COMMONWEALTH OF PENNSYLVANIA

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February 10, 2022

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

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

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Exceptions in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

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Enclosures:
cc: The Honorable Christopher P. Pell **(email only)**
Office of Special Assistants (**email only**: ra-OSA@pa.gov)
Certificate of Service
*324008

CERTIFICATE OF SERVICE

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

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

Dated this 10th day of February 2022.

SERVICE BY E-MAIL ONLY

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS
OF THE
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Dated: February 10, 2022

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I. INTRODUCTION

Pursuant to Section 5.533 of the Pennsylvania Public Utility Commission's (Commission) regulations, 52 Pa. Code Section 5.533, the Office of Consumer Advocate (OCA) hereby files these Exceptions to the January 21, 2022 Initial Decision (I.D.) of Administrative Law Judge Christopher P. Pell (ALJ Pell or the ALJ). In the I.D., ALJ Pell determined that the non-unanimous Settlement filed by the Bureau of Investigation and Enforcement (I&E) and Verde Energy USA, Inc. (Verde or the Company) was in the public interest and, therefore, should be approved by the Commission.

The OCA submits that the ALJ erred in approving the Settlement because it fails to meet the standard for a "non-unanimous" Settlement. The OCA has not joined in the Settlement in this proceeding, and as a non-unanimous Settlement, the Commission's standards for review are the same as those for deciding a fully contested case.[1] In order for the Settlement to be approved by the Commission, it must both serve the public interest and it must be supported by "substantial evidence."[2] Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[3] The record in this case is devoid of evidence, let alone substantial evidence, sufficient to support approving the Settlement. Moreover, ALJ Pell's I.D.

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

[2] Pa. PUC v. PGW, Docket No. R-2020-3017206 at 13-15 (Opinion and Order entered Nov. 19, 2020).

[3] Consolidated Edison Company of New York v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938); see also, 66 Pa. C.S. § 332 for definition of evidence that may be received. Under the Commission's regulations on the admissibility of evidence, "[r]elevant and material evidence is admissible subject to objections on other grounds." 52 Pa. Code § 5.401. Evidence will be excluded if (1) it is repetitious or cumulative or (2) its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or considerations of undue delay or waste of time. 52 Pa. Code § 5.401(b).

does not correctly apply this standard to the facts presented in this case. For the reasons set forth in the Exceptions below, substantial evidence has not been presented to support the Settlement.

As an active intervening party to this proceeding, the OCA has been denied the opportunity to present any evidence in the case. In fact, the record demonstrates that the ALJ allowed the settling parties to not only frame the settlement, but also establish the facts to admit into the record through a stipulation, which was accepted without question, while at the same time relegating the OCA to the position of a mere bystander permitted only to file comments. These decisions deprived the Commission of the record necessary for the ALJ to evaluate whether the Settlement is in the public interest and whether substantial evidence exists to approve the Settlement. In the procedural history below, the OCA discusses the extensive efforts that it has made to attempt to have additional evidence heard in this matter. In her dissenting Statement to the Commission's decision in this matter regarding the denial of the OCA's Petition for Interlocutory Review and Answer to Material Question, Chairman Gladys Brown Dutrieuille correctly identified a concern that the OCA's due process rights have been denied in this proceeding.[4] Chairman Brown Dutrieuille's Statement provided:

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

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[4] Pa. PUC, Bureau of Investigation and Enforcement v. Verde Energy USA, Inc., Docket No. C-2020-3017229, Statement of Chairman Gladys Brown Dutrieuille at 1-3 (Oct. 7, 2021).

[5] Id. at 3.

The requirement of due process of law[6] in procedural matters applies equally to proceedings before administrative tribunals as well as judicial bodies.[7] Due process is required in Commission proceedings which are adjudicatory in nature and involve substantial property rights.[8] The opportunity to be heard at a meaningful time and in a meaningful manner is the fundamental requirement of due process.[9] Meaningful opportunity to be heard also includes the opportunity to present evidence.[10] The OCA has been denied the opportunity to present evidence that opposes the Settlement.

While under the Public Utility Code, 66 Pa.C.S. Section 703, formal hearings are not always required in Complaint proceedings, the Commission must still "…make and file its findings and order with its opinion, if any…" and "[i]ts findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence." 66 Pa.C.S. Section 703(b) and (e). In Popowsky v. Pa. PUC (Popowsky)[11], the Commonwealth Court found that the provisions of Section 703 "clearly

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6 U.S. Const. Amend. XIV.

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

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

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

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

11 Popowsky v. Pa. PUC, 805 A.2d 637, 643 (Pa. Comm. 2002) (Commission's allowance of interested party and intervenor to submit comments without the opportunity to present evidence or cross-examine witnesses did not

envisioned a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings" and that "the allowance by the Commission to submit comments without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard as provided in Chapter 7 of the Public Utility Code or due process." Although Popowsky involved Section 703(g) of the Public Utility Code regarding the rescission and amendment of orders, the provision refers to the "notice and opportunity to be heard" safeguard as provided in Chapter 7 entirely implying that the safeguard applies to all Complaints under Chapter 7.[12]

Similarly, the Commonwealth Court recently affirmed the principle that "due process…requires an evidentiary hearing…if there are disputed questions of fact to be resolved…"[13] The matter was remanded to the Commission for evidentiary proceedings.[14] The OCA submits that in the instant case there are disputed questions of fact to be resolved. As discussed in the Exceptions below, the OCA disputes the adequacy of facts presented in support of the Settlement. Specifically, the OCA submits that the Settlement is not supported by substantial evidence and is not in the public interest. The OCA submits that, without adequate due process to the OCA, the Settlement cannot be fully evaluated and determined to be in the public interest.

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constitute a meaningful opportunity to be heard in the context of non-unanimous settlement effectively rescinding a Commission final order under 66 Pa.C.S. Section 703(g)).

[12] Id.

[13] See, John R. Evans v. Pa. Public Utility Commission and Tanya J. McCloskey v. Pa. Public Utility Commission, 421 and 422 C.D. 2020 (consolidated), slip op., 2021 Pa. Commw. Unpub. LEXIS 519, *27 (Sept. 29, 2021) (Remand Order), citing West Penn Power Co. Pa. PUC, 659 A. 2d 1055, 1062 (Pa. Commw. 1995).

[14] Id. at *45.

The OCA respectfully submits the following Exceptions to the Initial Decision of Administrative Law Judge Christopher P. Pell.

II. PROCEDURAL HISTORY

On January 30, 2020, I&E filed a Formal Complaint against Verde alleging, *inter alia*, that from February 2017 up to the date of the Complaint, Verde engaged in deceptive and misleading tactics while conducting door-to-door and telemarketing sales, enrolled customers without authorization (i.e., slamming) and accessed customer accounts without authorization. See I&E's Non-Proprietary Formal Complaint at 4-5. The allegations stemmed from an initial informal investigation by I&E of Verde during which PPL Electric Utilities (PPL), in response to I&E-served data requests, identified and provided 339 customer accounts allegedly affected by Verde's alleged conduct. Id. I&E requested, as relief, a total civil penalty of $8,883,000.00, license revocation, refunds in the amount of the first two billing periods to customers whose electricity supply was changed without their consent, and refunds in the amount of any cancellation fees charged to customers for switching suppliers as a result of an unauthorized switch. Id. at 18-19.

On February 14, 2020, Verde was granted an extension of time to file an Answer to the Complaint. The OCA filed a Notice of Intervention on February 21, 2020 to protect the interests of consumers in this proceeding before the Commission. Following the OCA's intervention, on March 30, 2020 and again, on May 15, 2020, Verde requested an extension of time to file its Answer. Prior to each request, Verde notified the OCA of the planned request and asked if there were any objections on behalf of the OCA. The OCA was not provided a reason for the request for extensions of time, but nonetheless stated no objection to Verde's requests given the occurrence of the COVID-19 pandemic. With the pandemic-related stay at home orders in full effect, the Commission's emergency orders regarding its operations and deadline extensions, the OCA

transitioning to working remotely, and no Answer having yet been filed to the Complaint, the OCA refrained from initially conducting its own discovery in this matter.

While the OCA continued to not object to extensions by Verde to file an Answer and continued to wait until the pleadings closed before issuing discovery, unbeknownst to the OCA, Verde and I&E were engaging in settlement discussions for months. The OCA was excluded from these discussions and was never notified about them until a call with Verde's counsel on May 26, 2020. During that call, the OCA learned for the first time that Joint Petitioners had been engaged in settlement negotiations dating back to before the Complaint filing on January 30, 2020 and that Joint Petitioners had reached a near complete settlement. While Verde's Counsel urged the OCA to hear the details of the proposed settlement, the OCA declined because it was the OCA's view that the settlement was premature as the pleadings had not closed, the agreement was negotiated before the OCA was able to conduct discovery into the allegations in the Complaint, and the OCA was excluded from the conversations. The OCA was not notified of any meetings or discussions concerning the development of this Settlement prior to the oral notice on May 26, 2020 and was not included in any settlement negotiations that led up to the proposed Settlement. A mere one day after first learning about the settlement, Verde provided a draft of the settlement to the OCA in an email attachment on May 27, 2020, and counsel for Verde requested that the OCA provide its position and any input on the settlement. Per the email, Joint Petitioners had agreed to nearly all of the terms except for the civil penalty amount.

The OCA served interrogatories to Verde on June 1, 2020, July 6, 2020, and August 3, 2020. Before all of the responses to the OCA's first set of discovery were provided, Verde filed its Answer to the Formal Complaint on June 30, 2020 and, a few hours later, I&E filed a Joint Petition of I&E and Verde for Approval of Settlement.

On July 20, 2020, the OCA filed a Statement in Opposition to the Non-unanimous Settlement filed by Verde and I&E pursuant to 52 Pa. Code Section 5.232(g) (OCA Statement in Opposition), within which the OCA explained why the Settlement was premature and inadequate. Specifically, the OCA argued that, "[b]ased on the seriousness of the allegations and the information the OCA has been able to obtain and review to date, the OCA cannot agree with this proposed Settlement." OCA Statement in Opposition at 1. The OCA argued that the Commission should allow this matter to proceed so that the alleged violations can be assessed in greater detail and the reasonableness of the proposed remedies in the Settlement can be determined. Id. In response, I&E filed a letter with the Commission's Secretary Bureau requesting that the OCA Statement in Opposition be considered "objections" and the Settlement be presented to the Commission for disposition. I&E Letter to Secretary Chiavetta (July 23, 2020). On July 24, 2020, a Secretarial Letter was issued to the parties notifying them of the assignment of the contested matter to the Office of Administrative Law Judge. Secretarial Letter: Contested Matter Assigned to OALJ (July 24, 2020). Administrative Law Judge Christopher P. Pell (ALJ Pell) was subsequently assigned to the matter and a prehearing conference was held telephonically on August 27, 2020.

During the prehearing conference, the parties were given an opportunity to state their positions on the matter and the pending Settlement. In light of the fact that the other parties had engaged in Settlement and information sharing for months, the OCA believed that a short delay of the procedural schedule could accommodate its concerns and it requested that the matter be held in abeyance for sixty days while the OCA conducted further discovery. In the September 25, 2020 Order Denying the Office of Consumer Advocate's Request for Sixty Day Abeyance (September 25 Order), ALJ Pell concluded that the OCA had the opportunity to conduct discovery and weigh

in on the Settlement and he would issue an initial decision on the Settlement addressing whether it is in the public interest and should be approved. ALJ Pell's September 25 Order also permitted I&E and Verde to file a stipulated statement of facts 20 days after the issuance of the order, but only permitted the OCA to file comments (rather than evidence) on the Settlement 40 days after the issuance of the order and permitted I&E and Verde to file reply comments on the Settlement 60 days after issuance of the order. The ALJ provided no reason for excluding the OCA ability to present evidence of its own. Verde and I&E filed the Joint Stipulation of Facts on October 21, 2020 and the OCA filed its Comments in Opposition of the Joint Petition for Approval of Settlement (OCA's Comments or Comments) on November 9, 2020. Attached to the OCA's Comments, was an affidavit by OCA witness Ms. Barbara Alexander along with accompany exhibits. The affidavit relied on evidence that was generally available to all parties in the proceeding.

Verde filed a Motion to Strike portions of the OCA's Comments on November 18, 2020. On November 19, 2020, I&E filed a Letter with the Commission's Secretary Bureau indicating its support of Verde's Motion to Strike. On December 3, 2020, the OCA filed an Answer to Verde's Motion to Strike in which the OCA argued the OCA's Comments referencing Ms. Alexander's Affidavit and the OCA's Findings of Facts are both relevant and admissible in this proceeding and due process requires the evidence to go before the ALJ and the Commission for consideration in determining whether the proposed Settlement should be approved. This is particularly true given that the ALJ permitted the parties to filed unchallenged, negotiated, and stipulated facts.

On January 15, 2021, the ALJ issued an Interim Order Granting Verde's Motion to Strike (January 15, 2021 Order). The OCA filed a Petition for Interlocutory Review and Answer to

Material Question (OCA's Petition) on January 28, 2021 that requested the Commission to consider the following material questions:

> 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?

On February 5, 2021, I&E filed a brief in opposition to the OCA's Petition and, on February 8, 2021, Verde filed a brief in opposition to the OCA's Petition and the OCA filed a brief in support of its Petition.

On October 26, 2021, the Commission entered an Order (October 26, 2021 Order) denying the OCA's Petition for Interlocutory Review and Answer to Material Question and answered the Material Question in the negative. In its order, the Commission agreed with ALJ Pell that the OCA was not permitted to present evidence in the proceeding through the facts and information learned in discovery, but excluded from the Joint Petition for Settlement and stipulated facts negotiated by I&E and Verde, and concluded that the OCA, as an intervenor, cannot force the parties to litigate. October 26, 2021 Order at 19-20. The Commission returned the matter to ALJ Pell for an initial decision on the Joint Petition for Approval of Settlement. Id. at 21.

Attached to the October 26, 2021 Order, Chairman Gladys Brown Dutrieuille (Chairman Dutrieuille) issued a statement (Statement of Chairman Dutrieuille) disagreeing with the Commission's answer to the OCA's material question. Chairman Dutrieuille specifically disagreed with the Commission's conclusion on the rights of the OCA as an intervenor in the matter:

> The relief requested by the OCA should be granted on the basis that the OCA, a statutory advocate, properly intervened prior to the development of the record in this adversarial proceeding and is entitled to due process. The Commission's regulations are clear regarding the right of a statutory advocate to participate in proceedings before the Commission. "A statutory advocate may exercise a right of participation or file a notice of intervention

> consistent with law at any time in a proceeding. A statutory advocate exercising a right of participation or filing a notice of intervention following expiration of any protest or intervention period shall take the record as developed unless determined otherwise in exceptional circumstances for good cause shown." 52 Pa. Code § 5.74(b)(4). No record had been developed at the time the OCA intervened.

Chairman Gladys Brown Dutrieuille at 2. Chairman Dutrieuille further disagreed with the finding that the information presented by the OCA in its Comments was not previously available to Verde and I&E and that both parties would be disadvantaged without an opportunity to cross-examine the OCA's witness supporting such evidence. Id. at 2-3. The proper solution to provide all parties with due process in this adversarial proceeding, as concluded by Chairman Dutrieuille, would have been to schedule hearings for I&E and Verde to cross-examine the OCA's witness rather than striking the OCA's evidence. Id.

On January 21, 2022, ALJ Pell issued his I.D. which found the Joint Petition for Approval of Settlement to be in the public interest and recommended its approval to the Commission. The OCA respectfully submits these Exceptions to ALJ Pell's I.D.:

III. EXCEPTIONS

OCA Exception 1: The ALJ Erred in Denying the OCA Additional Time to Conduct Discovery. (I.D. at 4; OCA Comments at 9-12)

The ALJ erred in denying the OCA additional time to conduct discovery. I.D. at 4. During the prehearing conference, the OCA requested that the matter be held in abeyance for sixty days while the OCA conducted further discovery.[15] In the September 25 Order denying the OCA's request for abeyance, the ALJ determined that he would instead issue an initial decision on the Settlement without allowing for further discovery effectively depriving the OCA of the ability to

[15] See OCA Comments at 11-12. A period of almost 30 days passed from the date of the prehearing conference on August 27, 2020 until ALJ Pell denied the OCA's request. The OCA posits that if ALJ Pell had just held the schedule in abeyance for thirty days, the OCA would have had a more complete record in this proceeding.

enter evidence in the proceeding. In reaching this conclusion, the ALJ failed to recognize that OCA did not sit on its rights to conduct discovery. Instead, the period of time after the OCA filed its intervention, but before Verde filed its Answer to the I&E Complaint, coincided with the onset of the COVID-19 pandemic in the United States and Verde's consistent requests for additional time. Rather than allow the OCA a limited opportunity to clarify the facts and seek evidence that could be used to address the Settlement fully, ALJ Pell's September 25 Order permitted two parties, I&E and Verde, the ability to file a stipulated statement of facts 20 days after the issuance of the order, but relegated the OCA to submitting only unsworn arguments in the form of comments on the settlement 40 days after the issuance of the order.[16] The ALJ also permitted I&E and Verde to file reply comments on the settlement 60 days after issuance of the order.[17]

In its Comments, the OCA was not permitted the opportunity to present any evidence identified in its limited discovery or to present an Affidavit of the OCA's consultant in this matter, Barbara Alexander. In spite of this, in his I.D., the ALJ concluded that "[f]ollowing discovery and discussions, the Settling parties agreed that entering into this Settlement agreement was preferable to pursuing litigation." I.D. at 33. The "discovery" that the ALJ identifies in his I.D. was limited to I&E's and Verde's recitation of the Stipulated Facts. No witnesses were presented to support the facts in the case. The verifications attached to the Stipulated Facts are signed by counsel. The OCA was only allowed to pursue very limited discovery in this matter, after significant delays on the part of Verde, and was not permitted to present any of the findings of that limited discovery in support of its Comments. The OCA was also not permitted to probe through cross-examination of witnesses or additional discovery of the limited I&E and Verde Stipulated Facts. The OCA's

[16] September 25 Order at 8-9.

[17] September 25 Order at 9.

Comments and attached materials raised important concerns about the facts underlying the Settlement that should be considered by the Commission.

Moreover, as discussed in the Procedural History above, the timing of this case should not be ignored because it addresses the deficiencies in the due process afforded to the OCA. The OCA filed its Intervention in this proceeding on February 22, 2020, just a few weeks prior to the global shutdown due to COVID-19. With the government stay at home order in full effect due to COVID-19, the Commission's emergency orders regarding its operations and deadline extensions, the OCA transitioning to working remotely, and no Answer having yet been filed to the Complaint, the OCA refrained from conducting its own discovery in this matter. Because of this restraint on the OCA's side due to the unprecedented circumstances and requests to delay proceedings by Verde's counsel, the OCA was shut out of the process. It was only at the end of May that both Verde and I&E exhibited a false sense of urgency to then fully settle the matter without further input or information from the OCA; the consequence of which resulted in the denial of due process and the Commission deciding the merits of a settlement with an incomplete record devoid of essential facts.

For the reasons set forth above, and in the OCA's Comments, the ALJ erred in his decision to deny the OCA the opportunity to conduct discovery. I.D. at 4. The short delay requested by the OCA – 60 additional days – was far less than the time Verde took to answer the Complaint and would have resulted in a record sufficient for the Commission to render a decision. The Commission's ability to fully and fairly review the Settlement has been diminished because the OCA has been denied the opportunity to conduct discovery and to present the findings of any such discovery to the Commission.

OCA Exception 2: <u>The ALJ Erred 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.</u> (I.D. at 5; OCA Comments)

As discussed in the I.D., the ALJ issued an Interim Order on January 15, 2021 granting Verde's Motion to Strike portions of the OCA's Comments and the attached Affidavit of Barbara Alexander. I.D. at 5. The stricken portions of the OCA's Comments identified additional evidence that the OCA and its consultant, Barbara Alexander, were able to adduce through the limited discovery opportunity available, publicly available information, and Ms. Alexander's expert experience. The ALJ, however, determined to not allow the OCA to present counter-evidence to the Settlement on the basis that the evidence was not available to all parties or subject to cross examination. <u>January 15, 2021 Order</u> at 7. As to this first assertion, it is simply not the case that the evidence stricken was not available to all parties. In fact, all of the evidence and factual statements came from either Verde itself or from the information submitted by PPL, all of which was available to all of the parties in the proceeding. While some statements in the affidavit were the result of Ms. Alexander's experience, the ALJ did not choose to simply strike those statements but rather took an absolute view that the evidence presented by the OCA would not be entertained. The ALJ stated:

> I offered the OCA the opportunity to delineate the issues they would raise if the Settlement is rejected, and to outline how the OCA's interests would be affected if the Settlement is accepted. I did not invite the OCA to provide an affidavit with accompanying exhibits from the witness it proposed in its Prehearing Memorandum, to provide proposed findings of fact, or to attempt to expand the scope of this proceeding.
>
> My expectation was for the OCA to provide comments based upon the allegations raised by I&E in the Complaint and the information obtained through discovery. Comments based solely upon this information would have been proper since the comments would have been based upon information available to all parties throughout the course of this proceeding. It would be improper for me to rely upon this affidavit or the accompanying exhibits, or any information contained within

> the comments that is derived from or references these materials, since I&E and Verde never had the opportunity to cross examine this witness or to offer rebuttal testimony.

January 15, 2021 Order at 12-13. As a result of the ALJ's determination, the only facts that were able to be presented in this case were the Stipulated Facts identified by I&E and Verde.

Like the non-unanimous Settlement, I&E and Verde developed the Stipulated Facts without the participation of OCA. The Stipulated Facts are verified by counsel and not by witnesses. No witnesses were presented by either party in this case. The OCA was not allowed the opportunity to present additional facts or evidence to be heard regarding the OCA's objections to the non-unanimous Settlement. The OCA was not permitted to present a witness in this case. The OCA was also not permitted to cross-examine any witnesses regarding the Stipulated Facts or the non-unanimous Settlement. No open evidentiary record was ever created in this proceeding. The facts presented are entirely one-sided in support of the non-unanimous Settlement.

In his recitation of the OCA's position in this case, the ALJ describes the gaps in evidence that the OCA identified in its Comments. I.D. at 35. For example, the OCA identified a concern regarding gaps in the sales activities presented by the Settlement. See, OCA Comments at 27-28. The ALJ summarizes the OCA's concern as follows:

> 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.

I.D. at 35. The ALJ determined that the Settlement addressed the sales activities concern presented by the OCA, but the ALJ's I.D. made that conclusion without consideration of any facts except those identified in the Stipulated Facts presented by I&E and Verde. See, I.D. at 35. This is

problematic. As a statutory party in the proceeding, the OCA should have been afforded the opportunity to present its own evidence. Instead, as can be seen from the foregoing, the ALJ's determination provides that the only evidence that the OCA may present to challenge the Settlement is the evidence presented by the parties supporting the Settlement. In rejecting the evidence presented by the OCA, based in part on the fact that it was not subject to cross, the ALJ nevertheless accepted the same sort of evidence from the parties, placing the OCA at a significant disadvantage as party. The OCA entered this case before an Answer was filed and before the prehearing conference, thus, it was entitled to present evidence and was not bound by the curated record without any real or meaningful opportunity to challenge the evidence presented.

For the reasons set forth above, the OCA submits that the ALJ erred in his decision to deny the OCA the opportunity to present evidence counter to the Stipulated Facts. I.D. at 5. The Commission's ability to fully and fairly review the Settlement has been diminished because the OCA has been denied the opportunity to submit evidence contrary to the Stipulation of Facts or even to test the accuracy and scope of the Stipulated Facts through cross-examination.

OCA Exception 3: <u>The ALJ Erred in Concluding that the Non-Unanimous Settlement is in the Public Interest *and Supported by Substantial Evidence.*</u> (I.D. at 44-45; OCA Comments at 7-8)

In his Initial Decision, the ALJ erroneously concluded that the non-unanimous Settlement is in the public interest and is supported by substantial evidence. I.D. at 44-45. The OCA submits that the ALJ erred in his conclusion because the Settlement fails to meet the standard for a "non-unanimous" Settlement. For a non-unanimous Settlement, the Commission's standards for review

are the same as those for deciding a fully-contested case.[18] In order for the Settlement to be approved by the Commission, it must both serve the public interest and it must be supported by "substantial evidence."[19] Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[20] The record in this case is devoid of evidence, let alone substantial evidence sufficient to support approving the Settlement. Moreover, the I.D. does not correctly apply this standard to the facts presented in this case.

The evidence presented in this case was set forth solely by I&E and Verde in Stipulated Facts. As an active statutory party to this proceeding, the OCA was denied the opportunity to present any evidence in the case contrary to those Stipulated Facts. In fact, the record demonstrates that the ALJ allowed the settling parties to not only frame the settlement, but also to establish the facts to admit into the record through a stipulation, which was accepted without question, while at the same time relegating the OCA to the position of a mere bystander permitted only to file comments.

As noted above, the substantial evidence standard requires that the evidence presented be such relevant evidence that a reasonable might accept as adequate to support a conclusion.[21] I&E and Verde presented Stipulated Facts that the ALJ relied upon for his determination in this case.

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

[19] Pa. PUC v. PGW, Docket No. R-2020-3017206 at 13-15 (Opinion and Order entered Nov. 19, 2020).

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

[21] Id.

The Stipulated Facts, however, failed to meet the substantial evidence standard as they were either non-substantive or too vague to be meaningful. Nineteen of the thirty-five Stipulated Facts related to the identity of I&E and Verde (including the respective business addresses of I&E and Verde), the law under which I&E's complaint, the procedural history of the case, and recitation of the allegations in I&E's Formal Complaint. Stipulated Facts at ¶¶ 14-32. Three of the facts were related to the benefits of a settlement and that Verde did not admit wrongdoing. Stipulated Facts at ¶¶ 46-48. One Stipulated Fact related to Verde's satisfactory compliance history with the Commission. Stipulated Facts at ¶ 45.

Only twelve of the Stipulated Facts related to the substance of the Complaint. The twelve Stipulated Facts related to the substance of the complaint provide as follows: (1) Verde provided notices of door-to-door marketing activity but did not provide the notices to the local distribution companies (¶ 33); (2) Verde could not provide 5 telephone third party sales verifications requested by I&E (¶ 34); (3) all but two of allegations were based upon the PPL Report (¶ 35); (5) upon receipt of the Complaint, Verde acknowledged the seriousness of the allegations and contacted I&E to request the PPL Report and begin settlement discussions (¶¶ 36, 37); (6) on February 6, 2020, Verde ceased in-person marketing and telemarketing in Pennsylvania (¶ 38)[22]; (7) all of Verde's marketing was completed by third party vendors and Verde had a Code of Conduct for the vendors (¶¶ 39-40); (8) during the period in question, Verde had a sales quality assurance program that was to oversee telemarketing and door-to-door sales activities, including monitoring sales calls and third party verifications (¶ 41); (9) Verde did not have a record of enrollment of

[22] The OCA notes that all in-person marketing by all EGSs was ceased a month later on March 16, 2020. See, Supplier Door-to-Door and In-Person Marketing Moratorium, Proclamation of Disaster Emergency- COVID-19, Docket No. M-2020-3019254, Emergency Order (March 16, 2020). The moratorium was partially lifted for outdoor events by Order on December 3, 2020 and for commercial and industrial customers by Order on May 6, 2021, and not fully lifted for all door-to-door marketing activities until the Commission's July 15, 2021 Order. Under the Settlement, the moratorium on door-to-door marketing would have extended until May 31, 2021. Settlement at ¶ 31(a).

110 of 339 of the customer identified in the PPL Report, but acknowledged that the lack of enrollment "does not negate the allegations of deceptive and misleading marketing practices (¶ 42); and (10) Verde has new executive leadership, hired a new Chief Operating Officer, and a compliance officer (¶¶ 43-44).

None of these Stipulated Facts mitigate or refute the substance of the allegations or otherwise represent substantial evidence in support of the Settlement. In fact, at least two of the facts support the conclusion that the PPL Report was foundational to any further determination of this case as it was the basis of the allegations in the Complaint, but that report, and OCA's analysis of it were stricken from the record. The evidence that the ALJ relied upon was limited to just twelve substantive Stipulated Facts presented by only two of the parties without a hearing or the opportunity for other parties to test that evidence or present facts that undermine the evidence. Given the severity of the information identified in the I&E Formal Complaint and underlying PPL Report and the information that was excluded from the record, the OCA submits should have been given the opportunity to complete discovery, and present additional evidence or even challenge the evidence presented by I&E and Verde. As a result, the OCA, as the statutory representative of consumers in this proceeding, has been deprived of the right to fully participate in the proceeding. Moreover, I&E and Verde have failed to rely on any corroborating evidence other than their limited Stipulated Facts. The Commission has identified a zero-tolerance policy for "slamming" customers, and yet the Stipulated Facts do not even address the most serious allegations related to "slamming" customers, other than to identify that 110 of the impacted 339 customers were not listed in Verde's enrollment records. The OCA submits that the record upon which the ALJ based his decision simply cannot amount to substantial evidence.

In his Initial Decision, the ALJ relies upon the Popowsky and the ARIPPA cases in support of the premise that "substantial evidence consistent with the statutory requirements must support the proposed Settlement." I.D. at 13. [23] The OCA agrees that substantial evidence consistent with the statutory requirements must support the proposed non-unanimous Settlement. The OCA, however, does not agree that substantial evidence existed in the record in this case to support the acceptance of the non-unanimous Settlement. As the OCA discussed above and in its Comments, there is no record evidence or even Stipulated Facts to support many of the elements of the non-unanimous Settlement. See, e.g., OCA Comments at 25 (lack of investigation regarding the complaints identified in the PPL Report, lack of investigation of other complaints outside of those identified in the PPL Report, and the underlying gaps in Verde's records); OCA Comments at 27-28 (lack of evidence regarding third-party vendor sales activities); OCA Comments at 34 (lack of evidence regarding use of two-month timeframe for refunds). Moreover, as discussed in Exception Nos. 1 and 2, the OCA was not given the opportunity to present any counter-evidence or to challenge the Stipulated Facts presented by I&E and Verde in a meaningful manner.

The Initial Decision cites to the Popowsky and ARIPPA cases; however, Popowsky and ARIPPA do not support approval of the non-unanimous Settlement under the record of this proceeding.[24] In particular, in Popowsky, the Commonwealth Court held that the Commission's allowance of an interested party and an intervenor to submit comments without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard in the context of a non-unanimous Settlement, and that determination effectively rescinded

[23] Popowsky v. Pa. PUC, 805 A.2d 637, 643 (Pa. Comm. 2002); ARIPPA v. Pa. PUC, 792 A.2d 636, 661 (Pa. Cmwlth. 2002).

[24] Popowsky at 643.

a Commission final Order under 66 Pa. C.S. Section 703(g).[25] The Commonwealth Court found that the provisions of Section 703 "clearly envisioned a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings" and that "the allowance by the Commission to submit comments without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard as provided in Chapter 7 of the Public Utility Code or due process." Although Popowsky involved Section 703(g) of the Public Utility Code regarding the rescission and amendment of orders, the provision refers to the "notice and opportunity to be heard" safeguard as provided in Chapter 7 generally implying that the safeguard applies to all Complaints under Chapter 7.[26] In this proceeding, the only parties provided an opportunity to be heard were I&E and Verde as they were the only parties invited to present evidence whereas the OCA was relegated to a second tier able to simply present comments. Due process requires that all parties be afforded the same opportunity to participate.[27]

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[25] Id.

[26] Id.

[27] In its October 26, 2021 Order regarding the OCA's Petition for Interlocutory Review and Answer to Material Question, the Commission provided that the OCA, as an intervenor, has a non-party status. October 26, 2021 Order at 19, citing Petition of the Bureau of Investigation and Enforcement of the Pa. PUC for the Issuance of an Ex Parte Emergency Order, Docket No. P-2018-3000281, Order at 8 (May 3, 2018) (Sunoco End-of-Emergency Order). The Sunoco End-of-Emergency Order involved the application of emergency regulation provisions of the Commission's regulations and provide that only the party constrained by the order may file for an emergency hearing. The Commission's End-of-Emergency Order specifically provided "Third parties such as would-be intervenors possess no such rights under the Commission's emergency order regulations." End-of-Emergency Order at 11 (emphasis added)..

Moreover, the Sunoco End-of-Emergency Order did not involve the OCA as a intervenor. As the statutory advocate representing consumers in this proceeding, the OCA plays an important role. The OCA's role as an intervenor is, in fact, defined separately in the Commission's regulations. 52 Pa. Code §§ 5.74(b)(4), 5.575(d). Section 5.74(b)(4) of the Commission's regulations provide:

> A statutory advocate may exercise a right of participation or file a notice of intervention consistent with law at any time in a proceeding. A statutory advocate exercising a right of participation or filing a notice of intervention following expiration of any protest or intervention period shall take the record as developed unless determined otherwise in exceptional circumstances for good cause shown.

52 Pa. Code § 5.74 (b)(4). Chairman Gladys Brown Dutrieuille's Statement in this proceeding correctly provided that "when an eligible intervenor timely seeks to intervene in a formal complaint proceeding prior to the development of

The OCA plays an important, but different role, from I&E in this proceeding. I&E's participation in this proceeding is not a substitute for the OCA. Under its statutory authority, the OCA represents "the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission in any matter properly before the commission…"[28] The allegations identified in the I&E's Formal Complaint directly impact residential consumers. Neither I&E nor Verde can fully represent that consumer interest in this proceeding. The OCA represents the interests of the residential consumers impacted by the allegations in I&E's Formal Complaint. Representation of the impacted consumers' interest was why the OCA intervened in this proceeding and why meaningful due process to protect their interests is essential.

The facts of the ARIPPA case differ markedly from the instant proceeding. Here, the Settlement was presented to the OCA after months of closed door negotiations without Verde filing an answer, and without any reasonable opportunity for the OCA to conduct discovery given the onset of the pandemic and the extensions requested by Verde. The ARIPPA case, however, was factually and procedurally different. As the Commonwealth Court details, in the ARIPPA case, substantial evidence in support of the merger was presented at *extensive hearings in the matter*.[29] After hearings and an initial decision in the matter, the Commission determined to hold its recommendations regarding the proposed rate cap in abeyance until after a Commission-facilitated

a record, it must be provided a meaningful opportunity to be heard." Pa. PUC, Bureau of Investigation and Enforcement v. Verde Energy USA, Inc., Docket No. C-2020-3017229, Statement of Chairman Gladys Brown Dutrieuille at 3 (Oct. 7, 2021), citing another Order involving Sunoco, Pa. PUC, Bureau of Investigation and Enforcement v. Sunoco Pipeline, L.P., Docket No. C-2018-3006534, Order at 14-21 (June 10, 2019)(Sunoco Complaint Order). .

[28] 71 P.S. §709-4(a).

[29] Id. at 646, 655.

collaborative.[30] The non-unanimous Settlement was filed with the Commission after the collaborative and amended several issues raised in the ALJ's initial decision. The Commission subsequently approved the Settlement, and provided opposing parties 42 hours to respond.[31] The Commonwealth Court held that the settlement was substantially similar to a previous settlement that the parties were already afforded an opportunity to review, and had this non-unanimous settlement been their first time reviewing, they would have allowed an additional round of reply exceptions.[32] Given all of these facts, the Commonwealth Court found that there was not a deprivation of due process to allow comments. The intervenors in the ARIPPA case were afforded more due process than has been presented in this case, and the ALJ's reliance on this decision to support the fact that permitting the OCA to merely file comments was erroneous.

The OCA submits that the facts of this case do not meet the requirements set forth in the cases cited by the Initial Decision. For the reasons set forth in the OCA's Comments and in these Exceptions, the OCA submits that the ALJ erred in his determination that the non-unanimous is in the public interest and that substantial evidence supports the non-unanimous Settlement.

OCA Exception 4: The ALJ Erred in Concluding that the OCA Opted Out of Participating In Settlement Discussions. (I.D. at 2, 44-45, 50-51, and 66; OCA Comments at 9-11)

The ALJ accepted as true, without citation or supporting evidence, that the OCA was repeatedly invited to participate in settlement negotiations with Verde and I&E and the OCA repeatedly declined. I.D. at 2, 44-45, 50-51, and 66. This is not the case. The OCA was presented

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30 Id. at 650.

31 Id., at 660-61.

32 Id.

with a near-complete settlement and requested by Verde to provide the OCA's input with hopes that the OCA would at least not oppose the terms of the settlement. In the I.D., the ALJ was not concerned as to why the OCA, the agency that intervened to represent the interest of the customers impacted by the allegations in the Complaint, was not invited to help craft the terms of the settlement before they were presented to the OCA as a near-complete settlement.

Even upon request to provide input on the near-complete settlement, the OCA did not once communicate to Verde or I&E that it would not participate in settlement negotiations when they were appropriate. OCA Comments at 10-12. In fact, at that point, the only part of the settlement negotiations left to be discussed was the civil penalty amount. Id. Instead, to allow it to fully assess the merits of the Settlement, the OCA asked for the time it needed to exercise its due process rights to learn the facts about this matter before providing an opinion about the Settlement. Id. The OCA also wanted to understand the full extent of allegations and how they might have occurred to provide meaningful input on improving the Settlement terms to make the affected customers as whole as possible and to protect future customers from becoming victims of similar allegations. Id. Therefore, ALJ erred in finding that the OCA simply refused to participate in the negotiations that led to the proposed Settlement.

OCA Exception 5: <u>The Refund Provision Adequately Addresses the Extent of Financial Harm Done to Customers as a Result of the Allegations Against Verde.</u> (I.D. at 28-30; OCA Comments at 5 and 20-25)

The ALJ erred in finding that the refund provision in the Settlement was sufficient to "address the behavior alleged in the complaint", notwithstanding his slight modification to address the missing information on the process to notify the customers of the potential refund of the early termination fee (ETF) and the steps required to secure the refund. I.D. at 30-31. As provided in

the OCA's Comments, the refund provision ignores a potential pool of customers who are explicitly identified in the PPL Report as well as others who may have experienced similar conduct. OCA Comments at 5 and 20-25. The OCA avers that, because the Settlement was crafted prematurely before crucial discovery could be conducted by the OCA into the extent of customer harm occurred as a result of Verde's management that led to the allegations listed in the PPL Report and the I&E Complaint, the refund provision of the Settlement only provides limited remedy to certain "known" customers in one service territory where Verde conducts business.

The ALJ also erred in finding that the refund provision requirement that affected customers provide proof of ETF payment within 60 days was proper. I.D. at 30. In the OCA's Comments, the OCA asserted that this provision unfairly places the burden on the customers who were switched without their authorization for locate and present receipts—which could date back to 2018—for paying a fee as a result of the unauthorized switch. OCA Comments at 23. The OCA averred that the Settlement provision should simply accept an affected customer's verified declaration that they paid the ETF. Id. As the provision currently stands, it is far from being in the public interest to permit a Settlement provision that allows Verde to not pay affected customer's EFTs that resulted from Verde's alleged unsolicited and illegal behavior simply because a customer does not present a receipt for payment within 60 days.

In regard to the customer refund amount, the ALJ erred in finding that the provision of the Settlement that limits customer refund amounts to the first two months of service, less previously refunded amounts, following the unauthorized switch is in the public interest because it is consistent with the Commission's regulations at 52 Pa. Code § 57.177(b). As provided by in the OCA's Comments:

> 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 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. Therefore, the ALJ erred in finding the two-month refund provision to be in compliance with the Commission's regulations and in the public interest.

Lastly, the ALJ erred in finding that the provision requiring impacted customers to execute a "Release of Claims" before receiving a refund is in the public interest. I.D. at 29-30. The OCA explained in its Comments that the "Release of Claims" requirement is unnecessary and not in the public interest as it serves as a significant barrier for impacted customers to receive the refunds they deserve, there are no class action cases or other complaints pending, and it is not typical in supplier complaint cases before the Commission to require one of customers as a condition to receive a refund. OCA Comments at 24-25. The OCA submits that it was an error for the ALJ to support this aspect of the refund provision as it is not in the public interest to approve of unnecessary barriers for the victims to obtain the refunds they deserve.

As it currently stands, the refund provision of the Settlement is not in the public interest as it places the burden on the impacted customers to comply with the provisions of the Settlement or Verde will retain in full the money that should be refunded to them plus the ETF charged to them for being switched without their authorization. Had the OCA been included in settlement negotiations to represent the customers affected by the allegations in the Complaints, such provisions would not have been agreed to in a settlement.

OCA Exception 6: <u>The Length of the Marketing Moratorium is Not Appropriate to Address Verde's Lack of Compliance with the Commission's Marketing Regulations</u>. (I.D. at 33- 34; OCA Comments at 25-27)

In the OCA's Comments, the OCA raised that the allegations against Verde in this Complaint are among the most egregious set of allegations against an energy supplier in Pennsylvania to date. OCA Comments at 25-27. However, the ALJ erred in finding the Marketing Moratorium from February 6, 2020 to 6 months following approval of the Settlement, or until May 31, 2021, and not until quality assurance measures are in place, is sufficient to help ensure that Verde will resume marketing in compliance with the Settlement and the Commission's regulations. I.D. at 33-34. The OCA objected to the short marketing moratorium provision in the Settlement because it did not reflect the egregious nature of the allegations. OCA Comments at 27. Moreover, the OCA's primary recommendation was a revocation of Verde license to send a clear message to Verde and other potential and current Pennsylvania suppliers that the Commission stands by its zero-tolerance policy for "slamming". <u>Id</u>. Among the reasons why the OCA wanted to conduct discovery and introduce testimony was to demonstrate the fact that Verde's actions in Pennsylvania were not isolated incidents. While the OCA was deprived of the ability to present this evidence, the record that is before the Commission nevertheless dictates that the Settlement provisions are not reasonably tailored to remedy the harm caused. Therefore, the ALJ erred in approving the short Marketing Moratorium in this case because it does not reflect the egregiousness of the allegations and it is not in the public interest to permit Verde to continue marketing in Pennsylvania about fifteen months after the filing of this Complaint.

OCA Exception 7: <u>The ALJ Erred in Accepting as Truth that the Compliance, Monitoring, and Reporting Commitments Would Resolve the Underlying Issues in the Complaint Despite the Insufficient Record Evidence to Support This Conclusion.</u> (I.D. at 35-40; OCA Comments at 27-30)

As explained more fully in OCA Exception 3, the ALJ based his findings that the provisions of the Settlement are in the public interest without having the requisite substantial evidence in the record to support such a finding. The ALJ based his decision on the promise to do better by Verde as stipulated by Verde and I&E. Without more, and without a fuller record that was denied by the sidelining the OCA's participation, the ALJ's conclusion that the compliance, monitoring, and reporting commitments were reasonable and in the public interest was in error.

For example, the ALJ erred in finding that the marketing restriction provisions that restrict Verde to no more than three (3) telemarketing calls to any prospective customer within a period of ninety (90) days and one in-person sales vendor per service territory at a time will help protect customers against the type of behavior alleged in the Complaint. I.D. at 35. As the OCA pointed out in its Comments, these restrictions are a step in the right direction, but they are not a significant step in correcting the issues with Verde's sales practices in Pennsylvania because they do not guarantee that "bad actors" will not be employed to conduct sales activities again. OCA Comments at 27-28. Given the lack of factual findings regarding Verde's third-party vendors responsible for the egregious behavior underlying the allegations in the Complaint, the sales restrictions do not ensure that such actors will not be conducting the limited telemarketing calls or the in-person sales in compliance with this provision. Id.

Similarly, the ALJ erred in finding that the provisions of the Settlement instructing Verde to form a Compliance Plan to be approved by I&E before it can resume marketing in Pennsylvania is sufficient to ensure that Verde is meeting the objective of avoiding the behavior alleged in the Complaint. I.D. at 40. As provided in the OCA's Comments, the Settlement provision is devoid of substance and leaves all of the compliance plan details to be determined by Verde after the

Settlement is approved without opportunity for parties to address the training materials if they are deficient. There is no oversight, there is no monitoring or accountability. OCA Comments at 30.

These provisions are simply insufficient standing alone, or in combination, to form a conclusion that the Settlement is in the public interest. The OCA submits the lack of factual record in this matter, combined with future promises of a compliance plan that is largely left to Verde's own discretion, cannot be a provision that lies in within the public interest. Without a full record in this proceeding to explain how Verde's previous compliance procedures failed, the ALJ erred in finding that the promise of a compliance plan, after the case has concluded, would resolve the issues underlying the Complaint and be in the public interest. I.D. at 40.

OCA Exception 8: <u>The Compliance Monitoring and Reporting Provisions for Telephonic Communications and Door-To-Door Sales Contacts Are Too Limited and Lack Proper Reconciliation Measures If A Violation Occurs</u>. (I.D. at 43 and 45; OCA Comments at 31-35)

The ALJ also improperly concluded that the Settlement's compliance monitoring and reporting provisions for telephonic communications and door-to-doors sales contacts with potential customers are in the public interest and supported by substantial evidence. I.D. at 43 and 45.

As provided by the OCA in its Comments, the sales monitoring provision of the Settlement does not provide assurance that that customer complaints filed directly with Verde are evaluated to determine red flags or evidence of non-compliance of a generic nature. OCA Comments at 33. Without the requisite facts in the record about Verde's previous handling of customer complaints, this provision amounts to nothing more than self-policing by an entity that allegedly engaged in significantly egregious violations of Pennsylvania law and policy. This is insufficient to form a basis for accepting a settlement. Additionally, the review of a limited sample of calls and lack of

recording of in person door-to-door sales contacts are insufficient to address the concerns raised in this Complaint. Id. Further, the ALJ erred in finding that the Settlement's method for handling "slamming" allegations by a customer are appropriate. I.D. at 43. As the OCA raised in its Comments, a customer alleging that an agent of Verde's switched them without their authorization should not have to wait through a dispute process to have their service returned to default service or their previous supplier. OCA Comments at 33. Once again, this provision is the result of a settlement crafted without the input of the state agency tasked with representing the interest of consumers. The Commission should reject the Settlement as the Compliance Monitoring provisions are insufficient to address the egregious allegations in the Complaint and, therefore, it is not in the public interest.

The ALJ also erred in finding that the reporting provisions of the Settlement are sufficient to track Verde's compliance and to monitor its compliance plan. I.D. at 45. In the OCA's Comments, the OCA explained that the reporting provisions only require that Verde report quarterly to I&E—and not the OCA or the Commission—the amount of calls reviewed, a description of the audits or investigations performed as well as the results thereof, and a summary of the number and type of customer complaints and disputes received by Verde, but not the actual audits or complaints themselves. OCA Comments at 34-35. The OCA expressed its concern that the Settlement provides no requirement for Verde to conduct random monitoring and reporting of door-to-door sales for any or all third-party contractors or that the Commission will have the ability to order or conduct such random audits. Id.

The Commission should reject the Settlement as the compliance monitoring and reporting provisions are not supported by substantial evidence and not in the public interest as they are insufficient to address the egregious allegations in the Complaint.

OCA Exception 9: The Policy Changes Provision is Vague and Lacks Sufficient Detail to Be Enforceable. (I.D. at 47; OCA Comments at 35)

The ALJ erroneously concluded that the policy changes provision of the Settlement, that allows Verde to change its policies related to marketing to Pennsylvania consumers for EGS products and services so long as it provides written notice to I&E, is reasonable despite its vagueness and lack of sufficient detail to be enforceable. I.D. at 47. As provided in the OCA's Comments, 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. OCA Comments at 35. The OCA submits that the Settlement should be rejected as the policy changes provision is too vague to be enforced to protect customers.

OCA Exception 10: The Settlement Fails to Address Perhaps the Most Alarming and Egregious Allegations: Spoofing PPL's Number and Unauthorized Customer Account Access. (I.D. at 50; OCA Comments at 35-36)

The ALJ erred in dismissing the concerns of the OCA that the Settlement does not address the allegations that Verde's agents spoofed PPL's number when making sales calls and illegally gained access to customers' online accounts. I.D. at 50. Specifically, the ALJ erred in his conclusion that the marketing and policy changes as well as the increased oversight provided for in the Settlement will address all of the concerns in the Complaint. Id. As provided in the OCA's Comments, the Settlement is void of any provisions specifically addressing these allegations of spoofing and unauthorized access. OCA Comments at 35-36. The OCA expressed its grave concern that the Settlement does not address these potentially criminal acts against customers nor does it include any provisions to specifically address Verde's plan to prevent such acts against

customers in the future. Id. This provision fails short of being in the public interest as it does not address very serious allegations in the Complaint.

OCA Exception 11: The ALJ Erred in Concluding that the Settlement is in the Public Interest. (I.D. at 53; OCA Comments at 1, 7, 36 and 39)

As noted throughout, the Settlement falls short of being in the public interest as it is not supported by substantial evidence and it does not represent the interests of the consumers impacted by Verde's mismanagement. While it is the Commission's policy to encourage settlements between the parties, 52 Pa. Code § 5.231, the terms and conditions of any settlement must nevertheless be in the public interest.[33] The Commission has defined the public interest as including ratepayers, shareholders, and the regulated community and it is determined by examining the effect of the proposed settlement on these entities.[34] As raised throughout the OCA's Comments and within these exceptions, the Settlement falls well short of being in the public interest as it lacks the necessary provisions to adequately compensate the affected customers, deter Verde from allowing similar allegations to occur again in the future, and to ensure that Verde has the proper management procedures in place to control and monitor its third-party vendors conducting sale in Pennsylvania. The OCA, therefore, respectfully requests that the Commission reject the proposed Settlement as it is not in the public interest.

OCA Exception 12: The ALJ Erred in Concluding that the Civil Penalty is Appropriate in Light of the Allegations. (I.D. at 53-73; OCA Comments at 18, 36-46)

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[33] Pa. PUC. v. York Water Co., Docket No. R-00049165 (Order entered Oct. 4, 2004); see also, Pa. PUC v. C.S. Water and Sewer Assocs., 74 Pa. P.U.C. 767 (1991); Pa. PUC v. PPL Utilities Corporation, Docket No. M-2009-2058182 (Order entered November 23, 2009); Pa. PUC v. Phila. Gas Works, Docket No. M-00031768 (Order entered January 7, 2004); Warner v. GTE North, Inc., Docket No. C-00902815 (Order entered April 1, 1996); 52 Pa. Code § 69.1201.

[34] Pa. PUC v. Bell Atlantic-Pennsylvania, Inc., Docket No. R-00953409 (Order entered September 29, 1995).

The ALJ erroneously concluded that the Civil Penalty provision in the Settlement is in the public interest and supported by substantial evidence. I.D. at 73. As an initial matter, the ALJ erred in evaluating the Rosi civil penalty factors using the incomplete set of facts set forth by Verde and I&E. As explained in more detail in OCA Exception 3, this Settlement in devoid of substantial evidence to arrive at a finding that it is in the public interest. Similarly, the Rosi civil penalty factors analysis cannot be performed without the requisite factual record needed to determine whether a civil penalty is in the public interest.

As provided in the OCA's Comments, the civil penalty in the Settlement of $1 million, plus the $75,000 contribution to PPL's hardship fund, is significantly lower than the penalty initially requested by I&E of $8.8 million which was based upon a fine of $1,000 per day per violation of the Commission's regulations. OCA Comments at 18; see also, Formal Complaint at ¶¶ 45-62 (Non-Proprietary). The basis of the conclusion that $1 million is appropriate is the incomplete record that was developed in this case. The imposition of a $1 million fine is not supported based on the seriousness of Verde's alleged conduct and its apparent disregard for the Commission rules and regulations. .

The OCA respectfully requests that the Settlement be rejected as the record in this matter lacks substantial evidence to determine whether the civil penalty provision meets the factors under Rosi.

IV. CONCLUSION

For the reasons set forth above and in the OCA's Comments, the OCA respectfully files these Exceptions to the Initial Decision of ALJ Pell. The OCA submits that the Commission should reject the non-unanimous Settlement as it is not in the public interest nor supported by substantial evidence in the record. The Commission should return the proceeding to the ALJ to initiate a second prehearing conference for this contested matter to proceed to litigation.

Respectfully submitted,

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