

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

**PUC BUREAU OF INVESTIGATION
AND ENFORCEMENT
VS
VERDE ENERGY USA INC**

**PUBLIC MEETING OCTOBER 7, 2021
3017229-OSA
DOCKET NO. C-2020-3017229**

STATEMENT OF CHAIRMAN GLADYS BROWN DUTRIEUILLE

This matter comes before the Commission as a Petition for Interlocutory Review and Answer to Material Question filed by the Office of Consumer Advocate (OCA). The basic facts are that the Commission's independent prosecutorial arm, the Bureau of Investigation & Enforcement (I&E) filed a formal Complaint on January 30, 2020, alleging slamming and deceptive sales practices resulting in nearly 9,000 violations of the Commission's energy marketing regulations by Verde Energy USA, Inc. (Verde). The OCA filed a timely Notice of Intervention on February 24, 2020.¹

Verde filed three requests for extension of time to answer the Complaint, all of which were granted. During this time, the case was not assigned to an Administrative Law Judge (ALJ). Upon the filing of an Answer on June 30, 2020, the case was assigned to the Office of Administrative Law Judge (OALJ).² On that same date, Verde and I&E filed a Joint Petition for Settlement.

On July 10, 2020, the OCA filed a Letter stating its intention to oppose the Settlement. On August 21, 2020, the OCA, in its Prehearing Memorandum, requested that this matter be held in abeyance for 60 days to permit the OCA time to conduct discovery.

On September 25, 2020, the ALJ issued an Order denying the OCA's request for a 60-day abeyance (*Abeyance Order*). The ALJ's *Abeyance Order* explained that the request for time to conduct discovery was denied because the OCA had already had sufficient time, six months, to conduct discovery. The *Abeyance Order* further provided that I&E and Verde would be permitted to file stipulated facts in support of the Settlement; that the OCA would be permitted to file substantive comments; and, that I&E and Verde would be permitted to file reply comments thereto. On November 9, 2020, the OCA filed Comments in Opposition to the Settlement with

¹ The OCA is a statutory intervenor in this Formal Complaint proceeding representing the interest of consumers. See 52 Pa. Code §§ 5.72(a)(1), 5.74(b)(4); see also 71 P.S. § 309-4 ("[T]he Consumer Advocate is authorized, and it shall be his duty, in carrying out his responsibilities under this act, to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission in any matter properly before the commission...").

² Once an Answer is filed disputing allegations, the matter becomes an adversarial proceeding and should be assigned to the OALJ for the purpose of fixing a hearing or other proceeding as necessary. 66 Pa. C.S. §§ 703(b)-(c).

evidence in support. Verde filed a Motion to Strike the OCA's supporting evidence and I&E filed a Letter in Support of Verde's Motion to Strike.

By Order issued on January 15, 2021 (*Interim Order*), the ALJ granted Verde's Motion to Strike the OCA's evidence, holding that Verde's dealings in other states was beyond the scope of this slamming and deceptive sales practices proceeding. The ALJ also reasoned that because the OCA's supporting evidence was not available to I&E and Verde throughout the course of the proceeding, it would not be proper to rely upon these materials since I&E and Verde never had the opportunity to cross-examine witnesses or to offer rebuttal testimony. *Interim Order* at 13.

The Material Question now before us asks whether the ALJ erred in striking the OCA's factual evidence presented in support of its Comments, thereby denying the OCA a meaningful opportunity to be heard.

I believe that the response to that question should be affirmative. The relief requested by the OCA should be granted on the basis that the OCA, a statutory advocate, properly intervened prior to the development of the record in this adversarial proceeding and is entitled to due process. The Commission's regulations are clear regarding the right of a statutory advocate to participate in proceedings before the Commission. "A statutory advocate may exercise a right of participation or file a notice of intervention consistent with law at any time in a proceeding. A statutory advocate exercising a right of participation or filing a notice of intervention following expiration of any protest or intervention period shall take the record as developed unless determined otherwise in exceptional circumstances for good cause shown." 52 Pa. Code § 5.74(b)(4). No record had been developed at the time the OCA intervened.

I take issue with the finding in the *Abeyance Order* that the OCA had sufficient time to conduct discovery. Contrary to the finding, the OCA did not have 6 months during which to conduct discovery because Verde did not file an Answer to the Complaint until June 30, 2020, the same day that Verde and I&E filed their Settlement. Verde's Answer to the Complaint is an intrinsic and precipitating part of any litigant's discovery process. An answer contesting a complaint is not meant to be filed as an adjunct or afterthought to a Settlement.

I also take issue with the *Interim Order's* determination that the OCA presented evidence that was not available to Verde and I&E during the course of the proceeding. No hearing was scheduled in this adversarial proceeding for the presentation of evidence. The OCA offered the evidence³ at the only time that the *Abeyance Order* allowed it to do so, with the filing of the

³ Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. PA PUC*, 67 Pa. Commw. 597, 447 A.2d 1100 (1982), *Edan Transportation Corp. v. Pa. PUC*, 154 Pa. Commw. 21, 623 A.2d 6 (1993), 2 Pa. C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980). Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence. [*49] *Pa. Bureau of Corrections v. City of Pittsburgh*, 516 Pa. 75, 532 A.2d 12 (1987); *Mid-Atlantic Power Supply Assoc. v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000).

OCA's substantive Comments. The *Interim Order* noted that to admit the OCA's evidence would unfairly disadvantage I&E and Verde as those Parties would not have an opportunity to cross-examine the OCA's witness or to offer rebuttal testimony. Rather than striking the OCA's evidence, in order to afford all participants due process, a hearing should have been scheduled in this adversarial proceeding.

When an eligible intervenor timely seeks to intervene in a formal complaint proceeding prior to the development of a record, it must be provided a meaningful opportunity to be heard.⁴ Again, the OCA's intervention occurred prior to the development of the record. "As a matter of fairness, the interested parties which filed requests to intervene should have the opportunity for their petitions to be heard and decided based upon the procedural posture of the case as it existed at the time the petitions were filed. Otherwise, party litigants could delay a hearing until a joint settlement is filed for the purpose of preventing intervention by interested parties."⁵ In this instance, the OCA's Petition to Intervene was filed well before Verde's Answer and the Settlement. Therefore, as a matter of fairness, the OCA should have been given a meaningful opportunity to be heard.

Because the OCA's Material Question should be answered affirmatively, I respectfully dissent on this matter.



October 7, 2021

Date

Gladys Brown Dutrieuille, Chairman

⁴ *Pa. PUC, Bureau of Investigation and Enforcement v. Sunoco Pipeline, L.P.*, Docket No. C 2018-30006534 (Order entered June 10, 2019) at 14-21.

⁵ *Id.* at 19.