

**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

INITIAL DECISION

Before
Christopher P. Pell
Deputy Chief Administrative Law Judge

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I. INTRODUCTION

The Pennsylvania Public Utility Commission's (Commission) Bureau of Investigation and Enforcement (I&E) initiated this Complaint against Verde Energy USA, Inc. (Verde), alleging that from February 2017 through January 30, 2020, 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. I&E and Verde have agreed to settle the matter. The Office of Consumer Advocate (OCA) objected to the Settlement. The terms of the Settlement are set forth in a Joint Petition for Approval of Settlement. This Decision finds that approval of the Joint Petition for Approval of Settlement, with addendum regarding refunds of early termination fees, is in the public interest and supported by substantial evidence.

II. HISTORY OF THE PROCEEDING

On January 30, 2020, I&E filed a formal Complaint against Verde with the Commission. In the Complaint, I&E alleged, based in part on information provided by PPL Electric Utilities (PPL) regarding 339 affected customer accounts, 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.

Verde and I&E engaged in settlement discussions, dating back prior to the filing of the formal Complaint.

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, 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. No action was taken on Verde's 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 its own 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. Verde, in its Prehearing Memorandum, maintained that no further discovery was needed in this matter, that hearings were not necessary, that no testimony or hearings were required, and that no litigation schedule was necessary because the Complainant, I&E, and the Respondent, Verde, had reached a complete and final resolution of this proceeding which effectively addresses the issues that were the subject of the Complaint.

I&E, in its Prehearing Memorandum, maintained that providing a plan or schedule for discovery was not necessary, that proposing a litigation schedule was not necessary, that providing a list of witnesses was not necessary, and that the only issues to be considered are 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 OCA, in its Prehearing Memorandum, 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 60 days, the parties could each evaluate their respective positions and collectively determine whether there was 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.

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 the same order, I also: permitted the Settling Parties to file stipulated facts in support of the Joint Petition for Settlement with the Commission's Secretary within 20 days of the date of issuance of the Order; permitted the OCA the opportunity to file Comments with the Secretary's Bureau regarding the Joint Petition for Approval of Settlement within 40 days of the date of the issuance of the Order; and permitted the Settling Parties the opportunity to file Reply Comments in response to the OCA's Comments within 60 days of the date of issuance of the Order.

On October 19, 2020, the Settling Parties filed Stipulated Facts with the Commission's Secretary.

On October 30, 2020, the OCA filed a Motion for Protective Order in this matter.

By Order issued on November 5, 2020, I granted the OCA's Motion for Protective Order.

On November 10, 2020, the OCA filed Comments of the Office of Consumer Advocate in Opposition of the Joint Petition for Approval of the Non-Unanimous Settlement Filed by Verde Energy USA, Inc. and the Bureau of Investigation and Enforcement with the

Commission's Secretary, including the Affidavit of Barbara R. Alexander and 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.¹

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

On November 30, the Settling Parties filed Reply Comments with the Commission's Secretary.

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

On January 15, 2021, I issued my Interim Order Granting the Motion to Strike of Verde Energy USA, Inc.

On January 28, 2021, the OCA filed its Petition for Interlocutory Review and Answer to Material Question. The OCA requested the Commission to consider the following material question:

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?

OCA Petition at 1.

On February 5, 2021, I&E filed a Brief in Opposition to the OCA's Petition for Interlocutory Review and Answer to Material Question.

¹ In the Motion to Strike, Verde requested that the following portions of 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 February 8, 2021, Verde filed a Brief in Opposition to the OCA's Petition for Interlocutory Review and Answer to Material Question.

Also on February 8, 2021, the OCA filed a Brief in Support of its Petition for Interlocutory Review and Answer to Material Question.

By Order entered on October 26, 2021, the Commission denied the OCA's Petition for Interlocutory Review and Answer to Material Question, answered the Material Question in the negative, adopted my January 15, 2021 Interim Order, and returned the matter to me to determine whether the proposed Settlement should be approved as being in the public interest.

The matter having been returned to me by the Commission for disposition, the Joint Petition for Approval of Settlement is now ripe for a decision.

III. FINDINGS OF FACT

The Settling Parties filed the following Stipulated Facts in this matter:²

1. The Parties to the Settlement Agreement are the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement, by its prosecuting attorneys, 400 North Street, Commonwealth Keystone Building, Harrisburg, PA 17120, and Verde Energy USA, Inc., with a principal place of business of 12140 Wickchester Lane, Suite 100, Houston, TX 77079.

2. The Pennsylvania Public Utility Commission is a duly constituted agency of the Commonwealth of Pennsylvania empowered to regulate public utilities within this Commonwealth, as well as other entities subject to its jurisdiction, pursuant to the Public Utility Code ("Code"), 66 Pa. C.S. §§ 101, *et seq.*

² Stipulated Facts In Support Of The Joint Petition For Approval Of Settlement pp. 4-10. With the exception of renumbering each finding of fact, the Settling Parties' Stipulated Facts are reprinted here verbatim.

3. I&E is the entity established to prosecute complaints against public utilities and other entities subject to the Commission’s jurisdiction pursuant to 66 Pa .C.S. § 308.2(a)(11); *see also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011)(delegating authority to initiate proceedings that are prosecutor in nature to I&E).

4. Section 501(a) of the Code, 66 Pa. C.S. § 501(a), authorizes and obligates the Commission to execute and enforce the provisions of the Code.

5. Section 701 of the Code, 66 Pa. C.S. § 701, authorizes the Commission, *inter alia*, to hear and determine complaints alleging a violation of any law, regulation, or order that the Commission has jurisdiction to administer.

6. Section 3301 of the Code, 66 Pa. C.S. § 3301, authorizes the Commission to impose civil penalties on any public utility or on any other person or corporation subject to the Commission’s authority for violations of the Code, the Commission’s regulations and orders. Section 3301 allows for the imposition of a fine for each violation and each day’s continuance of such violation(s).

7. Verde is a jurisdictional electric generation supplier (“EGS”) licensed by the Commission at Docket No. A-2010-2151038 to operate in the Pennsylvania electric distribution company (“EDC”) service territories of Allegheny Power (“West Penn Power Company”), Duquesne Light Company (“Duquesne Light”), Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, PECO Energy Company (“PECO”), PPL Electric Utilities, Inc. (“PPL”), and UGI Utilities, Inc.

8. Verde, as an EGS in Pennsylvania, is a public utility as defined by Section 102 of the Public Utility Code, 66 Pa.C.S. § 102, for the limited purposes as described in Sections 2809 and 2810 of the Competition Act, 66 Pa.C.S. §§ 2809-2810.

9. Verde, as a provider of electric generation service for compensation, is subject to the power and authority of the Commission and must observe, obey, and comply with the Commission's regulations and orders pursuant to Section 501(c) of the Public Utility Code, 66 Pa.C.S. § 501(c).

10. Pursuant to the provisions of the applicable Commonwealth statutes and regulations, the Commission has jurisdiction over the subject matter and the actions of Verde in its capacity as an EGS serving consumers in Pennsylvania. 66 Pa.C.S. §§ 102, 501.

11. This matter involves allegations related to deceptive and misleading sales tactics, enrolling customers without authorization (i.e., slamming) and accessing customer accounts without authorization in the PPL service territory from February 2017 to February 2020.

12. I&E initiated an informal investigation of Verde on September 9, 2019, as a result of information provided by the Office of Competitive Market Oversight ("OCMO") relating to allegations of deceptive and misleading telemarketing practices, deceptive and misleading door-to-door sales, unauthorized account access, and unauthorized enrollment within the PPL service territory.

13. The allegations referred to I&E by OCMO were not based on complaints filed with Verde or on complaints filed with the Commission's Bureau of Consumer Services ("BCS").

14. As part of the investigation, I&E served two (2) sets of I&E data requests to Verde on September 9, 2019 and December 4, 2019, respectively.

15. Verde provided timely responses to both sets of I&E data requests and fully cooperated with I&E in connection with I&E's investigation.

16. Additionally, I&E served a data request letter to PPL on September 18, 2019. PPL timely responded to the data request letter and provided its customer complaint interactions relating to Verde from 2017 to 2019.

17. On January 30, 2020, I&E filed the Complaint in this matter based upon the 339 customer account complaints identified and provided by PPL.

18. The Complaint was the first time Verde was provided with information regarding allegations in the PPL service territory which formed the basis of I&E's investigation.

19. The Complaint alleged various conduct by agents of Verde that violated the Commission's regulations in connection with, *inter alia*, 339 PPL customer interactions. The Complaint included allegations of:

- Unauthorized enrollment or “slamming” in violation of 52 Pa. Code § 54.42(a)(9), 52 Pa. Code §§ 57.171 - 57.180, and 52 Pa. Code § 111.7.
- Improper release of customer information, in violation of 52 Pa. Code § 54.8(a) and 52 Pa. Code §54.43(1)(d).
- Failure to provide notice of door-to-door activity in violation of 52 Pa. Code § 111.14(b).
- Failure to prominently display badges in violation of 52 Pa. Code § 111.9(c) and 52 Pa. Code § 111.8(a)(4).
- Agents displaying branding or logo of the EDC in violation of 52 Pa. Code § 111.8(c).
- Failure by door-to-door agents to identify themselves, the reason for visit, and explain that he/she does not work for the EDC in violation of 52 Pa. Code § 111.9(d).
- Failure by an agent to terminate sales contact for language barrier or failure to understand in violation of 52 Pa. Code § 111.9(e).

- Failure by an agent to terminate contact after the customer stated no interest in violation of 52 Pa. Code § 111.9(g).
- Failure by an agent to comply with the regulations governing marketing, consumer protections, and door-to-door sales in violation of 52 Pa. Code § 111.9(b).
- Failure by agent to identify the supplier he/she represents and/or failed to state that he/she is not working for and is independent of the local distribution company or other supplier in violation of 52 Pa. Code § 111.8(b).
- Suggesting that a customer is required to choose a supplier in violation of 52 Pa. Code § 111.8(f).
- Failure by telemarketing agents to comply with the regulations governing marketing, consumer protection, and telemarketing sales in violation of 52 Pa. Code § 111.10(a).
- Misleading and deceptive conduct in violation of 52 Pa. Code § 111.12(d)(1).
- False or misleading representations in violation of 52 Pa. Code § 111.12(d).
- False or deceptive advertising to customers in violation of 52 Pa. Code § 54.122(3).
- Failure to maintain sales verifications in violation of 52 Pa. Code § 111.7(b)(4) and 52 Pa. Code § 111.13(b).

20. With respect to the Complaint's allegations relating to proper notification of door-to-door marketing activity, Verde provided the requisite notices of door-to-door marketing activity to the Commission but failed to copy the local distribution companies on such notices.

21. Verde was unable to provide five (5) telephone third party sales verifications requested by I&E.

22. With the exception of the allegations regarding failure to provide proper notice of door-to-door sales and marketing activity (Complaint, paragraph 46) and the allegations

regarding failure to maintain a record of a sales verification (Complaint, paragraph 62), all of the Complaint's allegations were based on customer contacts to PPL that were provided to I&E through the data request letter.

23. Upon receiving the Complaint, Verde immediately acknowledged the seriousness of the allegations to I&E.

24. Upon receiving the Complaint, Verde contacted I&E to address the allegations of the Complaint, to request a copy of the information provided by PPL, and to begin settlement discussions.

25. On February 6, 2020, Verde voluntarily ceased in-person and telemarketing in Pennsylvania and has not resumed such marketing.

26. During the periods covered by the Complaint's allegations, all of Verde's marketing in Pennsylvania was performed by third party vendors.

27. During the periods covered by the Complaint's allegations, Verde had a Code of Conduct for third party marketing vendors.

28. During the periods covered by the Complaint's allegations, Verde had a sales quality assurance program to oversee the activities of telemarketing and door-to-door marketing vendors acting on its behalf, which involved monitoring of sales calls and third party verification calls.

29. Verde avers that it had no record of 110 of the 339 customers listed in the Complaint as being enrolled with Verde. However, the Parties agree that a lack of confirmed enrollment with Verde does not negate the allegations of deceptive and misleading marketing practices.

30. Since I&E initiated its investigation of Verde, Verde has undergone significant changes in its executive leadership, including the following:

- a. Executive Vice-President of Sales in October of 2019;
- b. Senior Director of Mass Market Sales in March of 2020;
- c. General Counsel in January of 2020; and
- d. Chief Executive Officer in March of 2020.

31. In addition, Verde has hired a new regulatory compliance consultant in January of 2020 and a new Chief Operating Officer in March of 2020.

32. As of the date of this Stipulation, notwithstanding the allegation raised in the instant complaint, Verde has a satisfactory compliance history with the Commission and no record of any violations of the Public Utility Code or the Commission's regulations.

33. Had this matter proceeded to litigation, I&E would have proffered evidence and legal arguments to support the allegations in the Complaint, and Verde was prepared to rebut the allegations of the Complaint with evidence and testimony.

34. Verde and I&E recognize the inherent challenges and unpredictability of the outcome of a contested proceeding involving the issues raised in the Complaint.

35. The Stipulation of Facts is not an admission of wrongdoing or liability by Verde.

IV. DISCUSSION

The Commission has the power, and the duty, to enforce the requirements of the Public Utility Code. 66 Pa. C.S. § 501(a). Pursuant to Act 129 of 2008, the Commission was reorganized, and the Commission created I&E.³ In the *I&E Implementation Order*, the

³ *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Final Procedural Order entered August 11, 2011) (*I&E Implementation Order*).

Commission moved responsibility for all prosecutory functions to I&E. The Commission stated that I&E would serve as the prosecutory bureau in matters brought before the Commission's ALJs. *Id.*

As set forth above, I&E initiated this Complaint against Verde, alleging 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. Verde filed an Answer to the Complaint, generally denying the allegations set forth in the Complaint. After discovery and prior to this matter being assigned to the Office of Administrative Law Judge, I&E and Verde reached a Settlement regarding the allegations set forth in I&E's Complaint. The OCA opposes the Settlement.

Commission policy promotes settlements.⁴ Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve precious administrative hearing resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding.⁵

The Commission's standards for reviewing a non-unanimous Settlement, as proposed here, are the same as those for deciding a fully contested case. Accordingly, substantial evidence consistent with the statutory requirements must support the proposed Settlement.⁶

As discussed below, I find that the Joint Petition for Settlement, although opposed by the OCA, is in the public interest.

⁴ 52 Pa. Code § 5.231.

⁵ 52 Pa. Code § 69.401.

⁶ *Popowsky v. Pa. Pub. Util. Comm'n*, 805 A.2d 637 (Pa. Cmwlth. 2002) (*en banc*), *appeal den.*, 820 A.2d 163 (Pa. 2003); *ARIPPA v. Pa. Publ. Util. Comm'n*, 792 A.2d 636 (Pa. Cmwlth. 2002), *appeal den.*, 815 A.2d 634 (Pa. 2003).

V. TERMS OF THE SETTLEMENT

I&E and Verde filed a Joint Petition for Approval of Settlement on June 30, 2020. The Joint Petition includes the terms of the Settlement, and also includes I&E's and Verde's Statements in Support of the Joint Petition for Settlement. The principal terms and conditions of the Settlement, contained in Section IV of the Petition beginning at Paragraph 23 (the original numbering is maintained here for ease of reference), provide that:

23. Pursuant to the Commission's policy of encouraging settlements that are reasonable and in the public interest, the Parties held a series of discussions that culminated in this Settlement. I&E and Verde desire to (1) resolve I&E's formal Complaint; and (2) settle this matter completely without litigation. The Parties recognize that this is a disputed claim, and given the inherent unpredictability of the outcome of a contested proceeding, the Parties further recognize the benefits of amicably resolving the disputed issues. The terms and conditions of the Settlement, for which the Parties seek Commission approval, are set forth below.

A. Penalty and Contribution to EDC Hardship Fund

24. Verde shall pay a civil penalty in the amount of \$1,000,000.00. Verde shall not claim a tax deduction for the \$1,000,000.00 civil penalty and no amount of the civil penalty shall be passed through as an additional charge to Verde's customers in Pennsylvania.

25. Verde shall make a contribution of \$75,000.00 to PPL's hardship fund.

B. Refunds

26. For each customer identified in the Complaint that actually enrolled with Verde, Verde will provide a refund equal to their first two months of electricity supply charges, less any amounts previously refunded to that customer.

27. For customers who allege unauthorized enrollment by Verde, and who were actually charged and paid early termination fees ("ETF") to their prior supplier, Verde would

refund those ETFs, upon receipt of proof of payment by customer.

28. No customer shall be paid any refunds without executing a “Release of Claims” pursuant to which the customer agrees, in exchange for payment of the funds, to release, acquit, and forever discharge the Company and all of its current and former officers, shareholders, and employees from any and all claims related to the conduct alleged in the Complaint over which the Commission has jurisdiction.

29. That the refunds described in this section shall be provided within sixty (60) days of the date of entry of the Final Order in this proceeding.

C. Voluntary Modification to Business Practices

30. Modifications to Business Practices:

In addition to complying with all Commission regulations, Orders and policies, Verde shall implement the following modifications to its business practices in Pennsylvania and with respect to Pennsylvania customers:

31. Marketing Moratorium:

a. Verde voluntarily ceased in-person marketing and telemarketing in Pennsylvania on or about February 6, 2020. Verde agrees to continue its moratorium on in-person marketing and telemarketing in Pennsylvania for an additional six (6) months after Commission approval of this Settlement Agreement or until May 31, 2021,^[7] whichever is earlier. In addition, even after the expiration of the moratorium, Verde will not conduct any telemarketing or in-person marketing until the quality assurances measures discussed below have been fully implemented and Verde provides confirmation of such information to I&E in writing. The moratorium described herein will not prevent Verde from enrolling new customers online or via the internet, and will not prevent Verde from contacting existing customers

⁷ It should be noted that the Pennsylvania Public Utility Commission issued an Emergency Order on March 16, 2020 placing a moratorium on supplier door-to-door and in-person marketing in Pennsylvania. *See generally* M-2020-3019254. Thus, all electric generation suppliers have been prohibited from door-to-door and public, in-person marketing since March 16, 2020 and for the remainder of the pendency of the Proclamation of Disaster Emergency issued by Governor Tom Wolf. In the event that the voluntary marketing moratorium would cease during the pendency of the Proclamation of Disaster Emergency, the March 16, 2020 Emergency Order and marketing moratorium will remain in effect and take precedent.

to renew their enrollment, or contacting customers by telephone based on inbound requests for information from prospective customers.

32. Limitations on Sales Activities

a. When Verde resumes telemarketing in Pennsylvania, it will restrict the number of telemarketing contacts to prospective customers, such that no prospective customer shall receive a contact from Verde more than three (3) times over any ninety (90) day period. This limitation can be modified by agreement of I&E upon request by Verde, if Verde demonstrates substantial compliance with the provisions of this Settlement.

b. When Verde resumes in-person marketing in Pennsylvania, it will utilize no more than one (1) in-person marketing vendor in any utility territory at a time. This limitation can be modified by agreement of I&E upon request by Verde, if Verde demonstrates substantial compliance with the provisions of this Settlement.

33. General Marketing Commitments:

a. Verde shall comply with all Pennsylvania laws, including the Public Utility Code, 66 Pa. C.S. § 101 *et seq.*, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (hereinafter “Consumer Protection Law”), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (hereinafter “TRA”), and other applicable laws, as well as Commission regulations, Orders and policies.

b. Verde commits that the Company, its agents, employees and representatives shall not make misrepresentations to residential or small business consumers.

c. Verde will provide timely notice of door-to-door marketing activity to the Commission’s Bureau of Consumer Services and the EDCs as required by the Commission’s regulations.

d. Verde will complete an internal review of all its third-party vendors to ensure compliance with the Public Utility Code, 66 Pa. C.S. § 101 *et seq.*, the Unfair Trade

Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (hereinafter “Consumer Protection Law”), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (hereinafter “TRA”), and other applicable laws, as well as Commission regulations, Orders and policies.

e. Verde will implement a new Third-Party Verification (“TPV”) platform which will include the following:

- i. Ensure compliance with the applicable law by creating an internal audit system based on analytics; and
- ii. Ensure that the TPV call center contains bilingual individuals who can accurately confirm the sale in the potential customer’s native or preferred language.

34. Compliance Plan:

a. At a minimum, the compliance plan shall include the following:

i. Training- In General: Verde shall ensure that its training program for internal and external sales representatives meets the requirements of this section.

- (1) Prior to the resumption of marketing in Pennsylvania, Verde shall provide to I&E a detailed description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania.
- (2) After a 30-day review period, the Verde will meet with I&E and designated Commission staff to review and discuss the training and quality assurance program.

ii. Verde’s training materials for its sales representatives and customer service representatives will accurately and comprehensively cover the following:

- (1) The applicable requirements of the Public Utility Code and the Commission’s regulations, Orders and policies regarding marketing and billing practices for EGSs;

- (2) The applicable requirements of the Consumer Protection Law and TRA, including both prohibited practices and affirmative requirements;
- (3) The applicable requirements of the Commission's regulations regarding door-to-door sales and other applicable state and federal law;
- (4) Training to marketing and customer service representatives on the proper use of the Eligible Customer List and releasing private customer information.
- (5) Training to all customer service representatives and marketing persons to identify themselves, identify his/her representation of Verde, and provide the reasoning for the phone call or in-person meeting upon first contact.
- (6) Training to all marketing persons on the different charges on the electric bill and which charge relates to the generation of electricity.
- (7) Training to all marketing persons on conducting a no-pressure sales call or in-person meeting, and enforcing the concept that a customer is not required to choose a supplier or switch suppliers. Verde will enforce that threatening a customer to switch will not be tolerated.
- (8) An express warning that deceptive sales practices will not be tolerated by Verde's management;
- (9) An express warning and material description of the remedial steps that will be taken against any sales representatives and customer service representatives that violate any term of this Settlement or otherwise engage in improper sales practices; and

(10) A description of the quality assurance, monitoring, auditing and reporting practices Verde maintains to identify and prevent improper sales practices.

iii. Verde shall implement and conduct the training and ensure that its internal sales representatives and third-party sales agents comply with the Public Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies.

iv. Individual marketers retained by Verde shall be required to successfully complete Verde's training program. Each trainee shall be required to sign a form acknowledging that he or she has received and understands the information provided in Verde's training materials before marketing to and enrolling customers on behalf of Verde.

v. Verde will review all paper and physical marketing tools provided to in-person sales to ensure that the documentation does not include any misleading information concerning a relationship with the local EDC, incorrect information on the EDC's rates, or the EDC's logo. This review will also include any sales script provided to telemarketers.

vi. Verde will review all paper and physical marketing tools provided to in-person sales to ensure that the documentation does not include any misleading information concerning a relationship with other electric generations suppliers (EGS), incorrect information on the EGS's rates, or the EGS's logo. This review will also include any sales script provided to telemarketers.

vii. Verde will ensure that all door-to-door sales persons and other in-person marketers will be issued a uniform which clearly displays Verde's logo and/or name. Verde maintains its discretion of what will constitute as the "uniform."

viii. Verde will ensure that all door-to-door sales persons and other in-person marketers are issued a badge with the person's name and Verde's logo and/or name, and that training will be provided on the proper display of such badge during in-person marketing activities.

ix. Verde will create and implement a compliance program to ensure that all in-person marketing follows the prior two directives, (vii) and (viii).

x. Verde will implement an internal call system to ensure that all customer service calls, solicitations, and telemarketing are transmitted through a telephone number bearing Verde's name on the caller-ID. Verde will ensure that all business transactions and calls to potential or existing customers will be through its internal call system.

xi. Verde will confirm that at least 25% of its call center representatives are bilingual and are fluent in the potential and existing customer's native or preferred language.

35. Compliance Monitoring- Sales Calls:

a. Verde shall increase internal quality control efforts to include at least the following:

i. Verde shall record all telephonic communications between Pennsylvania customers and Verde's customer service representative and maintain such call recordings for a period of at least ninety (90) days.

ii. Verde shall require its telemarketers to record all communications with residential and small business consumers in Pennsylvania that result in a sale. The Verde representative will record every call placed to potential customers (with proper notice of the call being recorded provided to the potential customer), but will maintain a record all of calls that result in a sale. Verde has the discretion to not keep and maintain those calls which do not result in a sale, unless if Verde decides to use such calls for quality and compliance assurance.

iii. Verde shall maintain such recordings in accordance with the Commission's requirements.

iv. Verde shall, on a monthly basis, review a random sample of calls recorded from each of Verde's agents and third-party contractors in order to evaluate the sales practices employed and ensure that the sales practices comply with this Settlement Agreement, the Public

Utility Code, the Consumer Protection Law, the TRA, and Commission regulations, Orders and policies.

- (1) The sample shall include no fewer than three (3) sales for each sales representative conducting sales solicitations for Verde to Pennsylvania customers.
- (2) Whenever such sample reveals one or more non-compliant sales calls by an agent, third-party contractor or sales representative, Verde shall investigate whether other Pennsylvania consumers enrolled by the agent, third-party contractor or sales representative were subjected to sales practices that violated this Settlement Agreement, the Public Utility Code, the Consumer Protection Law, the TRA, or Commission regulations, Orders and policies. Such investigation, at a minimum, shall include a review of the sales calls and call notes for the ten (10) Pennsylvania consumers enrolled before the call in question and the ten (10) Pennsylvania consumers enrolled after the call in question.
- (3) If Verde identifies additional non-compliant sales calls, Verde shall implement remedial steps as described below.
 - (a) If the consumer did not file a complaint or allege slamming on the part of the Verde representative but the call was otherwise not in accordance with the Commission's regulations and the Public Utility Code, Verde shall offer to any residential or small business consumer subjected to the non-compliant sales practices a refund equal to the difference between the price charged by Verde and the consumer's applicable Price to Compare for the period in which the consumer was a customer as a result of the non-compliant sales practice.

Such refund shall be paid to the consumer within thirty (30) business days.

- (b) If the consumer did file a complaint or allege slamming on the part of the Verde representative, Verde will follow the customer dispute process provided in 52 Pa. Code § 57.177.
- (c) In the event Verde determines that a sales representative has violated any terms of this Settlement Agreement, the Public Utility Code, the Consumer Protection Law, the TRA, or Commission regulations, Orders and policies or otherwise engaged in improper sales practices, Verde shall take prompt remedial actions against such representative.

36. Reporting: Within ninety (90) days of implementation of the resumption of in-person marketing or telemarketing in Pennsylvania and quarterly thereafter for a period of two (2) years, Verde shall provide to I&E:

- a. An explanation of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof and
- b. A summary of the number and type of customer complaints and disputes received by Verde during the reporting period.

37. Policy Changes: Verde agrees to provide I&E with written notice of any changes to its practices and procedures related to marketing to Pennsylvania consumers for EGS products and services. This provision will remain in effect for two (2) years following the entry of the Commission's Final Order and may be extended at the discretion of I&E.

VI. CONDITIONS OF THE SETTLEMENT

The Settling Parties note that the Settlement shall be binding upon the successors and assigns of the parties to the Settlement. Any party may petition the Commission for rehearing or take other recourse allowed under the Commission's rules if the Commission Order in this matter substantively modifies the terms of the Joint Petition for Approval of Settlement. If the Commission modifies the Joint Petition, either of the Settling Parties may give notice to the other party that it is withdrawing from the Settlement. Such notice must be in writing and must be given within twenty (20) business days of the issuance of any Initial or Recommended Decision or any Commission Order or Secretarial Letter which adopts the Joint Petition with substantive modifications of its terms. The consequence of any party withdrawing from the Settlement is that all issues associated with the requested relief presented in the proceeding will be fully litigated unless otherwise stipulated between the parties and all obligations of the parties to each other are terminated and of no force and effect. In the event that a party withdraws from the Settlement, I&E and Verde jointly agreed that nothing in the Settlement shall be construed as an admission against, or as prejudice to, any position which any party might adopt during litigation of this case.

The Settling Parties further note that this Settlement consists of the entire agreement between I&E and Verde regarding the matters addressed herein, and that the Settlement represents a complete settlement of I&E's Complaint against Verde's alleged violations of the Public Utility Code and the Commission's regulations. The Settling Parties expressly acknowledge that this Settlement represents a compromise of positions and does not in any way constitute a finding or an admission concerning the alleged violations of the Public Utility Code and the Commission's regulations.

Lastly, the Settling Parties note that the Settlement contains a summary of alleged violations of the Public Utility Code and the Commission's regulations. The Settling Parties maintain that the Settlement terms contain proposed settlement terms, and that none of the provisions in the Settlement shall be considered or shall constitute an admission, a finding of any fact, or a finding of culpability on the part of Verde in this or any other proceeding. The Settling

Parties assert that this Settlement is presented without prejudice to any position that either party may have advanced, and without prejudice to the position any party may advance, in the future on the merits of the issues in future proceedings, except to the extent necessary to effectuate the terms and conditions of this Settlement.

VII. OPPOSITION TO THE SETTLEMENT

The OCA maintains that the Settlement entered into by I&E and Verde is not sufficient to address the issues raised in I&E's Formal Complaint, the underlying PPL Report, and the additional factual information discovered through its own investigation. The OCA submits that further investigation is needed in order to provide an equitable remedy for consumers. Moreover, the OCA asserts that the Settlement does not give sufficient weight to the seriousness of the slamming allegations in this proceeding. OCA Comments at 18, 21.

The OCA's specific objections to the Settlement, along with the Settling Parties' replies,⁸ will be addressed below.

1. Refunds
 - a. OCA's Position

The OCA asserts that the customer refund provisions are not sufficient for several reasons. The dollar amount of the refund pool is not identified, unlike prior settlements with suppliers in Pennsylvania. A refund pool creates a defined amount of money that the Company must pay out. The refund is also limited to only customers identified in the Formal Complaint "that actually enrolled with Verde." The Settlement ignores the potential pool of customers who are explicitly identified in the PPL Report or others who may have experienced similar conduct. The Settlement also leaves no potential remedy for the 110 customers that complained to PPL that they were slammed by Verde, but Verde was unable to find in their records. The OCA submits that Verde's inability to maintain proper records should not bar customers from

⁸ Not every issue raised by the OCA was of equal concern to Verde and I&E.

recovery. Customers complained to PPL, and Verde should seek assistance from PPL in the identification of these customers. OCA Comments at 22-23.

The Settlement also provides that the Company will return any ETFs upon receipt of proof of payment.⁹ The OCA avers that the Settlement places the burden on customers who were illegally enrolled with Verde to provide proof that they paid an ETF. Some of the issues date from February 2017 in the PPL Report. There is a strong likelihood that customers will not have retained proof of payment for nearly four years from the date of payment. The OCA maintains that the burden should not be on the customer to provide proof of payment, but instead, the Company should accept the customer's verified declaration of any ETF paid. OCA Comments at 23.

Additionally, the OCA notes that the Settlement provides that customers must request a refund within sixty days.¹⁰ If customers do not step forward to claim the refund, Verde can then retain the refunds. Considering the allegations in this proceeding, it is not appropriate for Verde to retain dollars that are supposed to be paid to the impacted customers. OCA Comments at 23.

The OCA further avers that the Settlement provides no notice provisions to customers. Under the Settlement, customers must take action within sixty days, but the Settlement does not provide any information regarding how customers will be informed about the Settlement. The Settlement also does not provide any information regarding the steps that Verde must take to locate the customers if the customers no longer live at the same residence as when the complaint was made to PPL. OCA insists that customers must be provided with appropriate notice about the steps that customers need to take in order to collect on the refunds. OCA Comments at 23-24.

The OCA further challenges that the refund provided for in the Settlement is limited to the first two months of electricity less previously refunded amounts.¹¹ Section

⁹ Settlement at ¶ 27.

¹⁰ Settlement at ¶ 29.

¹¹ Settlement at ¶ 29.

57.177(b) provides that a refund may be ordered for the first two months of a billing dispute when a customer alleges that an “EGS has been changed without consent.”¹² The OCA submits that the violations presented here are far more serious than allegations of a billing dispute. Among other violations of the Commission’s regulations, the allegations include 179 incidents of slamming and unauthorized access, and incidents of failure to maintain customer personal information and incidents of failure to maintain the confidentiality of customer information by utilizing personal customer information to access or create customer on-line accounts without customer consent in violation of 52 Pa. Code § 54.43(1)(d). The OCA asserts that the Commission has set forth a zero-tolerance policy for such conduct, and a zero-tolerance policy should not include allowing Verde to retain such ill-gotten gains. OCA Comments at 24.

The OCA further submits that there is no basis for limiting this refund to two months as opposed to the entire time that Verde served these customers starting with the documentation of improper conduct in 2017. In particular, the allegations in this proceeding allege slamming and unauthorized access to the customer’s account. The customer may not have known that the customer was enrolled with Verde and may have been charged by the Company for longer than two months. There is no information in the record supporting the proposed two-month timeframe. The OCA avers that the Company should not be permitted to retain its ill-gotten gains when it has been accused of slamming and potentially criminal acts against the customer. OCA Comments at 24.

The OCA also argues that "Release of Claims" required for a customer to obtain a refund is a significant barrier that will prevent the issuance of a substantial volume of refunds.¹³ In this case, the “Release of Claims” is not appropriate. The case is only looking to those customers who were allegedly slammed. Unlike prior settlements of supplier misconduct in which the OCA participated, there are no class action cases pending, and there are no other complaints pending. The OCA submits that it is not typical in PUC cases to require a “Release of Claims.” A Release of Claims should not be included in the Settlement as a condition for a customer to receive a refund. OCA Comments at 24-25.

¹² 52 Pa. Code § 57.177(b).

¹³ Settlement at ¶ 28.

Lastly, the OCA submits that formal Complaint allegations are limited by the PPL Report. The OCA believes that similarly situated customers who may not have filed a complaint with the Commission or contacted other Pennsylvania EDCs are ignored by these provisions. No investigation has been completed to determine whether additional Verde customers have been impacted at PPL or in other service territories where Verde has operated. The settlement also does not address Verde's current customers who may have experienced similar issues. OCA Comments at 25.

b. Verde's Position

Verde responds that for each customer identified in the Complaint that actually enrolled with Verde, Verde will provide a refund equal to their first two months of electricity supply charges, less any amounts previously refunded to that customer. This methodology is fully consistent with the Commission's regulation at 52 Pa. Code § 57.177, which authorizes a refund of all supplier charges when a customer disputes an EGS enrollment within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent. As for the distribution of refunds, Verde notes that the OCA appears to argue that customers other than those whose enrollments were identified in the Complaint should be provided refunds, but Verde maintains that it is not possible or appropriate to issue refunds to customers who have not disputed their enrollment and who were not identified in the Complaint that is the subject of this proceeding. Verde maintains that the Settlement's refund provisions are appropriate and commensurate with the nature of the allegations in that they provide the full relief authorized by the Commission's regulations for each customer who was alleged to have been affected by the actions set forth in the Complaint. Verde Reply Comments at 6-7.

Additionally, Verde submits that the OCA's other concerns with the refund payments are not justified. I&E has already identified the 179 customers who were allegedly enrolled without authorization and Verde has agreed to issue the refunds to each of those identified customers. Verde notes that the OCA appears to argue that a larger group of customers may be entitled to refunds, but no such other customers are at issue in this proceeding.

This proceeding and this Settlement are limited in scope by the specific allegations set forth in the Complaint. The refund component of the Settlement was meant to specifically address the allegation related to 179 unauthorized enrollments, and it does so in accordance with the Commission's regulation regarding unauthorized enrollment. It is common for refund payments to be accompanied by release of claims in order to bring closure to any potential dispute, and both Verde and I&E agreed it was appropriate for such a release to be included as a component of the Settlement. Verde Reply Comments at 7.

c. Disposition

The OCA argues that the Settlement ignores a potential pool of customers who are explicitly identified in the PPL Report as well as others who may have experienced similar conduct. However, I agree with Verde that this Complaint and associated Settlement are limited in scope by the specific allegations made by I&E in the formal Complaint. This matter pertains to the 179 customers specifically identified by I&E. Moreover, if there are any customers outside of the 179 customers identified by I&E and who are not covered by the terms of the Settlement, then any such customer is free to bring their own Complaint against Verde.

I disagree with the OCA's position that Verde should accept a customer's verified declaration of any ETF payment made to refund those payments. The OCA believes there is a strong likelihood that any customer seeking a refund of these payments will not have retained proof of payment for nearly four years from the date of payment. While that may be the case, there is also the possibility that a customer may not remember if they actually made an ETF payment, or how much they paid. Requiring proof of payment will demonstrate that the customer did make the payment, when they made the payment, the amount of that payment, and whether a refund is warranted under the terms of the Settlement.

The OCA also argues that it is unreasonable to put a time limit on the customer's request for refunds. Additionally, the OCA argues that the Settlement lacks notice about the steps customers must take to secure their refund. However, paragraph 27 of the Settlement clearly indicates that "[f]or each customer identified in the Complaint that actually enrolled with

Verde, Verde will provide a refund equal to their first two months of electricity supply charges, less any amount previously refunded to the customer.” The terms of the Settlement place the responsibility on Verde to make refunds to the identified customers, not on the customers to actively seek the refund. Since the terms of the Settlement call for Verde to actively make these payments, and because the customers do not have to actively seek this refund, notice is not necessary. However, the terms of the Settlement are unclear as to how customers identified in the Complaint who paid ETFs will know of their potential eligibility for a refund of the fee paid. Accordingly, Verde will be ordered to notify the customers identified in the Complaint who alleged unauthorized enrollment of the potential refund of the ETF, and the steps required to secure the refund.

The OCA also challenges the adequacy of the two-month period for refunds instead of the entire period that Verde served the customers. However, I agree with Verde that the methodology outlined in the Settlement is consistent with the Commission’s regulation regarding customer dispute procedures which provide in pertinent part:

When the customer’s dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer’s consent, the customer is not responsible for EGS bills rendered during that period.

52 Pa. Code § 57.177(b).

Regarding the OCA’s challenge to the release of claims provision of the Settlement, I agree with Verde that requiring a release of claims along with a refund is necessary to bring finality to any potential claims. Moreover, any consumer who will not execute a release of claims, as with any consumer who has a claim against Verde but was not identified in the Complaint, would still have the option to pursue their own formal Complaint against Verde.

To the extent that the OCA believes that the refund terms of the Settlement, or any of the terms of the Settlement, are deficient and do not adequately address the claims raised

in the Complaint, as noted by the Commission in its October 26, 2021 Order, the OCA is free to bring its own Complaint on these issues. Upon review, I find that the refund terms of the Settlement, with my slight modification, sufficiently address the behavior alleged in the Complaint.

2. Marketing Moratorium
 - a. OCA's Position

The OCA notes that the Marketing Moratorium provision of the Settlement states that Verde voluntarily ceased in-person marketing and telemarketing on or about February 6, 2020.¹⁴ Under the Settlement, Verde will continue the moratorium on its in-person marketing and telemarketing for an additional six months after the Commission approval of the Settlement, or until May 31, 2021.¹⁵ Verde will also not conduct any telemarketing or in-person marketing until the quality assurances measures have been fully implemented.¹⁶ The Settlement specifically states that:

The moratorium described herein will not prevent Verde from enrolling new customers online or via the internet, and will not prevent Verde from contacting existing customers to renew their enrollment, or contacting customers by telephone based on inbound requests for information from prospective customers.¹⁷

OCA Comments at 25-26.

The OCA submits that the conditions that would allow Verde to resume marketing are not reasonable. Under the Settlement, Verde alone confirms that the proposed quality assurance measures have been implemented. However, the marketing moratorium does

¹⁴ Settlement at ¶ 31.

¹⁵ Settlement at ¶ 31.

¹⁶ Settlement at ¶ 31.

¹⁷ Settlement at ¶ 31.

not apply to customers that have signed up on-line or in any way address Verde's contact with existing customers to renew enrollment or contact customers by telephone based on in-bound requests for information. One of the primary issues identified in the Formal Complaint has been the veracity of the Company's communications with customers, and there is nothing in the Settlement that prevents issues from arising with communications to existing or new customers that are enrolled via the Internet.¹⁸ The OCA submits that these loopholes should be addressed. In addition, consideration must be given to requiring Verde to obtain a written authorization for every new customer in light of the fact pattern identified in the Formal Complaint. The Commission's regulation at 52 Pa. Code §57.177(e) specifically calls for this type of remedy when dealing with issues of slamming. OCA Comments at 26-27.

The OCA further submits that, given the seriousness of the allegations, and in particular, the slamming allegations, a longer timeframe for a marketing moratorium is warranted in this case. Given the Commission's stated zero-tolerance policy on slamming, the Commission should consider whether a ban on all marketing and enrollment of customers is necessary. Given the allegations of slamming and unauthorized access, the Commission should also consider whether a revocation of Verde's license for a period of time for non-compliance with the Commission's regulations is appropriate. OCA Comments at 27.

b. Verde's Position

Verde responds that the OCA's concerns, that the agreed-upon marketing moratorium is not reasonable because it supposedly does not contain a process to confirm implementation of quality assurance measures and because it does not extend to online enrollment or enrollments in response to inbound customer inquiries, are not warranted. Paragraph 31 of the Settlement clearly states that Verde will not conduct any telemarketing or in-person marketing until the quality assurance measures have been fully implemented and Verde provides confirmation of such information to I&E in writing.

¹⁸ See, Formal Complaint at ¶ 59 (alleging 755 incidents of making false or misleading representations, including regarding rates and savings in violation of 52 Pa. Code § 111.12(d)(2) for a civil penalty of \$755,000).

In response to OCA's argument, Verde counters that OCA's position is not reasonable. Verde submits that the Compliance Plan that it is required to develop will result in one of the strictest quality assurance and oversight regimes for any EGS operating in Pennsylvania. Before it resumes marketing, Verde must submit to I&E a detailed description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania, and then meet with I&E and designated Commission staff to review and discuss the training and quality assurance program.¹⁹ Verde must then confirm its implementation of these processes to I&E, and then continually report the results of sales audits to I&E for two years, and must also report any changes in marketing policies to I&E. The extent of the restrictions and the multitude of quality assurance safeguards and ongoing auditing and reporting obligations demonstrate that the Settlement's Compliance Plan components are in fact reasonable and appropriate. Verde Reply Comments at 8.

With respect to OCA's concerns about online enrollments, or customers who are contacted after submitting inbound requests for information, it must be noted that those sales channels were not at issue in the Complaint. No allegations of improper activity were alleged in connection with those sales channels, and those channels differ in significant ways in that they are much less susceptible to the types of improper sales agent actions than the sales channels at issue in the Complaint (*i.e.* door-to-door and outbound telemarketing). As such, it is reasonable and appropriate for those sales channels to be excluded from the agreed-upon marketing moratorium. Verde Reply Comments at 8-9.

Verde further submits that the length of the agreed-upon marketing moratorium is appropriate. While the OCA treats every single allegation in the Complaint as having been conclusively proven, Verde notes that is not the case. Verde and I&E recognized the inherent uncertainty of litigation and challenges associated with litigating a complaint of this nature, which involved third-party summaries of prior customer contacts rather than first-hand complaints or disputes. Settlements necessarily involve compromises and the length of the moratorium in this case (February 2020 to May 2021) is significant and reasonable in the context of the broader settlement. In addition, it bears repeating that even upon expiration of the

¹⁹ See Settlement ¶ 34.

moratorium, marketing cannot resume until the new Compliance Plan is fully implemented. The Compliance Plan will incorporate all of the operational changes and controls required by I&E. Furthermore, the Settlement, in paragraphs 34-36, obligates Verde to perform continual sales monitoring and auditing, and take specific steps in response to identified improper behavior, and report the results of those audits to I&E quarterly. The required oversight and reporting in the Settlement provide extra assurances that once marketing resumes it will be conducted in a fully compliant manner. Verde Reply Comments at 9.

c. Disposition

The OCA argues that the conditions that would allow Verde to resume marketing are not reasonable when considering the allegations in the Complaint. However, it is important to note that none of the allegations in the Complaint have been proven. Following discovery and discussions, the Settling parties agreed that entering into this Settlement agreement was preferable to pursuing litigation. I&E, the party that brought this Complaint, is satisfied that the terms of the Settlement address its concerns regarding the conduct alleged in the formal Complaint.

Also, as Verde noted, Paragraph 31 of the Settlement provides that Verde will not conduct any telemarketing or in-person marketing until the quality assurance measures provided for in the Settlement have been fully implemented with written confirmation from Verde. Moreover, the terms of the Settlement require Verde to report the results of sales audits to I&E for two years and, as discussed below, report any changes in marketing policies. Accordingly, I&E will ensure that Verde is adhering to the terms of the Settlement.

Regarding the OCA's concerns about online enrollments or customers who are contacted after submitting inbound requests for information, I agree with Verde that these sales channels were not at issue in the Complaint. Since these sales channels were not at issue in the Complaint, I find it reasonable that the Settling Parties did not include them in the terms of the Settlement.

The Settlement provisions as a whole, including the required oversight and reporting to I&E, will help to ensure that once Verde resumes its marketing activities, it will do so in compliance with the terms of the Settlement, as well as with Commission regulations. Accordingly, I will not order any modification to the Marketing Moratorium provision of the Settlement.

3. Limitations on Sales Activities

a. OCA's Position

The OCA submits that there are also gaps in the limitations on sales activities.

The Settlement provides:

a. When Verde resumes telemarketing in Pennsylvania, it will restrict the number of telemarketing contacts to prospective customers, such that no prospective customer shall receive a contact from Verde more than three (3) times over any ninety (90) day period. This limitation can be modified by agreement of I&E upon request by Verde, if Verde demonstrates substantial compliance with the provisions of the Settlement.

b. When Verde resumes in-person marketing in Pennsylvania, it will utilize no more than one (1) in-person marketing vendor in any utility territory at a time. This limitation can be modified by agreement of I&E upon request by Verde, if Verde demonstrates substantial compliance with the provisions of this Settlement.

Settlement at ¶ 32(a)-(b). The OCA asserts that the limitation on sales activities highlights the problem created by the lack of record evidence in this case. While the OCA agrees that it is reasonable that Verde restrict itself to one third-party vendor, the Settlement provision does not address the underlying factual problem that there is no information as to who the bad actor or bad actor(s) were that Verde previously used. Even though there will be only one vendor at any given time, there is no restriction on hiring the vendor that was involved in these allegations. OCA Comments at 27-28.

b. Verde's Position

Verde responds that these limitations are just one piece of the much larger Compliance Plan that Verde is obligated to implement before Verde can resume marketing. The OCA is concerned that these limitations can be modified in the future, but Paragraph 32 of the Settlement expressly states that such modifications can only be made with the agreement of I&E after Verde demonstrates substantial compliance with the Settlement's provisions. Therefore, the OCA is incorrect when it says that these restrictions can be modified at any time without notice or input. The restrictions in Paragraph 32 are meant to limit the extent of Verde's sales activities to protect against the types of behavior alleged in the Complaint and to better enable ongoing sales compliance. In that respect, the restrictions are reasonable and appropriate in scope, such that no modification is warranted. Verde Reply Comments at 10.

c. Disposition

The OCA is concerned that the limitation on sales activities demonstrates the problem created by the lack of record evidence in this case, namely that the previous "bad actor(s)" used by Verde were never identified. However, I agree with Verde that the marketing restrictions set forth in the Settlement will help protect customers against the type of behavior alleged in the Complaint. Verde must demonstrate "substantial compliance" with the provisions of the Settlement before I&E will agree to any modifications of these marketing limitations. This agreed-upon restriction should compel Verde to strive to avoid the marketing practices that prompted the Complaint in this matter. Accordingly, I find this provision to be reasonable, and that no modification is necessary.

4. General Marketing Commitments

a. OCA's Position

The OCA asserts that the General Marketing commitments are not sufficient because they do not address the identified structural problems with the Company's oversight procedures. Under Settlement Paragraph 33(a)-(e), the Company will: (a) comply with the

Pennsylvania laws; (b) not make misrepresentations to consumers; (c) provide timely notice of door-to-door marketing activity to the Commission's Bureau of Consumer Services and the EDCs as required by the Commission's regulations; (d) complete an internal review of all of its third-party vendors to ensure compliance with the law; and (e) implement a new Third-Party Verification platform to create a new internal audit-based system based on analytics and ensure bilingual individuals can accurately confirm the sale in the consumer's native language.²⁰ OCA Comments at 28.

The OCA maintains that the primary defect with this provision is that the Company has not addressed the problems of the lack of oversight. While the Company may implement a new TPV system that can track issues, the Settlement provides for no process regarding what the Company will do with that information. Nor does this provision address the actual conduct of its third-party sales representatives prior to entering into the TPV process. If the problem is that the management is not responsive to consumer complaints and does not oversee its third-party marketers appropriately, the underlying problem that necessitated the investigation will not be resolved. Verde was under an obligation to do so already as a licensed supplier in Pennsylvania. It is not enough for the Company to claim to abide by the rules. Instead, the Settlement needs to provide oversight that the Company is, in fact, complying with the law. OCA Comments at 28.

b. Verde's Position

Verde submits that the OCA's criticism of Paragraph 33 of the Settlement highlights the unreasonable nature of its position. Paragraph 33 is a form of a standard paragraph that appears in nearly all settlements with EGSs, and reiterates the basic marketing regulations with which EGSs must comply in addition to highlighting some specific compliance obligations implicated by the Complaint. The OCA criticizes the paragraph for not addressing oversight requirements, but oversight requirements are addressed in separate paragraphs, specifically, Paragraphs 34-35. Rather than acknowledging this, OCA instead uses Paragraph 33 to criticize Verde and its management. Notably, Verde has undergone significant changes in its

²⁰ Settlement at ¶ 33(a)-(e).

executive leadership since I&E initiated its investigation, including the following: replacement of its Executive Vice-President of Sales; replacement of its Director of Mass Market Sales in March of 2020; replacement of its General Counsel in January of 2020; and replacement of its Chief Executive Officer in March of 2020. In addition, Verde has hired a new regulatory compliance consultant in January of 2020 and a new Chief Operating Officer in March of 2020. In short, OCA's criticisms of its management oversight have already been addressed through these personnel changes, and the specific oversight components of the Compliance Plan are addressed in subsequent paragraphs of the Settlement. Verde Reply Comments at 10-11.

c. Disposition

Regarding the OCA's concerns about the General Marketing Commitments portion of the Settlement for a lack of oversight and poor management, as noted by Verde, Settlement Paragraphs 34 and 35 provide for extensive oversight of these marketing commitments. Moreover, there have been significant changes in Verde's executive leadership since this matter began.²¹ In light of the allegations in the Complaint, this change in executive leadership should provide Verde with the necessary oversight to ensure that the marketing commitments outlined in the Settlement are satisfactorily achieved. Accordingly, I find the general marketing commitments terms of the Settlement to be reasonable, and that no modification is necessary.

5. Compliance Plan

a. OCA's Position

The OCA submits that the Compliance Plan is deficient because the Settlement provides for no approval process for the Plan by the Commission and does not allow for input from other stakeholders. The Settlement provides for Verde to commit to the completion of a Compliance Plan that will address the development and implementation of a training program.²² The Settlement includes terms for providing to I&E a detailed description of the "sales training

²¹ See Findings of Fact 30-31.

²² Settlement at ¶ 34.

and quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania.”²³ But the details of the program are left to Verde. Verde will also create a compliance program to ensure that the in-person marketing follows the directives of Settlement provisions (vii) and (viii) which will require that all door-to-door sales representatives where a uniform and badge bearing the Verde name.²⁴ Twenty-five percent of call center representatives must also be bilingual.²⁵ OCA Comments at 29-30.

While on its surface the Compliance Plan appears to address training issues and sales conduct, the problem is that there are no real details provided about the Plan. Everything is left to a future date, and Verde’s management discretion. The Settlement provides for no opportunity for parties to address the training materials if deficient and there is no monitoring of how the training is actually carried out. OCA Comments at 30.

Under the Settlement, marketing agents will be required to complete the training program and sign a form acknowledging that the agent has received the training materials.²⁶ The OCA submits that this provision appears to be very similar to the requirement already used by Verde that the agents sign a Code of Conduct, but under the facts provided by the Company, that Code of Conduct does not appear to have been previously enforced or even kept on file.²⁷ The OCA maintains that the primary issue raised by this formal Complaint, but that is not properly addressed in the Settlement, is that the actual monitoring to determine compliance with written training policies and Codes of Conduct is nonexistent. OCA Comments at 30-31.

The OCA submits that the Settlement is deficient in the level of detail provided about monitoring third-party agents. The Settlement provides that Verde shall ensure that its third-party agents adhere to the law, but the Settlement does not provide any substantive detail about how the Company will monitor the third-party agents.²⁸ The alleged misconduct in the formal Complaint directly relates to Verde’s lack of oversight over its third-party agents. The

²³ Settlement at ¶¶ 34(a)(i)(1), 34(a)(v)-(viii).

²⁴ Settlement at ¶ 34(a)(ix)-(x).

²⁵ Settlement at ¶ 34(a)(xi).

²⁶ Settlement at ¶ 34(a)(iv).

²⁷ Verde Response to OCA-I-7; Verde Response to OCA-III-16.

²⁸ Settlement at ¶ 34(iii).

Settlement must address how the Company plans to ensure that its third-party agents follow the Public Utility Code, the Consumer Protection Law, the TRA, and the Commission's regulations, Orders and policies. OCA Comments at 31.

The Settlement also does not address what happens if the parties do not agree on the Compliance Plan. The details of the Compliance Plan should not be worked out at some future date when the case is over. Instead, the details of the Plan should be agreed upon as a part of the Settlement and specifically address the issues raised by the allegations in the Complaint. Moreover, as with any compliance filing, the Commission should ultimately have the final decision as to whether the Plan resolves the Complaint. OCA Comments at 31.

b. Verde's Position

Verde responds that the OCA's argument, that the Compliance Plan is deficient because there is no approval process for the Plan and it does not allow for input from stakeholders, is incorrect. Verde maintains that the intent of the settling parties was not to negotiate every last detail of a potential Compliance Plan that Verde would implement before resuming marketing sometime in 2021. Instead, the parties agreed that Verde would be required to develop a Compliance Plan that covered a variety of different operation aspects, with minimum requirements in multiple categories of operations including hard restrictions on number of sales vendors, detailed training program components, detailed sales audit procedures, verification and reporting requirements, recording of sales calls, and quality assurance sampling among others. Before it resumes marketing, Verde must submit to I&E a detailed description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania, and then meet with I&E and designated Commission staff to review and discuss the training and quality assurance program. Verde must then confirm its implementation to I&E, and then continually report the results of sales audits to I&E for two years, and must also report any changes in marketing policies to I&E.²⁹ Contrary to the OCA's comments, the Settlement specifically provides for review and input of the training

²⁹ See Settlement, ¶¶ 30-37.

materials and program by I&E and Commission staff.³⁰ In criticizing the framework developed by Verde and I&E to ensure ongoing compliance before marketing can resume, the OCA is now criticizing the Settlement as not being to its liking after having previously rejected the opportunity to help craft the Settlement's terms. Verde maintains that this is not a valid reason to deny approval of the Settlement. Verde Reply Comments at 11-12.

c. Disposition

Regarding the OCA's concerns about the Compliance Plan terms contained in the Settlement because it does not provide for an approval process for the plan by the Commission nor allow for input by stakeholders, I note that the Compliance Plan provides for a number of safeguards to be put in place to avoid the conduct alleged in the Complaint. This includes detailed training measures and requirements for its sales and customer service representatives, including third-party sales agents, to ensure proper marketing protocols are being followed. Additionally, under the terms of the Settlement, Verde is required to meet with I&E and designated Commission staff to review and discuss the training and quality assurance program to ensure that it is meeting the objective of avoiding the behavior alleged in the Complaint. Moreover, the terms of the Settlement provide for input from I&E and Commission staff for two years. Under these circumstances, I find the agreed-upon Compliance Plan provisions in the Settlement to be reasonable, and that no modifications are necessary.

6. Compliance Monitoring

a. OCA's Position

The OCA asserts that the compliance monitoring for telephonic communications and door-to-door sales contacts are deficient. As to telemarketing sales calls, the Settlement provides that the Company will record and maintain the call recordings for a period of 90 days and will require all communications to be recorded.³¹ Additionally, Verde will review a random sample of calls on a monthly basis of no less than three sales calls for each call center

³⁰ See Settlement, ¶ 34(a)(i).

³¹ Settlement at ¶ 35(i)-(iii).

representative. If there are one or more non-compliant calls for a sales representative, the investigation will then include a review of ten Pennsylvania consumers enrolled before the call and ten after the call in question.³² The Settlement provides that if the consumer did not file a complaint or allege slamming but the Company finds that the call was non-compliant, the Company will issue a refund within 30 days of the difference between the price charged by Verde and applicable Price to Compare.³³ If the consumer files a Complaint or alleges slamming, the Company will follow the dispute process.³⁴ OCA Comments at 31-32.

The OCA argues that there is no evidence that customer complaints filed directly with Verde are evaluated to determine red flags or evidence of non-compliance of a generic nature. A review of an even more limited sample of calls does not adequately address these underlying issues. OCA Comments at 33.

The OCA further argues that the call monitoring provisions also only state that a customer who is slammed will follow the customer dispute process provided in 52 Pa. § 57.177.³⁵ The Settlement does not require that the customer be returned to its EDC or that the customer specifically be provided a refund or address ETFs. A customer who is slammed should not have to wait out the Commission's dispute resolution process in order to be offered a remedy. OCA Comments at 33.

As to door-to-door sales contacts, there does not appear to be any similar requirement that these sales contacts be monitored through recording of the contact, or in any other substantial way. The OCA would note that Connecticut has recently enacted a requirement that all door-to-door sales contacts be monitored if they extend for more than 30 seconds.³⁶ Given the seriousness of the allegations here, the OCA suggests that a similar requirement is

³² Settlement at ¶ 35(iv).

³³ Settlement at ¶ 35(iv)(3).

³⁴ Settlement at ¶ 35(iv)(3)(a)-(b).

³⁵ See Settlement at ¶ 35(iv)(3)(b).

³⁶ See *PURA Development and Implementation of Marketing Standards and Sales Practices by Electric Suppliers – Revised Standards*, Docket No. 14-07-20RE01, Order at 7-8 (Order entered May 6, 2020); see, [http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/e0d2ecaa643017d7852585600060b010/\\$FILE/140720RE01-050620.pdf](http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/e0d2ecaa643017d7852585600060b010/$FILE/140720RE01-050620.pdf)

needed to ensure that door to door sales contacts comply with all Pennsylvania regulations and laws. OCA Comments at 33-34.

b. Verde's Position

Verde maintains that the OCA's concerns about whether or not Verde can or will comply with the Settlement is not a basis to reject the Settlement. The OCA also alleges that the Settlement is not specific enough in outlining the remedial measures that Verde must take if it identifies a sale that is non-compliant. For instance, OCA criticizes the Settlement for incorporating the slamming dispute process at 52 Pa. Code § 57.177. However, in doing so, OCA misinterprets the regulations as triggering a "Commission dispute process" that a customer must go through in order to get a remedy. Verde asserts that the regulation actually requires that when an EGS learns of a slamming allegation, it must treat it as a customer dispute and initiate the investigation and dispute resolution requirements of 52 Pa. Code §§ 56.151 and 56.152, regarding utility company dispute procedures. Also contrary to the OCA's allegation, the regulation explicitly states that any customer who was switched without consent must be automatically switched back without any fees. The OCA Comments also fail to recognize that the requirements of Settlement Paragraph 35 go beyond those of Section 57.177. For instance, under Paragraph 35(a)(iv)(3)(a), if Verde identifies a non-compliant call, Verde must provide the customer with a refund for the full length of the enrollment, not just the two billing cycles required by the regulation. With respect to the OCA recommendation to impose sales recording requirements that were recently enacted by the Connecticut Public Utilities Regulatory Authority, those regulations obviously are specific to Connecticut and were enacted after a multi-year rulemaking with numerous stakeholders and multiple rounds of testimony and comments. There is no similar requirement in Pennsylvania law or regulation and, therefore, there is no basis to suggest that the Settlement is somehow deficient because it does not include those Connecticut-specific requirements. Verde Reply Comments at 12-13.

c. Disposition

I disagree with the OCA claims that the Compliance Monitoring terms contained in the Settlement are deficient. The Compliance Monitoring terms of the Settlement require Verde to *increase* internal quality controls by: recording all calls between Verde's Pennsylvania residential and small business customers and Verde Customer Service Representatives; maintaining the recordings in accordance with Commission requirements; and reviewing a random sample of these calls on a monthly basis ensure compliance with this Settlement, the Public Utility Code, Commission Regulations and Orders. Also, if Verde identifies violations by a sales representative, the terms provide for remedial measures, including refunds to the affected party as well as actions against the offending sales representative. Additionally, I agree with Verde that the sales recording requirements enacted by the Connecticut Public Utilities Regulatory Authority, which were the result of a multi-year rulemaking in that state, is not a basis upon which to conclude that the Compliance Monitoring provisions of this Settlement are deficient. Moreover, and as noted by Verde, there is no similar requirement under the Public Utility Code, Commission Regulations or Commission Order. Accordingly, I find the Compliance Monitoring provisions agreed to by I&E and Verde in the Settlement to be reasonable, and that no modifications are necessary.

7. Reporting

a. OCA's Position

The OCA submits that the reporting requirements terms of the Settlement are also deficient. The Settlement provides that within 90 days of resuming in-person marketing and telemarketing, Verde will provide to I&E the following:

- a. An explanation of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof and

- b. A summary of the number and type of customer complaints and disputes received by Verde during the reporting period.³⁷

Verde will provide the reports quarterly for the period of two years.³⁸ OCA Comments at 34.

The OCA argues that the facts demonstrate that Verde has not completed a sufficient investigation of the allegations presented in the formal Complaint, and many of the defects in that investigation relate to the Company's alleged gaps in its records. Under the Settlement, Verde is required to report only to I&E, not the OCA or the Commission, on audits and investigations, the amount of the calls reviewed, and a description of the audits or investigations. Even though a significant component of the allegations relates to Verde and the lack of oversight from Spark Energy, Inc., Verde's parent company, the Settlement reporting requirement provisions do not address this lack of oversight by the Company. The lack of detailed oversight and reporting with respect to door-to-door sales activities is a major defect in this proposed Settlement. There is, for example, no requirement that actual monitoring and reporting of door-to-door sales occur in a random manner for any or all third-party contractors or that the Commission will have the ability to order or conduct such random audits. Verde is required to report quarterly to I&E (and not the OCA) on audits and investigations, the amount of calls reviewed, and a "description of the audits or investigations performed as well as the results thereof." Verde must also report a "summary of the number and type of customer complaints and disputes received by Verde."³⁹ This provision does not require Verde to submit the actual audits or customer complaints. OCA Comments at 34-35.

b. Verde's Position

In response to the OCA's criticism of the reporting section of the Settlement because it does not call for OCA to be copied on the quarterly reports that Verde must submit to I&E with the results of its quality assurance monitoring, Verde notes that the OCA repeatedly declined to participate in any settlement discussions. Therefore, I&E and Verde crafted the Settlement without OCA's input. Verde further responds that the reporting provisions of the

³⁷ Settlement at ¶ 36(a)-(b).

³⁸ Settlement at ¶ 36.

³⁹ Settlement at ¶ 36(a)-(b).

Settlement are robust and require Verde to provide I&E with quarterly explanations of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof and also provide a summary of the number and type of customer complaints and disputes received by Verde during the reporting period. The purpose of the reporting provisions is to allow I&E to track compliance with the Settlement and to monitor the effectiveness of the Compliance Plan in eliminating non-compliant activity. By providing I&E with quarterly figures on the number of both complaints and disputes received, I&E will be able to quickly gauge Verde's adherence to the Compliance Plan and the Plan's effectiveness. Verde Reply Comments at 13-14.

c. Disposition

The OCA takes issue with the reporting requirements of the Settlement, namely that the Settlement does not require that Verde report to the OCA or the Commission following the resumption of in-person marketing or telemarketing in Pennsylvania. However, as Verde pointed out, the OCA opted not to participate in any settlement discussions even though I&E and Verde repeatedly invited their input. Thus, the settling parties drafted the Settlement without the OCA's input, which led to the OCA being left out of the Settlement terms. Under these circumstances, I cannot conclude that the lack of inclusion of the OCA in the Settlement terms is a defect in the Settlement.

The OCA also maintains that the reporting requirement terms of the Settlement are deficient in addressing the allegations raised in the Complaint. However, I agree with Verde that the Settling Parties drafted sufficient reporting requirements that will allow I&E to track Verde's compliance with the Settlement and monitor the effectiveness of the Compliance Plan in eliminating non-compliant activity. Moreover, as the enforcement arm of the Commission, I&E is well suited to take additional action should Verde fail to comply with any of the requirements outlined in the Settlement.

8. Policy Changes
a. OCA's Position

Under Settlement Paragraph 37, for two years following the Final Order, Verde agrees to provide I&E with written notice of any policy changes to its practices and procedures related to marketing its products and services to Pennsylvania consumers.⁴⁰ The time period may be extended at I&E's discretion.⁴¹ The policy changes provision is vague and does not provide sufficient detail to be enforceable. The term "policy changes to its practices and procedures" is not defined. The issues raised by this case involve the conduct of the third-party vendor and the monitoring and oversight completed by the Company. It is not clear from this provision whether the policy changes would include vendor script changes, changes to training materials, vendor Code of Conduct agreements, or changes to the Company's internal procedures for handling complaints. The OCA recommends that the term specifically identify what policy changes to the Company's practices and procedures will be provided and that the information address the issues raised by the allegations. The information provided should relate specifically to the Company's handling of customer contacts and complaints, the Company's oversight of the third-party marketing agents, and the materials and information provided to the third-party marketing agents. OCA Comments at 35.

b. Verde's Position

Verde responds that both Verde and I&E felt the language in this Settlement provision had the appropriate level of specificity, and that the OCA provides no justification for any changes other than its own preferences. The language regarding changes to its practices and procedures provides a clear directive to Verde to provide written notice to I&E. It also should be noted that the Settlement mandates a high level of reporting and communication between Verde and I&E for at least two years after the Settlement is approved. To the extent that there is any misunderstanding between the parties as to the extent of reporting or notification required, Verde maintains that I&E and Verde are capable of resolving any such misunderstandings. As such,

⁴⁰ Settlement at ¶ 37.

⁴¹ *Id.*

there is no basis to modify the Settlement's terms on required notifications of policy changes. Verde Reply Comments at 14.

c. Disposition

The OCA takes issue with the Policy Changes provisions of the Settlement, insisting that the terms are vague and lack sufficient detail to be enforceable. However, the language of the Settlement specifically provides:

Verde agrees to provide I&E with **written notice of any changes** to its practices and procedures related to marketing to Pennsylvania consumers for EGS products and services.⁴²

The language of the Settlement clearly provides that Verde must provide notice to I&E of any changes to its practices and procedures. I agree with Verde that this Settlement provision is appropriately specific, since any change must be reported to I&E. Moreover, I agree with Verde that, should there be any ambiguity or misunderstanding regarding this term, the Settling Parties are capable of resolving the issue. Accordingly, I find the Policy Changes terms contained in the Settlement to be reasonable, and that no modifications to these terms are necessary.

9. Areas Not Addressed By The Settlement

a. OCA's Position

In addition to the specific criticisms of the Settlement, the OCA argues that the Settlement does not address two of the more egregious allegations identified in the Complaint: (1) the alleged spoofing of PPL's number to customers and (2) the unauthorized access to customer accounts. The OCA maintains that the Stipulated Facts also do not specifically address either of the allegations regarding the spoofing or the unauthorized access. Both of these allegations rise to the level of potential criminal actions against consumers. The Settlement also does not specifically place into effect any protections against these two issues potentially arising again. OCA Comments at 35-36.

⁴² Settlement ¶ 37 (emphasis added).

The OCA further argues that the Settlement does not address potential harm to consumers outside of those identified in the PPL Report. The OCA submits that 339 complaints were received by PPL. Given the scope of the number of complaints received by PPL, it is likely that other consumers were similarly impacted and did not report the incident. OCA Comments at 36.

b. Verde's Position

Regarding the OCA's allegations that the Settlement does not address the two issues regarding alleged unauthorized account access, Verde explains that these alleged issues were addressed during I&E's investigation of this matter and satisfactorily resolved as part of this Settlement. While Verde agrees that the allegations related to that matter are certainly troubling, there is little to no information about the issue in the Complaint or from I&E's investigation which justifies making Verde responsible for the unauthorized account access. I&E's investigation materials indicate that the improper account access seems to be the work of an unscrupulous actor who was working for multiple suppliers. Verde notes that it was unaware of these alleged actions and that it did not authorize them. Nevertheless, the Settlement includes remedial measures to address these allegations, including, but not limited to, the provisions of Paragraph 34(a)(ii)(4). Verde Reply Comments at 14-15.

In response to the OCA's argument that the Settlement should attempt to account for customers other than the ones involved in the 339 interactions underlying the Complaint, Verde maintains that this proceeding and this Settlement are limited in scope by the specific allegations set forth in the I&E Complaint. Moreover, I&E and Verde both have agreed that the Settlement fully and finally resolves all of the allegations. Verde maintains that there is no basis to reject the Settlement based on the speculation that there may be additional improper interactions even though no other improper interactions were alleged. Nonetheless, it should be noted that even though the allegations arose in PPL territory only, the Settlement's marketing moratorium is statewide in scope. Therefore, in this respect the Settlement does include remedial measures and protections that go beyond the geographic scope of the allegations in the Complaint. Verde Reply Comments at 15.

Verde further responds that the OCA's Comments contain several other inaccurate characterizations and assumptions. For instance, the OCA Comments state on page 41 that the Settlement does not include any modifications to Verde's management, but as noted in the Stipulated Facts a major overhaul of Verde's management has already taken place. The OCA Comments on page 40 allege that Verde was unable to locate enrollment records for 110 of the 339 interactions underlying the Complaint. However, contrary to the OCA's characterization, the issue was not that Verde could not locate enrollment records for 110 customers, the reality is that 110 of the 339 customers never completed an enrollment with Verde to begin with.⁴³ OCA also criticizes Verde for not conducting additional investigation or initiating any litigation regarding the 339 allegedly improper interactions. However, the OCA fails to recognize that Verde only learned of these 339 interactions upon the filing of the I&E Complaint which triggered this proceeding. In other words, by the time Verde learned of the alleged 339 improper interactions they were already the subject of an I&E Complaint.⁴⁴ Verde asserts that it immediately began investigating the allegations and cooperated with I&E to fully resolve the Complaint within several months of the Complaint being filed. It is unclear what additional steps the OCA would expect Verde to take under these circumstances. Verde Reply Comments at 15-16.

c. I&E's Position

I&E generally comments that the Settlement terms more than adequately explain the business modifications and compliance plans that Verde will implement upon the approval of the Settlement. Notably, the Commission is not in the business of micro-managing utilities absent a manifest abuse of discretion or a showing of an arbitrary action by the utility, which is not present in this matter.⁴⁵ I&E Reply Comments at 9.

⁴³ See Stipulated Facts, ¶ 42.

⁴⁴ See Stipulated Facts, ¶ 31.

⁴⁵ Recognizing the Commission's duty to the public and a utility's right of self-management, the courts have adopted the further proposition that it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown. *Lower Chichester Twp. v. Pa. Pub. Util. Comm'n*, 119 A.2d 674, (Pa. Super. 1956); *Pittsburgh v. Pa. Pub. Util. Comm'n*, 95 A.2d 555, (Pa. Super. 1953); see also *Pa. R.R. v. Pa. Pub. Util. Comm'n*, 152 A.2d 422, (Pa. 1959) (Bell, J., dissenting); *Bell Tel. Co. of Pa. v. Pa. Pub. Util. Comm'n*, 331 A.2d 572, (Pa. Cmwlth. 1975); see also *Coplay Cement Mfg. Co. v. Pub. Serv. Comm'n et al.*, 114 A. 649 (Pa. 1921) ("It was not intended by the legislature that the commission should be a board of managers to conduct and control the affairs of public service companies . . ."). In

Furthermore, while the OCA has written “brief-like” comments to the Joint Petition criticizing every aspect of the settlement’s terms, I&E recounts that the OCA intervened in this matter in February 2020, had been provided multiple opportunities to express these concerns or comments prior to the submission of the Joint Petition, but continually declined to do so. Even after the Joint Petition was filed on June 30, 2020, the OCA continued to refuse to discuss the Settlement and its concerns with I&E and Verde. I&E maintains that the OCA’s comments regarding the alleged lack of detail in the Settlement terms is another baseless attempt to sideline an agreement they had an opportunity to address months ago. I&E Reply Comments at 9-10.

d. Disposition

As previously noted, the OCA challenges the terms of this Settlement in part because it does not address two allegations identified in the Complaint: the alleged spoofing of PPL’s number to customers; and the unauthorized access to customer accounts. However, I find that the Settlement terms will appropriately address all of the concerns raised in the Complaint due to the marketing and policy changes as well as the increased oversight provided for in the Settlement. In particular, the increased oversight provided for in the Settlement will assist Verde in detecting and addressing improper conduct of the sort alleged in the Complaint going forward. I also find it convincing that I&E, the party that brought this Complaint against Verde alleging multiple instances of improper conduct, is satisfied with the Settlement terms, noting that they “more than adequately explain the business modifications and compliance plans that Verde will implement upon the approval of the Settlement.”⁴⁶

The OCA further challenged the Settlement because it did not address potential harm to consumers outside of those identified in the PPL Report. I agree with Verde that this proceeding and the Settlement are limited in scope by the allegations raised by I&E in the

determining whether management has abused its discretion in operating a utility, the Commission cannot fall prey to judging management action by hindsight. Instead, management’s actions must be judged on what it knew or should have known at the time in question. *Pittsburgh v. Pa. Pub. Util. Comm’n*, 88 A.2d 59 (Pa. 1952); *Nat’l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm’n*, 464 A.2d 546 (Pa. Cmwlth. 1983).

⁴⁶ I&E Reply Comments at 9.

Complaint. Moreover, and as noted by the Commission in their October 26, 2021 Order,⁴⁷ the OCA may file its own Complaint against Verde if it wants to raise concerns that are beyond the scope of the Complaint in this matter.

Lastly, it is important to consider that the Settling Parties invited the OCA to comment on the Settlement on several occasions. The OCA could have raised all of the aforementioned concerns at that time, and I&E and Verde could have revised the Settlement to address these concerns. Instead, by its own volition, the OCA continually declined to participate in the settlement discussions. Accordingly, I do not find that there is any reason to modify any of the terms of the Settlement.

VIII. PUBLIC INTEREST

Having set forth the terms of the Joint Petition for Settlement and addressed the OCA's objections to the Settlement, I will now address why approving and adopting the Joint Petition is in the public interest.

1. I&E's Position

I&E notes that pursuant to the Commission's policy of encouraging settlements that are reasonable and in the public interest, the Parties held a series of settlement discussions. These discussions culminated in this Settlement Agreement, which, once approved, will resolve all issues related to I&E's Complaint involving allegations related to deceptive and misleading sales tactics, enrolling customers without authorization (i.e., slamming), accessing customer accounts without authorization, and failure to maintain verification records in the PPL service territory. I&E Statement in Support at 3-4.

I&E maintains that the terms of the Settlement Agreement fully address all allegations brought forth against Verde and provide not only a civil penalty, but refunds to those

⁴⁷ "We note that the Settlement does not preclude the OCA from filing its own formal complaint against Verde." *Pa. Pub. Util. Comm'n, Bureau of Investigation & Enforcement v. Verde Energy USA, Inc.* C-2020-3017229 at 20 (Order Entered October 26, 2021).

customers who were harmed by Verde's conduct. I&E's approach of seeking a civil penalty and refunds coupled with extensive marketing and training changes to Verde's business practices provides a corrective measure to both the customers who were harmed as well as ensure that future customers are not harmed by deceptive and misleading marketing practices and/or slamming. I&E Statement in Support at 4.

I&E intended to prove the factual allegations set forth in the Complaint at a hearing to which Verde would have disputed. I&E notes that this Settlement Agreement results from the compromises of the Parties. I&E recognizes that, given the inherent unpredictability of the outcome of a contested proceeding, the benefits to amicably resolve the disputed issues through settlement outweigh the risks and expenditures of litigation. I&E submits that the settlement constitutes a reasonable, fair compromise of the issues presented in the Complaint and is in the public interest. As such, I&E respectfully requests that the Commission approve the Settlement without modification. I&E Statement in Support at 4.

2. Verde's Position

Verde notes that it is the Commission's policy to encourage settlements.⁴⁸ Settlements decrease the time and expense the parties must expend litigating a case and, at the same time, conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding.⁴⁹ "The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a 'burden of proof' standard, as is utilized for contested matters."⁵⁰ Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest.⁵¹ Verde Statement in Support at 3-4.

⁴⁸ See 52 Pa. Code § 5.231.

⁴⁹ 52 Pa. Code § 69.401.

⁵⁰ *Pa. Pub. Util. Comm'n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Order entered July 14, 2011) at p. 11.

⁵¹ See *Pa. Pub. Util. Comm'n v. PPL Utils. Corp.*, M-2009-2058182 (Order entered November 23, 2009); *Pa. Pub. Util. Comm'n v. Phila. Gas Works*, M-00031768 (Order entered January 7, 2004); 52 Pa. Code § 69.1201; *Warner v. GTEN, Inc.*, Docket No. C-00902815 (Order entered April 1, 1996); *Pa. Pub. Util. Comm'n v. CS Water & Sewer Assocs.*, 74 Pa. PUC 767 (1991).

Verde submits that the Settlement is in the public interest because it is a complete and final resolution of this proceeding, which effectively addresses the issues that were the subject of the Complaint, avoids the time and expense of litigation and possible appeals, and provides immediate, concrete benefits to Verde's current and former customers that would otherwise be unavailable in the near term. Verde Statement in Support at 5.

3. Disposition

The provisions of the Settlement will adequately address the allegations made by I&E in the formal Complaint against Verde and are therefore in the public interest. The Settlement provides for a civil penalty (addressed below) as well as refunds to customers who were allegedly harmed by the conduct described in the Complaint. Additionally, the Settlement requires Verde to implement changes to its marketing and training practices which should, as noted by I&E, provide a corrective measure to those who were allegedly harmed by the conduct described in the Complaint, and make sure that customers are not harmed by this type of conduct going forward.

Moreover, approving and adopting the Joint Petition for Approval of Settlement is in the public interest because accepting the Settlement will avoid the substantial time and expense involved in litigating the proceeding. Accepting the Settlement will negate the need to examine or cross-examine witnesses, prepare main briefs, reply briefs, exceptions and reply exceptions and possibly file appeals. Avoiding these expenses serves the interests of I&E, Verde's Customers, and the general public. Accordingly, I find that accepting the Joint Petition for Settlement is in the public interest.

IX. CIVIL PENALTY

The Joint Petition for Settlement requires Verde to pay a \$1,000,000 civil penalty. The terms of the Settlement provide that Verde shall not claim a deduction for the \$1,000,000 civil penalty and no amount of the civil penalty shall be passed through as an additional charge to Verde's customers in Pennsylvania.

In addition to the civil penalty, the Settlement requires Verde to make a \$75,000 contribution to PPL's hardship fund.

The Commission, at 52 Pa. Code § 69.1201, has adopted a policy statement setting forth the standards it will consider in evaluating litigated and settled proceedings before the Commission. The policy statement is set forth below:

69.1201. Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy.

(a) The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa. C.S. (relating to Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.

(b) Many of the same factors and standards may be considered in the evaluation of both litigated and settled cases. When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest. The parties to a settlement should include in the settlement agreement a statement in support of settlement explaining how and why the settlement is in the public interest. The statement may be filed jointly by the parties or separately by each individual party.

(c) The factors and standards that will be considered by the Commission include the following:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

The Commission uses the factors set forth in the policy statement to evaluate whether a settlement is reasonable and whether approval of the settlement is in the public interest.⁵² In evaluating settlements, the Commission will not apply the factors in as strict a fashion as in a litigated proceeding.⁵³ In settled cases, the Commission will afford flexibility to parties so that the parties may reach an amicable resolution to a complaint or other matter as long as the settlement is in the public interest.⁵⁴

I&E and Verde have addressed the factors set forth in 52 Pa. Code § 69.1201 in their respective statements in support of the Joint Petition for Approval of Settlement. The OCA also addressed these factors in its Comments in Opposition of the Settlement. I will address each of the factors in turn.

1. First Civil Penalty Factor

The first factor considers whether the conduct at issue was of a serious nature, such as willful fraud or misrepresentation, or if the conduct was less egregious, such as an administrative or technical error. Conduct of a more serious nature may warrant a higher civil penalty while conduct that is less egregious warrants a lower amount.⁵⁵

I&E alleges that the conduct in this matter involves 4 actions: (1) Slamming, the unauthorized switch of a customer's supplier; (2) Deceptive and Misleading Sales Practices; (3) Releasing Private Customer Information/Unauthorized Account Access; and (4) Failure to Maintain Verification Records. I&E further alleges that all of these actions were the result of fraudulent conduct or misrepresentations on the part of Verde and/or its agents and are of a serious nature. I&E Statement in Support at 16.

⁵² 52 Pa. Code §69.1201(a).

⁵³ 52 Pa. Code §69.1201(b).

⁵⁴ *Id.*

⁵⁵ 52 Pa. Code § 69.1201(c)(1).

I&E notes that the Commission has a zero-tolerance policy for slamming.⁵⁶ In this instance, I&E avers that Verde slammed 179 customers in the PPL service territory. I&E Statement in Support at 17.

In addition to slamming, I&E alleges that the extent of Verde's fraudulent and misrepresentation included, but was not limited to: failure to identify; misrepresenting as PPL or another generation supplier; providing false information as to the customer's current status with his/her supplier; providing false information as to the status of other generation suppliers, such as suggesting that the supplier was going out of business; providing false or incorrect rate information; providing incorrect information on the distribution charge or customer charge; threatening to disconnect service; spoofing, using other companies' or businesses' phone number on the caller ID to entice customers to answer the call; suggesting or explicitly stating that the customer must switch suppliers; wearing clothing or providing documentation which included PPL's logo; failing to terminate contact with the customer after being informed of a language barrier or inability to understand; and using false stories to solicit the customer into providing his/her bill. Accordingly, I&E asserts that the egregious nature of Verde's conduct warrants a higher civil penalty. I&E Statement in Support at 17.

Verde acknowledges that the actions alleged in I&E's Complaint are serious in nature, as they involved various alleged violations of the Public Utility Code and the Commission's regulations. Moreover, Verde agrees with the Commission's zero tolerance policy towards slamming and takes such allegations seriously. Therefore, Verde submits that the alleged actions of vendors acting on its behalf as set forth in I&E's Complaint are of a serious nature and were appropriately considered in arriving at the civil penalty in this Settlement. Verde Statement in Support at 5-6.

⁵⁶ See, e.g., *Pa. Pub. Util. Comm'n v. Energy Servs. Providers, Inc. d/b/a Pa. Gas & Elec., et al.*, Docket No. M-2013-2325122 (Order entered October 2, 2014); *Pa. Pub. Util. Comm'n v. MXenergy Elec. Inc.*, Docket No. M-2012-2201861 (Order entered December 5, 2013); *Pa. Pub. Util. Comm'n v. AP Gas & Elec. (PA), LLC, d/b/a APG&E*, Docket No. M-2013-2311811 (Order entered October 17, 2013); and *Pa. Pub. Util. Comm'n v. IDT Energy, Inc.*, Docket No. M-2013-2314312 (Order entered October 17, 2013).

The OCA argues that the amount and various types of allegations involved in the formal Complaint are extremely serious and warrant more consideration than that given in the proposed Settlement. The OCA also notes the Commission’s “zero-tolerance” policy on “slamming” and argues that the Joint Petition’s Settlement does not give proper weight to it in light of the number of PPL Electric accounts allegedly “slammed” over the period of almost two years. In discussing its “zero-tolerance” policy on “slamming,” the Commission has stated, “[t]he Commission does not trivialize allegations of unauthorized enrollment of customers, or ‘slamming,’ and seeks to deter such conduct by instituting firm retaliatory measures for violations of the Commission’s regulations with respect to enrollment of customers.”⁵⁷ OCA Comments at 37-38.

The OCA further argues that in addition to “slamming,” I&E alleged that Verde used personal information to falsely report a power outage or request a service termination on behalf of 16 customers and to gain access to—or attempt to access to—customer online accounts without consent.⁵⁸ These types of allegations appear to be novel in Pennsylvania and raise many concerns. There is no evidence that Verde investigated this issue, took actions against the third-party vendor, or reported this conduct to the authorities. The OCA maintains that the seriousness of this conduct has not been fully addressed by the Settlement. OCA Comments at 38.

After reviewing the positions of the parties, I concur that the allegations of fraud and misrepresentation identified in the Complaint constitute conduct of a serious nature. Although the OCA argues that the alleged conduct warrants more scrutiny, after reviewing the terms of the Settlement I find that I&E & Verde have given adequate consideration to the conduct alleged in the formal Complaint and addressed it appropriately. I will also note that following the filing of this Complaint, Verde ceased in-person and telemarketing in Pennsylvania in order to investigate and address the conduct alleged in the Complaint. Accordingly, I conclude that this justifies the proposed Settlement, including the \$1,000,000 civil penalty as well as the \$75,000 contribution to PPL’s hardship fund.

⁵⁷ *Pa Pub. Util. Comm’n v. Total Gas & Elec. Inc.*, Docket No. M-0011529 (Order entered September 26, 2001) at *5.

⁵⁸ *See I&E’s Non-Proprietary Formal Complaint* at 11.

2. Second Civil Penalty Factor

The second factor considers whether the resulting consequences of Verde's alleged conduct were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.⁵⁹

I&E submits that no personal injury or property damage occurred as a result of the alleged violations. Nonetheless, I&E restates that the Commission has a zero-tolerance policy for slamming. Moreover, I&E maintains that the deceptive, and sometimes hostile, conduct alleged in the Complaint creates public distrust and self-loathing towards the electric generation supplier shopping process. I&E Statement in Support at 17-18.

While Verde agrees that the allegations in I&E's Complaint are serious, the consequences of these alleged actions show that they did not cause personal injury or property damage. Therefore, Verde asserts that the resulting consequences of the actions of vendors marketing on Verde's behalf were not of a serious nature. Verde Statement in Support at 6.

Verde maintains that it takes the allegations very seriously and proposed consequential terms and conditions to address the allegations, which were ultimately agreed to and included in the Settlement. First, the Settlement provides for the issuance of refunds to affected customers identified in the Complaint that actually enrolled with Verde. Where applicable, such refunds will be equal to those customers' first two months of electricity supply charges from Verde. Also, Verde will refund the early termination fees actually charged and paid for by customers who alleged unauthorized enrollment by Verde. More significantly, Verde has agreed to pay a civil penalty of \$1,000,000 and contribute \$75,000 to PPL's hardship fund to assist customers with the payment of their electricity bills. The Company has proposed and agreed to numerous modifications to its business practices, including a lengthy moratorium on marketing in Pennsylvania. The modifications agreed to by Verde and I&E include, but are not limited to, a wide range of changes to the Company's sales training program, restrictions on sales activities, a new sales verification program, a new sales quality assurance program, vendor

⁵⁹ 52 Pa. Code § 69.1201(c)(2).

screening, and recording of sales calls. The Settlement also includes ongoing compliance and reporting requirements to allow the implementation of the modifications to be verified. Verde maintains that these measures are appropriately designed to respond to the serious nature of the allegations, and therefore are commensurate with the second standard for evaluation of the Settlement. Verde Statement in Support at 6-7.

The OCA maintains that the civil penalty in the proposed settlement does not reflect the seriousness of the allegations against Verde and is not in the public interest when compared to other supplier complaint matters in Pennsylvania with similar allegations. These cases include *Hiko* wherein the Commission approved both a \$1.8 million civil penalty in the I&E Formal Complaint and *Blue Pilot* where the Commission ordered a \$1.06 million civil penalty.⁶⁰ Albeit the Joint Petitioners reached a lower civil penalty as a result of negotiations and compromise, the civil penalty must be an appropriate amount given the seriousness of the allegations and the settled upon civil penalty of \$1 million is too low to be in the public interest in this case. OCA Comments at 38-39.

The OCA also argues that the formal Complaint initially requested license revocation given the extensive and egregious conduct alleged.⁶¹ In the proposed Settlement, Verde would only cease marketing for 6 months following approval of the settlement or until May 31, 2021 whichever is sooner.⁶² While Verde has ceased marketing, it has continued to participate in the Referral Programs operated by Pennsylvania EDCs, continues to enroll customers in those programs, continues to serve Pennsylvania customers enrolled prior to February 2020, and continues to issue renewal notices and retain customers who fail to opt out of those notices and contract terms. OCA Comments at 39.

As noted by I&E and Verde, the second factor addresses the consequences of the conduct at issue. As also noted by I&E and Verde, there were no injuries or property damage as

⁶⁰ See *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Opinion and Order entered Dec. 3, 2015) (*Hiko*); see also, *Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Opinion and Order entered July 11, 2019) (*Blue Pilot*).

⁶¹ *I&E formal Complaint* at 18.

⁶² Settlement ¶ 8(a).

a result of the alleged conduct. I agree with the parties that the allegations in the Complaint were of a serious nature. However, the lack of any serious incident to Verde's customers coupled with the remedial measures agreed to by the Settling Parties to prevent the conduct alleged in the Complaint going forward leads me to conclude that a higher penalty is not warranted.

3. Third Civil Penalty Factor

The third factor addresses whether the conduct was negligent or intentional and only applies to litigated cases.⁶³ Both I&E and Verde contend that this factor does not apply to this proceeding since the matter was not litigated and is instead being resolved by Settlement of the parties. I&E Statement in Support at 18; Verde Statement in Support at 7. For its part, the OCA maintains that since the proposed Settlement is contested, this factor should be evaluated in this matter. OCA Comments at 40. However, I agree with I&E and Verde that, since this matter was not litigated, this factor does not apply. Accordingly, I will not consider this factor.

4. Fourth Civil Penalty Factor

The fourth factor to be considered is whether Verde has made efforts to change its practices and procedures to prevent similar conduct in the future.⁶⁴ I&E notes that Verde voluntarily issued a moratorium on marketing once I&E brought the allegations to its attention. Additionally, in accordance with the settlement terms, Verde will make tremendous efforts to change its practices and procedures to prevent similar conduct from occurring in the future. I&E Statement in Support at 18.

Verde notes that prior to the filing of the Complaint by I&E, it had already begun the process of overhauling its sales and compliance operations. Verde terminated most of its sales vendors even before I&E made its initial contact to Verde. Top personnel responsible for sales operations have departed the company, and Verde now has a completely new sales leadership team in place with a renewed commitment to improving oversight of sales. As

⁶³ 52 Pa. Code § 69.1201(c)(3)

⁶⁴ 52 Pa. Code § 69.1201(c)(4).

discussed earlier, upon learning of the investigation by I&E, Verde immediately began its own investigation into any alleged misconduct engaged in by its vendors. Also, Verde voluntarily ceased marketing in Pennsylvania and has agreed to a continued moratorium of in-person marketing and telemarketing activities in Pennsylvania in accordance with the terms of the Settlement. The Settlement outlines additional steps that the Company has agreed to take to modify internal practices and procedures to address the conduct alleged in the Complaint. The Company has agreed to substantial changes in its marketing practices and third-party verification procedures in order to address the alleged conduct and to avoid similar incidents in the future.⁶⁵ Verde maintains that these changes are intended to result in a sales and quality assurance framework that will be a model for the industry to follow for years to come. The Settlement also includes ongoing compliance and reporting requirements to allow the implementation of the modifications to be verified. All of these factors demonstrate that Verde has made efforts to change its practices and procedures to prevent similar conduct in the future, which Verde maintains supports approval of the Settlement. Verde Statement in Support at 7-8.

The OCA argues that the Settlement Compliance plan does not describe how Verde will assume oversight of and review the sales calls recordings in Settlement ¶ 35 and there is also no provision in the Settlement directing Verde to take certain actions if noncompliant sales calls are identified. Lastly, the OCA argue that the proposed Settlement lacks detailed oversight and reporting requirements to ensure compliance, especially with respect to door-to-door sales activities. The provisions requiring Verde to report to I&E (and not the OCA) audits and investigations do not require Verde to submit the actual audits and customers complaints.⁶⁶ The OCA submits that, given the lack of management and monitoring at Verde, the provisions of the Settlement designed to address this area lack detail and effectiveness. OCA Comments at 41-42.

As I noted previously, the agreed-upon Compliance Plan and Monitoring provisions in the Settlement are reasonable, and no modifications are necessary. I find that the remedial measures agreed to by Verde will protect the public from the improper sales activities

⁶⁵ Settlement at 14-31.

⁶⁶ Settlement ¶ 36.

alleged in the Complaint. These measures will directly benefit the public. Accordingly, I agree with I&E and Verde that these measures support approval of the terms of the settlement and in particular, the civil penalty agreed to by I&E and Verde.

5. Fifth Civil Penalty Factor

The fifth factor to be considered relates to the number of customers affected by the Company's actions and the duration of the violations.⁶⁷

I&E identified 339 PPL customers who filed complaints against Verde for the period of February 2017 to November 2019. Some customers alleged that the deceptive and misleading telemarketing calls occurred multiple times a day, some alleged multiple calls a day for a couple of days, while others alleged multiple calls over a longer period of time. I&E notes that Verde voluntarily ceased marketing on or about February 6, 2020. I&E Statement in Support at 18-19.

Verde notes that of the 339 customers referenced in I&E's Complaint, not all of the 339 customers enrolled with Verde. A substantial portion of the customers never enrolled with Verde, but reported concerns about Verde sales vendors' activity to PPL. Verde notes that under the terms of the Settlement, it will provide refunds to those customers identified in the Complaint that actually enrolled with Verde. Also, Verde will refund the early termination fees actually charged to and paid for by customers who alleged unauthorized enrollment by Verde. Additionally, Verde asserts that the agreed upon civil penalty of \$1,000,000 and the \$75,000 contribution to PPL's hardship fund (which will benefit all low-income consumers in PPL's territories and not solely the customers of Verde), is designed to address the concern that Verde shares with I&E regarding the number of customers potentially impacted by the alleged actions of vendors acting on behalf of Verde. Verde Statement in Support at 8-9.

The OCA notes that the 339 customer complaints against PPL are broken down as follows: 288 or 85% of the complaints alleged that Verde conducted misleading and

⁶⁷ 52 Pa. Code § 69.1201(c)(5).

deceptive telemarketing conduct;⁶⁸ 39 of the complaints indicated that Verde conducted misleading and deceptive door-to-door sales conduct;⁶⁹ 179 or 52% of the complaints indicated that Verde processed and completed an unauthorized switch by slamming or upon false information—3 of which involved Verde enrolling a customer who was deceased;⁷⁰ 29 of the complaints indicated that Verde released private customer information to a third party; and 16 of the complaints indicated that Verde used private customer information to falsely report a power outage or falsely submit a disconnection of service request. In addition to complaints received by customers, PPL identified incidents where a Verde agent either attempted to or successfully accessed online customer accounts without the customer's consent or authorization.⁷¹ The number of customers affected and the duration of violations speaks loudly to the lack of oversight at Verde that these complaints were able to accumulate to such an amount over the course of almost two years. OCA Comments at 42-43.

The conduct alleged in the Complaint affected a significant number of customers. While I understand the concerns raised by the OCA in its comments opposing the Settlement, the fact that Verde voluntarily ceased marketing in February 2020 demonstrates that Verde is committed to preventing the behavior alleged in the Complaint. Moreover, I agree with Verde that the civil penalty and hardship fund contribution agreed upon is designed to address the concerns raised in the Complaint and motivate Verde to ensure that alleged behavior identified in the Complaint is prevented going forward. Accordingly, I conclude that this justifies the terms of the proposed Settlement, including the \$1,000,000 civil penalty and the \$75,000 contribution to PPL's hardship fund.

6. Sixth Civil Penalty Factor

The sixth factor looks at the compliance history of the regulated entity. As a general proposition, neither the Public Utility Code nor the Commission's regulations require public utilities to provide constantly flawless service. The Public Utility Code at

⁶⁸ *Id.* ¶¶ 24-26.

⁶⁹ *Id.* ¶¶ 29-31.

⁷⁰ *Id.* ¶¶ 33-36.

⁷¹ *Id.* ¶ 38-40.

66 Pa.C.S. § 1501 requires public utilities to provide reasonable and adequate, not perfect service. Since the Public Utility Code does not require perfect service, it is a logical conclusion that it cannot require perfect compliance.

I&E notes that this is the first investigation and formal complaint filed against Verde. However, I&E further notes that there are numerous formal complaints filed by *pro se* complainants against Verde. I&E Statement in Support at 19. For its part, Verde notes that it has a satisfactory compliance history with the Public Utility Code and the Commission's regulations. Verde Statement in Support at 9. The OCA notes that in addition to this formal Complaint, Verde's responses to I&E data requests included information on 198 unauthorized enrollment allegation complaints made directly to Verde from May 2018 through April 2019 and 72 various additional allegation complaints Verde received of customers who allegedly complained to its third-party vendors from June 2018 through December 2019. OCA Comments at 43-44.

Although there have been numerous formal Complaints filed against Verde, nothing was offered to show the outcome of those Complaints, or to show that Verde has a poor compliance history. Moreover, the allegations in this case, while serious in nature, were not proved. Under the circumstances, I conclude that no increase is warranted under this factor to the \$1,000,000 civil penalty agreed to by the Settling Parties.

7. Seventh Civil Penalty Factor

The seventh factor asks whether the regulated entity cooperated with the Commission's investigation.⁷² According to I&E, Verde cooperated in the investigation in this matter, including cooperating in both informal discovery as well as settlement discussions. I&E Statement in Support at 19. Similarly, Verde indicated that it fully cooperated with I&E both prior to and during the pendency of this proceeding, including providing significant amounts of information and data both formally and informally during settlement discussions. Verde Statement in Support at 9. Although the OCA maintains that it was not included in the

⁷² 52 Pa. Code § 69.1201(c)(7).

Settlement discussions,⁷³ the OCA was given several opportunities to review and comment on the Settlement and repeatedly declined. Under the circumstances, I cannot conclude that the lack of the OCA's involvement supports a higher penalty. Accordingly, I find that Verde's cooperation in this matter supports a reduced payment amount.

8. Eighth Civil Penalty Factor

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations.⁷⁴

The OCA submits that the civil penalty of \$1 million in the proposed Settlement is a reduction of \$7.833 million from the requested amount in the Formal Complaint.⁷⁵ The OCA believes that the civil penalty amount of \$1 million is significantly inadequate given the seriousness of the allegations. The OCA maintains that the Commission's zero-tolerance policy for slamming merits further examination as to whether the level of the civil penalty is appropriate. The formal Complaint stated that the civil penalty requested in the Complaint was calculated based upon a penalty of \$1,000 per day for violations of the Commission's regulations.⁷⁶ Given the scope and scale of the alleged violations and the detailed description of the customer complaints, this case requires a civil penalty higher than the \$1 million provided for in the Settlement. The civil penalty in this proposed Settlement is lower than the civil penalties in *Hiko* (\$1.8 million) and *Blue Pilot* (\$1.06 million). The purpose of the penalty should be to deter future conduct. The OCA recommends that given the significant nature of the violations, a higher penalty and consideration of license revocation is warranted. OCA Comments at 22, 45.

I&E submits that a civil penalty amount of \$1,000,000.00, which is not tax deductible, combined with a \$75,000.00 payment to PPL's Hardship Fund, refunds equal to the amount of the first two months of electricity supply charges to customers who were slammed, refunds to those customer who were slammed and paid an early termination fee from their prior

⁷³ OCA Comments at 45.

⁷⁴ 52 Pa. Code § 69.1201(c)(8).

⁷⁵ *I&E Formal Complaint* at 18.

⁷⁶ Formal Complaint at ¶¶ 45-62 (Non-Proprietary).

EGS, a moratorium on marketing and telemarketing in Pennsylvania for a prescribed time-frame, and extensive training, marketing, and business practice changes/modifications is substantial and sufficient to deter Verde from committing future violations. I&E Statement in Support at 19-20.

In response to the OCA's criticisms of the agreed-upon civil penalty, I&E notes that the *HIKO* case was litigated, not settled, and was a result of the 2014 Polar Vortex. The Commission imposed a \$1,836,125.00 civil penalty, noting that HIKO acted knowingly, deliberately, and "effectively treated its own customers as the financial guarantors of its own business plan, which backed contracts offering customers guaranteed savings with what was essentially a speculative supply portfolio based exclusively on spot market purchases."⁷⁷ To calculate the civil penalty, the Commission determined the average amount the customers were overbilled and multiplied that amount by the number of invoices.⁷⁸ Not only are the facts in *HIKO* clearly distinguishable from the instant matter, but the total number of customers affected is also vastly different (i.e., 339 PPL customers with multiple complaints in this matter versus 5,708 HIKO customers overcharged on approximately 14,689 invoices.)⁷⁹ Thus, the \$1,000,000.00 civil penalty agreed to by I&E and Verde is reasonable and on par with the civil penalty and allegations raised in the *HIKO* case. I&E Reply Comments at 5-6

Additionally, I&E notes that the *Blue Pilot* case was also a litigated matter resulting from the 2014 Polar Vortex.⁸⁰ The Commission imposed a civil penalty of \$1,066,900.00, noting that 2,516 residential and small business customers were impacted by Blue Pilot's conduct resulting in 7,861 overbilling occurrences.⁸¹ Thus, noting the difference in affected customers and overbilled occurrences, the agreed upon civil penalty of \$1,000,000.00 in this matter is reasonable and consistent. I&E Reply Comments at 6.

⁷⁷ *Id.* at 44.

⁷⁸ *Id.* at 5, 33-34.

⁷⁹ *Id.* at 44.

⁸⁰ *Blue Pilot*, Docket No. C-2014-2427655 (Opinion and Order entered July 11, 2019).

⁸¹ *Id.* at 6; *see also Blue Pilot*, Docket No. C-2014-2427655 (Opinion and Order entered June 14, 2018) at 63-63, 89 (calculating the civil penalty as \$125 per-violation for 4,490 occurrences of overbilling of residential customers and \$150 per-violation for the 3,371 occurrences of overbilling of small business customers).

I&E avers that the *Public Power* matter provides a better comparison to this matter.⁸² In *Public Power*, I&E instituted an informal investigation upon a referral from the Commission's Office of Competitive Market Oversight related to erroneous customer enrollments in PECO's service territory.⁸³ Specifically, Public Power initiated the enrollment of 2,937 customers without authorization, i.e., slamming, and PECO rescinded all but 263 of those enrollments.⁸⁴ I&E and Public Power entered into a settlement agreement which included a civil penalty of \$64,450.00, customer refunds in the amount of \$22,161.68, and the implementation of operational safeguards and a quality control department.⁸⁵ The Commission approved the settlement without modification.⁸⁶ I&E Reply Comments at 6-7.

Accordingly, I&E maintains that the civil penalty of \$1,000,000.00 is reasonable and consistent with prior Commission decisions and is proportionate to the conduct alleged in the Complaint and the facts agreed upon in the Joint Stipulation. Furthermore, the civil penalty is a carefully negotiated compromise between I&E and Verde to further the Commission's encouragement of settlements and to save the time and expense of a fully litigated matter. Again, I&E properly used its prosecutorial discretion in limiting the scope of the investigation and Complaint to the PPL service territory and by negotiating and reaching a settlement that includes both monetary and non-monetary relief and is clearly in the public interest. Thus, the OCA's comments regarding the inclusion of other EDCs and monetary value of the civil penalty as a basis to undermine the Joint Petition should be rejected. I&E Reply Comments at 7.

Verde submits that the size of the civil penalty agreed to is a significant deterrent to not just Verde, but to other EGSs marketing in Pennsylvania as well. Verde notes that from the beginning of discussions with I&E, it made it clear that it fully accepts any alleged wrongdoing done by vendors acting on its behalf. Verde also made it clear that it was independently overhauling its business practices in order to develop and implement marketing

⁸² *Pa. Pub. Util. Comm'n v. Pub. Power, LLC*, Docket No. M-2012-2257858 (Opinion and Order entered December 19, 2013) (*Public Power*).

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 8-10.

⁸⁵ *Id.* at 4.

⁸⁶ *Id.* at 11-13. I&E notes that the OCA filed Comments in this matter commending I&E's investigation and supporting the settlement. *Public Power*, Docket No. M-2012-2257858, at 5.

practices and training programs that are based on industry-wide best practices. Verde realizes that a significant factor in demonstrating its commitment to being an industry leader in marketing and compliance related matters is reflected in its willingness to accept responsibility for alleged wrongdoing done by its vendors by agreeing to pay one of the largest civil penalties brought before the Commission. On the basis of the number of improper customer interactions alleged in the Complaint, the civil penalty which Verde has agreed to is consistent with or exceeds civil penalties imposed previously by the Commission in connection with allegations of deceptive and misleading marketing practices, unauthorized account access, and unauthorized enrollments. In addition, as previously stated, Verde will offer refunds to affected customers who enrolled with Verde, and it will make a \$75,000 contribution to PPL's hardship fund. As such, Verde submits that the total amount of refund payments, civil penalty, and hardship contributions to be made by the Company is clearly sufficient to deter future violations and, therefore, constitutes a reasonable and appropriate amount to resolve this proceeding. Verde Statement in Support at 9-10.

In response to the OCA's criticisms of the civil penalty, Verde argues that the Complaint's number of alleged violations is based on the cumulative attribution of up to 10 violations for a single reported agent interaction, with many of those tabulated violations being exact duplicates. For example, the Complaint identifies 29 incidents of agents not prominently displaying an identification badge. Those exact same 29 incidents are identified in both Paragraph 47/Exhibit C of the Complaint and Paragraph 48/Exhibit D of the Complaint, and counted as 58 separate violations: 29 violations of 52 Pa. Code § 111.9(c) and 52 Pa. Code § 111.8(a)(4). Verde maintains that these two code sections do not set forth different requirements, rather, they state and re-state the exact same requirement for an agent to prominently display an identification badge. The same multiple-counting methodology applies to Paragraph 54/Exhibit I and Paragraph 56/Exhibit M (310 incidents of failure of agent to identify themselves counted twice), and Paragraph 58/Exhibit O, Paragraph 59/Exhibit P and Paragraph 60/Exhibit Q (several hundred agent interactions being counted as nearly two thousand alleged violations. Single agent interactions were also counted as multiple violations of the same catchall section of the Commission's regulations. Paragraph 57 of the Complaint identified 1422 violations of 52 Pa. Code § 111.10(a). This section is the opening paragraph of

the Telemarketing subsection of the Marketing and Sales Practices for the Retail Residential Energy Market. It does not include any precise requirements or restrictions, but rather reiterates and confirms that suppliers and their agents must comply with other marketing and consumer protections outlined in Chapters 54, 62, 56, 57 and 59 of the Commission’s regulations.⁸⁷ While the paragraph identifies 1422 violations, the accompanying Exhibit N only lists 288 customer interactions. Therefore, on average each one of those 288 interactions is being assigned 5 separate violations of Section 111.10(a). The issue is further exacerbated because most of these 288 interactions are also counted as having other violations, and the same interactions also appear on Complaint Exhibits M, O, P, and Q. Verde Reply Comments at 3-4.

Verde further notes that all of this could have been explained to the OCA had the OCA agreed to participate in settlement discussions, but OCA refused to do so. Verde maintains, as confirmed in Paragraph 32 of the Stipulated Facts, that I&E identified 339 customers for which improper agent interactions were alleged. While the civil penalty is also meant to address a smaller number of other alleged violations that did not involve agents, the \$1,000,000 civil penalty is clearly a substantial amount for 339 allegedly improper agent interactions (approximately \$2900 per interaction). On a per-interaction basis, this amount far exceeds any prior civil penalty issued against a supplier by the Commission as part of a settlement. See, for instance:

- *Clearview Electric, Inc.* (“Clearview”), in which Clearview agreed to pay a \$250,000 civil penalty (\$24.15 per violation) in a Settlement that was approved by the Commission by Order entered on June 30, 2017 in Docket No. C-2016-2543592 in a case involving 10,351 alleged violations of 52 Pa. Code § 54.4(a).
- *Great American Power LLC* (“Great American”), in which Great American agreed to pay a civil penalty of \$13,500 civil penalty [sic] (an average of \$346 per incident) under a Settlement that was approved by the Commission by Order entered on July 11, 2019 in Docket No. M-2018-2617335 in a case involving 22 alleged incidents.

⁸⁷ 52 Pa. Code § 111.10(a)

- *Public Power LLC* (“Public Power”), in which Public Power agreed to pay a civil penalty of \$72,500 (approximately \$609 per instance) under a Settlement approved by the Commission by Order entered on May 19, 2016 in Docket No. M-2015-2439492 in a case involving 119 alleged incidents.
- *Plymouth Rock Energy, LLC* (“Plymouth Rock”) in which Plymouth Rock agreed to a civil penalty of \$98,683 under a Settlement approved by the Commission by Order entered on April 19, 2018 in Docket No. C-2016-2579276 in a case involving 2437 incidents.
- *Vista Energy Marketing, L.P.* (“Vista”), in which Vista paid a civil penalty of \$52,700 (\$425 per incident) under a Settlement approved by the Commission by Order entered on March 14, 2019 in Docket No. M-2018-2624484 in a case involving 124 incidents.

Verde Reply Comments at 4-6.

While the Settlement address several other allegations that did not involve agents (such as failure to maintain verification records and failure to comply with door to door notice requirements), the large majority of the Complaint’s allegations and proposed violations related to these 339 agent interactions.⁸⁸ As such, when viewed in the context of other EGS settlements, Verde maintains that the \$1,000,000 civil penalty coupled with the \$75,000 hardship fund contribution is clearly a significant amount relative to the number of alleged improper interactions. Verde Reply Comments at 6.

I agree with I&E and Verde that the amount of the penalty and payment to the hardship fund is commensurate with civil penalties paid in previous similar cases and sufficient to deter future violations. Under the circumstances presented, imposition of a penalty beyond the \$1,000,000 penalty agreed to by I&E and Verde is not necessary to deter future violations.

⁸⁸ The Complaint also included two paragraphs alleging improper customer account access. However, Verde notes that such account access was associated with vendors working for numerous EGSs in Pennsylvania and not limited to Verde.

9. Ninth Civil Penalty Factor

The ninth factor to be considered relates to past Commission decisions in similar situations.⁸⁹ I&E notes that the facts alleged in this case are voluminous and are not similar to past Commission decisions. However, I&E also notes that the Commission imposes a \$1,000.00 civil penalty against companies for allegations of slamming and has imposed a higher civil penalty for egregious conduct.⁹⁰ Further, as in previous slamming matters, Verde agrees to undertake additional non-monetary corrective actions designed to prevent similar misconduct from occurring in the future. I&E Statement in Support at 20.

Verde asserts that the civil penalty which it has agreed to is consistent with or exceeds civil penalties imposed previously by the Commission in connection with allegations of deceptive and misleading marketing practices, unauthorized account access, and unauthorized enrollments.⁹¹ This is based, in part, on Verde acknowledging the Commission's zero tolerance of unauthorized enrollments,⁹² as well as deferring to prior Commission decisions as they relate to civil penalties associated with allegations of deceptive and misleading marketing practices and unauthorized account access.⁹³ Accordingly, the Company submits that approval of the Settlement Agreement is reasonable and appropriate and consistent with prior Commission decisions. Verde Statement in Support at 10.

The OCA notes that in 2013, 108 accounts of customers were physically switched to receive EGS or NGS service from PaG&E without authorization and 211 customer accounts

⁸⁹ 52 Pa. Code § 69.1201(c)(9).

⁹⁰ See *Pa. Pub. Util. Comm'n v. Energy Servs. Providers, Inc. d/b/a Pa. Gas & Elec., et al.*, Docket No. M-2013-2325122 (Order entered October 2, 2014) (Commission approved a settlement agreement imposing a \$150,200.00 civil penalty for allegations of slamming and attempted slamming); *Hiko Energy, LLC v. Pa. Pub. Util. Comm'n*, 209 A.3d 246 (Pa. 2019) (Commission imposed a \$1,836,125.00 civil penalty against Hiko for the egregious conduct of overcharging customers during the polar vortex).

⁹¹ Under 66 Pa.C.S. § 3301, the maximum civil penalty is \$1,000 per violation. While the Complaint identified 339 customer interactions, it alleged multiple violations per interaction.

⁹² See *Pa. Pub. Util. Comm'n v. MXenergy Elec., Inc.*, Docket No. M-2012-2201861 (Order entered August 29, 2013); See also *Pa. Pub. Util. Comm'n v. Energy Serv. Providers, Inc. d/b/a Pa. Gas & Elec. and U.S. Gas & Elec., Inc. d/b/a Pa. Gas & Electric*, Docket No. M-2013-2325122 (Order entered October 2, 2014).

⁹³ See *Pa. Pub. Util. Comm'n v. Great Am. Power, LLC*, Docket No. M-2018-2617335 (Order entered July 11, 2019).

were in the process of being switched to PaG&E.⁹⁴ The Commission noted that the allegations in the PaG&E case were the most egregious it had thus far seen and fined the supplier \$150,200 which, at the time, was the largest civil penalty imposed on a supplier for slamming.⁹⁵ An important distinction to make, however, between PaG&E and this matter, is that only one agent and an accomplice were responsible for “slammings” and attempted “slammings.”⁹⁶ Here, the OCA argues, the alleged action of Verde’s third-party agents go beyond “slamming” and, due to Verde’s lack of oversight, it is unclear of which and how many of Verde’s third-party agents would be responsible for the alleged misconduct. Therefore, the OCA submits that a penalty higher than \$1 million is warranted and revocation of license should be strongly considered. OCA Comments at 46.

As noted previously, the agreed-upon civil penalty in this matter is commensurate with civil penalties paid in previous similar cases and sufficient to deter future violations. Moreover, as noted by I&E, as with previous slamming cases Verde has agreed to implement additional non-monetary corrective actions designed to prevent the conduct alleged in the Complaint from occurring in the future. I agree that the \$1,000,000 civil penalty, coupled with the \$75,000 payment to PPL’s hardship fund, is appropriate in this situation.

10. Tenth Civil Penalty Factor

The tenth factor considers “other relevant factors.”⁹⁷ In support of the \$1,000,000.00 civil penalty, I&E notes that of the 339 customer accounts affected/impacted by Verde’s deceptive conduct, 41 identified as senior citizens, 3 of the customers were deceased, 12 of the customers identified as infirmed/disabled or unwell, and at least 12 of the customers alleged that Verde refused to cancel enrollments once the customer complained or brought the deceptive acts to its attention. Additionally, 16 of the complaints indicated that Verde used private customer information to falsely report a power outage or falsely submit a disconnection

⁹⁴ *Pa. Pub. Util. Comm’n v. Energy Servs. Providers, Inc. d/b/a Pa. Gas & Elec., et al.*, Docket No. M-2013-2325122 (Order entered Oct. 2, 2014).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 52 Pa. Code § 69.1201(c)(10).

of service request. I&E maintains that all of these factors, in addition to the allegations brought forth in the Complaint, fully support the civil penalty amount and the affirmative actions to be taken by Verde and are in the public interest. I&E Statement in Support at 20-21.

Verde submits that all settlements avoid the time, expense, and uncertainty of litigation, which is why the Commission generally encourages settlements as being in the public interest. Approval of the Settlement of the present case is especially beneficial to the public interest because of the unique and complex issues involved, the amount of time that would be required to litigate the case to conclusion, the considerable uncertainty over the outcome, and the immediate customer refunds to be issued as a result of the Settlement. As evidenced by the various communications engaged in throughout the course of this proceeding, there was considerable disagreement between the parties over the legal and factual issues raised by the Complaint. Both I&E and Verde acknowledge that a considerable amount of resources and time would need to be devoted to litigate this matter to its conclusion. By contrast, the Settlement immediately and comprehensively resolves all of the allegations made in the Complaint, establishes a framework to immediately provide refunds to affected customers, and outlines detailed modifications to business practices to implement industry-wide best practices. The Settlement thus provides immediate, concrete benefits to the public that would otherwise be unavailable in the near term. As such, the Settlement meets the criteria for approval of settlements involving allegations of violations of the Public Utility Code and the Commission's regulations set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201. However, Verde asserts that the most significant aspects of the Settlement go beyond the criteria enumerated in the Policy Statement. Verde Statement in Support at 11.

The OCA reiterates that the allegations against Verde in this Complaint are extremely serious. The number of accounts identified in only one service territory is significant, and the allegations of conduct related to unauthorized access to customer accounts is extremely concerning. The OCA maintains that the Settlement does not fully address the serious nature of this alleged conduct. OCA at 46.

Upon review of the positions of the parties, I find that I&E and Verde have arrived at a civil penalty that sufficiently addresses the conduct alleged in the Complaint. Additionally, the Settlement is a complete and final resolution of the allegations raised in I&E's Complaint that ultimately avoids the time and expense of litigation. Moreover, approval of the Settlement will provide Verde's current and former customers with immediate relief that might not be possible if the matter had been fully litigated. For the reasons set forth above, I find that the proposed Settlement, with addendum regarding refunds of ETFs, is in the public interest and consistent with the Public Utility Code and Commission regulations. Accordingly, I find that the Joint Petition for Approval of Settlement, including the \$1,000,000 civil penalty and \$75,000 payment to PPL's hardship fund, is reasonable and in the public interest.

X. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. § 701.
2. The Commission has the power and the duty to enforce the requirements of the Public Utility Code. 66 Pa.C.S. § 501(a).
3. Under Public Utility Code Sections 3301(a) and (b), the Commission may levy a fine of up to \$1,000 per day for continuing violations of the Public Utility Code. 66 Pa.C.S. § 3301.
4. The Commission has adopted a policy statement which enumerates the standards that it uses to evaluate civil penalties. 52 Pa. Code § 69.1201.
5. For a unanimous settlement, the Joint Petitioners share the burden of proving that the terms and conditions of the Settlement are supported by substantial evidence and are in the public interest. *Pa. Pub. Util. Comm'n v. City of Bethlehem – Water Dep't*, Docket R-2020-3020256 (Opinion and Order entered April 15, 2021) (*City of Bethlehem*), at p. 13.

6. When a settlement is nonunanimous, the standards for reviewing the terms are the same as those for deciding a fully contested case. *City of Bethlehem*, at p. 31 (citing *Joint Application of W. Penn Power Co. d/b/a Allegheny Power, Trans-Allegheny Interstate Line Co. and FirstEnergy Corp.*, Docket Nos. A 2010 2176520 and A-2010-2176732 (Order entered March 8, 2011); see also *Pa. Publ. Util. Comm'n v. Pa. Am. Water Co.*, Docket No. R-2020-3019369 (Opinion and Order entered February 25, 2021), at p. 40.

7. The Joint Petition for Settlement submitted by I&E and Verde, including the \$1,000,000 civil penalty and \$75,000 payment to PPL's hardship fund and with addendum, is reasonable and in the public interest.

XI. ORDER

THEREFORE,

IT IS ORDERED:

1. That the Joint Petition for Approval of Settlement filed on June 30, 2020 between the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement and Verde Energy USA, Inc. and modified by addendum discussed herein, is approved.

2. That within sixty (60) days of the date of entry of a final Commission Order approving the Settlement, Verde Energy USA, Inc. shall pay the \$1,000,000 civil penalty by sending a certified check or money order payable to the Commonwealth of Pennsylvania to:

Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

3. That no amount of the civil penalty shall be passed through as an additional charge to Verde Energy USA, Inc.'s customers in Pennsylvania.

4. That within sixty (60) days of the date of entry of a final Commission Order approving the Settlement, Verde Energy USA, Inc. shall pay \$75,000 to PPL's Hardship Fund.

5. That within ninety (90) days of the date of entry of a final Commission Order approving the Settlement, Verde Energy USA, Inc. be directed to file a sworn certification with the Commission demonstrating the \$75,000 payment to PPL's Hardship Fund.

6. That within sixty (60) days of the date of entry of a final Commission Order approving the Settlement, for each customer identified in the Complaint that actually enrolled with Verde, Verde be directed to provide refunds equal to the first two months of electricity supply charges, less any amounts previously refunded to that customer.

7. That within ninety (90) days of the date of entry of a final Commission Order approving the Settlement, Verde Energy USA, Inc. be directed to file a sworn certification with the Commission demonstrating that it provided the ordered refunds.

8. That the terms of the Joint Petition for Approval of Settlement are modified to require that Verde notify the customers identified in the Complaint who alleged unauthorized enrollment of the potential refund of early termination fees and the steps required to secure a refund.

9. That within sixty (60) days of the date of entry of a final Commission Order approving the Settlement, for each customer who alleged unauthorized enrollment by Verde Energy USA, Inc. and who was actually charged and paid early termination fees to their supplier, Verde Energy USA, Inc. be directed to refund those early termination fees upon receipt of proof of payment by the customer.

10. That within ninety (90) days of the date of entry of a final Commission Order approving the Settlement, Verde Energy USA, Inc. be directed to file a sworn certification with the Commission demonstrating that it refunded the early termination fees.

11. That within ninety (90) days of the resumption of in-person marketing or telemarketing in Pennsylvania and quarterly thereafter for a period of two (2) years, Verde Energy USA, Inc. shall provide to the Bureau of Investigation and Enforcement an explanation of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof.

12. That within ninety (90) days of the resumption of in-person marketing or telemarketing in Pennsylvania and quarterly thereafter for a period of two (2) years, Verde Energy USA, Inc. shall provide to the Bureau of Investigation and Enforcement a summary of the number and type of customer complaints and disputes received by Verde during the reporting period.

13. That for two (2) years following the entry of the Commission's Final Order in this matter, Verde Energy USA, Inc. provide the Bureau of Investigation and Enforcement with written notice of any changes to its practices and procedures related to marketing to Pennsylvania consumers for EGS products and services.

14. That the remaining terms and conditions contained in the Joint Petition for Approval of Settlement filed by Verde Energy USA, Inc. and the Bureau of Investigation and Enforcement are approved and adopted consistent with the discussion contained herein.

15. That Verde Energy USA, Inc. cease and desist from any and all violations of the Public Utility Code and the Pennsylvania Public Utility Commission's Regulations and Orders.

17. That the Secretary mark the docket at C-2020-3017229 closed.

Date: January 21, 2021

/s/
Christopher P. Pell
Deputy Chief Administrative Law Judge