

COMMONWEALTH OF PENNSYLVANIA



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February 8, 2021

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

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Brief in Support of Petition for Interlocutory Review and Answer to Material Question in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

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cc: The Honorable Christopher P. Pell (**email only**)  
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Certificate of Service

\*303580

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Brief in Support of Petition for Interlocutory Review and Answer to Material Question, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 8<sup>th</sup> day of February 2021.

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement

v.

Verde Energy USA, Inc.

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Docket No. C-2020-3017229

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BRIEF OF THE OFFICE OF CONSUMER ADVOCATE  
IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW  
AND ANSWER TO MATERIAL QUESTION

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DATED: February 8, 2021

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## I. INTRODUCTION

Pursuant to Section 5.302 of the Pennsylvania Public Utility Commission's (Commission) regulations, 52 Pa. Code Section 5.302, the Office of Consumer Advocate (OCA) hereby files this Brief in Support of the Petition for Interlocutory Review and Answer to Material Question (Petition) filed by the OCA on January 28, 2021. The OCA avers that, on January 15, 2021, Administrative Law Judge Christopher P. Pell (ALJ Pell or the ALJ) erred in issuing an Interim Order Granting the Motion to Strike of Verde Energy USA, Inc. (Interim Order) which struck from the record portions of the OCA's Comments in Opposition of Settlement (Comments) filed by the OCA, Appendix A (Findings of Fact), the Affidavit of OCA witness Barbara Alexander (Affidavit), and Exhibit BA-2 (the PPL Report). In the Interim Order, ALJ Pell reasoned that the evidence found within the materials he struck was not available to all parties throughout the course of the proceeding and that it would not be proper for him to rely upon these materials or any references to them since the Bureau of Investigation and Enforcement (I&E) and Verde Energy USA, Inc. (Verde) never had the opportunity to cross-examine this witness or to offer rebuttal testimony.<sup>1</sup> ALJ Pell also noted that the OCA's evidence regarding Verde's dealings in other states was beyond the scope of this proceeding.<sup>2</sup>

The OCA's Comments referencing Ms. Alexander's Affidavit, attachments, and the OCA's Findings of Facts are relevant and admissible in this proceeding and due process requires the evidence to go before the ALJ and the Commission for consideration in determining whether the proposed Settlement should be approved. Far from being information that was not available to Verde and I&E, the Affidavit, written and sworn to by OCA witness Barbara Alexander,

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<sup>1</sup> Interim Order at 13.

<sup>2</sup> Id.

contains facts and findings developed by the OCA during discovery and are based on discovery responses provided by Verde, the information obtained by I&E that formed the basis of the Formal Complaint, or public documents concerning Verde, its parent and affiliates. The information presented by the OCA supports the OCA's substantive opposition to the proposed Settlement and provides the necessary information for the Commission to conduct a full and complete analysis of the proposed Settlement, and whether the proposed Settlement serves the public interest. Specifically, the Affidavit and the Findings of Fact, provide relevant background information, *inter alia*, on Verde's ownership structure, Verde's and its affiliate's history of similar allegations and proceedings in other jurisdictions, and Verde's use and management of third-party vendors in Pennsylvania. This information is necessary to understanding the OCA's substantive issues with the Settlement and its potential implementation. Importantly, the OCA's identification of specific deficiencies in the Settlement in Section V of its Comments is supported by the facts it was able to develop in the limited discovery it was able to conduct. The Stipulation of Facts jointly filed by I&E and Verde did not contain many of the pertinent facts which the OCA included with its Comments to demonstrate why the proposed Settlement falls short of serving the public interest or misstated other facts relating to this proceeding. Without the ability to present substantive Comments on the contested proposed settlement and the facts and evidence supporting those substantive comments, the OCA is not provided a meaningful opportunity to be heard in this proceeding in violation of its due process rights.<sup>3</sup> The substantial prejudice stemming from the ALJ's legal error in regard to the OCA's stricken evidence cannot be cured during the normal Commission review process in the proceeding.

In support of its Petition, the OCA submits as follows:

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<sup>3</sup> The OCA submits that, even if the concern that the parties never had the opportunity to cross-examine the OCA's witness or to offer rebuttal testimony had merit, striking relevant and necessary information would not be an appropriate remedy; see also, U.S. Const. Amend. XIV.

**II. STATEMENT OF THE MATERIAL QUESTION PRESENTED**

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

*Suggested answer in the affirmative.*

### III. LEGAL STANDARDS

The standard for interlocutory review of a material question, as set forth in the Commission's regulations at 52 Pa. Code Section 5.302(a), requires that the petitioning party "state ... the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding."<sup>4</sup> The pertinent consideration for interlocutory Commission review under Section 5.302(a) is whether such review is *necessary* in order to prevent substantial prejudice.<sup>5</sup> The petitioner must prove that, without such interlocutory review, some harm would result which would not be reparable through the normal Commission review process and, therefore, that the relief sought should be granted now, rather than later.<sup>6</sup> The Commission has found that when an ALJ commits a reversible legal error relating to the admission of relevant evidence, "compelling reasons" exist for interlocutory review if the resulting substantial prejudice to a party's right to present all relevant evidence cannot be rectified during the normal Commission review process.<sup>7</sup> Pursuant to the Commission's Regulations at 52 Pa. Code Section 5.303, on consideration of a petition for interlocutory Commission review and answer to a material question, the Commission may either: (1) continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; (4) answer the question.<sup>8</sup>

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<sup>4</sup> 52 Pa. Code Section 5.302(a).

<sup>5</sup> Commonwealth of Pennsylvania, et al.; v.; IDT Energy, Inc., 2014 Pa. PUC LEXIS 715, \*16 (Pa. P.U.C. December 18, 2014).

<sup>6</sup> Id.

<sup>7</sup> Pa. PUC v. PGW, Docket No. R-2020-3017206 et al. at 11-12 (Opinion and Order entered Aug. 6, 2020)

<sup>8</sup> 52 Pa. Code § 5.303.

For a Settlement to be approved by the Commission, it must serve the public interest and it must be supported by “substantial evidence.”<sup>9</sup> Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>10</sup> In the event of a non-unanimous settlement, the Commission’s standards for review are the same as those for deciding a fully contested case.<sup>11</sup>

The requirement of due process of law<sup>12</sup> in procedural matters applies equally to proceedings before administrative tribunals as well as judicial bodies.<sup>13</sup> Due process is required in Commission proceedings which are adjudicatory in nature and involve substantial property rights.<sup>14</sup> The opportunity to be heard at a meaningful time and in a meaningful manner is the fundamental requirement of due process.<sup>15</sup> Meaningful opportunity to be heard also includes the

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<sup>9</sup> Pa. PUC v. PGW, Docket No. R-2020-3017206 at 13-15 (Opinion and Order entered Nov. 19, 2020).

<sup>10</sup> Consolidated Edison Company of New York v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217; see also, 66 Pa. C.S. § 332 for definition of evidence that may be received. Under the Commission’s regulations on the admissibility of evidence, “[r]elevant and material evidence is admissible subject to objections on other grounds.” 52 Pa. Code § 5.401. Evidence will be excluded if (1) it is repetitious or cumulative or (2) its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or considerations of undue delay or waste of time. 52 Pa. Code § 5.401(b).

<sup>11</sup> Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp., Docket Nos. A-2010-2176520, and A-2010-2176732 (Opinion and Order entered March 8, 2011)

<sup>12</sup> U.S. Const. Amend. XIV.

<sup>13</sup> West Penn Power Co. v. Pennsylvania Public Utility Com., 174 Pa. Super. 123, 131 (Pa. Super 1953) (citing Armour Transportation Co. v. Pennsylvania Public Utility Commission, 138 Pa. Superior Ct. 243, 249, 10 A. 2d 86).

<sup>14</sup> Mid-Atlantic Power Supply Association v. PECO Energy Company, Docket Nos. P-00981615 et al. 1999 Pa. PUC LEXIS 30, \*54-55 (Pa. P.U.C. May 19, 1999) (citing Barasch v. Pa. PUC, 546 A.2d 1296 (Pa. Cmwlth. Ct. 1988), petition for allowance of appeal denied 523 Pa. 652 (1989)).

<sup>15</sup> Amy Grainda; v.; Pennsylvania Electric Company, Docket No. C-2018-3000992, 2018 Pa. PUC LEXIS 449, \*7 (Pa. P.U.C. December 20, 2018) (citing Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC, 421 A.2d 481, 484 (Pa. Cmwlth. 1980)); see also, 2 Pa.C.S. § 504 (Section 504 of the Administrative Law and Procedure Act) stating “[n]o adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.”

opportunity to present evidence.<sup>16</sup> While under the Public Utility Code, 66 Pa.C.S. Section 703, formal hearings are not always required in Complaint proceedings, the Commission must still “...make and file its findings and order with its opinion, if any...” and “[i]ts findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence.” 66 Pa.C.S. Section 703(b) and (e). In Popowsky v. Pa. PUC, 805 A.2d 637, 643 (Pa. Comm. 2002) (Popowsky)<sup>17</sup>, the Commonwealth Court found that the provisions of Section 703 “clearly envisioned a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings” and that “the allowance by the Commission to submit comments without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard as provided in Chapter 7 of the Public Utility Code or due process.” Although Popowsky involved Section 703(g) of the Public Utility Code regarding the rescission and amendment of orders, the provision refers to the “notice and opportunity to be heard” safeguard as provided in Chapter 7 entirely implying that the safeguard applies to all Complaints under Chapter 7.<sup>18</sup>

#### **IV. DISCUSSION**

The Commission assigned this contested matter to the Office of Administrative Law Judge following the Joint Petition for Approval of Settlement filed jointly by Verde and I&E on June 30,

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<sup>16</sup> Pennsylvania Public Utility Commission; v.; Verizon Pennsylvania Inc. Tariff No. 216 Revisions, et al., Docket Nos. R-00049524 et al., 2005 Pa. PUC LEXIS 10, \*97 (Pa. P.U.C. May 16, 2005).

<sup>17</sup> Popowsky v. Pa. PUC, 805 A.2d 637, 643 (Pa. Comm. 2002) (Commission’s allowance of interested party and intervenor to submit comments without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard in the context of non-unanimous settlement effectively rescinding a Commission final order under 66 Pa.C.S. Section 703(g)).

<sup>18</sup> Id.

2020 and the subsequent Statement in Opposition of the Petition for Non-Unanimous Settlement filed by the OCA on July 20, 2020. A Prehearing Conference was held on August 28, 2020 and ALJ Pell determined that he would review the contested settlement after permitting I&E and Verde to submit facts supporting the settlement, the OCA to file substantive comments on the proposed settlement, and I&E and Verde to file reply comments to those filed by the OCA.<sup>19</sup> On November 9, 2020, the OCA submitted its substantive Comments on the proposed settlement which included an affidavit provided by its witness (Affidavit), a report of logged complaints provided by a utility company in discovery (PPL Report), and the OCA's own findings of facts to fully develop the factual basis of its substantive comments in opposition to the proposed settlement. If the material remains excluded from the evidence of record before the Commission in this proceeding, it would lead to a decision rendered without full consideration of the facts that support the OCA's substantive position.

Additionally, the OCA submits that it would be denied a meaningful opportunity to be heard in violation of its due process rights by excluding necessary facts developed during discovery and necessary corrections to certain misstated, unsworn, unverified facts provided by Verde and I&E which ALJ Pell has erroneously determined to be the only evidence of record in this proceeding involving a contested settlement. ALJ Pell's September 25, 2020 Order sought *substantive* comments from the OCA and that substance was based on the facts that the OCA had been able to develop through the discovery it was permitted to conduct.<sup>20</sup> Contested settlements before the Commission are reviewed under the same standards as a contested case and any decision

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<sup>19</sup> See Order Denying OCA's Request for Sixty Day Abeyance at 9.

<sup>20</sup> Id.

must be supported by substantial evidence.<sup>21</sup> To file substantive comments without factual support would lead to dismissal of the OCA's comments as unsupported and lacking in substantial evidence to support its position. The OCA is entitled to a meaningful opportunity to be heard and that includes the opportunity to present factual evidence.<sup>22</sup> Under the Commonwealth Court's ruling in Popowsky, notice and comment without the opportunity to present evidence or cross-examine witnesses in a Complaint proceeding does not constitute a meaningful opportunity to be heard as provided by Chapter 7 of the Public Utility Code.<sup>23</sup> As stated in the OCA's Petition for Interlocutory Review and Answer to Material Question filed on January 28, 2021, the OCA will be substantially and irreversibly prejudiced if these materials remain excluded from the evidence of record before the Commission in this proceeding and a decision is rendered without full consideration of the facts and a meaningful opportunity for the OCA to be heard.<sup>24</sup>

The ALJ's reliance on Verde's and I&E's "lack of opportunity for cross-examination" is misplaced. First, there was no hearing scheduled for this matter. Both Verde and I&E in their prehearing memorandums requested that no hearings be held.<sup>25</sup> Verde and I&E, however, have provided a statement of facts for the record that they found necessary to support the proposed

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<sup>21</sup> Pa. PUC v. PGW, Docket No. R-2020-3017206 at 13-15 (Opinion and Order entered No. 19, 2020); see also, Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp., Docket Nos. A-2010-2176520, and A-2010-2176732 (Opinion and Order entered March 8, 2011).

<sup>22</sup> Pennsylvania Public Utility Commission; v.; Verizon Pennsylvania Inc. Tariff No. 216 Revisions, et al., Docket Nos. R-00049524 et al., 2005 Pa. PUC LEXIS 10, \*97 (Pa. P.U.C. May 16, 2005).

<sup>23</sup> Popowsky v. Pa. PUC, 805 A.2d 637, 643 (Pa. Comm. 2002).

<sup>24</sup> Petition of the OCA for Interlocutory Review and Answer to Material Question at 2.

<sup>25</sup> In addition to requesting a 60 day abeyance to conduct further discovery in this matter at the Prehearing Conference, the OCA also proposed that, after the 60 days, the parties each evaluate the respective positions and collectively determine whether there is a need to establish a litigation schedule to address the allegations in I&E's Complaint. See Order Denying OCA's Request for Sixty Day Abeyance at 2.

settlement and the OCA is presenting the facts it finds necessary to support its position regarding the proposed settlement. The OCA would also note that Verde and I&E have been provided with notice of the OCA's issues and concerns about the Settlement and supporting facts and evidence, through the OCA's Comments and have taken the opportunity to file reply comments in response to the Comments of the OCA and the materials subsequently stricken. If, however, lack of an opportunity for cross examination is a concern for I&E and Verde, the OCA submits that striking the OCA's factual evidence and denying the OCA due process is not an appropriate remedy.

The Interim Order also erroneously claims that Verde and I&E did not have access to this information within the stricken materials that was developed in discovery. In the Interim Order, ALJ Pell conveys that he expected the OCA to submit comments based upon information found in the Formal Complaint and gathered in discovery, however, he struck in full the OCA's Affidavit, PPL Report, and Findings of Facts, as well as portions of the OCA's Comments that referenced this evidence.<sup>26</sup> This evidence, as explained in further detail below, was largely prepared using the Formal Complaint and verified discovery responses provided by Verde from this proceeding. Other facts and statements made within these materials were developed from the OCA's witness based on public documents regarding Verde and its parent and affiliates. The OCA witness swore to their authenticity of the facts presented.

The ALJ's Interim Order strikes important facts from the OCA's Comments, the Affidavit of Barbara Alexander and the attached Exhibits that should be included as a part of the record as the Commission evaluates the proposed Settlement. The facts identified in the OCA's Comments were derived from Ms. Alexander's Affidavit which was based on verified discovery responses provided by Verde, verified information from PPL that formed the basis of the Formal Complaint,

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<sup>26</sup> Interim Order at 13.

and public documents involving Verde.<sup>27</sup> In the Interim Order, the ALJ specifically provides that information from discovery responses from I&E and Verde would be permissible to be included in Comments, yet the ALJ struck this information from the Affidavit and Comments even though the source of the information, was, in fact, Verde and I&E. The ALJ specifically stated:

My expectation was for the OCA to provide comments based upon the allegations raised by I&E in the Complaint and the information obtained through discovery. Comments based solely upon this information would have been proper since the comments would have been based upon information available to all parties throughout the course of this proceeding. It would be improper for me to rely upon this affidavit or the accompanying exhibits, or any information contained within the comments that is derived from or references these materials, since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony. Moreover, I agree that the comments provided by the OCA regarding the Company's dealings in other states is beyond the scope of this proceeding and should be stricken.<sup>28</sup>

Contrary to the ALJ's conclusions in the Interim Order, much of the evidence presented in the OCA's Comments and attached Affidavit was based upon verified information provided by I&E and Verde to the OCA in discovery.

The Affidavit, written and sworn to by Ms. Barbara Alexander, was compiled using the following data sources: I&E's Formal Complaint in this matter, Verde's verified responses to interrogatories and data requests made by I&E and the OCA in this matter, verified data request responses provided by PPL Electric to I&E data requests upon which the allegations in I&E's Formal Complaint were based, and public data involving Verde and its parent company, Spark Energy and affiliates. Each fact identified in Ms. Alexander's Affidavit was accompanied by a footnote showing the specific source of the information. The sources for the 72 footnotes in the

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<sup>27</sup> Section 5.342(a)(6) of the Commission's regulations states that: "(a) *Form*. Answers to interrogatories must... (6) Be verified in accordance with § 1.36 (relating to verification)." 52 Pa. Code § 5.342(a)(6)(emphasis in original).

<sup>28</sup> Interim Order at 13.

Affidavit can be categorized as follows: 1 footnote cited the I&E Formal Complaint in this matter; 13 footnotes cited the verified responses of PPL Electric that was the stated basis for the I&E Formal Complaint in this matter; 2 footnotes cited the Stipulated Facts presented by I&E and Verde in this matter; 39 footnotes cited the verified I&E and Verde discovery responses; 3 footnotes referenced information from Verde's own filings before the Pennsylvania Public Utility Commission; 1 footnote cited a Securities and Exchange Commission filing by Verde's parent company, Spark Energy; 1 footnote referenced a filing before the Pennsylvania Public Utility Commission about Verde's affiliate, HIKO Energy; 1 footnote referenced a filing by Major Energy, a Verde affiliate, in another jurisdiction; 4 footnotes referenced a Staff Report involving a Verde affiliate in another jurisdiction where Ms. Alexander was a witness in the proceeding; 2 footnotes referenced decisions pertaining to affiliates of Verde; and 1 cite referenced a newspaper article. The remaining three footnotes referenced Ms. Alexander's credentials, Ms. Alexander's role in a related proceeding in another jurisdiction, and procedural information related to this case.

The cited source of fifty-five of the seventy-two footnotes in Ms. Alexander's Affidavit was information provided to the OCA by I&E and Verde in this proceeding. The Interim Order struck this information even though the ALJ stated that this information was otherwise permissible. The information contained in the Affidavit relates to facts and findings developed by the OCA during discovery and provide support for the OCA's substantive opposition to the proposed Settlement. The OCA submits that these facts provide the necessary information for the ALJ and the Commission to conduct a full and complete analysis of the proposed Settlement, and whether the proposed Settlement serves the public interest given this background information developed in discovery. Specifically, the information cited by the OCA in its Comments involve the allegations and functions of Verde's management which are necessary to understanding the OCA's

substantive issues with the Settlement and its potential implementation. Importantly, the OCA's identification of specific deficiencies in the Settlement in Section V of its Comments are supported by the facts it was able to develop. For example, through discovery and presented in the OCA's Comments, the OCA developed information as to Verde's management of its third party vendors to assess whether the provisions regarding future control of these vendors was appropriate and reasonably capable of implementation. The OCA also developed and presented information about Verde's handling and monitoring of door-to-door sales contacts, handling and monitoring of telemarketing calls, and complaints of slamming arising from these calls to determine if the Settlement provisions reasonably address the slamming issues presented. The OCA also developed information about similar actions in other states related to Verde and its affiliates under common management since the Rossi factors call for consideration of other violations. The OCA also developed information about potential gaps in the Settlement's proposed marketing moratorium and Verde's activities in other service territories.

Without the facts presented from the OCA's investigation, the Commission will not have access to important information to help it evaluate whether the Settlement addresses the serious allegations identified in I&E's Formal Complaint. Requiring the OCA to make substantive comments and then denying the OCA an opportunity to support those substantive comments with factual evidence of record simply places the OCA in a Catch-22 and denies the OCA a meaningful opportunity to be heard on its objections to the Non-Unanimous Settlement.

Finally, the OCA submits that it is necessary for the Commission to address this matter at this time as adequate due process is fundamental to all Commission decisions. If the Commission renders a decision without full consideration of the facts, the public interest will not be served and the OCA will be substantially prejudiced in its representation of consumers. In addition, it will

conserve precious resources if the Commission later determines it requires the information presented by the OCA to fully consider the Non-Unanimous Settlement and develop substantial evidence in support of its determination.

## V. CONCLUSION

For the reasons discussed herein, the OCA's Affidavit, Findings of Facts, PPL Report, and Comments that reference these documents are material, relevant, and need to be included so that the OCA has a meaningful opportunity to be heard in this contested matter and the Commission has a full and complete record upon which to render its decision on the Non-Unanimous Proposed Settlement. Accordingly, the Office of Consumer Advocate respectfully requests that the Commission grant the Petition for Interlocutory Review of a Material Question regarding the evidence stricken in the ALJ's Interim Order and answer the question in the affirmative.

Respectfully submitted,

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement

v.

Verde Energy USA, Inc.

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C-2020-3017229

**INTERIM ORDER GRANTING  
THE MOTION TO STRIKE  
OF VERDE ENERGY USA, INC.**

On January 30, 2020, the Pennsylvania Public Utility Commission's (Commission) Bureau of Investigation and Enforcement (I&E) filed a formal Complaint against Verde Energy USA, Inc. (Verde) with the Commission. In the Complaint, I&E alleged that from February 2017 through the date of the Complaint, Verde, and/or a third-party marketing agent acting on Verde's behalf, conducted deceptive and misleading sales tactics, enrolled customers without authorization, and accessed customer accounts without authorization while participating in Pennsylvania's competitive supplier retail market.

Shortly thereafter, Verde and I&E began to engage in settlement discussions.

On February 14, 2020, Verde filed a Motion for Extension of Time to Answer or Respond to Complaint. Verde's Motion was granted by Secretarial letter dated February 14, 2020.

On February 24, 2020, the Office of Consumer Advocate (OCA) filed a Notice of Intervention and Public Statement.

On March 30, 2020, Verde filed a second Motion for Extension of Time to Answer or Respond to Complaint. Verde's Motion was granted by Secretarial email issued on March 30, 2020.

On May 15, 2020, Verde filed a third Motion for Extension of Time to Answer or Respond to Complaint.

On May 20, 2020, the OCA contacted I&E about accessing the confidential data requests and responses in this matter in order to initiate its review of the available information and to begin drafting its own discovery.

On May 22, 2020, the OCA received the confidential responses to I&E data requests.

On May 26, 2020, the OCA learned that Verde and I&E had been engaged in settlement negotiations dating back to before I&E filed the formal Complaint. Verde's counsel urged the OCA to hear the details of the proposed settlement, but OCA declined, maintaining that the settlement was premature and negotiated before the OCA was able to conduct discovery into the allegations in the Complaint.

On May 27, 2020, Verde's counsel provided the OCA with a draft of the settlement and requested that the OCA provide its position and any input on the settlement.

On June 1, 2020, the OCA served its Set I interrogatories to Verde. The OCA served follow up discovery on Verde on July 6, 2020 (OCA Set II) and on August 3, 2020, (OCA Set III).

On June 30, 2020, I&E and Verde (Settling Parties) filed a Joint Petition for Approval of Settlement (Joint Petition or Settlement). Also on June 30, 2020, Verde filed an Answer to the Complaint, generally denying the allegations set forth in the Complaint and noting that the parties filed a Settlement.

On July 10, 2020, the OCA filed a letter stating its intention to file a Statement in Opposition to the Joint Petition and requested that the Commission assign the matter to an Administrative Law Judge (ALJ).

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

By Call-In Telephonic Hearing Notice dated July 31, 2020, an Initial Call-In Telephonic Prehearing Conference was scheduled for August 27, 2020 and the matter was assigned to me.

In accordance with my Prehearing Conference Order issued on July 31, 2020, Verde, I&E, and the OCA filed Prehearing Memoranda on August 21, 2020.

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

By Order dated September 25, 2020, I denied the OCA's request for a 60-day abeyance. In addition to denying the OCA's request for the 60-day abeyance, I directed: that the Settling Parties would be permitted to file stipulated facts in support of the Joint Petition for Settlement with the Commission within 20 days of the date of the order; that the OCA would be permitted to file Comments with the Secretary's Bureau regarding the Joint Petition for Approval of Settlement within 40 days of the date of the order; and that I&E and Verde would be permitted to file Reply Comments in response to the OCA's Comments within 60 days of the date of the order.

On November 10, 2020, the OCA filed with the Commission its Comments 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. Included with the OCA's

Comments were the Affidavit of Barbara R. Alexander, and the OCA's proposed findings of fact.

On November 18, 2020, Verde filed with the Commission its Motion to Strike Portions of Comments of the Office of Consumer Advocate (Motion). In the Motion, Verde requests that the following portions of the 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.

Verde endorsed its Motion with a Notice to Plead advising the OCA that it had twenty days to file a written response to the Motion.<sup>1</sup> The OCA's response to the Motion was due on or before December 8, 2020.

On November 19, 2020, I&E filed its Letter in Support of Verde Energy USA Inc.'s Motion to Strike. In the letter, I&E emphasized that the true intent of the comment and reply period afforded to the parties after the filing of the Settlement is to provide interested parties the opportunity to provide remarks or differing positions on the settlement. I&E further emphasized that the intent is not for interested parties to attempt to introduce evidence, submit testimony, and essentially partake in paper litigation. I&E asserted that the OCA is attempting to impermissibly litigate a settled matter through its comments and disregard my September 25, 2020, Order, and that this attempt should not be allowed.

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

For the reasons set forth below, Verde's Motion is granted.

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<sup>1</sup> A party has 20 days from the date of service within which to answer or object to a motion unless the period of time is otherwise fixed by the Commission or the presiding officer. 52 Pa.Code § 5.103(c).

## DISCUSSION

### Verde's Position

Verde argues that the OCA's attempt to introduce evidence and testimony in the form of the Alexander Affidavit and its two exhibits violates my September 25, 2020, Order and basic principles of due process. Verde asserts that the Affidavit and its two exhibits go far beyond the scope of the limits established for the OCA's Comments on the Joint Petition, since my Order provided the 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." Verde asserts that while the OCA provided some substantive comments on the Settlement, the inclusion of the Affidavit and Exhibits goes far beyond "delineating" the issues that OCA would raise if the Settlement was rejected, or "outlining" how the OCA's interests would be affected if the Settlement is accepted. Verde notes that the express purpose of the Alexander Affidavit, as stated in paragraph 11 of the Affidavit, was to "provide additional facts and evidence." Verde maintains that the attempted submission of the Alexander Affidavit shows a clear disregard for the proper scope of comments in response to a Settlement Petition, and is essentially an attempt by the OCA to improperly expand the record in the proceeding and develop a one-sided "parallel" record without affording any due process to Verde or I&E.

Verde further argues that the inclusion of additional "evidence and facts" in the OCA's Comments is prejudicial to Verde. As noted in the Joint Stipulation of Facts submitted with the Settlement Petition, had this proceeding not settled, Verde indicated it would have challenged the accuracy of the statements, opinions and conclusions of witnesses through evidence and testimony.<sup>2</sup>

Verde notes that no litigation procedure was established for the case because the Complaint was fully resolved via a Settlement between the Complainant and the Respondent. Verde maintains that inclusion of the Alexander Affidavit in the record in this matter would

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<sup>2</sup> See Stipulation Facts in Support of the Joint Petition for Approval of Settlement, at ¶ 46.

violate Verde's and I&E's due process rights 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. Verde argues that expanding the procedural schedule to allow for such cross-examination and testimony is not the appropriate remedy to the situation, and that to do so would effectively reverse my prior ruling regarding the appropriate process for evaluating the Joint Petition, and reward the OCA for its disregard of that ruling in its attempt to "force" litigation of a proceeding that has been fully resolved.

Additionally, Verde argues that the Alexander Affidavit and Attachment BA-2 are inadmissible hearsay. Verde notes that the Commission, as an administrative body, is bound by due process provisions of constitutional law and by principles of common fairness.<sup>3</sup> 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.<sup>4</sup> Verde maintains that 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.<sup>5</sup>

Verde asserts that the OCA is attempting to use the Alexander Affidavit to create a factual record that it wants the Commission to rely upon to reject a Settlement, and force I&E and Verde to litigate a Complaint that they have satisfactorily resolved. It is Verde's position that even if the prior procedural rulings in the case would allow for submission of testimony and evidence, 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.

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<sup>3</sup> *Hess. v. Pa. Pub. Util. Commission*, 107 A.3d 266 (Pa. Cmwlth. 2014)(*Hess*); *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).

<sup>4</sup> *Hess*.

<sup>5</sup> 225 Pa. Code §801.

Verde maintains that Exhibit BA-2 also cannot be included in the record in this matter because it was prepared by a third party, and it summarizes prior phone discussions between call representatives and various unnamed individuals about alleged discussions between those unnamed individuals and unnamed sales agents. Ms. Alexander did not observe any of those alleged interactions, which raises serious foundation, authentication, and due process issues. Moreover, 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.

Additionally, Verde asserts that the body of the OCA's Comments contains statements that go well beyond the scope of the proceeding and factual record and therefore should be stricken. Verde notes that 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. Verde further notes that the allegations in a Complaint are not established facts but rather mere allegations that need to be proven by substantial evidence before they can be relied upon. The Stipulated Facts in Support of the Joint Petition for Approval of Settlement constitutes the factual record in this case and delineates that scope of the alleged violations, the factual foundation for the alleged violations, and material facts on which the Settlement is based.

In addition to the attachments challenged by Verde in its Motion, Verde maintains that the following portions of the OCA's Comments contain statements that go well beyond the scope of the proceeding and factual record and therefore should be stricken, specifically:

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

Moreover, Verde argues that the OCA's proposed "findings of fact" should be stricken because the September 25, 2020 Order did not permit the expansion of the factual record in this case. Verde submits that the OCA's proposed "findings of fact" are based entirely on information that is not in the record in this case, which is limited to the Stipulation of Facts submitted by Verde and I&E. Moreover, the OCA's proposed "findings of fact" rely upon and seek to amplify hearsay (i.e. the Alexander Affidavit and Exhibits). Lastly, Verde argues that the OCA's proposed "findings of fact" seek to address issues that go well beyond the scope of the proceeding, including allegations regarding Verde operations in other states, Verde's affiliates, and Verde's operations that were not part of the Complaint.

### OCA's Position

The OCA responds that its presentation does not violate my September 25, 2020 Order, is not an impermissible expansion of the proceeding, and does not include impertinent allegations. The OCA maintains that the comments, Affidavit of Barbara Alexander and attached exhibits do not violate Verde's due process rights.

The OCA notes that in my September 25, 2020 Order, I permitted it to file substantive Comments on the Settlement. The OCA argues that my order did not prohibit it from introducing its own facts and evidence upon which it based its substantive Comments in opposition to the proposed Settlement. As the Order sought substantive comments from the OCA, the OCA maintains that the substance of its comments was based on the facts that the OCA had been able to develop through the discovery it was permitted to conduct. To file substantive comments without factual support would have led to dismissal of the OCA's comments as unsupported. The OCA submits that Verde's narrow interpretation of the September 25, 2020, Order would create a Catch-22 where the OCA would face dismissal for failure to support its position, but is precluded from presenting that support by Verde's Motion to Strike.

The OCA asserts that Ms. Alexander's Affidavit and the Findings of Fact provide relevant background information on Verde's ownership structure, Verde's and its affiliate's

history of similar allegations and proceedings in other jurisdictions, and Verde's use and management of third-party vendors in Pennsylvania. The information cited by the OCA in its Comments involves the allegations and functions of Verde's management which are necessary to understanding the OCA's substantive issues with the Settlement and its potential implementation. The OCA believes that this information is vital to support its position that the proposed Settlement does not serve the public interest.

The OCA's identification of specific deficiencies in the Settlement in Section V of its Comments are based on the facts it was able to develop. The purpose of the Affidavit and proposed Findings of Fact are to allow the OCA to make informed, substantive Comments permitted by the September 25, 2020, Order. The OCA's concerns identified in the Comments needed to be supported with facts, and the information developed from the discovery responses was critical to understanding and supporting the OCA's substantive Comments.

The OCA argues that the only position rejected in the September 25, 2020, Order was OCA's request that the matter be held in abeyance for 60 days in order to allow the OCA to conduct further discovery. OCA further notes that the September 25, 2020, Order did not address the substance of the OCA's issues identified in its Statement of Opposition or its Prehearing Memorandum but asked for the OCA to specifically delineate the substance of those issues in its Comments. The OCA maintains that Ms. Alexander's Affidavit and attached Exhibits are not an attempt to create a "one-sided" parallel record. Instead, the OCA's Comments and Affidavit are presented to show the deficiencies the OCA has found to date in the proposed Settlement.

Additionally, the OCA argues that the September 25<sup>th</sup> Order did not limit it to only the facts presented by Verde and I&E, and that it would not be proper to expect that a party contesting the settlement must rely solely on those limited facts. The OCA maintains that the facts presented in its Comments are necessary for an evaluation of the allegations raised by I&E's Formal Complaint and the proposed Settlement proffered by Verde and I&E to resolve these allegations.

Regarding the Affidavit of Barbara Alexander and attached exhibits, the OCA submits that this information and related allegations are presented to demonstrate the potential deficiencies of the Settlement and identify the issues that the OCA has identified with the Settlement. Moreover, the OCA has identified in its Comments and Affidavit of Barbara Alexander the facts that the Verde and I&E Settlement and Stipulation of Facts do not address.

Regarding Verde's hearsay concerns, the OCA counters that Verde's request to strike the entirety of Ms. Alexander's Affidavit because it constitutes hearsay is inaccurate, overly broad, and should be rejected. Many of the statements within the Affidavit were derived from Verde's verified responses to OCA and I&E data requests, PPL's verified responses to I&E data requests, and Ms. Alexander's first-hand knowledge and own research as an expert in the field. Additionally, the PPL Report and the portion of the Affidavit and Comments which rely upon the allegations found within it, do not constitute hearsay in light of the purpose of the statements contained in them. Ms. Alexander's Affidavit and the PPL Report are offered here to alert the Commission that these are the full and detailed allegations which are to be considered by the Commission in deciding whether the proposed Settlement is in the public interest.

OCA further argues that under Pennsylvania law, there is an exception to the rule against hearsay for records of a regularly conducted activity at 225 Pa. Code Section 803(6). This exception permits documents, including memorandums and reports, into the record if it was made at or near the time—or from information transmitted by—someone with knowledge, the record was kept in the course of regularly conducted activity of a “business,” making the record was a regular practice of that activity, the aforementioned conditions can be shown by the testimony of the custodian or another qualified witness, and the opponent does not show any indication of a lack of trustworthiness.<sup>6</sup> The PPL Report is a confidential memorandum in response to I&E data requests served to PPL. It provides records of alleged conversations between PPL personnel and Verde customers and was the basis for I&E's Formal Complaint. The Commission recognizes this exception to the hearsay rule when commonly used in consumer complaint proceedings and only requires a copy of a business record and its

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<sup>6</sup> *Id.*

appropriate authentication by a witness qualified to provide testimony on the subject matter.<sup>7</sup> Similarly here, even if the document contained hearsay for the purpose of showing the truth of the statements made within it, the document would still be admissible under the exception for records of a regularly conducted activity. The PPL Report constitutes a report created by PPL to keep record of contacts between PPL employees and customers regarding alleged discrepancies and complaints, mostly alleged unauthorized switches, throughout the time period of the allegations of this Formal Complaint. The PPL Report also includes a signed verification from a project manager at PPL.<sup>8</sup>

Regarding Verde's arguments concerning impertinent information and the scope of this proceeding, the OCA responds that its Comments and Findings of Fact are fully within the parameters set forth by my September 25<sup>th</sup> Order. In accordance with the Order, the OCA filed substantive Comments with supporting facts and information developed from Verde responses to OCA and I&E discovery as well as PPL responses to I&E data requests. Far from being "impertinent allegations," the OCA's position is fully supported by the facts it has developed to date. The Affidavit, written and sworn to by OCA witness Barbara Alexander, was compiled using: I&E's Formal Complaint in this matter; Verde's verified responses to interrogatories and data requests made by I&E and the OCA in this matter; and Ms. Alexander's own research on Verde and its parent Company, Spark, and verified data request responses provided by PPL Electric to I&E data requests upon which the allegations in I&E's Formal Complaint were based. The information contained in the Affidavit relates to facts and findings developed by the OCA during discovery and are the basis of the OCA's substantive opposition to the proposed Settlement. It provides the necessary information for the ALJ and the Commission to conduct a full and complete analysis of the allegations, the proposed Settlement, and whether the proposed Settlement serves the public interest given this background information developed in discovery.

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<sup>7</sup> See *Sanchez v. PPL Electric Utilities Corporation*, Docket No. C-2015-2472600 (Order entered July 21, 2016) at 12-13.

<sup>8</sup> See *OCA Comments (Confidential Version)*, Affidavit Attachment BA-2, p. 125 of PDF.

## Disposition

When I&E and Verde filed their settlement on June 30, 2020, no presiding officer had been assigned to this case. Regarding the review of a settlement petition by the Commission when no presiding officer has been assigned, Commission Regulations provide the following:

When no presiding officer has been assigned, the Commission will review the settlement. Parties not joining in the settlement may submit objections to the Commission within 20 days of the filing of the petition unless another time period is set by the Commission.

52 Pa.Code § 5.232(g). As previously noted, the OCA filed its Statement in Opposition to the Joint Petition on July 20, 2020. The OCA's Statement in Opposition to the Joint Petition largely challenged the Settlement on procedural grounds because the OCA maintained that it had not fully conducted discovery.

In its Prehearing Memorandum and during the August 27, 2020, Prehearing Conference, the OCA identified three issues, identified a witness, and requested that this matter be held in abeyance for 60 days in order for the OCA to conduct additional discovery and to engage in further settlement discussions with I&E and Verde to see if there were possible modifications to the settlement that would address the OCA's concerns. The OCA further proposed that at the end of that 60-day period, the parties could each evaluate their respective positions and collectively determine whether there is a need to establish a litigation schedule to address the allegations in I&E's Complaint, and to determine whether the Settlement signed by Verde and I&E is in the public interest.

By Order dated September 25, 2020, I denied the OCA's request for a 60-day abeyance. In my September 25, 2020 Order, I went into considerable detail explaining why the OCA had sufficient time to conduct discovery (a period of six months) and why I denied their request. However, in the interest of fairness, I wanted to provide the OCA with another opportunity to provide substantive comments on the Settlement since their July 20, 2020, Statement in Opposition largely challenged the Settlement on procedural grounds. With that in mind, I offered the OCA the opportunity 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. I did not invite the OCA to provide an affidavit with accompanying exhibits from the witness it proposed in its Prehearing Memorandum, to provide proposed findings of fact, or to attempt to expand the scope of this proceeding.

My expectation was for the OCA to provide comments based upon the allegations raised by I&E in the Complaint and the information obtained through discovery. Comments based solely upon this information would have been proper since the comments would have been based upon information available to all parties throughout the course of this proceeding. It would be improper for me to rely upon this affidavit or the accompanying exhibits, or any information contained within the comments that is derived from or references these materials, since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony. Moreover, I agree that the comments provided by the OCA regarding the Company's dealings in other states is beyond the scope of this proceeding and should be stricken.

As I said in my September 25, 2020, Order regarding intervenor's rights, the Commission has determined that "[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."<sup>9</sup> I&E and Verde, the initiating and responding parties in this matter, acted within their rights by engaging in discussions to resolve I&E's Complaint, and ultimately settling the Complaint. The Settling Parties did ask for the OCA's input prior to filing the Settlement with the Commission, and the OCA declined the Settling Parties' request. My role at this point is simply to determine whether the Settlement should be approved as being in the public interest.

Accordingly, the Motion to Strike filed by Verde is granted in its entirety, and the identified items will be stricken from the record.

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<sup>9</sup> *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 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.").



**C-2020-3017229 Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Verde Energy USA, Inc.**

Revised on 9-25-20

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