was denied an opportunity to be heard. Rather, the OCA's true position, as it has stated explicitly, is that OCA should be permitted to force a Complainant and a Respondent to litigate a case that they had already fully settled.

ALJ Pell's September 25, 2020 Order explicitly permitted 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." While OCA did provide some substantive comments on Settlement in its Comments in Opposition to the Joint Petition, the OCA's "Comments" mostly attempted to interject additional proposed facts and evidence that went far beyond the scope of Comments permitted by ALJ Pell in his September 25th Order. The filing that OCA refers to as its "Comments" is tantamount to a hybrid of a legal brief, with 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 were based almost entirely on information that is not in the record in the proceeding. The ALJ was entirely correct in striking those improper portions of the OCA's Comments, and the striking of those improper portions did not deny the OCA any opportunity to be heard regarding the Settlement's terms.

IV. ARGUMENT

A. There is No Compelling Reason to Answer the Material Question

In response to ALJ Pell's Interim Order, OCA asserts that by excluding improper portions of its Comments from the record, a decision on approval of the Settlement Petition would be rendered without full consideration of the facts. OCA further states that by striking the specified materials from the record, its due process rights would be violated by denying it with a meaningful opportunity to be heard.

Despite the OCA's protestations, the fact is that no compelling reasons exist to justify Interlocutory Review of the ALJ's Interim Order, or to support a finding that Interlocutory Review will "prevent substantial prejudice or expedite the conduct of this proceeding" as required by 52 Pa. Code § 5.302(a). The Commission has made it clear that the role of an intervenor in a proceeding before the Commissions "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."² OCA's stated position in this matter was that the Complaint should not be settled. Disregarding the Commission's policy to encourage settlements,³ OCA's has instead taken the formal position that the Complaint should be litigated despite the fact that 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 OCA's Prehearing Memorandum. It also must be noted that OCA was invited by Verde and I&E on multiple occasions to provide input to the Settlement Petition before it was filed with the

² *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-2038-3000281 at 10 (Order entered May 3, 2018)(citing 52 Pa. Code § 5.75(c)) ("Rights upon grant of petition. Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding. Intervenors are granted no rights which survive discontinuance of a case.").

³ *See* 52 Pa. Code § 5.231; *see also* 52 Pa. Code § 69.401 (In the Commission's judgment, the results achieved from a negotiated settlement or stipulation, or both, in which the interested parties have had an opportunity to participate are often preferable to those achieved at the conclusion of a fully litigated proceeding.)

Commission. Each and every time such input was requested, OCA refused to provide any input. *See Stipulated Facts in Support of Settlement*, at ¶ 6. Having been provided the opportunity to provide input on the Settlement Petition and refusing to do so, and then having the opportunity to submit comments on the Settlement Petition, OCA cannot reasonably argue that it was not given an opportunity to be heard regarding the Settlement Petition. In light of this, OCA has not demonstrated any substantial prejudice to its interests as an intervenor, and therefore there is no compelling reason for the Commission to grant OCA's request for interlocutory review. Furthermore, addressing the OCA's Material Question will not expedite the conduct of the proceeding, and in fact it will do just the opposite – it will delay the review of a full settlement that is fully supported by both the Complainant and the Respondent and that is ripe for review and disposition.

B. The Commission Should Uphold the Interim Order Striking Portions of the Comments of OCA

To the extent that the Commission deems it necessary to review the Material Question, the Commission should uphold ALJ Pell's decision to strike the improper materials that were included in the OCA's Comments. The materials in question go far beyond the scope of Comments permitted by ALJ Pell in his September 25th Order. Furthermore, OCA's Comments contain 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.

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." While the OCA provided some substantive comments on Settlement Petition, the

inclusion of the Alexander Affidavit and Exhibits goes far beyond “delineating” the issues that OCA would raise if the Settlement Petition was rejected, or “outlining” how the OCA’s interests would be affected if the Settlement Petition is accepted. **To the contrary, the express purpose of the Alexander Affidavit, as explicitly stated in Paragraph 11 of the Affidavit, was to “provide additional facts and evidence.”** This is consistent with OCA’s formal position in this proceeding that the Complaint should be litigated rather than settled. *See* OCA’s Statement in Opposition to Joint Petition for Approval of Non-Unanimous Settlement, and the OCA’s Prehearing Memorandum. By 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. Therefore, ALJ Pell correctly determined that the Alexander Exhibits, attachments and references thereto were submitted in violation of the September 25, 2020 Order and therefore should be stricken.

In evaluating the Settlement Petition, ALJ Pell correctly noted that the Commission must only consider the evidence that is in the record in this case, and it is inappropriate for OCA’s Comments to reference information which is not in the record, or seek to expand the record with new information. He noted that his “expectation was for the OCA to provide comments based on the allegations raised by I&E in the Complaint and the information obtained through discovery.” Interim Order, at p. 13.

ALJ Pell also correctly observed that inclusion of the Alexander Affidavit in the record in this matter would 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. Interim Order, at p. 13. 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. No litigation procedure was established for the case because the Complaint was fully resolved via a Settlement between the Complainant and the Respondent.

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*. 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).

The attempted submission of the Alexander Affidavit and Exhibits was an effort by the OCA to improperly expand the record in the proceeding that did not afford due process to Verde or I&E. 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).

Furthermore, unauthenticated written statements such as Ms. Alexander’s Affidavit constitute inadmissible hearsay. 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. 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).

Rule 901 of the Pennsylvania Rules of Evidence, 225 Pa. Code § 901, provides for the necessity of authentication of documentary evidence. 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.⁴

While it may be argued that the Commission is not bound by the technical rules of evidence, the Commission has routinely and consistently rejected this interpretation. Acknowledging that “the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding,” the Commission has made it clear that “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).

Here, the OCA was attempting to use the Alexander Affidavit to create a factual record that it wanted the Commission to rely upon to reject a Settlement, and force I&E and Verde to litigate a Complaint that they have satisfactorily resolved. 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.

⁴ 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.

Furthermore, the Affidavit that the OCA attempted to introduce raises serious foundation, authentication, and due process issues. 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 by *third* parties, regarding what *fourth* parties allegedly said to them. Such a document cannot possibly be admissible under even the most lenient interpretation of administrative evidentiary rules. 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 center 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. 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.

In addition to the improper attachments to the OCA Comments, the body of the OCA's Comments also contained statements that go well beyond the scope of the proceeding and factual record and therefore should be stricken. 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. 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 Petition is based.

Notably, ALJ Pell did not strike the OCA's Comments in their entirety. ALJ Pell carefully evaluated all of the due process, evidentiary and procedural issue noted above, and correctly determined that the following portions of OCA's Comments should be stricken:

- a. The affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2;
- b. The OCA's proposed findings of fact;
- c. The OCA's discussion of Verde ownership structure, affiliates and operations in other states, and vendors; and
- d. All citations to "Affidavit" and/or its Exhibits, and Ms. Alexander's opinions throughout the comments.

The OCA was still provided with the opportunity to provide Comments on the Settlement Petition, and even with portions of the Comments stricken, the OCA was given, and did take, the opportunity to provide its view on the Settlement Petition's terms. Therefore, because the OCA was able to provide its comments on the substantive terms of the Settlement Petition, the OCA was not denied due process or prejudiced in any way.

V. CONCLUSION

For the reasons set forth above, Verde respectfully requests that the Commission deny the OCA's Petition for Interlocutory Review and Answer to a Material Question and uphold the Interim Order which struck portions of OCA's Comments.

Respectfully submitted,

STEVENS & LEE



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DATE: February 8, 2021