

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

PA PUC Bureau of Investigation
v.
Verde Energy USA, Inc.

Public Meeting September 15, 2022
3017229-OSA
Docket No. C-2021-3017229

STATEMENT OF CHAIRMAN GLADYS BROWN DUTRIEUILLE

The Commission's independent prosecutorial arm, the Bureau of Investigation & Enforcement (I&E) filed a formal Complaint on January 30, 2020, alleging that Verde Energy USA, Inc. (Verde) engaged in slamming and deceptive sales practices resulting in nearly 9,000 violations of the Commission's energy marketing regulations. As relief, I&E requested a civil penalty of \$8.8 million, revocation of Verde's license, and customer refunds. The OCA filed a timely Notice of Intervention on February 24, 2020.

Over the course of three months, Verde filed three requests for extension of time to answer the Complaint, all of which were granted. During this time, the case was not assigned to an Administrative Law Judge (ALJ). Upon the filing of an Answer on June 30, 2020, the case was assigned to the Office of Administrative Law Judge.¹ On that same date, Verde and I&E filed a Joint Petition for Settlement.

On July 10, 2020, the OCA filed a Letter stating its intention to oppose the Settlement. On August 21, 2020, the OCA, in its Prehearing Memorandum, requested that this matter be held in abeyance for 60 days to permit the OCA time to conduct discovery.

On September 25, 2020, the ALJ issued an Order denying the OCA's request for an abeyance (*Abeyance Order*). The ALJ's *Abeyance Order* explained that the request for time to conduct discovery was denied because the OCA had already had sufficient time, six months, to conduct discovery. The *Abeyance Order* further provided that I&E and Verde would be permitted to file stipulated facts in support of the Settlement; that the OCA would be permitted to file substantive comments; and, that I&E and Verde would be permitted to file reply comments thereto. On November 9, 2020, the OCA filed Comments in Opposition to the Settlement along with evidence to support those Comments. Verde filed a Motion to Strike the OCA's supporting evidence and I&E filed a Letter in Support of Verde's Motion to Strike.

By Order issued on January 15, 2021 (*Interim Order*), the ALJ granted Verde's Motion to Strike the OCA's evidence, holding that Verde's competitive market dealings in other states was beyond the scope of the slamming and deceptive sales practices proceeding in this state. The ALJ also reasoned that because the OCA's supporting evidence was not available to I&E and

¹ Once an Answer is filed disputing allegations, the matter becomes an adversarial proceeding and should be assigned to the OALJ for the purpose of fixing a hearing or other proceeding as necessary. 66 Pa. C.S. §§ 703(b)-(c).

Verde throughout the course of the proceeding, it would not be proper to rely upon these materials since I&E and Verde never had the opportunity to cross-examine witnesses or to offer rebuttal testimony. *Interim Order* at 13.

On January 28, 2021, the OCA filed a Petition for Interlocutory Review and Answer to Material Question (Petition) asking whether the ALJ erred in striking the OCA's factual evidence presented in support of its Comments, thereby denying the OCA a meaningful opportunity to be heard. By Order entered on October 26, 2021, the Commission denied the OCA's Petition and answered the Material Question in the negative.

Because the OCA's Material Question should have been answered affirmatively, I dissented from the majority's decision to deny the OCA's Petition for Interlocutory Review.² That Order also returned the proceeding to the Administrative Law Judge. On January 21, 2022, the ALJ issued an Initial Decision approving the Settlement between BIE and Verde. Before us today for review and consideration are the Exceptions filed by the OCA opposing the ALJ's Initial Decision.

In its Exceptions, the OCA argues that,

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.

Exc. At 14.

As noted by I&E in its Reply Exceptions, "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." R.Exc. at 3. It is true that this Commission has a policy favoring settlements.³ However, the Commission's duty to make decisions based on substantial evidence and in furtherance of the public interest cannot become a victim of the procedural efficiency afforded by settlements. The process used in this case to facilitate the

² The OCA's intervention occurred prior to the development of the record. Therefore, the OCA should have been given a meaningful opportunity to be heard pursuant to 52 Pa. Code § 5.74(b)(4). See, *Pa. PUC, Bureau of Investigation and Enforcement v. Sunoco Pipeline, L.P.*, Docket No. C 2018-30006534 (Order entered June 10, 2019) at 14-21.

³ 52 Pa. Code § 69.401.

settlement prevented the OCA, the statutory advocate charged with representing the interests of the very residential consumers victimized by Verde's actions, from fully participating in the proceeding. *See, 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 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)).

It is true that the OCA could have filed a separate complaint against Verde to present the evidence regarding the pool of customers not captured in the instant Complaint as well as other evidence that it sought to enter here. However, our regulations provide interested persons the right to intervene in an existing proceeding. In recognition of the special role that advocates play protecting the public interest, our regulations provide a broader right to intervene to statutory advocates.⁴

While the Settlement before us provides for refunds and much needed controls on Verde's sales practices, I believe that because the OCA was not afforded due process, it is not possible to state affirmatively that the evidentiary record in this case is complete or that substantial evidence has been presented to support the Settlement.



September 15, 2022

Date

Gladys Brown Dutrieuille, Chairman

⁴ The OCA is a statutory intervenor in this Formal Complaint proceeding representing the interest of consumers. *See* 52 Pa. Code §§ 5.72(a)(1), 5.74(b)(4); *see also* 71 P.S. § 309-4 (“[T]he Consumer Advocate is authorized, and it shall be his duty, in carrying out his responsibilities under this act, to represent 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...”).