Stevens & Lee
17 N. Second Street, 16th Floor
Harrisburg, PA 17101
(717) 234-1090
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: michael.gruin@stevenslee.com
Direct Fax: (610) 988-0852

February 22, 2022

VIA ELECTRONIC FILING
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

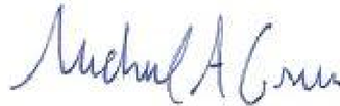
Dear Secretary Chiavetta:

Enclosed for filing on behalf of Verde Energy USA Inc. is its Reply to the Exceptions of the Office of Consumer Advocate in the above-referenced matter. Copies have been served in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Very truly yours,

STEVENS & LEE



Michael A. Gruin

Encl.
cc: Certificate of Service
Office of Special Assistants

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY OF VERDE ENERGY USA, INC.
TO THE EXCEPTIONS OF THE OFFICE OF CONSUMER ADVOCATE

Pursuant to 52 Pa. Code § 5.302, Verde Energy USA, Inc. ("Verde") hereby files this Reply to the Exceptions filed by the Office of Consumer Advocate ("OCA"), to the January 21, 2022 Initial Decision ("I.D.") issued by Deputy Chief Administrative Law Judge Christopher Pell ("ALJ Pell") in the above-captioned matter. For the reasons set forth below, the Pennsylvania Public Utility Commission ("Commission") should deny OCA's Exceptions, adopt the I.D. without modification, and approve the Settlement between Verde and the Bureau of Investigation & Enforcement ("I&E") without further unnecessary delay.

I. INTRODUCTION AND SUMMARY OF REPLY TO EXCEPTIONS

The I.D. in this matter was issued on January 21, 2022. The I.D. recommends the approval by the Commission, without modification, of a Joint Petition for Settlement ("Settlement Petition") filed by Verde and I&E to fully resolve all of the allegations of the Formal Complaint filed by I&E against Verde. The Settlement Petition addresses each of the finite allegations contained in I&E's Formal Complaint, provides for a significant civil penalty, provides refunds to those customers who were identified as being impacted by the conduct alleged in the Formal Complaint, provides a significant contribution to PPL's hardship fund to assist customers with the payment of their electricity bills, establishes a lengthy prohibition on

Verde's marketing in Pennsylvania, includes a requirement to implement a detailed compliance plan before the resumption of marketing, and places ongoing monitoring and reporting requirements on Verde. The Joint Petition was accompanied by a Joint Stipulation of Facts, and Statements in Support of the Settlement from Verde and I&E.

On February 10, 2021, OCA filed twelve Exceptions to the I.D. The filing of Exceptions represents a continuation of the OCA's attempt to prevent the settlement of a Formal Complaint and to force protracted and expanded litigation to address issues that go far beyond the scope of the Formal Complaint. OCA's formal position in this matter is that the Formal Complaint should be fully litigated even though both the Complainant and Respondent have already reached a full settlement that resolves all of the allegations of the Formal Complaint. *See* OCA's Statement in Opposition to Joint Petition for Approval of Non-Unanimous Settlement, and the OCA's Prehearing Memorandum.

For the reasons set forth below, each of the OCA's Exceptions should be denied, and the Initial Decision approving the Settlement Petition should be upheld and adopted in its entirety. Most, if not all, of the OCA's objections to the approval of the Settlement Petition have already been expressly rejected by the Commission and/or ALJ Pell, and the OCA's Exceptions do not provide any valid basis for rejecting the ID and continuing to unnecessarily delay the approval and implementation of the Settlement Petition. The OCA's Exceptions fail to point to any evidence or legal authority to rebut the ALJ's careful and well-reasoned findings that approval of the Settlement Petition is in the public interest under the Commission's standards for evaluating settlements.

II. REPLY TO OCA INTRODUCTION AND PROCEDURAL HISTORY

While not styled as an Exception, the OCA's Introduction and Procedural History continue to allege that its due process rights were violated, even though the Commission already

addressed and rejected those exact concerns when it denied OCA's Petition for Interlocutory Review and Answer to a Material Question earlier in this proceeding. The fact is that OCA was in no way denied any opportunity to be heard regarding its objections to the Settlement Petition. OCA was given the opportunity to serve three sets of discovery requests after the Settlement Petition was filed, the OCA filed a detailed letter outlining its opposition to the Settlement, the OCA advocated its position at a Pre-hearing Conference, and the OCA submitted written comments explaining its position on the Settlement Petition. OCA's true position is not that is was denied an opportunity to be heard. Rather, the OCA's true position, as it has stated explicitly, is that OCA should be permitted to force a Complainant and a Respondent to litigate a case that they had already fully settled, so that the OCA can attempt to create a different record from the one that formed the basis for the Settlement Petition. The Commission correctly rejected this position in its October 26, 2021 Order which denied OCA's Petition for Interlocutory Review and Answer to a Material Question. OCA's Exceptions provide no basis for revisiting or reversing that decision now.

III. REPLIES TO EXCEPTIONS

A. Reply to OCA Exception No. 1: <u>The ALJ Did Not Err in Denying OCA's Request for Additional Time to Conduct Discovery, and the OCA Did Not Seek Interlocutory Review of ALJ Pell's Denial</u>.

In its Prehearing Memorandum filed on August 21, 2020, OCA requested that this matter be held in abeyance for an additional 60 days to allow the OCA to obtain more discovery in order to evaluate the settlement. At the time OCA made that request, it already had access to all of the information related to the Formal Complaint that I&E had, and had received responses to two additional sets of discovery requests from Verde.[1] ALJ Pell correctly rejected OCA's

[1] See *September 25 2020 Order Denying OCA's Request for Sixty Day Abeyance*, at pp. 4-5 ("The OCA received the confidential responses to I&E data requests on May 22, 2020 and began its review and drafting of additional discovery…...The OCA then served Set I Interrogatories on June 1, 2020 and Set II on July 6, 2020.")

request by Order issued on September 25, 2020 ("*September 25 Order*"), noting that OCA could have commenced discovery upon the filing of its Notice of Intervention on February 24, 2020, and that OCA did in fact have access to all of the information that I&E had, and had already begun drafting its own discovery before it learned of a potential settlement.[2] ALJ Pell correctly noted that the OCA had three additional months after Verde provided it with a copy of the draft settlement (May 27th) to conduct discovery prior to the scheduled prehearing conference (August 27th), and in total, by the date of the prehearing conference, the OCA already had six months to conduct discovery into this matter.[3] For these reasons, ALJ Pell correctly concluded that "OCA clearly had sufficient time to conduct discovery into this matter and to evaluate the terms of the Settlement."[4] It is simply not the case that OCA was prevented in any way from conducting discovery in this proceeding, and neither Verde nor I&E delayed OCA's access to discovery materials as OCA incorrectly alleges on page 11 of its Exceptions.

Pursuant to the Commission's regulation at 52 Pa. Code § 5.483 ("*Authority of presiding officer*"), the presiding ALJ has the express 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."[5] In denying the OCA's request to further delay the consideration of the Settlement Petition, ALJ Pell was acting squarely within his powers, and provided numerous well-reasoned explanations for his denial of OCA's request. To the extent that OCA felt that ALJ's ruling was in error, OCA could have exercised its rights to seek Interlocutory Review of the *September 25 Order* pursuant

[2] See *September 25 Order,* at p. 7
[3] Id, at pp. 7-8
[4] Id, at p. 8
[5] 52 Pa. Code. § 5.483 *See also* sections 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in non-rate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223 (pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223.

to 52 Pa. Code § 5.483, yet the OCA did not do so. The Commission therefore should not entertain OCA's attempt to overturn ALJ' Pell's procedural ruling more than a year after it was issued.

B. Reply to OCA Exception No. 2: <u>The Commission has Already Conclusively Ruled that the ALJ Did Not Err in Striking OCA's Improper Comments on the Settlement Petition.</u>

The OCA's Exception No. 2 is a clear attempt to improperly re-litigate the OCA's Petition for Interlocutory Review and Answer to a Material Question, which the Commission denied by Order entered on October 26, 2021 ("*Material Question Order*").

The specific Material Question that the OCA submitted to the Commission was:

> 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?"

The OCA's Exception No. 2 makes the identical arguments on this point that the Commission has already explicitly rejected in the *Material Question Order.* ALJ Pell correctly determined that the extraneous affidavit and portions of the Comments submitted by the OCA in opposition to the Petition for Settlement went beyond the scope of this proceeding, were improperly prejudicial, and should be stricken. The record in this case reflects that the OCA was provided with a meaningful opportunity to be heard regarding the Petition for Settlement, and the striking of its attempted expansion of the record in the case and reference to material not in the record was the proper decision. In its *Material Question Order*, the Commission thoroughly reviewed all parties' positions and correctly held that it would be improper to rely on the additional materials included in the OCA's comments, which were entirely comprised of unauthenticated, inadmissible, third-party hearsay. The Commission also conclusively ruled that the OCA does not have the ability to require I&E and Verde to litigate this matter or to attempt to expand the

scope of the proceeding beyond the allegations in the Formal Complaint. The Commission noted that I&E and Verde acted properly by engaging in settlement discussions and ultimately settling the Complaint, and that I&E and Verde asked for the OCA's input prior to filing the Settlement, but the OCA declined this request. The Commission has already definitively concluded that "OCA then improperly attempted to use its role as an intervenor to introduce additional factual materials in its substantive comments. For these reasons, the Motion to Strike was properly granted by the ALJ…"[6] The Commission also noted its agreement that the proceeding should not be unnecessarily delayed.[7] By filing Exceptions on an issue that the Commission has previously resolved in the Material Question Order, the OCA is sadly continuing its attempt to unnecessarily delay the resolution of this proceeding and the implementation of a Settlement that will result in substantial refunds to customers and other outcomes that are in the public benefit.

C. Reply to OCA Exception No. 3: The ALJ Did Not Err in Concluding That the Settlement is in the Public Interest and Supported by Substantial Evidence

OCA Exception No. 3 argues that the Settlement was not in the public interest and not supported by substantial evidence. In doing so, OCA argues that ALJ Pell relied only on the Joint Stipulation of Facts as the evidentiary basis for recommending approval of the Settlement.[8] This is not correct. In reviewing the Settlement Petition, ALJ Pell carefully and thoroughly considered not only the Stipulation, but also the Formal Complaint, Verde's Answer to the Formal Complaint, Verde's Statement in Support of Settlement, I&E's Statement in Support of Settlement, and OCA's Comments. ALJ then considered all of the Parties' positions on whether or not the Settlement was in the public interest and held that the Settlement:

[6] *Material Question Order*, at p. 20.
[7] Id.
[8] See OCA Exceptions, at p. 16

> "…will adequately address the allegations made by I&E in the formal Complaint against Verde and are therefore in the public interest. The Settlement provides for a civil penalty (addressed below) as well as refunds to customers who were allegedly harmed by the conduct described in the Complaint. Additionally, the Settlement requires Verde to implement changes to its marketing and training practices which should, as noted by I&E, provide a corrective measure to those who were allegedly harmed by the conduct described in the Complaint, and make sure that customers are not harmed by this type of conduct going forward.
>
> Moreover, approving and adopting the Joint Petition for Approval of Settlement is in the public interest because accepting the Settlement will avoid the substantial time and expense involved in litigating the proceeding. Accepting the Settlement will negate the need to examine or cross-examine witnesses, prepare main briefs, reply briefs, exceptions and reply exceptions and possibly file appeals. Avoiding these expenses serves the interests of I&E, Verde's Customers, and the general public."[9]

ALJ Pell then went on to evaluate the Settlement by applying each of the criteria established in Commission's *Policy for Litigated and Settled Proceedings Involving Violations of the Code and Commission Regulations* under 52 Pa. Code § 69.1201, and he correctly concluded that civil penalty provision of the Settlement was appropriate.

The OCA's Exceptions provide no basis to reject the I.D. approving the Settlement. OCA repeatedly refers to the Settlement as a "non-unanimous" settlement that somehow requires a different analysis. But it must be recognized that this matter is a Formal Complaint with one Complainant and one Respondent. This is not a multi-party rate case or Application proceeding with a wide variety of interests and issues. The case that OCA cites to justify a different standard for evaluating a non-unanimous settlement involved a highly complex and contentious Application for Transfer of Control with over twenty parties, including multiple parties that did not join in the Settlement and who sought additional conditions for the Settlement.[10] This is far different from a Formal Complaint case in which the sole Complainant and sole Respondent reached a full resolution of all issues raised in the Complaint, and an Intervenor that did not

---

[9] I.D. , at p. 53

[10] *Joint Application of West Penn Power, et al,* Docket Nos. A-2010-217-6520 and A-2010-2176732 (Order entered March 8, 2011)

participate in settlement discussions wishes to force the Complainant and Respondent to litigate the matter against their wishes.

OCA's secondary position is that the Settlement should have attempted to address potential harm to customers other than the ones involved in the 339 specific interactions underlying the Formal Complaint. However, this proceeding and this Settlement are limited in scope by the specific allegations set forth in the Formal Complaint and I&E and Verde both have agreed that the Settlement fully and finally resolves all of the allegations. There is no basis to reject the Settlement based on the speculation that there may additional improper interactions even though no other improper interactions were alleged.

In short, the Settlement Petition, the parties' Statements in Support of Settlement and the Stipulated Facts provide the factual and legal justification for approval of the Settlement as being in the public interest. It is the Commission's policy to encourage settlements because they decrease the time and expense the parties must expend litigating a case and, at the same time, conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. "The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a 'burden of proof' standard, as is utilized for contested matters." *Pa. Pub. Util. Comm'n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al*. (Order entered July 14, 2011) at p. 11. Instead, the benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. *See Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation*, M-2009-2058182 (Order entered November 23, 2009); *Pa. Pub. Util. Comm'n v. Philadelphia Gas Works*, M-00031768 (Order entered January 7, 2004); 52 Pa. Code § 69.1201; *Warner v. GTE*

North, Inc., Docket No. C-00902815 (Order entered April 1, 1996*); Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates*, 74 Pa. PUC 767 (1991).

Verde and I&E have demonstrated that that approval of the Settlement in this matter is consistent with the Commission's Policy for Litigated and Settled Proceedings Involving Violations of the Code and Commission Regulations at 52 Pa. Code § 69.1201. As set forth in Verde's Statement in Support, this Settlement is in the public interest because it is a complete and final resolution of this proceeding that effectively addresses the issues that were the subject of the Complaint, avoids the time and expense of litigation and possible appeals, and provides immediate, concrete benefits to Verde's current and former customers that would otherwise be unavailable in the near term. In this particular case, litigation would be particularly difficult because the Complaint's allegations are based on second-hand customer complaints received by a utility. Both I&E and Verde recognized that challenge. But rather than litigate every underlying allegation, which Verde has the right to do, Verde essentially agreed to take responsibility for each and every one of the alleged improper actions by its vendors. From I&E's perspective, a satisfactory settlement of this matter frees I&E's limited staff and resources to conduct investigations of other suppliers. That is another reason why protracted litigation of this matter makes no sense. The Settlement immediately and comprehensively resolves all of the allegations made in the Complaint, establishes a framework to immediately provide refunds to affected customers, and outlines detailed modifications to business practices to implement industry-wide best practices. All of these outcomes are beneficial to the public interest and justify approval and implementation of the Settlement without further delay.

D. Reply to OCA Exception No. 4: <u>The ALJ Did Not Err in Concluding That the OCA Opted Out of Settlement Negotiations, and the Commission has Already Reached the Same Conclusion</u>

ALJ Pell's conclusion that the OCA opted out of settlement negotiations, was not in error, and to the contrary, <u>it is based on the OCA's own filings in this proceeding</u>. OCA's own Statement in Opposition to Settlement, filed on July 20, 2020, acknowledges on page 3 that "[w]hile Verde's Counsel urged OCA to hear the details of the proposed settlement, **OCA declined because it was OCA's view that settlement was premature**…." and that "the draft of the settlement was provided to OCA in an email attachment on May 27, 2020, and **counsel for Verde requested that OCA provide its position and any input on the settlement**." (emphasis added). OCA repeatedly declined to participate in any way in settlement discussions, and repeatedly stated on the record that is formal position in this case was that the Settlement should be rejected. *See* OCA's Statement in Opposition to Joint Petition for Approval of Non-Unanimous Settlement, OCA's Prehearing Memorandum and the Stipulated Facts in Support of Settlement, at ¶ 6. In light of these repeated statements by OCA, it was perfectly accurate for ALJ Pell to conclude that OCA opt-ed out of participating in settlement discussions. There is simply no other way to characterize OCA's position. The Commission agreed, and made the same finding in the *Material Question Order*, at p. 20.

E. Reply to OCA Exception No. 5: <u>The Refund Provision of the Settlement is Fully Adequate to Address the Allegations in the Formal Complaint</u>

The OCA's Exception No. 5 alleges that ALJ Pell should have rejected the Settlement because the Settlement ignores a pool of customers who "may have experienced" improper conduct. But, the reality is that the Settlement provides for a refund to each and every customer identified in the Formal Complaint that actually enrolled with Verde. For those customers, Verde will provide a refund equal to their first two months of electricity supply charges, less any

amounts previously refunded to that customer. This methodology is fully consistent with the Commission's regulation at 52 Pa. Code § 57.177, which authorizes a refund of all supplier charges when a customer disputes an EGS enrollment within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent.

As for the distribution of refunds, the OCA appears to argue that customers other than those whose enrollments were identified in the Complaint should be provided refunds, but obviously, it is not possible or appropriate to issue refunds to customers who have not disputed their enrollment and who were not identified in the Complaint that is the subject of this proceeding. The Settlement's refund provisions are appropriate and commensurate with the nature of the allegations in that they provide the full relief authorized by the Commission's regulations for each customer who was alleged to have been affected by actions set forth in the Complaint.

OCA's other concerns with the refund payments are not justified. I&E has identified the 179 customers who were allegedly enrolled without authorization and Verde has agreed to issue the refunds to each of those identified customers. OCA appears to argue that a larger group of customers may be entitled to refunds, but no such other customers are at issue in this proceeding. This proceeding and this Settlement are limited in scope by the specific allegations set forth in the Complaint. The refund component of the Settlement was meant to specifically address the allegation related to 179 unauthorized enrollments, and it does so in accordance with the Commission's regulation regarding unauthorized enrollment. Furthermore, it is common for refund payments to be accompanied by release of claims in order to bring closure to any

potential dispute[11], and both Verde and I&E agreed it was appropriate for such a release to be included as a component of the Settlement.

F. Reply to OCA Exception No. 6: The Marketing Moratorium Provision of the Settlement is Fully Adequate to Address the Allegations in the Formal Complaint

OCA's Exception No. 6 argues that the Settlement's marketing moratorium is not sufficient because OCA believes it is too short. However, as the I.D. correctly noted, the marketing moratorium is not limited to six months as the OCA suggests. Paragraph 31 of the Settlement clearly states that Verde will not conduct any telemarketing or in-person marketing until its Compliance Plan has been fully implemented and Verde provides confirmation of such information to I&E in writing. The Compliance Plan that Verde is required to develop will result in one of the strictest quality assurance and oversight regimes for any EGS operating in Pennsylvania. Before it resumes marketing, Verde must submit to I&E a detailed description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania, and then meet with I&E and designated Commission staff to review and discuss the training and quality assurance program. The Settlement Petition, in paragraphs 34-36, obligates Verde to perform continual sales monitoring and auditing, and take specific steps in response to identified improper behavior, and report the results of those audits to I&E quarterly. The required oversight and reporting in the Settlement provides extra assurances that once marketing resumes it will be conducted in a fully compliant manner. The extent of the restrictions and the multitude of quality assurance safeguards and

---

[11] See, e.g., *Commonwealth of Pennsylvania, et al, v. IDT Energy, Inc*., Docket No. C-2014-2427657 (Order entered June 30, 2016); *Commonwealth of Pennsylvania, et al, v. Respond Power, LLC*, Docket No. C-2014-2438640, (Order entered August 11, 2016); *Commonwealth of Pennsylvania, et al., v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order entered March 9, 2016)

ongoing auditing and reporting obligations demonstrate that the Settlement's Compliance Plan components are in fact reasonable and appropriate.

G. Reply to OCA Exception No. 7: The ALJ Did Not Err in Finding That the Compliance Plan Adequately Addresses the Allegations in the Formal Complaint.

OCA's Exception No. 7 alleges that the Compliance Plan is deficient because it is merely a "promise to do better" by Verde. This is not correct. The intent of the settling parties was not to negotiate every last detail of a potential Compliance Plan that Verde would implement before resuming marketing at some point in the future. Instead, the parties agreed that Verde would be required to develop a Compliance Plan that covered a variety of different operation aspects, with minimum requirements in multiple categories of operations including hard restrictions on number of sales vendors, detailed training program components, detailed sales audit procedures, verification and reporting requirements, recording of sales calls, and quality assurance sampling among others. Then, before it resumes marketing, Verde must submit to I&E a thorough description of the sales training and sales quality assurance program that Verde intends to implement prior to the resumption of marketing in Pennsylvania, and then meet with I&E and designated Commission staff to review and discuss the training and quality assurance program. Verde must then confirm its implementation to I&E, and then continually report the results of sales audits to I&E for two years, and must also report any changes in marketing policies to I&E. See Settlement, ¶¶ 30-37. Contrary to the OCA's comments, the Settlement specifically provides for review and input of the training materials and program by I&E and Commission staff. See Settlement, ¶ 34(a)(i). After having previously rejected the opportunity to help craft the Settlement's terms, OCA is now criticizing the framework developed by Verde and I&E to ensure ongoing compliance before marketing can resume as not being to its liking. This is not a valid reason to deny approval of the Settlement.

H. Reply to OCA Exception No. 8: The ALJ Did Not Err in Finding That the Compliance Monitoring and Reporting Provisions Adequately Address the Allegations in the Formal Complaint.

OCA's Exception No. 8 argues that the compliance monitoring and reporting provisions for the Compliance Plan are deficient. In doing so, the OCA ignores the very precise and thorough monitoring requirements of the Compliance Plan at outlined in Paragraphs 35 and 36 of the Settlement. These include requiring the recording of all sales calls that result in an enrollment, and monthly sampling of at least three sales call done be every sales agent, with extensive follow-up required for any identified issues. OCA also alleges that the Settlement method for handling "slamming" allegations is deficient. However, the Settlement expressly incorporates the slamming dispute process at 52 Pa. Code § 57.177. The OCA misinterprets the "slamming" regulations as triggering a "Commission dispute process" that a customer must go through in order to get a remedy. That is <u>not</u> what Section 52.177 says or what the Settlement requires. The regulation actually requires that when an EGS learns of a slamming allegation, it must treat it as a customer dispute and initiate the investigation and dispute resolution requirements of 52 Pa. Code §§ 56.151 and 56.152, regarding utility company dispute procedures, but it does not prohibit the EGS from immediately terminating the customer's enrollment. The regulation referenced in the Settlement explicitly states that any customer who was switched without consent must be automatically switched back without any fees. The OCA Comments also fail to recognize that the requirements of Settlement Paragraph 35 go beyond those of Section 57.177. For instance, under Paragraph 35(a)(iv)(3)(a), if Verde identifies a non-compliant call, Verde must provide the customer with a refund for the full length of the enrollment, not just the two billing cycles required by the regulation.

OCA also argues that reporting provisions of the Settlement are insufficient because they do not require OCA to be copied on the quarterly reports that Verde must submit to I&E with the

results of its quality assurance monitoring. Again, OCA repeatedly declined to participate in any settlement discussions, so I&E and Verde had no choice but to craft the Settlement without OCA's input. In any event, the reporting provisions of the Settlement are robust and require Verde to provide I&E with quarterly explanations of all internal audits and investigations performed during the reporting period, including a detailed description of the amount of calls reviewed pursuant to this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof and also provide a summary of the number and type of customer complaints and disputes received by Verde during the reporting period. The purpose of the reporting provisions is to allow I&E to track compliance with the Settlement and to monitor the effectiveness of the Compliance Plan in eliminating non-compliant activity. By providing I&E with quarterly figures on the number of both complaints and disputes received, I&E will be able to quickly gauge Verde's adherence to the Compliance Plan and the Plan's effectiveness.

I. Reply to OCA Exception No. 9: <u>The Settlement's Policy Change Provision is Not Vague or Lacking in Sufficient Detail</u>

OCA Exception No. 9 argues that the Settlement provision that requires Verde to provide written notice of any policy changes to its practices and procedures related to marketing in Pennsylvania is somehow vague. Both Verde and I&E felt the language had the appropriate level of specificity, and OCA provides no justification for any changes other than its own preferences, which it could have suggested during settlement discussions if OCA had chosen to participate. The language regarding changes to its practices and procedures provides a clear directive to Verde to provide written notice to I&E in the event of a change. It also should be noted that the Settlement mandates a high level of reporting and communication between Verde and I&E for at least two years after the Settlement is approved. To the extent that there is any

misunderstanding between the parties as to the extent of reporting or notification required, I&E and Verde are more than capable of resolving any such misunderstandings. As such, there is no basis to modify the Settlement's terms on required notifications of policy changes.

J. Reply to OCA Exception No. 10 – The Settlement Does Not Fail to Address Any Allegations in the Formal Complaint.

OCA Exception No. 10 argues that the Settlement does not address two issues that were touched upon in the Complaint regarding alleged unauthorized account access and spoofing. However, these alleged issues were addressed during I&E's investigation of this matter and satisfactorily resolved as part of this Settlement. While the allegations related to that matter are certainly troubling, there is little to no information about the issues in the Complaint or from I&E's investigation which justifies making Verde responsible for the unauthorized account access. I&E's investigation materials indicate that the improper account access was the work of an unscrupulous actor who was working for multiple suppliers. Verde was unaware of these alleged actions and certainly did not authorize them. Nevertheless, the Settlement includes remedial measures to address these allegations, including, but not limited to, the provisions of Settlement Paragraph 34(a)(ii)(4). Furthermore, it should be noted that even though the allegations arose in PPL territory only, the Settlement's remedial measures are statewide in scope.

K. Reply to OCA Exception No. 11 – The ALJ Did Not Err in Concluding That the Settlement Was in the Public Interest.

Verde's Reply to the OCA's argument that the Settlement not in the public interest is addressed in more detail in Verde's Reply to OCA Exception No. 3, above, which is incorporated herein by reference. As ALJ Pell correctly concluded, the Settlement is in the public interest because it is a complete and final resolution of this proceeding that effectively addresses

the issues that were the subject of the Complaint, avoids the time and expense of litigation and possible appeals, and provides immediate, concrete benefits to Verde's current and former customers that would otherwise be unavailable in the near term. In this particular case, litigation would be particularly difficult because the Complaint's allegations are based on second-hand customer complaints received by a utility. Both I&E and Verde recognized that challenge. But rather than litigate every underlying allegation, which Verde has the right to do, Verde essentially agreed to take responsibility for each and every one of the alleged improper actions by its vendors. From I&E's perspective, a satisfactory settlement of this matter frees I&E's limited staff and resources to conduct investigations of other suppliers. That is another reason why protracted litigation of this matter makes no sense. The Settlement immediately and comprehensively resolves all of the allegations made in the Complaint, establishes a framework to immediately provide refunds to affected customers, and outlines detailed modifications to business practices to implement industry-wide best practices. For these reasons the Settlement is clearly in the public interest, and should be approved so that the customer refunds and other remedies can be implemented without further delay.

L. Reply to OCA Exception No. 12 – The ALJ Did Not Err in Concluding That the Settlement's Civil Penalty Amount is Appropriate.

OCA Exception No 12 provides no legal or factual basis for rejecting ALJ Pell's careful and thorough application of the *Rosi* civil penalty standards to the Settlement. OCA's Exception compares the maximum civil penalty requested in the Formal Complaint, to the Settlement's final civil penalty amount of $1,000,000 civil penalty to argue that the final civil penalty amount is not justified in light of those alleged violations. However, it must be recognized that the Formal Complaint's proposed civil penalty was based on counting duplicate violations for the same incidents. In fact, the number of alleged violations in the Formal Complaint is based on the cumulative attribution of up to 10 violations for a single reported agent interaction, with many of

those tabulated violations being exact duplicates. For example, the Complaint identifies 29 incidents of agents not prominently displaying an identification badge. Those exact same 29 incidents are identified in both Paragraph 47/Exhibit C of the Complaint and Paragraph 48/Exhibit D of the Complaint, and counted as 58 separate violations: 29 violations of 52 Pa. Code § 111.9(c) and 52 Pa. Code § 111.8(a)(4). These two code sections do not set forth different requirements, rather, they state and re-state the exact same requirement for an agent to prominently display an identification badge. The same multiple-counting methodology applies to Paragraph 54/Exhibit I and Paragraph 56/Exhibit M (310 incidents of failure of agent to identify themselves counted twice), and Paragraph 58/Exhibit O, Paragraph 59/Exhibit P and Paragraph 60/Exhibit Q (several hundred agent interactions being counted as nearly two thousand alleged violations). Single agent interactions were also counted as multiple violations of the same catchall section of the Commission's regulations. Paragraph 57 of the Complaint identified 1422 violations of 52 Pa. Code 111.10(a). This section is the opening paragraph of the Telemarketing subsection of the Marketing and Sales Practices for the Retail Residential Energy Market. It does not include any precise requirements or restrictions, but rather reiterates and confirms that suppliers and their agents must comply with other marketing and consumer protections outlined in Chapters 54, 62, 56, 57 and 59 of the Commission's regulations. While the paragraph identifies 1422 violations, the accompanying Exhibit N only lists 288 customer interactions. Therefore, on average each one of those 288 interactions is being assigned 5 separate violations of Section 111.10(a). The issue is further exacerbated because most of these 288 interactions are also counted as having other violations, and the same interactions also appear on Complaint Exhibits M, O, P, and Q.

All of this could have been explained to OCA had OCA agreed to participate in settlement discussions, but OCA refused to do so. The bottom line, as confirmed in Paragraph

32 of the Stipulated Facts, is that I&E identified 339 discrete customers for which improper agent interactions were alleged. While the civil penalty is also meant to address a smaller number of other alleged violations that did not involve agents, the $1,000,000 civil penalty is clearly a substantial amount for 339 allegedly improper agent interactions (approximately $2900 per interaction). On a per-interaction basis, this amount far exceeds any prior civil penalty issued against a supplier by the Commission as part of a settlement. See, for instance,

- *Clearview Electric, Inc*. ("Clearview"), in which Clearview agreed to pay a $250,000 civil penalty ($24.15 per violation) in a Settlement that was approved by the Commission by Order entered on June 30, 2017 in Docket No. C-2016-2543592 in a case involving 10,351 alleged violations of 52 Pa. Code § 54.4(a).

- *Great American Power LLC* ("Great American"), in which Great American agreed to pay a civil penalty of $13,500 civil penalty (an average of $346 per incident) under a Settlement that was approved by the Commission by Order entered on July 11, 2019 in Docket No. M-2018-2617335 in a case involving 22 alleged incidents.

- *Public Power LLC* ("Public Power"), in which Public Power agreed to pay a civil penalty of $72,500 (approximately $609 per instance) under a Settlement approved by the Commission by Order entered on May 19, 2016 in Docket No. M-2015-2439492 in a case involved 119 alleged incidents.

- *Plymouth Rock Energy, LLC* ("Plymouth Rock") in which Plymouth Rock agreed to a civil penalty of $98,683 under a Settlement approved by the Commission by Order entered on April 19, 2018 in Docket No. C-2016-2579276 in a case involving 2437 incidents.

- *Vista Energy Marketing, L.P*. ("Vista"), in which Vista paid a civil penalty of $52,700 ($425 per incident) under a Settlement approved by the Commission by Order entered on March 14, 2019 in Docket No. M-2018-2624484 in a case involving 124 incidents.

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

IV. CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in the Settlement Petition and Verde's Statement in Support, Verde respectfully requests that the Commission issue an Order which:

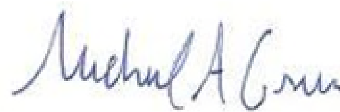
1) Dismisses the Exceptions of the Office of Consumer Advocate;

2) Adopts the Initial Decision of Chief Deputy Administrative Law Judge Christopher Pell; and

3) Approves the Joint Petition for Approval of Settlement submitted by the Verde and I&E filed on June 30, 2020.

Respectfully submitted,

STEVENS & LEE



____

Michael A. Gruin, (I.D. No. 78625)
17 N. 2nd St., 16th Floor
Harrisburg, PA 17101
Tel. (717) 255-7365
Fax (610) 988-0852
COUNSEL FOR VERDE ENERGY USA, INC.

DATE: February 22, 2022

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

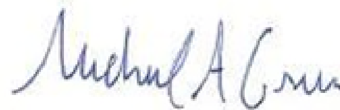
Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement Complainant	:	
v.	:	Docket No. C-2020-3017229
Verde Energy USA, Inc. Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2022, a copy of the enclosed Reply to Exceptions has been served upon the persons listed below via electronic mail in accordance with the requirements of 52 Pa. Code Sections 1.54 and 1.55.

Kayla Rost, Prosecutor
Pennsylvania Public Utility Commission,
Bureau of Investigation & Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
karost@pa.gov

Laura J. Antinucci
Assistant Consumer Advocate
Pennsylvania Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
LAntinucci@paoca.org



DATE: February 22, 2022

Michael A. Gruin