



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

February 22, 2022

Via Electronic Filing

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
I&E Reply Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Bureau of Investigation and Enforcement's ("I&E") **Reply to the Exceptions of the Office of Consumer Advocate** in the above-referenced matter.

Please note that Matthew Fallings is no longer with the Commission and can be removed from the service list.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

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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.	:	

**REPLY EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: February 22, 2022

TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY TO EXCEPTIONS..... 2

A. Reply Exception 1: The ALJ properly denied the OCA additional time to conduct discovery. 3

B. Reply Exception 2: The ALJ properly struck OCA’s “evidence” from the record. 5

C. Reply Exception 3: The ALJ correctly concluded that the Settlement is in the public interest and supported by substantial evidence. 7

D. Reply Exception 4: The ALJ correctly concluded that the OCA opted out of participating in settlement discussions. 9

E. Reply Exception 5: The refund provisions in the Settlement adequately address the allegations made against Verde. 10

F. Reply Exception 6: The length of the marketing moratorium is appropriate.. 11

G. Reply Exception 7: The ALJ correctly accepted the compliance, monitoring, and reporting commitments made by Verde..... 12

H. Reply Exception 8: The compliance monitoring and reporting provisions are not limited and do not lack proper reconciliation measures. 14

I. Reply Exception 9: The policy changes provision is not vague or lacking in detail. 15

J. Reply Exception 10: The Settlement does not fail to address the allegations of spoofing and unauthorized account access. 16

K. Reply Exception 11: The ALJ correctly concluded that the Settlement is in the public interest..... 16

L. Reply Exception 12: The ALJ properly concluded that the civil penalty amount is appropriate. 17

III. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

3D Trucking Co., Inc. v. Workers’ Compensation Appeal Board (Fine and Anthony Holdings International), 921 A.2d 1281, 1288 (Pa. Cmwlth. 2007)..... 3

ARIPPA v. Pa. PUC, 792 A.2d 636, 661 (Pa. Cmwlth. 2002) 6

Borough of E. McKeesport v. Special/Temporary Civil Service Comm’n, 942 A.2d 274, 281 (Pa. Cmwlth. 2008)..... 2

Duick v. Pennsylvania Gas and Water Company, 56 Pa.P.U.C. 553, 559 (1982) 5

Lyft, Inc. v. Pa. Pub. Util. Comm’n, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016)..... 2, 3

McCloskey v. Pa. Pub. Util. Comm’n, 127 A.3d 860, 867 n.16 (Pa. Cmwlth. 2015) 2

Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 128 (1980) 2

Pa Pub. Util. Comm’n v. Community Util. of Pa., Inc.,
Docket No. C-2021-3027252 at 14 (Order entered Jan. 13, 2022) 3, 7

Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission,
179 A. 850, 854 (Pa. Super. 1935) 5

Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order,
Docket No. P-2018-3000281 (Order entered May 3, 2018)..... 2

Popowsky v. Pa. Puc, 805 A.2d 637 (Pa. Cmwlth. 2002) 7, 8

Scott Paper Company v. Pennsylvania Public Utility Commission,
126 Pa. Commw. 111, 558 A.2d 914 (Pa. Cmwlth. 1989) 8

Scott Paper Company v. Pennsylvania Public Utility Commission,
558 A.2d 914 (Pa. Cmwlth. 1989)..... 8

Statutes

66 Pa.C.S. § 703..... 7, 8

Regulations

52 Pa. Code § 1.33 2

52 Pa. Code §§ 5.231-5.234..... 8

52 Pa. Code § 5.231(a) 3

52 Pa. Code § 5.232 3, 7

52 Pa. Code § 5.232(a) 9

52 Pa. Code § 5.232(c) 8

52 Pa. Code § 5.331 4

52 Pa. Code § 5.403(a). 5

52 Pa. Code § 5.48(a)..... 5

52 Pa. Code § 5.483(a) 4

52 Pa. Code § 5.75(c)..... 2

52 Pa. Code § 57.177 11

52 Pa. Code § 69.1201 17

I. INTRODUCTION

On October 26, 2021, the Pennsylvania Public Utility Commission (“Commission”) issued an Opinion and Order denying the Petition for Interlocutory Review and Answer to Material Question filed by the Office of Consumer Advocate (“OCA”) and answering the Material Question in the negative.¹ Additionally, the Opinion and Order adopted Administrative Law Judge (“ALJ”) Christopher Pell’s Interim Order granting Verde Energy USA, Inc.’s (“Verde”) Motion to Strike and returned the matter to ALJ Pell for further proceedings, as deemed necessary, on whether the Joint Petition for Approval of Settlement (“Joint Petition,” “Settlement Agreement,” or “Settlement”) should be approved as reasonable and necessary and in the public interest.²

On January 21, 2022, ALJ Pell issued an Initial Decision finding the Settlement Agreement to be reasonable and in the public interest, and approving the Settlement in its entirety, with one modification.³ The modification to the Settlement Agreement was to order Verde to notify the customers identified in the Complaint who alleged unauthorized enrollment of the potential refund of an early termination fee, and the steps required to secure the refund.⁴ On February 10, 2022, the OCA filed twelve (12) Exceptions to the Initial Decision. For the reasons fully explained below, the Bureau of Investigation and Enforcement (“I&E”) respectfully requests that the Commission deny the OCA’s Exceptions and adopt the Initial Decision of ALJ Pell in its entirety.

¹ Opinion and Order (adopted October 7, 2021, entered October 26, 2021)(hereinafter “Opinion and Order”).

² *See generally* Opinion and Order.

³ *See generally* Initial Decision (entered January 21, 2022)(hereinafter “Initial Decision”).

⁴ Initial Decision, pg. 29.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates the Joint Petition, the Stipulated Facts in Support of the Joint Petition for Approval of Settlement, Reply Comments, and Brief in Opposition to the OCA's Petition for Interlocutory Review that it filed in the instant proceeding on June 30, 2020, October 19, 2020, November 30, 2020, and February 5, 2021, respectively.

II. REPLY TO EXCEPTIONS

From the onset, as an intervenor, the OCA does not have the right or ability to force I&E and Verde to litigate a settled matter.⁵ While the OCA identified twelve (12) Exceptions in its filing, a common argument is contained throughout, specifically an argument relating to substantial evidence. Rather than addressing this common argument in each Exception as presented by the OCA, for efficiency, I&E presents its argument related to this topic here and will address the OCA's other arguments in each Reply below.

Contrary to the OCA's claims, ALJ Pell did not err in concluding that the Settlement is supported by substantial evidence. The substantial evidence standard requires that the Commission's "decision must be supported by substantial evidence, meaning more than a mere trace of evidence or suspicion of the existence of a fact sought to be established."⁶ The substantial evidence standard is not a measure of the size of the evidentiary record before the Commission when it issues an adjudication. Instead, the standard considers the record as it

⁵ See *Petition of the Bureau of Investigation and Enforcement of The Pennsylvania Public Utility Commission for the Issuance of an Ex Parte Emergency Order*, Docket No. P-2018-3000281 (Order entered May 3, 2018) (citing 52 Pa. Code § 5.75(c)("[a]n intervenor's role in proceedings before this Commission is on a non-party basis, meaning that the initiating and responding parties can drive the outcome without regard to the alleged interests of would-be intervenors.")).

⁶ *Lyft, Inc. v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016) (citing *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 128 (1980)); see also *McCloskey v. Pa. Pub. Util. Comm'n*, 127 A.3d 860, 867 n.16 (Pa. Cmwlth. 2015) ("Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion.") (citing *Borough of E. McKeesport v. Special/Temporary Civil Service Comm'n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008)).

stood before the factfinder at the time of the decision-making and looks to whether that record adequately supports the conclusions issued. In performing a substantial evidence analysis, the evidence must be viewed in the light most favorable to the party who prevailed before the factfinder, and draw all reasonable inferences from the evidence in support of the factfinder's decision in favor of the prevailing party.⁷

Importantly, whether those conclusions are the sole conclusions that could be reached based on the record evidence is immaterial.⁸ Where settlement is reached prior to the full litigation of a case and with limited discovery, the stipulated facts form the most useful basis for this determination.⁹ Substantial evidence does not require that there be a fully developed evidentiary record to evaluate the merits of settlement terms. To require further development of the evidentiary record would be to require litigation, which is contrary to the Commission's policy favoring settlement.¹⁰

A. Reply Exception 1: The ALJ properly denied the OCA additional time to conduct discovery.

The record is clear that the OCA filed its Notice of Intervention on February 24, 2020 and did nothing for three (3) months until May 20, 2020 when it requested confidential information from I&E, which I&E promptly provided on May 22, 2020. The OCA then served three (3) sets of discovery on Verde: Set I issued June 1, 2020 (16 interrogatories); Set II issued July 6, 2020 (9 interrogatories, some with subparts); and Set III issued August

⁷ *3D Trucking Co., Inc. v. Workers' Compensation Appeal Board (Fine and Anthony Holdings International)*, 921 A.2d 1281, 1288 (Pa. Cmwlth. 2007).

⁸ *Lyft, Inc. v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016) (“That the record may contain evidence that supports a different result than that reached by the PUC is irrelevant so long as the record contains substantial evidence supporting the PUC's decision.”).

⁹ *See* 52 Pa. Code § 5.232; *Pa. Pub. Util. Comm'n v. Community Util. of Pa., Inc.*, Docket No. C-2021-3027252 at 14 (Order entered Jan. 13, 2022) (accepting, upon review, the parties' stipulations of facts as “substantial evidence of record in support of the settlement.”).

¹⁰ *See* 52 Pa. Code § 5.231(a) (“It is the policy of the Commission to encourage settlements.”).

3, 2020 (16 interrogatories, some with subparts). The OCA was well aware of the issues presented in the Complaint¹¹ and had every right to conduct discovery after the Complaint was filed on January 30, 2020 (served on January 31, 2020) or after its notice was filed on February 24, 2020. Specifically, Section 5.331 of the Commission’s regulations state that discovery should be initiated as early as possible, and that the right to discovery commences when a complaint is filed.¹²

The OCA chose not to initiate discovery until the end of May, and its rationale for not commencing discovery until then is more related to legal strategy and is not a valid basis to later argue that it was “denied” the ability to conduct discovery.¹³ After starting discovery in May, the OCA then had an additional three (3) months to conduct discovery prior to the prehearing conference held on August 27, 2020. In denying the OCA’s request for the matter to be held in abeyance, ALJ Pell properly exercised his authority to not unreasonably delay the final disposition of the Joint Petition by imposing reasonable limitations on discovery.¹⁴ In total, the OCA had approximately six (6) months to conduct

¹¹ ALJ Pell’s September 25, 2020 Order Denying the Office of Consumer Advocate’s Request for Sixty Day Abeyance noted how much detail was contained in the Complaint, stating:

I&E went into considerable detail with its allegations in the Complaint, breaking it up into subsections including: misleading and deceptive telemarketing conduct; misleading and deceptive door-to-door sales conduct; slamming/unauthorized switch; releasing private customer information/unauthorized account access; and failure to maintain verification records. I&E also went into great detail regarding Verde’s alleged violations of Commission regulations. There was sufficient information contained within the Complaint, as well as from earlier discovery conducted by I&E, for the OCA to begin conducting its own discovery.

September 25, 2020 Order, pg. 7.

¹² 52 Pa. Code § 5.331.

¹³ *See generally* OCA Statement in Opposition of the Joint Petition, filed July 20, 2020 (“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”); OCA Prehearing Conference Memorandum, filed August 21, 2020 (“As no Answer had yet been filed to the Complaint, the OCA refrained from conducting its own discovery in this matter.”).

¹⁴ 52 Pa. Code § 5.483(a)(“The presiding officer will have the authority specified in the act, subject to this title. This authority includes, but is not limited to, the power to exclude irrelevant, immaterial or unduly repetitive evidence, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding.”)

discovery prior to the August 27, 2020 prehearing and its decision to wait until late May 2020 to initiate discovery should not be rewarded. Accordingly, ALJ Pell properly exercised his judicial authority to limit the OCA's discovery period and Exception 1 should be denied.

B. Reply Exception 2: The ALJ properly struck OCA's "evidence" from the record.

The OCA's Exception should be denied because exceptions are not the appropriate venue to reargue motions¹⁵ and the Commission has previously adopted ALJ Pell's Interim Order Granting the Motion to Strike on this issue.¹⁶ Specifically, ALJ Pell, as the presiding officer, has the distinct authority to define the scope of the proceeding and rule on any evidentiary matters.¹⁷ Under Section 5.48(a), the presiding officer will have the authority . . . "to exclude irrelevant, immaterial or unduly repetitive evidence, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding."¹⁸ Therefore, ALJ Pell properly found that

¹⁵ While the instant pleading is filed as exceptions, this particular issue was previously addressed by the Commission and should be reviewed under the same standard as a petition for reconsideration. The standard found in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa.P.U.C. 553, 559 (1982) requires that a reconsideration petition identify "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission," not "a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them." *Duick v. Pennsylvania Gas and Water Company*, 56 Pa.P.U.C. 553, 559 (1982) (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)). I&E further notes that any petition for reconsideration of the October 26, 2021 Opinion and Order would be untimely.

¹⁶ Opinion and Order.

¹⁷ "The presiding officer shall have all necessary authority to control the receipt of evidence, including the following:

- (1) Ruling on the admissibility of evidence.
- (2) Confining the evidence to the issues in the proceeding and impose, where appropriate:
 - (i) Limitations on the number of witnesses to be heard.
 - (ii) Limitations of time and scope for direct and cross examinations.
 - (iii) Limitations on the production of further evidence.
 - (iv) Other necessary limitations."

52 Pa. Code § 5.403(a).

¹⁸ 52 Pa. Code § 5.48(a) ("The presiding officer will have the authority specified in the act, subject to this title. This authority includes, but is not limited to, the power to exclude irrelevant, immaterial or unduly repetitive evidence, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding."); 52 Pa. Code § 5.403(a).

the inclusion of the OCA's "evidence," which contained unverified discovery and an affidavit that was not subject to cross examination or objections, should be stricken from the record.

The OCA, as intervenor, must take the case at the procedural posture it finds it in, and cannot drive the outcome of the case. The OCA's attempts to continue to litigate this settled matter should not be misconstrued as a deprivation of due process when the OCA intervened, failed to participate in settlement negotiations after being extended an invitation, had six months to conduct discovery, and was allowed to provide substantive comments on the Settlement Agreement.

Moreover, this issue was brought before the Commission through the OCA's Petition for Interlocutory Review and Answer to Material Question.¹⁹ By Opinion and Order entered October 26, 2021, the Commission denied the OCA's Petition, answered the Material Question in the negative, and adopted ALJ Pell's Interim Order Granting the Motion to Strike of Verde.²⁰ The Commission agreed that the OCA improperly attempted to use its role as an intervenor to introduce additional factual materials in its comments, and that it would be improper for the ALJ to rely on those materials as explained in the Interim Order.²¹ The Commission also concluded that the OCA's due process rights were protected by the opportunity to file comments.²²

In the Initial Decision, ALJ Pell agreed with I&E and Verde that the Settlement terms will appropriately address all of the concerns raised in the Compliant due to the marketing

¹⁹ Opinion and Order.

²⁰ Opinion and Order, Ordering Paragraphs 1 and 2.

²¹ Opinion and Order, pg. 19.

²² Opinion and Order, pg. 19 (*citing ARIPPA v. Pa. PUC*, 792 A.2d 636, 661 (Pa. Cmwlth. 2002)).

and policy changes in addition to the increase in oversight.²³ ALJ Pell further noted that the OCA could have raised its concerns with I&E and Verde but continually declined to participate in the settlement discussions.²⁴

Contrary to the OCA's argument, the OCA was provided with the opportunity to contest the Settlement and put forth its position on the Settlement terms through its comments. ALJ Pell weighed the OCA's comments and arguments when reviewing the Settlement and specifically disagreed with the OCA on their arguments. Accordingly, the OCA's Exception 2 should be denied.

C. Reply Exception 3: The ALJ correctly concluded that the Settlement is in the public interest and supported by substantial evidence.

Exception 3 should be denied because ALJ Pell properly determined that the Settlement is in the public interest, a conclusion that was based upon substantial evidence. As stated above, the substantial evidence standard requires the record to contain sufficient information for the Commission to thoroughly consider the terms of a proposed settlement. Where settlement is reached prior to the full litigation of a case and with limited discovery, the stipulated facts form the most useful basis for this determination.²⁵

Contrary to the OCA's argument, *Popowsky* related to Section 703(g) which specifically provides for notice and an opportunity to be heard if a rescission or amendment of a Commission order is to be made.²⁶ The circumstances of a 703(g) situation are dramatically different than the situation in this matter as the Joint Petition is not requesting a

²³ Initial Decision, pg. 50.

²⁴ Initial Decision, pg. 51.

²⁵ See 52 Pa. Code § 5.232; *Pa. Pub. Util. Comm'n v. Community Util. of Pa., Inc.*, Docket No. C-2021-3027252 at 14 (Order entered Jan. 13, 2022) (accepting, upon review, the parties' stipulations of facts as "substantial evidence of record in support of the settlement.").

²⁶ *Popowsky v. Pa. Puc*, 805 A.2d 637 (Pa. Cmwlth. 2002).

recession or amendment of a prior order. Notably, the Commonwealth Court compared the *Popowsky* matter to a similar matter, *Scott Paper Company v. Pennsylvania Public Utility Commission*, 558 A.2d 914 (Pa. Cmwlth. 1989),²⁷ and stated that “[o]n appeal, acknowledging that the Commission may rescind any order it made pursuant to Section 703(g) of the Public Utility Code, we noted that it may only do so after providing notice and opportunity to be heard to interested parties.”²⁸ The Commonwealth Court did not provide a blanket extension of the requirement of notice and an opportunity to be heard in every situation, but rather limited its holding to Section 703,²⁹ which is the section that provides procedures on hearings, not on settlements. Rather, the regulations related to settlements is found in Sections 5.231-5.234 of the Commission’s regulations.³⁰ Of importance, Section 5.232 only allows parties “the opportunity to comment on the proposed settlement.”³¹ Section 5.232 also states that stipulations of fact can be agreed upon by all or some of the

²⁷ In explaining the similarities to the *Popowsky* matter, the Commonwealth Court stated:

In *Scott Paper Company v. Pennsylvania Public Utility Commission*, 126 Pa. Commw. 111, 558 A.2d 914 (Pa. Cmwlth. 1989), we addressed an almost-identical situation to that found in this case and held that merely allowing for “notice and comment” did not satisfy Section 703 hearing requirements or due process. In that case, Philadelphia Electric Company (PECO) filed a tariff supplement to its existing electric tariff containing proposed rates, terms and conditions of electric service to be provided to self-generating customers on December 30, 1985. In response, Scott Paper Company (Scott) filed a complaint against the proposed tariff. Following evidentiary hearings, the ALJ found that the rates and terms presented as part of a stipulation agreement signed by a number of complainants represented the best resolution of the issues and recommended the Commission direct PECO to file tariff supplements in accordance with his recommended decision. On October 9, 1986, the Commission entered an opinion and order adopting that decision with certain noted modifications not involving the firm back-up power limitation.

On November 7, 1986, PECO filed a new proposed tariff supplement changing the tariff that the Commission had just approved. Scott filed objections to PECO’s compliance filing, contending that it did not comply with the Commission’s prior order. Nonetheless, as here, the Commission entered an order on August 13, 1987, allowing PECO to amend its tariff. Contending that the Commission improperly amended its previous order without affording appropriate notice and a meaningful opportunity to be heard, Scott appealed to this Court.

Popowsky v. Pa. Puc, 805 A.2d 637, 643 (Pa. Cmwlth. 2002).

²⁸ *Popowsky v. Pa. Puc*, 805 A.2d 637, 643 (Pa. Cmwlth. 2002).

²⁹ 66 Pa.C.S. § 703 (fixing of hearings).

³⁰ 52 Pa. Code §§ 5.231-5.234.

³¹ 52 Pa. Code § 5.232(c).

parties, thus I&E and Verde were not required to consult with the OCA prior to drafting and submitting the Joint Stipulation of Facts.³²

Moreover, ALJ Pell devoted approximately 27 pages of the Initial Decision to detailing the different provisions of the Joint Settlement and to an analysis and discussion of the opposing position of the OCA before spending approximately 3 pages discussing the public interest component of the settlement.³³ To argue that the OCA was denied due process or left without the ability to pursue its opposition to the Settlement is in direct contrast to the thorough analysis provided in the Initial Decision. Instead, the OCA has exercised its ability to contest the Settlement and put forth its arguments at every possible step, i.e., a Statement in Opposition of the Joint Petition, a Prehearing Conference Memorandum, Comments in Opposition of the Joint Petition, an Answer to Verde's Motion to Strike, a Petition for Interlocutory Review and Answer of Material Question, a Brief in Support of Petition, and now its Exceptions to the Initial Decision. Moreover, the Initial Decision specifically addressed all of the OCA's comments and arguments before concluding that the Settlement was in the public interest and should be approved. Accordingly, ALJ Pell correctly concluded that the Settlement is in the public interest and supported by substantial evidence.

D. Reply Exception 4: The ALJ correctly concluded that the OCA opted out of participating in settlement discussions.

ALJ Pell correctly concluded that the OCA opted out of participating in settlement discussions and Exception 4 should be denied. The OCA admitted to its decision not to participate in its Statement in Opposition of the Joint Petition: "While Verde's Counsel urged

³² 52 Pa. Code § 5.232(a).

³³ Initial Decision, pgs. 24-51, 51-53.

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"³⁴ Moreover, in reviewing the transcript, I&E and Verde state that they reached out to the OCA on multiple occasions to review and provide feedback on the Settlement, but that the OCA refused to review or comment.³⁵ The OCA does not deny these attempts by I&E and Verde to receive their comments nor deny I&E and Verde's statements that the OCA continued to refuse to review the draft settlement.³⁶ Notably, after being presented with the draft settlement and receiving discovery responses to three (3) sets of interrogatories, the OCA still refused to review and provide comments on the settlement and instead reiterated its opposition.³⁷ Accordingly, Exception 4 should be denied because the record clearly establishes that the OCA refused to participate in settlement discussions or to review the Settlement prior to filing.

E. Reply Exception 5: The refund provisions in the Settlement adequately address the allegations made against Verde.

In the Initial Decision, ALJ Pell correctly noted that the Complaint and the Settlement are limited to the specific allegations and persons identified by I&E.³⁸ It would be impossible, if not impracticable, to attempt to include customers outside the scope of the Complaint, who are free to bring their own complaint against Verde if a dispute existed.³⁹ ALJ Pell also acknowledged the practical difficulties of providing a refund to those customers who were assessed and paid an early termination fee ("ETF") and reasoned that

³⁴ OCA Statement in Opposition of the Joint Petition, filed July 20, 2020 ("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").

³⁵ N.T. pgs. 12, 16, and 27-28.

³⁶ *See generally* N.T.

³⁷ N.T. pg. 10, lns. 12-20.

³⁸ Initial Decision, pg. 28.

³⁹ Initial Decision, pg. 28.

requiring proof of payment will demonstrate that the customer did in fact incur the ETF, when the ETF was paid, the amount of the ETF, and whether the refund is warranted under the terms of the settlement.⁴⁰

Additionally, ALJ Pell correctly noted that the Settlement puts the burden on Verde to make the refunds to the identified customers, and thus notice to the customer is not required.⁴¹ However, ALJ Pell did modify the Settlement to require Verde to notify the customers identified in the Complaint of the potential refund and the steps to secure the refund.⁴² Neither I&E nor Verde filed Exceptions or objected to the modification provided by ALJ Pell.

Lastly, the 2-month billing cycle refund is consistent with the provisions of 52 Pa. Code § 57.177 and the release of claims provision in the Settlement provides finality on the alleged violations and complaints made.⁴³ Thus, the refund provisions in the Settlement are adequate and fully address the behavior alleged in the Complaint, and Exception 5 should be denied.

F. Reply Exception 6: The length of the marketing moratorium is appropriate.

Exception 6 should be denied because the moratorium is appropriate. The Settlement provided for a telemarketing and in-person moratorium from February 6, 2020, which Verde voluntarily imposed the moratorium on itself after the Complaint was filed, to May 31, 2021. However, practically speaking, the moratorium has continued during the pendency of this matter, so while the Settlement provided for a 15-month moratorium, it is now February 22,

⁴⁰ Initial Decision, pg. 28.

⁴¹ Initial Decision, pgs. 28-29.

⁴² Initial Decision, pg. 29.

⁴³ Initial Decision, pg. 29.

2022 and the marketing moratorium is still in effect. Verde has not resumed telemarketing or in-person marketing for a period of two (2) years, and will not be able to return to the market until the quality assurance measures discussed in the Settlement have been fully implemented. Moreover, online enrollments and customers who requested contact from Verde for information were not the subject of the Complaint nor an issue identified by I&E. The marketing moratorium, when placed in context with the full contents of the Settlement and the changes in leadership at Verde, is more than appropriate, and Exception 6 should be denied.

G. Reply Exception 7: The ALJ correctly accepted the compliance, monitoring, and reporting commitments made by Verde.

The modification to business practices and Compliance Plan consisted of over eight (8) pages of provisions which Verde has agreed to implement to address all the allegations raised in the Complaint.⁴⁴ ALJ Pell noted that the Compliance Plan provides for a number of safeguards to be put in place to avoid the alleged conduct in the Complaint, including

⁴⁴ Specifically, the settlement terms provide details on:

- (1) Verde's marketing moratorium;
- (2) Specific limitation on sales activities;
- (3) Limitations on the number of vendors Verde may use for in-person marketing;
- (4) A commitment to follow all Pennsylvania laws, including the Public Utility Code, the Consumer Protection Law, the Telemarketer Registration Act, and all Commission regulations, orders, and policies;
- (5) A commitment to complete internal reviews of all third-party vendors to ensure compliance;
- (6) Implementation of a new third-party verification platform which will include an internal audit system and bilingual individuals;
- (7) The creation and implementation of a new detailed sales training and sales quality assurance program;
- (8) A review all physical and paper marketing tools;
- (9) The issuance of a uniform to all door-to-door salespersons and other in-person marketers;
- (10) The creation and implementation of a compliance program for door-to-door salespersons and other in-person marketers;
- (11) The implementation an internal call system to ensure that all service calls, solicitations, and marketing are transmitted through a phone number bearing Verde's name on the Caller-ID;
- (12) Verde's increased internal quality control efforts for sales calls in addition to a limitation on solicitations, recording each sales call, and completing an internal audit of the calls; and
- (13) Verde's ongoing reporting requirements to ensure compliance.

training measures and requirements for the sales and customer service representatives, and for the third-party sales agents, to ensure compliance with the Commission’s regulations.⁴⁵ Moreover, ALJ Pell noted that Verde is required to meet with I&E and Commission staff to review and discuss the training and quality assurance program to make sure that the objectives and intent of the program are being met, which includes a two (2) year timeframe for I&E and Commission staff to review and provide input.⁴⁶ After viewing the entirety of the Compliance Plan, ALJ Pell found that the provisions were reasonable and that no modifications were necessary.⁴⁷

The OCA attempts to argue that the Settlement should be rejected because “[t]he ALJ based his decision on the promise to do better by Verde”⁴⁸ In making this argument, the OCA fails to realize that the main objective of a settlement is for the accused party to agree to terms and make promises that it will correct, stop, or prevent a certain behavior(s). If the Commission were to accept the OCA’s argument, then no settlement would ever be approved since settlements are promises by the one party “to do better.” The OCA then continues to make another meritless, baseless argument when it stated that the Settlement does “not guarantee that ‘bad actors’ will not be employed to conduct sales activities again.”⁴⁹ The Settlement provides multiple provisions on Verde’s regulation and responsibility over third-party vendors,⁵⁰ and common sense would dictate that Verde, after conducting its own

⁴⁵ Initial Decision, pg. 40.

⁴⁶ Initial Decision, pg. 40.

⁴⁷ Initial Decision, pg. 40.

⁴⁸ OCA Exceptions, pg. 27.

⁴⁹ OCA Exceptions, pg. 27.

⁵⁰ Joint Petition, pgs. 8, 11, and 13.

investigation into the Complaint, would not retain or re-hire those third-party vendors who may have been responsible for the bad conduct alleged in the Complaint.

Thus, the settlement terms more than adequately explain the business modifications and compliance plans that Verde will implement upon the approval of the settlement, and ALJ's reasoned decision correctly finds the Compliance Plan to be reasonable and in the public interest.

H. Reply Exception 8: The compliance monitoring and reporting provisions are not limited and do not lack proper reconciliation measures.

The OCA's Exception 8 arguments are speculative and again show the OCA's misunderstanding of the Settlement and the purpose of a settlement. The OCA attempts to argue that the Settlement is deficient because the provisions amount "to nothing more than self-policing by an entity that allegedly engaged in significantly egregious violations of Pennsylvania law and policy."⁵¹ In making this statement, the OCA almost suggests that the Commission should be tasked with micro-managing any entity which allegedly violated the Public Utility Code. As I&E and Verde have argued throughout this matter, the Commission is not in the business of micro-managing utilities and the Settlement provides oversight by I&E prior to Verde's return to marketing and for a period of 2 years after the resumption of marketing.⁵²

ALJ Pell agreed that I&E and Verde drafted sufficient reporting requirements that will allow I&E to track Verde's compliance with the Settlement terms and monitor the effectiveness of the Compliance Plan.⁵³ Moreover, ALJ Pell made a point to state, that I&E,

⁵¹ OCA Exceptions, pg. 28.

⁵² Joint Petition, pgs. 12-17.

⁵³ Initial Decision, pg. 45.

as the prosecutory bureau of the Commission, is “well suited to take additional action should Verde fail to comply with any of the requirements outlined in the Settlement.”⁵⁴

Moreover, ALJ Pell noted that the OCA opted not to participate in any settlement discussions with I&E and Verde, and thus the Settlement was drafted without the inclusion of the OCA in the Settlement terms.⁵⁵ ALJ Pell reasoned that the lack of inclusion of the OCA is not a defect in the Settlement.⁵⁶ Thus, Exception 8 should be denied.

I. Reply Exception 9: The policy changes provision is not vague or lacking in detail.

The OCA’s Exception 9 should be denied because the policy provision is not vague or lacking in detail. Rather, the policy provision states:

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.⁵⁷

Thus, Verde will provide **written** notice of **any** change related to **marketing** for a period of **two (2) years**, unless extended at the discretion of I&E. The provision is specific and provides enough detail for Verde to understand its obligations and for I&E to enforce the provision. ALJ Pell agreed and stated that the provision is appropriately specific, since any change must be reported to I&E, and that any ambiguity or misunderstanding can be resolved by I&E and Verde.⁵⁸ Accordingly, Exception 9 should be denied.

⁵⁴ Initial Decision, pg. 45.

⁵⁵ Initial Decision, pg. 45.

⁵⁶ Initial Decision, pg. 45.

⁵⁷ Joint Petition, pg. 17.

⁵⁸ Initial Decision, pg. 47.

J. Reply Exception 10: The Settlement does not fail to address the allegations of spoofing and unauthorized account access.

While the Settlement may not specifically mention spoofing or unauthorized account access, the remedial measures and requirements contained in the Compliance Plan more than adequately address these allegations.⁵⁹ Specifically, the Settlement requires Verde to 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.⁶⁰ In disposing of the OCA's comments related to this, ALJ Pell reasoned that the marketing and policy changes as well as the increased oversight of Verde as provided in the Settlement will address the allegations of spoofing and/or unauthorized account access.⁶¹

K. Reply Exception 11: The ALJ correctly concluded that the Settlement is in the public interest.

Without unnecessarily reiterating the arguments and statements made in I&E's Statement in Support, I&E emphasizes that the Settlement is in the public interest for the following reasons:

- (1) refunds for customers who alleged slamming⁶²
- (2) refunds for customers who alleged payment of an ETF from the alleged slamming⁶³
- (3) new third-party verification platform⁶⁴
- (4) increased I&E oversight⁶⁵
- (5) new training provisions⁶⁶

⁵⁹ Joint Petition, pgs. 12-15.

⁶⁰ Joint Petition, pg. 12.

⁶¹ Initial Decision, pg. 50.

⁶² Joint Petition, pgs. 5-6.

⁶³ Joint Petition, pgs. 5-6.

⁶⁴ Joint Petition, pgs. 8-9.

⁶⁵ Joint Petition, pg. 15.

⁶⁶ Joint Petition, pgs. 9-12.

- (6) moratorium on telemarketing and in-person marketing until quality assurance measures are approved by I&E⁶⁷
- (7) significant changes to Verde's executive leadership⁶⁸
- (8) payment of \$75,000.00 to PPL's hardship fund⁶⁹
- (9) payment of \$1,000,000.00 civil penalty⁷⁰

All of these provisions were crafted with the public interest in mind, to deter future bad conduct, and to provide corrective measures for Verde to implement to ensure customers are not harmed by this conduct in the future. The Settlement constitutes a reasonable, fair compromise of the issues presented in the Complaint and is therefore in the public interest. ALJ Pell agreed with I&E and Verde, emphasizing that the Settlement provides refunds for those customers allegedly harmed by the conduct described in the Complaint and also imposes a civil penalty to deter future bad conduct.⁷¹ ALJ Pell further noted that the Settlement is in the public interest because accepting the Settlement will avoid substantial time and expense in litigating the proceeding, which serves the interest of I&E, Verde's customers, and the general public.⁷² Thus, Exception 11 should be denied because the Settlement is clearly in the public interest.

L. Reply Exception 12: The ALJ properly concluded that the civil penalty amount is appropriate.

In assessing the civil penalty amount, ALJ Pell properly set forth the standards found in Section 69.1201⁷³ of the Commission's regulations and provided detailed analysis of each

⁶⁷ Joint Petition, pgs. 6-7.

⁶⁸ Verde Reply Comments, pgs. 10-11, Section E (filed November 30, 2020).

⁶⁹ Joint Petition, pg. 5.

⁷⁰ Joint Petition, pg. 5.

⁷¹ Initial Decision, pg. 53.

⁷² Initial Decision, pg. 53.

⁷³ 52 Pa. Code § 69.1201.

standard over approximately 19 pages to find that the civil penalty amount and hardship contribution sufficiently addressed the conduct alleged in the Complaint.⁷⁴ In his analysis, ALJ Pell acknowledged the serious nature of the allegations made in the Complaint, the lack of any personal injury or property damage, the efforts made by Verde to change its practice and procedure after the filing of the Complaint and in the Settlement terms, the number of customers affected by the alleged bad conduct, the various arguments related to the civil penalty amount needed to deter future bad conduct, and a comparison of prior Commission decisions.⁷⁵ After reviewing and addressing each factor, ALJ Pell properly found that the Settlement and all its terms were reasonable and in the public interest.⁷⁶ ALJ Pell further noted that the Settlement will provide Verde's former and current customers with immediate relief that might not be possible if the matter had been fully litigated and that the Settlement avoids the time and expense of litigation. Therefore, Exception 12 should be denied.

⁷⁴ Initial Decision, pgs. 56-75.

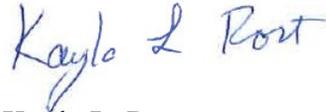
⁷⁵ Initial Decision, pgs. 56-75.

⁷⁶ Initial Decision, pg. 75.

III. CONCLUSION

Wherefore, for the above listed reasons, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny the Office of Consumer Advocate's Exceptions and adopt ALJ Pell's Initial Decision.

Respectfully submitted,



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Dated: February 22, 2022

**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.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Reply to the Exceptions of the Office of Consumer Advocate** dated February 22, 2022, upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Service by Electronic Mail Only¹

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¹ See *Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered September 15, 2021) (permitting electronic service by Commission staff on parties).