

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120**

**Pennsylvania Public Utility
Commission, Bureau of
Investigation and Enforcement**

**Public Meeting October 7, 2021
3017229-OSA
Docket No. C-2020-3017229**

v.

Verde Energy USA, Inc.

MOTION OF COMMISSIONER RALPH V. YANORA

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Interlocutory Review and Answer to Material Question (Petition) filed on January 28, 2021, by the Office of Consumer Advocate (OCA), in the above-captioned proceeding. In its Petition, the OCA seeks interlocutory review and an answer in the affirmative by the Commission to the Material Question, summarized as follows:

Whether the Administrative Law Judge's (ALJ's) Interim Order Granting the Motion to Strike of Verde Energy USA, Inc. (Verde), dated January 15, 2021 (*Interim Order*), erred as a matter of law, by granting Verde's Motion *In Limine* to strike the OCA's factual materials presented in support of the OCA's substantive comments contesting the settlement between the Commission's Bureau of Investigation and Enforcement (I&E) and Verde in this proceeding?

By way of background, Verde is a Commission-licensed electric generation supplier (EGS) authorized to operate in various service territories of Pennsylvania electric distribution companies (EDCs).¹ On January 30, 2020, I&E filed a Complaint (Complaint) against Verde with the Commission alleging that 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, from the period beginning February 2017 through the date of the Complaint.²

On June 30, 2020, I&E and Verde filed a Joint Petition for Settlement (Settlement) regarding the allegations set forth in the Complaint. On July 10, 2020, the OCA filed a letter stating its intention to file a Statement in Opposition to the Settlement and requested that the

¹ The EDC service territories in which Verde is authorized to operate as an EGS include Allegheny Power, Duquesne Light Company, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, PPL Electric Utilities, Inc., PECO Energy Company, and UGI Utilities, Inc.

² On February 24, 2020, the OCA filed a Notice of Intervention in this matter.

Commission assign the matter to an ALJ. On August 21, 2020, the OCA, in its Prehearing Memorandum, requested that this matter be held in abeyance for sixty (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.

On September 25, 2020, the ALJ issued an Order denying the OCA's request for a sixty (60) day abeyance (*Abeyance Order*). In the *Abeyance Order*, the ALJ went into detail explaining why the OCA had sufficient time to conduct discovery, totaling a six month period of time, and why the request was denied.³ The ALJ also directed that I&E and Verde would be permitted to file stipulated facts in support of the Settlement with the Commission; that the OCA would be permitted to file substantive comments; and that I&E and Verde would be permitted to file reply comments.

On November 18, 2020, Verde filed the relevant Motion to Strike portions of the substantive comments filed by the OCA in response to the *Abeyance Order*.⁴ In the Motion to Strike, Verde requested that the following portions of the OCA's Comments be stricken:

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

On January 15, 2021, the ALJ issued his *Interim Order* granting Verde's Motion to Strike. In the *Interim Order*, the ALJ explained that he "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."⁵ Rather, the ALJ noted that his "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."⁶ The ALJ explained that it would be improper to rely upon the OCA's affidavit or the accompanying exhibits (or any information derived therefrom) since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony. Additionally, the ALJ found that the factual comments provided by the OCA

³ The ALJ cited to the Commission regulations, which provide that "[a] party shall initiate discovery as early in the proceedings as reasonably possible," and that "the right to discovery commences when a complaint, protest or other adverse pleading is filed." 52 Pa. Code § 5.331(b).

⁴ On November 19, 2020, I&E filed its Letter in Support of Verde's Motion to Strike.

⁵ *Interim Order* at 13.

⁶ *Id.*

regarding Verde's corporate structure in other states was beyond the scope of this proceeding and should be stricken.

I agree with the ALJ that it would be improper to rely on the additional factual materials included in the OCA's substantive comments for the reasons set forth in the *Interim Order*. Additionally, I point out that the OCA, because of its choice to proceed as an intervenor, does not have the ability to require I&E and Verde to litigate this matter. 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."⁷ I&E and Verde acted properly by engaging in settlement discussions and ultimately settling the Complaint. In fact, I&E and Verde asked for the OCA's input prior to filing the Settlement, but the OCA declined this request. The OCA then improperly attempted to use its role as an intervenor to introduce additional factual materials in its substantive comments.⁸ For these reasons, the Motion to Strike was properly granted by the ALJ and the Material Question presented in the OCA's Petition should be answered in the negative.

In addition, I agree with I&E that we should answer the Material Question in the negative so that the current proceeding is not unnecessarily delayed. It is important to note that the Settlement before us today includes terms for the payment by Verde of refunds to affected customers. As such, the OCA's Petition should be denied in its entirety and the matter should be returned to the ALJ to promptly determine whether the Settlement proposed in this matter should be approved as being in the public interest.

THEREFORE, I MOVE:

1. That the Petition for Interlocutory Review and Answer to Material Question filed on January 28, 2021, by the Office of Consumer Advocate, in the above-captioned proceeding is denied, and the Material Question:

Whether the Administrative Law Judge's Interim Order Granting the Motion to Strike of Verde Energy USA, Inc., dated January 15, 2021, erred as a matter of law, by granting Verde's Motion *In Limine* to strike the OCA's factual materials presented in support of the OCA's substantive comments contesting the settlement between I&E and Verde in this proceeding?

is answered in the negative.

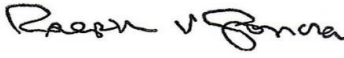
⁷ *Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 at 10 (Order entered May 3, 2018) (citing 52 Pa. Code § 5.75(c)) ("Rights upon grant of petition. Admission as an intervenor 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.").

⁸ I note that the Settlement does not preclude the OCA from filing its own formal complaint against Verde.

2. That the Interim Order Granting the Motion to Strike of Verde Energy USA, Inc., dated January 15, 2021, issued by Administrative Law Judge Christopher P. Pell in this proceeding, is adopted.

3. That the Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

October 7, 2021
DATE



RALPH V. YANORA
COMMISSIONER