

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held September 15, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman, Statement, Dissenting
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

C-2020-3017229

v.

Verde Energy USA, Inc.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of the Office of Consumer Advocate (OCA) filed on February 10, 2022, in the above-captioned proceeding, from the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Christopher P. Pell, issued on January 21, 2022. The ALJ's Initial Decision adopted the Joint Petition for Approval of Settlement (Joint Petition, Joint Petition for Settlement, Settlement Agreement or Settlement), as modified by the ALJ, filed by the Bureau of Investigation & Enforcement (I&E) and Verde Energy USA, Inc (Verde) (collectively, Joint Petitioners), resolving the Formal Complaint (Complaint) proceeding initiated by I&E alleging unlawful conduct by

Verde, including *inter alia*, deceptive sales tactics, unauthorized enrollment for service, and unauthorized access to customer accounts related to Verde's participation in the Commonwealth's competitive electric supplier retail market. On February 22, 2022, Reply Exceptions were filed by both I&E and Verde.

For the reasons discussed more fully below, we shall deny the Exceptions filed by the OCA, and shall adopt the ALJ's Initial Decision approving the Settlement, as modified by the ALJ, as we find it to be supported by substantial evidence and in the public interest.

I. History of the Proceeding

On January 30, 2020, I&E filed a Complaint against Verde with the Commission pursuant to the authority¹ under Section 701 of the Public Utility Code (Code), 66 Pa. C.S. § 701. In the Complaint, I&E alleged that Verde, and/or a third-party marketing agent acting on Verde's behalf, conducted deceptive and misleading sales tactics, enrolled customers without authorization, and accessed customer accounts without authorization while participating in Pennsylvania's competitive supplier retail market, from the period beginning February 2017 through the date of the Complaint.

On February 14, 2020, Verde filed an unopposed Motion seeking an extension of time to file an Answer to the Complaint, which was granted by the Commission.

¹ The Commission has delegated its authority to initiate proceedings that are prosecutory in nature to I&E and other bureaus with enforcement responsibilities. *See Delegation of Prosecutory Authority to Bureaus with Enforcement Responsibilities*, Docket No. M-00940593 (Order entered September 2, 1994), as amended by Act 129 of 2008, 66 Pa. C.S. § 308.2(11).

On February 24, 2020, the OCA filed a Notice of Intervention and Public Statement in this matter pursuant to its statutory authority under 71 P.S. § 309-4.

On March 30, 2020, and May 15, 2020, Verde filed two additional unopposed Motions seeking extensions of time to file an Answer to the Complaint, which were consecutively granted by the Commission through and until June 30, 2020.

On June 30, 2020, Verde filed an Answer to the Complaint denying the allegations set forth in the Complaint. On that same date, the Joint Petitioners in this matter filed a Joint Petition for Settlement.

On July 10, 2020, the OCA filed a letter stating its intention to file a Statement in Opposition to the Joint Petition and requesting that the Commission assign the matter to an ALJ.² On July 20, 2020, the OCA filed its Statement in Opposition to the Joint Petition.

On July 31, 2020, the matter was assigned to ALJ Pell, who issued a Prehearing Conference Order. On the same date, a Call-In Telephonic Hearing Notice was served on the Parties scheduling an Initial Call-In Telephonic Prehearing Conference for August 27, 2020.

On August 21, 2020, Verde, I&E, and the OCA filed Prehearing Memoranda in accordance with ALJ Pell's Prehearing Conference Order issued on July 31, 2020. The OCA, in its Prehearing Memorandum, identified three issues and a witness and requested that the matter be held in abeyance for sixty (60) days in order for the OCA to conduct additional discovery and to engage in further settlement discussions

² Once an Answer is filed disputing the 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).

with I&E and Verde to see if there are possible modifications to the Settlement that would address the OCA's concerns.³ The OCA further proposed that at the end of sixty (60) days, the Parties could each evaluate their respective positions and collectively determine whether there is a need to establish a litigation schedule to address the allegations in I&E's Complaint, and to determine whether the Settlement signed by I&E and Verde is in the public interest.

On August 27, 2020, the Call-In Prehearing Conference took place as scheduled, during which counsel for Verde, I&E, and the OCA participated and presented their respective positions as laid out in their Prehearing Memoranda.

In the Order Denying the OCA's Request for Sixty Day Abeyance, dated September 25, 2020 (*Abeyance Denial Order*), ALJ Pell denied the OCA's request for a 60-day abeyance. The ALJ explained in detail why the OCA had sufficient time to conduct discovery, totaling a six month period of time and why the request was denied.⁴ In addition, ALJ Pell directed: that I&E and Verde would be permitted to file stipulated facts in support of the Joint Petition for Settlement with the Commission within twenty (20) days of the date of the order; that the OCA would be permitted to file substantive

³ On May 20, 2020, the OCA contacted I&E about accessing the confidential data requests and responses in this matter in order to initiate its review of the available information and to begin drafting its own discovery. On May 22, 2020, the OCA received the confidential responses to I&E data requests. On May 26, 2020, the OCA learned that Verde and I&E had been engaged in settlement negotiations. The OCA maintained that the Settlement was premature and negotiated before the OCA was able to conduct discovery into the allegations in the Complaint. On May 27, 2020, Verde's counsel provided the OCA with a written draft of the Settlement and requested that the OCA provide its position and any input on the Settlement. On June 1, 2020, the OCA served interrogatories to Verde (OCA Set I). The OCA served follow-up discovery on Verde on July 6, 2020 (OCA Set II) and on August 3, 2020, (OCA Set III).

⁴ The ALJ cited to the Commission Regulations, which provide that "[a] party shall initiate discovery as early in the proceedings as reasonably possible," and that "the right to discovery commences when a complaint, protest or other adverse pleading is filed." 52 Pa. Code § 5.331(b).

comments within forty (40) days of the date of the order; and that I&E and Verde would be permitted to file reply comments within sixty (60) days of the date of the order.

In accordance with ALJ Pell's *Abeyance Denial Order*: on October 19, 2020, I&E and Verde filed their Joint Stipulation of Facts (Joint Stipulation of Facts); on November 10, 2020, the OCA filed its Comments in Opposition of the Joint Petition, including the Affidavit of Barbara R. Alexander and the OCA's proposed findings of fact; and on November 30, 2020, I&E and Verde each filed Reply Comments to the OCA's Comments.

On November 18, 2020, Verde filed with the Commission its Motion to Strike Portions of Comments of the Office of Consumer Advocate (Motion to Strike).⁵ In the Motion to Strike, Verde requested that the following portions of the OCA's Comments be stricken:

- The affidavit of Barbara Alexander, including Exhibits BA-1 and BA-2;
- The OCA's proposed findings of fact;
- The OCA's discussion of Verde ownership structure, affiliates and operations in other states, and vendors; and
- All citations to "Affidavit" and/or its Exhibits, and Ms. Alexander's opinions throughout the comments.

⁵ Verde endorsed its Motion to Strike with a Notice to Plead advising the OCA that it had twenty days to file a written response to the Motion. A party has 20 days from the date of service within which to answer or object to a motion unless the period of time is otherwise fixed by the Commission or the presiding officer. 52 Pa. Code § 5.103(c).

On November 19, 2020, I&E filed its Letter in Support of Verde Energy USA Inc.'s Motion to Strike. On December 3, 2020, the OCA filed its response to Verde's Motion to Strike.

On January 15, 2021, the ALJ issued an Interim Order Granting the Motion to Strike of Verde Energy USA, Inc. (*Interim Order*).

On January 28, 2021, the OCA filed a Petition for Interlocutory Review and Answer to Material Question, seeking the Commission's interlocutory review of the ALJ's *Interim Order*. As noted above, in accordance with 52 Pa. Code § 5.302(b), on or before February 8, 2021, the Parties timely filed Briefs in response to the OCA's Petition. Specifically, the OCA filed a Brief in Support of its Petition and I&E and Verde each separately filed a Brief in Opposition to the OCA's Petition.

On October 26, 2021, the Commission issued an Opinion and Order denying the Petition for Interlocutory Review and Answer to Material Question filed by the OCA and answering the Material Question in the negative (*October 2021 Order*). Additionally, the *October 2021 Order* adopted ALJ Pell's Interim Order granting Verde's Motion to Strike and returned the matter to ALJ Pell for further proceedings, as deemed necessary, on whether the Settlement should be approved as reasonable and necessary and in the public interest. *See generally, October 2021 Order.*

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. I.D. at 29. 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. *Id.*

As previously noted, on February 10, 2022, the OCA filed twelve (12) Exceptions to the Initial Decision, seeking reversal and denial of the Settlement. On February 22, 2022, I&E and Verde filed Replies to Exceptions, seeking denial of the OCA's Exceptions and requesting that the Commission adopt the Initial Decision of ALJ Pell in its entirety.

II. Discussion

A. Legal Standards

Initially, we note that any issue or argument that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider, expressly or at length, each contention or argument raised by the Parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The policy of the Commission is to encourage settlements, and the Commission has stated that settlement rates are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §§ 5.231, 69.401. A full settlement of all the issues in a proceeding eliminates the time, effort, and expense that otherwise would have been used in litigating the proceeding, while a partial settlement may significantly reduce the time, effort, and expense of litigating a case. A settlement, whether whole or partial, benefits not only the named parties directly, but, indirectly, all customers of the public utility.

However, despite the policy favoring settlements, the Commission does not simply rubber stamp settlements without further inquiry. In order to accept a settlement such as that proposed here, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. PUC v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C. S. Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991) (*CS Water and Sewer*). The focus of the inquiry for determining whether a proposed settlement should be approved by the Commission is whether the proposed terms and conditions foster, promote, and serve the public interest. *Pa. PUC, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Order entered July 14, 2011), citing *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Order entered April 1, 1996) and *CS Water and Sewer*. To the extent the Joint Petitioners request that the Commission enter an order in this proceeding approving the Settlement, as modified, they share the burden of proof to show that the terms and conditions of the proposed Settlement is in the public interest. *See* 66 Pa. C.S. § 332(a) (“Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.”).

Consistent with the Commission’s policy to promote settlements, we have promulgated a Policy Statement at 52 Pa. Code § 69.1201, which sets forth ten factors that we may consider in evaluating whether a civil penalty for violating a Commission Order, Regulation, or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of a proposed settlement agreement is in the public interest. The Commission will not apply the factors as strictly in settled cases as in litigated cases. 52 Pa. Code § 69.1201(b). While many of the same factors may still be considered, in settled cases, the parties “will be afforded flexibility in reaching amicable resolutions to complaints and other matters as long as the settlement is in the public interest.” *Id.* The Policy Statement sets forth the guidelines we use when determining whether, and to what extent, a civil penalty is warranted.

On appeal, the decision of the Commission must be supported by substantial evidence. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. PUC*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); and *Pa. Dep't of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

B. ALJ's Initial Decision

The ALJ reached thirty-five (35) Findings of Fact and drew seven (7) Conclusions of Law. I.D. at 6-12; 75-76. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In the Initial Decision, the ALJ reviewed the principal terms of the Settlement, contained in Section IV of the Petition beginning at Paragraph 23, which provide:

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

A. Penalty and Contribution to EDC Hardship Fund

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

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

B. Refunds

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

27. For customers who allege unauthorized enrollment by Verde, and who were actually charged and paid early termination fees ("ETF") to their prior supplier, Verde would refund those ETFs, upon receipt of proof of payment by customer.

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

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

C. Voluntary Modification to Business Practices

30. Modifications to Business Practices:

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

31. Marketing Moratorium:

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

⁶ It should be noted that the Commission issued an Emergency Order on March 16, 2020 placing a moratorium on supplier door-to-door and in-person marketing in Pennsylvania. *See generally* M-2020-3019254. Thus, all electric generation suppliers have been prohibited from door-to-door and public, in-person marketing since March 16, 2020 and for the remainder of the pendency of the Proclamation of Disaster Emergency issued by Governor Tom Wolf. In the event that the voluntary marketing moratorium would cease during the pendency of the Proclamation of Disaster Emergency, the March 16, 2020 Emergency Order and marketing moratorium will remain in effect and take precedent.

32. Limitations on Sales Activities

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

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

33. General Marketing Commitments:

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

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

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

d. Verde will complete an internal review of all its third-party vendors to ensure compliance with the

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

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

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

34. Compliance Plan:

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

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

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

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

- (1) The applicable requirements of the Public Utility Code and the Commission's regulations, Orders and policies regarding marketing and billing practices for EGSs [Electric Generation Suppliers];
- (2) The applicable requirements of the Consumer Protection Law and TRA, including both prohibited practices and affirmative requirements;
- (3) The applicable requirements of the Commission's regulations regarding door-to-door sales and other applicable state and federal law;
- (4) Training to marketing and customer service representatives on the proper use of the Eligible Customer List and releasing private customer information.
- (5) Training to all customer service representatives and marketing persons to identify themselves, identify his/her representation of Verde, and provide the reasoning for the phone call or in-person meeting upon first contact.
- (6) Training to all marketing persons on the different charges on the electric bill and which charge relates to the generation of electricity.
- (7) Training to all marketing persons on conducting a no-pressure sales call or in-person meeting, and enforcing the concept that a customer is not required to

choose a supplier or switch suppliers. Verde will enforce that threatening a customer to switch will not be tolerated.

- (8) An express warning that deceptive sales practices will not be tolerated by Verde's management;
- (9) An express warning and material description of the remedial steps that will be taken against any sales representatives and customer service representatives that violate any term of this Settlement or otherwise engage in improper sales practices; and
- (10) A description of the quality assurance, monitoring, auditing and reporting practices Verde maintains to identify and prevent improper sales practices.

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

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

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

also include any sales script provided to telemarketers.

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

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

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

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

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

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

35. Compliance Monitoring- Sales Calls:

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

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

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

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

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

(1) The sample shall include no fewer than three (3) sales for each sales representative conducting sales solicitations for Verde to Pennsylvania customers.

(2) Whenever such sample reveals one or more non-compliant sales calls by an

agent, third-party contractor or sales representative, Verde shall investigate whether other Pennsylvania consumers enrolled by the agent, third-party contractor or sales representative were subjected to sales practices that violated this Settlement Agreement, the Public Utility Code, the Consumer Protection Law, the TRA, or Commission regulations, Orders and policies. Such investigation, at a minimum, shall include a review of the sales calls and call notes for the ten (10) Pennsylvania consumers enrolled before the call in question and the ten (10) Pennsylvania consumers enrolled after the call in question.

- (3) If Verde identifies additional non-compliant sales calls, Verde shall implement remedial steps as described below.
 - (a) If the consumer did not file a complaint or allege slamming on the part of the Verde representative but the call was otherwise not in accordance with the Commission's regulations and the Public Utility Code, Verde shall offer to any residential or small business consumer subjected to the non-compliant sales practices a refund equal to the difference between the price charged by Verde and the consumer's applicable Price to Compare for the period in which the consumer was a customer as a result of the non-compliant sales practice. Such refund shall be paid to the consumer within thirty (30) business days.

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

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

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

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

Commission's Final Order and may be extended at the discretion of I&E.

I.D. at 14-23, *citing* Terms of Settlement (in original numbering for ease of reference).

In addition, the ALJ noted the principal Conditions of Settlement, as follows:

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

The Settling Parties further note that this Settlement consists of the entire agreement between I&E and Verde regarding the matters addressed herein, and that the Settlement represents a complete settlement of I&E's Complaint against Verde's alleged violations of the Public Utility Code and the Commission's regulations. The Settling Parties expressly acknowledge that this Settlement represents

a compromise of positions and does not in any way constitute a finding or an admission concerning the alleged violations of the Public Utility Code and the Commission's regulations.

Lastly, the Settling Parties note that the Settlement contains a summary of alleged violations of the Public Utility Code and the Commission's regulations. The Settling Parties maintain that the Settlement terms contain proposed settlement terms, and that none of the provisions in the Settlement shall be considered or shall constitute an admission, a finding of any fact, or a finding of culpability on the part of Verde in this or any other proceeding. The Settling Parties assert that this Settlement is presented without prejudice to any position that either party may have advanced, and without prejudice to the position any party may advance, in the future on the merits of the issues in future proceedings, except to the extent necessary to effectuate the terms and conditions of this Settlement.

I.D. at 23-24, *citing* Conditions of Settlement.

Noting the OCA's objections to the terms and conditions of Settlement, the ALJ reviewed the stipulation of fact developed by I&E and Verde, and their respective positions in support of Settlement. The ALJ concluded that, in these circumstances, the terms of the Settlement achieve a just and reasonable result, are supported by substantial evidence of record and are in the public interest. In reaching this conclusion, the ALJ applied the standards applicable to approving a settlement, and the *Rosi* factors applicable to review of civil penalties. I.D. at 24-53(determination that terms of Settlement are just and reasonable/supported by substantial evidence/in the public interest); I.D. at 53-75 (application of 10 *Rosi* factors).

The ALJ was not persuaded by the OCA's position that, as an Intervenor, it was unfairly precluded from developing evidence and litigating relevant issues to the

present proceeding. The ALJ did conclude, however, that the Settlement should be modified for clarification, noting:

[T]he terms of the Settlement are unclear as to how customers identified in the Complaint who paid ETFs will know of their potential eligibility for a refund of the fee paid. Accordingly, Verde will be ordered to notify the customers identified in the Complaint who alleged unauthorized enrollment of the potential refund of the ETF, and the steps required to secure the refund.

I.D. at 29.

Accordingly, the ALJ recommended that the Commission approve the Settlement with the noted modification. I.D. at 1, 76-79.

C. The OCA's Due Process Rights and Substantial Evidence Supporting the Settlement

As a general matter, the OCA's Exceptions rest upon two legal arguments which have bearing upon each of the OCA's Exceptions: (1) a material deprivation of the OCA's due process occurred; and, (2) as a result of the deprivation of the OCA's due process rights, the stipulated facts offered by I&E and Verde cannot establish substantial evidence upon which to base the Commission's approval of the Settlement. Specifically, the OCA argues that, as Intervenor, the OCA was not afforded due process where it was precluded from offering evidence and deprived of the opportunity to cross-examine I&E and Verde's witnesses and engage in discovery to offer any evidence to clarify and/or counter the stipulated facts agreed upon by I&E and Verde. Consequently, the OCA argues the record upon which the Settlement is based cannot provide substantial evidence, sufficient to justify approval of the Settlement as in the public interest.

Since the OCA's claims regarding both due process and substantial evidence have bearing upon each of the specific Exceptions, we shall address those issues prior to our disposition of the Exceptions.

1. The OCA's Due Process Rights

While not specifically enumerated as an Exception, the OCA asserts that it was deprived of due process. OCA Exc. at 1-10. Specifically, the OCA avers:

[T]he Commonwealth Court recently affirmed the principle that "due process...requires an evidentiary hearing...if there are disputed questions of fact to be resolved..."

OCA Exc. at 4.

In alleging it was denied due process, the OCA asserts:

As an active intervening party to this proceeding, the OCA has been denied the opportunity to present any evidence in the case. In fact, the record demonstrates that the ALJ allowed the settling parties to not only frame the settlement, but also establish the facts to admit into the record through a stipulation, which was accepted without question, while at the same time relegating the OCA to the position of a mere bystander permitted only to file comments.

OCA Exc. at 2.

The OCA sets forth a detailed procedural chronology, which the OCA avers demonstrates that upon I&E's filing of the Complaint and the OCA's intervention, and pending the filing of Verde's Answer, the OCA was effectively kept unaware of ongoing settlement discussions between I&E and Verde, until presented with a draft settlement

resolving all matters except for the civil penalty. The OCA sets forth the chronology of events, in part, as follows:

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

The OCA served interrogatories to Verde on June 1, 2020, July 6, 2020, and August 3, 2020. *Before all of the responses to the OCA's first set of discovery were provided, Verde filed its Answer to the Formal Complaint on June 30, 2020 and, a*

few hours later, I&E filed a Joint Petition of I&E and Verde for Approval of Settlement.

OCA Exc. at 6. (emphasis added).

In their Replies I&E and Verde both counter the OCA's proposition that it was denied due process. Both I&E and Verde assert that the OCA was provided with ample opportunity to be heard, *albeit* not by the adversarial proceeding of OCA's choosing. Rather, as asserted by Verde:

[The] OCA was in no way denied any opportunity to be heard regarding its objections to the Settlement Petition. [The] 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 [it] 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.

Verde R. Exc. at 3.

Upon review of the position of the OCA, and the Replies of both I&E and Verde, we conclude that the OCA was afforded adequate due process in the circumstances of this case. While it is acknowledged that I&E and Verde engaged in settlement discussions without the knowledge of the OCA, nothing indicates that the

discussions were improper or intentionally exclusive of the OCA. There is no rule which precludes I&E from directly engaging in settlement discussions with a utility after a Complaint has been filed, even after a third-party has sought intervention, and prior to the utility's Answer being filed. More importantly the record reflects that the nature of the OCA's opposition was adequately addressed by the ALJ, whose Initial Decision addressed each of the OCA's objections to the Settlement. *See* I.D. *passim*.

Upon review of the ALJ's Initial Decision, it is apparent that the OCA's opposition was duly considered, even though the OCA's request for additional discovery and suggestion that a hearing was required were ultimately denied. In noting the OCA's opposition to the Settlement, the ALJ stated:

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

I.D. at 24, citing, OCA Comments at 18, 21. The ALJ reviewed each category of the OCA's opposition which included: (1) refunds; (2) marketing moratorium; (3) limitations on sale activities; (4) general marketing commitments; (5) compliance plan; (6) compliance monitoring; (7) reporting; (8) policy changes; (9) areas not addressed by the Settlement. Finally, the ALJ considered the OCA's opposition to the civil penalty amount. I.D. at 24-73.

The ALJ's disposition of each matter in which the OCA expressed opposition reflects a careful consideration of the OCA's concerns. In fact, the OCA's concerns prompted the modification to the notification requirements set forth in the

Settlement. The ALJ's analysis of the OCA's objections to the Settlement reveal that the OCA's objections were driven, in major part, by the OCA's subjective preference that the scope of the Settlement be more far reaching, as to both the customer class impacted, and the utility conduct to be addressed by the Settlement. For example, as the ALJ discussed, in the section addressing refunds, the ALJ rejected the OCA's suggestion that the Settlement should be drawn more broadly to cover more customers, reasoning:

I agree with Verde that this Complaint and associated Settlement are limited in scope by the specific allegations made by I&E in the formal Complaint.

I.D. at 28. And again, in the section covering "matters not included in the Settlement," the ALJ rejected the OCA's contention that the terms of the Settlement are insufficient to address two allegations in the Complaint (alleged "spoofing" of PPL's number to customers and unauthorized access to customer accounts) and failed to address potential harm to consumers outside of those identified in the PPL report. The ALJ reasoned that, contrary to the OCA's assertion, the active measures adopted by the Settlement would adequately address "spoofing" and unauthorized access allegations, and the potential harm to others was beyond the scope of the allegations in the formal Complaint, and therefore, not relevant to the present proceeding. The ALJ further noted the OCA is free to initiate a complaint for matters deemed beyond the scope of this proceeding. I.D. at 50-51.

Upon review of the position of the OCA, and the Replies of both I&E and Verde, we conclude that the ALJ afforded the OCA adequate due process under the circumstances of this case. We conclude that rather than a genuine factual dispute, the OCA's objections go to the scope of both the consumers redressed and the utility conduct addressed by the Settlement, which are matters which pertain to the ALJ's discretion regarding the scope of evidence in each proceeding.

The presiding ALJ's authority to oversee and rule on the scope of and admissibility of evidence in a proceeding is well settled, as set forth in statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and Commission Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 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.

Under the present facts, we conclude the ALJ properly exercised his discretion, and limited the scope of the proceedings to those matters deemed relevant to allegations of I&E's formal Complaint. Therefore, the denial of the OCA's request for further discovery and the opportunity to provide fact witnesses was not a violation of the OCA's rights to due process of law. The OCA was afforded multiple opportunities to submit interrogatories and was afforded the opportunity to file comments to the proposed Settlement. The ALJ's thoughtful consideration and disposition of the OCA's comments demonstrates that the OCA was afforded due process.

2. Substantial Evidence in Support of the Settlement

The OCA contends that the Commission cannot fully and fairly review facts underlying a Settlement where an Intervenor, here the OCA, is prevented from adequately clarifying and/or disputing those facts, because the Intervenor is denied the opportunity to conduct adequate discovery and/or offer evidence based upon such discovery. The OCA contends that, in the present case, the procedural history reflects the OCA's repeated attempts to timely seek additional discovery and offer evidence were rejected. Therefore, the OCA contends that the decisions by the Commission and the

ALJ which effectively restricted the OCA to offering comments to the proposed Settlement, and stipulated facts agreed upon by I&E and Verde, directly impact the sufficiency of the evidence underlying the Settlement, stating:

These decisions deprived the Commission of the record necessary ...to evaluate whether the Settlement is in the public interest and whether substantial evidence exists to approve the Settlement.

OCA Exc. at 2, *citing, October 2021 Order* (Statement of Chairman Gladys Brown Dutrieuille at 1-3).

In summary, the OCA's position is not that there is a "lack of evidence" but that the evidence, *i.e.*, the stipulated facts offered by I&E and Verde, cannot be sufficient since it was never put to the test of an adversarial proceeding, which is required where the facts are in dispute.

In their Replies, I&E and Verde both counter the OCA's proposition that the stipulation of facts offered by I&E in support of the Settlement cannot suffice as substantial evidence upon which the Commission may approve the Settlement as in the public interest. Both I&E and Verde aver that ALJ Pell did not err in concluding that the Settlement is supported by substantial evidence. With respect to substantial evidence, I&E argues:

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.”⁷ 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 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.⁸

Importantly, whether those conclusions are the sole conclusions that could be reached based on the record evidence is immaterial.⁹ 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.¹⁰ 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

⁷ *Lyft, Inc. v. Pa. PUC*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016) (citing *Norfolk & W. Ry. Co. v. Pa. PUC*, 489 Pa. 109, 128 (1980)); see also *McCloskey v. Pa. PUC*, 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))

⁸ *3D Trucking Co., Inc. v. Workers’ Compensation Appeal Board (Fine and Anthony Holdings International)*, 921 A.2d 1281, 1288 (Pa. Cmwlth. 2007)

⁹ *Lyft, Inc. v. Pa. PUC*, 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.”).

¹⁰ See 52 Pa. Code § 5.232; *Pa PUC 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.”).

the evidentiary record would be to require litigation, which is contrary to the Commission's policy favoring settlement.¹¹

I&E R. Exc. at 2-3 (citations in original).

Upon review of the position of the OCA, and the Replies of both I&E and Verde, we conclude that the ALJ decision to adopt the Settlement, as modified, was supported by substantial evidence. The stipulation of facts offered in support of the Settlement by I&E and Verde were sufficient to support the Settlement and demonstrate a reasonable resolution to the matters alleged in the Complaint.

As will be discussed more fully, *infra.*, it appears that the OCA's opposition to the Settlement pertains to its scope, as to both the scope of the customers redressed by the Settlement, and the scope of Verde's conduct addressed in the Settlement. In this regard, we conclude that the ALJ properly exercised his discretion in limiting the scope of relevant evidence in the present proceeding, by precluding further discovery by the OCA or requiring matters to be litigated at hearing, where the relevant matters were limited to those initially set forth in the Complaint. The OCA's objections to the Settlement, which were detailed in its letter in opposition to the Settlement, were fully considered and rejected by the ALJ.

Accordingly, we conclude the ALJ's determination that the Settlement was in the public interest, in reliance upon the stipulated facts offered by I&E and Verde, was supported by substantial evidence.

¹¹ See 52 Pa. Code § 5.231(a) ("It is the policy of the Commission to encourage settlements.").

D. Exceptions, Replies, and Dispositions

1. OCA Exception No. 1: The ALJ Erred in Denying the OCA Additional Time to Conduct Discovery (I.D. at 4; OCA Comments at 9-12)

a. Exception and Replies

In its Exception No. 1, the OCA asserts that the ALJ erred in denying the OCA additional time and opportunity to conduct discovery, when the OCA requested the same at the prehearing conference. The OCA contends that the ALJ's denial of the OCA's request that the matter be held in abeyance for sixty days while the OCA conducted further discovery, and issuance of an Initial Decision on the Settlement without allowing for further discovery, effectively deprived the OCA of the ability to enter evidence in the proceeding. OCA Exc. at 10-12.

The OCA contends that the ALJ's decision to bar further evidence from the OCA was in error where the OCA did not "sit on its rights" to discovery during the period of time after the OCA filed its intervention, but before Verde filed its Answer to the I&E Complaint, but rather, the period coincided with the onset of the COVID-19 pandemic in the United States, as well as Verde's requests for additional time to Answer the Complaint. The OCA contends it was deprived of any opportunity to clarify or counter the facts which were stipulated to between I&E and Verde, and which only became apparent once the Settlement and supporting stipulation of facts was filed. The OCA contends that rather than any meaningful participation in development of a factual record, the OCA was restricted to submitting only unsworn arguments in the form of

comments on the Settlement forty (40) days after the issuance of the order. OCA Exc. at 10-12, *citing Abeyance Denial Order*.

Specifically, the OCA asserts that it was inaccurate for the ALJ to conclude that “[f]ollowing discovery and discussions, the Settling parties agreed that entering into this Settlement agreement was preferable to pursuing litigation.” Rather, the OCA asserts that the reference to “discovery” was limited to I&E’s and Verde’s recitation of the Stipulated Facts. No witnesses were presented to support the facts in the case. OCA Exc. at 10-12, *citing I.D. at 33*. The OCA asserts it was wrongfully precluded from cross-examination of witnesses or additional discovery of the limited I&E and Verde Stipulated Facts.

The OCA contends that the Commission cannot fully and fairly review the Settlement where the OCA has been denied the opportunity to conduct discovery and/or offer evidence based upon such discovery. Therefore, the OCA avers that it was error for the ALJ to deny the OCA the opportunity to conduct discovery. OCA Exc. at 10-12, *citing, I.D. at 4*.

In their Replies, I&E and Verde both assert that the ALJ acted properly in denying the OCA’s request for additional time in which to conduct discovery. I & E noted:

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.¹² In total, the OCA had approximately six (6) months to conduct

¹² 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.

I&E R. Exc. at 3-5; See, Verde R. Exc. at 3-5.

b. Disposition

Upon review, we do not agree with the OCA that it was error for the ALJ to deny the OCA's request for additional time in which to conduct discovery. The decision whether to grant the OCA additional time to conduct discovery was certainly a matter within the ALJ's discretion. Further, we see no abuse of discretion in the circumstances. As discussed, *supra.*, the ALJ's discretion to limit the scope and receipt of evidence is well settled. In this instance, it appears the ALJ properly exercised his discretion to limit the discovery to matters relevant and material to the allegations of the I&E Complaint. We conclude that OCA has asserted no basis to disturb the ALJ's ruling.

Further, as noted by both I&E and Verde, the OCA was afforded an opportunity, and did, conduct discovery during the period of six (6) months, prior to and following the prehearing conference in this matter. While the OCA may now regret that it exercised its choice to defer discovery until after the Answer to the Complaint was filed, that fact does not establish a violation of due process.

Accordingly, we find no merit in the OCA's Exception No. 1 and we shall, therefore, deny the Exception.

2. OCA Exception 2: The ALJ Erred in Striking the OCA's Factual Evidence Presented in Support of the OCA's Substantive Comments, Thereby Denying the OCA a Meaningful Opportunity to Be Heard Regarding Its Objections to the Non-Unanimous Settlement (I.D. at 5; OCA Comments)

a. Exception and Replies

In its Exception No. 2, the OCA asserts that, because the ALJ issued an Interim Order on January 15, 2021, granting Verde's Motion to Strike portions of the OCA's Comments and the attached Affidavit of Barbara Alexander, the stricken portions of the OCA's Comments would have otherwise provided additional evidence to counter the evidence in support of the Settlement. As a result, the OCA contends that the only facts that were able to be presented in this case were the Stipulated Facts identified by I&E and Verde.

The OCA contends that both the Settlement and stipulated facts were developed by I&E and Verde without the participation of OCA. The OCA further contends that because the stipulated facts are verified by counsel and not by witnesses, it was precluded from cross-examination of any of the facts. The OCA asserts that because no witnesses were presented by either Party in this case, and the OCA was precluded from presenting additional facts or evidence to be heard regarding the OCA's objections to the Settlement, the facts upon which the Settlement is based are entirely one-sided, and therefore not reliable.

Therefore, the OCA submits that the ALJ erred in denying the OCA the opportunity to present evidence counter to the stipulated facts underlying the Settlement. OCA Exc. at 13-15, citing I.D. at 5.

In their Replies, I&E and Verde both assert that, contrary to the OCA's assertion, the OCA was provided ample opportunity to oppose the Settlement *via* the comments in opposition. I&E and Verde note that the ALJ weighed the OCA comments and arguments and expressly disagreed with the OCA's position.

I&E and Verde further note that the Commission's *October 2021 Order* also expressly disagreed with the OCA that the preclusion of its witness constituted a violation of due process. I&E R. Exc. at 5-7; Verde R. Exc. at 5-6.

As noted by I&E:

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. The Commission also concluded that the OCA's due process rights were protected by the opportunity to file comments.

I&E R. Exc. at 6 (Citations omitted).

I&E and Verde assert that because the ALJ properly excluded the OCA's witness and testimony, the OCA's Exception No. 2 should be denied. I&E R. Exc. at 5-7; Verde R. Exc. at 5-6.

b. Disposition

Upon review, we agree with I&E and Verde that the issue of whether the OCA should be permitted to offer additional witness testimony and evidence was resolved by our *October 2021 Order* and will not be revisited here. As noted by that prior order, the ALJ was within his discretion to exclude the OCA's proffered evidence.

See October 2021 Order at 19. We find no merit in the OCA's Exception No. 2, and we shall, therefore, deny the Exception.

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

a. Exception and Replies

In its Exception No. 3, the OCA asserts that it was error for the ALJ to conclude that the Settlement is in the public interest and is supported by substantial evidence. OCA Exc. at 15, citing I.D. at 44-45. The OCA submits that given its position that the Settlement is not supported by substantial evidence, the ALJ could not properly conclude that the Settlement was in the public interest.

The OCA reiterates its views discussed in its Comments, that there is no record evidence or stipulated facts to support many of the elements of the Settlement. See, *e.g.*, OCA Comments at 25 (lack of investigation regarding the complaints identified in the PPL Report, lack of investigation of other complaints outside of those identified in the PPL Report, and the underlying gaps in Verde's records); OCA Comments at 27-28 (lack of evidence regarding third-party vendor sales activities); OCA Comments at 34 (lack of evidence regarding use of two-month timeframe for refunds).

Further, the OCA reiterates that, as discussed in its Exception Nos. 1 and 2, the OCA was not given the opportunity to present any counterevidence or to challenge the stipulated facts presented by I&E and Verde. The OCA contends that:

In this proceeding, the only parties provided an opportunity to be heard were I&E and Verde as they were the only parties invited to present evidence whereas the OCA was relegated to a second tier able to simply present comments. Due process

requires that all parties be afforded the same opportunity to participate.

OCA Exc. at 20.

The OCA contends that as statutory advocate, the OCA is not a typical Intervenor, but rather, plays an important, but different role, from I&E in this proceeding, asserting:

Under its statutory authority, the OCA represents “the interest of consumers as a party, or otherwise participate[s] for the purpose of representing an interest of consumers, before the commission in any matter properly before the commission...” The allegations identified in the I&E’s Formal Complaint directly impact residential consumers. Neither I&E nor Verde can fully represent that consumer interest in this proceeding. The OCA represents the interests of the residential consumers impacted by the allegations in I&E’s Formal Complaint. Representation of the impacted consumers’ interest was why the OCA intervened in this proceeding and why meaningful due process to protect their interests is essential.

OCA Exc. at 21, citing 71 P.S. §709-4(a).

Due to its preclusion from presenting evidence, the OCA contends that the facts of the present case are not sufficient to support a finding that the Settlement is in the public interest. Therefore, the OCA contends that the Settlement should be rejected.

OCA Exc. at 15-22.

In their Replies, I&E and Verde both assert that the ALJ properly found that the Settlement was supported by substantial evidence and in the public interest. I&E R. Exc. at 7-9; Verde R. Exc. at 6-10. Verde asserted that the ALJ’s conclusion that the Settlement was in the public interest was well reasoned, noting:

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 [Pell] then considered all of the Parties' positions on whether or not the Settlement was in the public interest and held that the Settlement:

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

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

Verde R. Exc. at 6-7, citing I.D. at 53.

Both I&E and Verde contend that the ALJ's conclusion that the Settlement was supported by substantial evidence and in the public interest comported with the Commission's policy favoring settlements. Therefore, I&E and Verde assert that the OCA's Exception No. 3 should be denied. I&E R. Exc. at 7-9; Verde R. Exc. at 6-10.

b. Disposition

Upon review, we agree with I&E and Verde that the ALJ's decision adopting the Settlement was supported by substantial evidence and in the public interest. As discussed, *supra*. in Section C, we conclude that, not only was the OCA afforded due process, but also, that the evidence relied upon by the ALJ in approving the Settlement constituted substantial evidence.

As the OCA's Exception No. 3, that the Settlement is not in the public interest, is premised upon the position that the Settlement lacked substantial evidence, which we have rejected, we find no merit in the OCA's Exception No. 3. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 4, the OCA asserts that the ALJ erred, as a factual matter by concluding that the OCA declined repeated invitations to participate in settlement negotiations. OCA R. Exc. at 22, citing I.D. at 2, 44-45, 50-51, and 66. The OCA contends that this is not the case, but rather that the OCA was effectively precluded from meaningful negotiations where the OCA was asked to offer input, only when presented with a near-complete settlement. *Id.*

The OCA contends that it was prepared to participate in settlement negotiations at the appropriate time, after the OCA was able to assess the merits of the Settlement. However, the OCA contends, that when the OCA asked for the necessary

time in which to conduct discovery, in the exercise of its due process rights to be fully informed of the facts before rendering a conclusion regarding the Settlement, the OCA's request was denied. Therefore, the OCA avers that the ALJ erred in finding that the OCA "refused to participate in the negotiations" underlying the proposed Settlement. OCA Exc. at 22-23.

In their Replies, I&E and Verde both assert that, contrary to the OCA's assertions, the ALJ was correct to conclude that the OCA opted not to participate in the settlement negotiations. I&E R. Exc. at 9-10; Verde R. Exc. at 10. Verde asserts that the OCA acknowledged it was provided an opportunity to participate, but opted not to, noting:

The OCA admitted to its decision not to participate in its Statement in Opposition of the Joint Petition: "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" ¹³ 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. ¹⁴ 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. ¹⁵ Notably, after being presented with the draft settlement and receiving discovery responses to three (3) sets of interrogatories, the OCA still

¹³ 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 . . .").

¹⁴ N.T. pgs. 12, 16, and 27-28.

¹⁵ *See generally* N.T.

refused to review and provide comments on the settlement and instead reiterated its opposition.¹⁶

Verde R. Exc. at 10. (Citations in the original)

Both I&E and Verde assert that because the OCA acknowledged it was invited to participate in settlement discussions, the OCA's Exception No. 4 is without merit and should be denied. I&E R. Exc. at 9-10; Verde R. Exc. at 10.

b. Disposition

Upon review, we agree with I&E and Verde that the record demonstrates that the OCA acknowledges it was invited to participate in settlement discussions and declined to do so. On that basis, we find the ALJ correctly concluded that the OCA opted not to participate in settlement discussions. Accordingly, we find no merit in the OCA's Exception No. 4. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 5, the OCA asserts that the ALJ erred in finding that the refund provision in the Settlement was sufficient to "address the behavior alleged in the complaint," notwithstanding the ALJ's modification of the notification process to

¹⁶ N.T. pg. 10, lns. 12-20.

notify the customers of the potential refund of the ETF and the steps required to secure the refund. OCA Exc. at 23, citing I.D. at 30-31.

The OCA reiterates its assertions, as argued before the ALJ, that the refund provision is deficient in several respects. The OCA contends that the provision is too narrowly drawn where it excludes a potential pool of customers who are explicitly identified in the PPL Report and any others who may have experienced similar conduct. The OCA also reiterates its position that the requirement that affected customers provide proof of ETF payment within sixty (60) days is improper. In addition, the OCA reiterates that the refund amount is too restrictive where limited to the first two months of service. Finally, the OCA asserts the provision's requirement that the customer execute a "Release of Claim" is not in the public interest.

The OCA asserts that the refund provision of the Settlement is not in the public interest as it places the burden on the impacted customers to comply with the provisions of the Settlement or Verde will retain in full the money that should be refunded to them plus the ETF charged to them for being switched without their authorization. OCA Exc. at 23-25.

In their Replies, I&E and Verde both assert that the ALJ properly approved the refund provisions of the Settlement as reasonable and in the public interest and sufficient to address the allegation of the Complaint. I&E R. Exc. at 10-11; Verde R. Exc. at 10-12. I&E asserts that the OCA's argument is an attempt to broaden the scope of the Settlement beyond the allegations of the Complaint and impose unnecessary burdens on Verde to complete the refunds, noting the impracticability of including customers outside the scope of the complaint, and that it is reasonable to require proof of payment of a fee by the customers in order to be entitled to a refund. I&E also noted that the ALJ modified the notice provisions to require Verde to notify the customers identified in the Complaint of their eligibility and how to seek a refund. Finally, I&E avers that the

two-month limitation of recovery and the provision for a “Release of Claims” are both reasonable provisions which bring finality to the issue. I&E R. Exc. at 11

Both I&E and Verde contend that the refund provision of the Settlement is reasonable in the circumstances and adequate to address the behavior alleged in the Complaint. Therefore, both I&E and Verde assert that the OCA’s Exception No. 5 is without merit and should be denied. I&E R. Exc. at 10-11; Verde R. Exc. at 10-12.

b. Disposition

Upon review, we agree with I&E and Verde that the ALJ properly approved the refund provision of the Settlement, finding it to be reasonable in the circumstances and adequate to address the behavior alleged in the Complaint. While we acknowledge that the OCA is committed to advocating for a more favorable outcome for the Pennsylvania consumer, the fact that the ALJ did not adopt the more favorable terms argued by OCA does not amount to reversible error.

In the present case, the ALJ gave due consideration to all the relevant factors and determined that the refund provision of the Settlement was reasonable in the circumstances and sufficient to address the conduct alleged in the Complaint. We note that I&E, as the prosecuting arm of the Commission which brought the Complaint, also avers that the refund provision is adequate to address the conduct alleged in the Complaint. We agree.

Accordingly, we find no merit in the OCA’s Exception No. 5. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 6, the OCA asserts that the ALJ erred in finding the Marketing Moratorium from February 6, 2020 to 6 months following approval of the Settlement is sufficient to help ensure that Verde will resume marketing in compliance with the Settlement and the Commission's Regulations, given that the allegations against Verde in the Complaint are among the most egregious set of allegations against an energy supplier in Pennsylvania to date. OCA Exc. at 26, citing OCA Comments at 25-27. The OCA asserts that the fact that it was precluded from additional discovery prevented it from introducing testimony to demonstrate that Verde's actions in Pennsylvania were not isolated incidents. The OCA maintains that, nevertheless, the record before the Commission shows that the Settlement is not reasonably tailored to remedy the harm caused. *Id.*

Therefore, the OCA asserts that the ALJ erred in approving the short Marketing Moratorium provision of the Settlement and the Commission should reject approval of the provision. OCA Exc. at 26.

In their Replies, I&E and Verde both assert that that ALJ properly approved the provision related to the Marketing Moratorium, as a reasonable settlement of the issues alleged in the Complaint. I&E R. Exc. at 11-12; Verde R. Exc. at 12-13. I&E asserts that, contrary to the OCA's assertion, the Marketing Moratorium provision is a substantial deterrent and in fact has remained in effect pending the resolution of the proposed Settlement. Further, I&E notes that Verde has not returned to telemarketing or in-person marketing and will not be able to return to the market until implementation of

the quality assurance measures required by the Settlement. I&E further asserts that, the OCA's argument for a more extensive moratorium is overreaching where the Complaint did not include allegations regarding online enrollments and customers who contact Verde. I&E at 12.

Both I&E and Verde argue that the OCA's opposition to the Marketing Moratorium fails to assert any basis upon which to reject the provision which is reasonable in view of the full Settlement, and sufficient to address the allegations of the Complaint. Therefore, I&E assert that the OCA's Exception No. 6 should be denied. I&E R. Exc. at 11-12; Verde R. Exc. at 12-13.

b. Disposition

Upon review, we agree with I&E and Verde, that the Marketing Moratorium provision is reasonable and sufficient to address the allegations of the Complaint.

The record reflects that the ALJ duly considered and rejected the OCA's position that a more stringent moratorium was warranted in the circumstances. Once again, the OCA appears to conflate the failure to prevail in its argument, as reversible error. The ALJ made a reasoned decision regarding the scope and degree of the moratorium in the given circumstances, which was within the ALJ's discretion. We find

the ALJ's reasoning to be sound, and find no basis asserted by the OCA to reject the ALJ's determination.

Accordingly, we find no merit in the OCA's Exception No. 6. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 7, the OCA asserts that for the same reasons asserted in its Exception No 3, which assert a general lack of substantial evidence upon which to approve the Settlement, it was reversible error for the ALJ to approve the compliance, monitoring, and reporting commitments as reasonable and in the public interest. OCA Exc. at 26-28.

In their Replies, I&E and Verde both reiterate their arguments in opposition to the OCA's position that the record lacks substantial evidence upon which to approve the Settlement, and specifically, upon which to approve the compliance, monitoring, and reporting commitments as reasonable and in the public interest. I&E and Verde both contend that the OCA's arguments regarding the lack of substantial evidence should be rejected, and the OCA's Exception No. 7 should be denied. I&E R. Exc. at 12-14; Verde R. Exc. at 13.

b. Disposition

Upon review, we agree with I&E and Verde that the OCA's arguments regarding a lack of substantial evidence upon which to approve the compliance, monitoring, and reporting commitments as reasonable and in the public interest are without merit. As we have already reviewed and rejected the OCA's argument that the record lacked substantial evidence, *supra.*, at Section C, we find the OCA's Exception No. 7 to be without merit.

Accordingly, we find no merit in the OCA's Exception No. 7. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 8, the OCA asserts that the ALJ improperly concluded that the Settlement's compliance monitoring and reporting provisions for telephonic communications and door-to-doors sales contacts with potential customers are in the public interest and supported by substantial evidence. The OCA again couches its Exception in terms of a lack of substantial evidence upon which to render the determination approving the provision as in the public interest. OCA Exc. at 28-29, citing I.D. at 43 and 45.

In their Replies, I&E and Verde both reiterate their arguments in opposition to the OCA's position that the record lacks substantial evidence upon which to approve the Settlement, and specifically, upon which to approve the compliance monitoring and

reporting provisions for telephonic communications and door-to-doors sales contacts with potential customers. I&E and Verde both contend that the OCA's arguments regarding the lack of substantial evidence should be rejected, and the OCA's Exception No. 8 should be denied. I&E R. Exc. at 14-15; Verde R. Exc. at 14-15.

b. Disposition

Upon review, we agree with I&E and Verde that the OCA's arguments regarding a lack of substantial evidence upon which to approve the compliance, monitoring, and reporting commitments, including as to telephonic communications and door-to-doors sales contacts with potential customers, as reasonable and in the public interest are without merit. As we have already reviewed and rejected the OCA's argument that the record lacked substantial evidence, *supra.*, at Section C, we find the OCA's Exception No. 8 to be without merit.

Accordingly, we find no merit in the OCA's Exception No. 8. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 9, the OCA asserts that the ALJ erroneously concluded that the policy changes provision of the Settlement, that allows Verde to change its policies related to marketing to Pennsylvania consumers for EGS products and services upon written notice to I&E, is reasonable despite its vagueness and lack of sufficient detail to be enforceable. The OCA contends that the Settlement should be rejected as the

policy changes provision is too vague to be enforced to protect customers. OCA Exc. at 30, citing I.D. at 47.

In their Replies, I&E and Verde both assert that the policy change provision in the Settlement is neither vague nor lacking in detail. Both I&E and Verde contend that the language of the provision, on its face, provides sufficient specificity for Verde to understand its obligations and for I&E to enforce the provision. I&E R. Exc. at 15; Verde R. Exc. at 15-16.

b. Disposition

Upon review, we agree with I&E and Verde that the OCA's argument that the policy change provision of the Settlement is so vague as to be unenforceable is without merit. A plain reading of the provision reflects that the duty of Verde is set forth, as is I&E's enforcement authority.

Accordingly, we find no merit in the OCA's Exception No. 9, and we shall, therefore, deny the Exception.

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

a. Exception and Replies

In its Exception No. 10, the OCA asserts that the ALJ erred by concluding that the marketing and policy changes as well as the increased oversight provided for in the Settlement will adequately address all of the allegations of the Complaint, including "spoofing" PPL's Number and unauthorized customer account access. The OCA

contends that the provision is not in the public interest as it does not directly address serious allegations in the Complaint. OCA Exc. at 30-31, citing I.D. at 50.

In their Replies, I&E and Verde both assert that the ALJ properly concluded that while the Settlement may not expressly reference “spoofing” and unauthorized account access, the remedial measures and requirements contained in the Compliance Plan provisions of the Settlement are more than sufficient to address those concerns. Both I&E and Verde assert that the OCA’s Exception No. 10 is without merit and should be denied. I&E R. Exc. at 16; Verde R. Exc. at 16.

b. Disposition

Upon review, we agree with I&E and Verde that the OCA’s argument is without merit. The ALJ duly considered the OCA’s position on the issue of spoofing and unauthorized account access and concluded the Settlement as a whole, and specifically the Compliance Plan provisions were more than adequate to address the circumstances in which spoofing and unauthorized account access may occur. See, I.D., at 50.

Accordingly, we find no merit in the OCA’s Exception No. 10. Therefore, we shall deny the Exception.

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

a. Exception and Replies

In its Exception No. 11, the OCA reiterates its assertion that the Settlement may not be found to be in the public interest as it is not supported by substantial evidence. The OCA further asserts that the Settlement does not represent the interests of

the consumers impacted by Verde's mismanagement. On this basis, the OCA requests that the Commission reject the proposed Settlement as not in the public interest. OCA Exc. at 31.

In their Replies, I&E and Verde both reassert their position that the Settlement is supported by substantial evidence and is in the public interest. Specifically, I&E asserts that the terms of the Settlement demonstrate the service to public interest, where the following is required:

- (1) refunds for customers who alleged slamming¹⁷
- (2) refunds for customers who alleged payment of an ETF from the alleged slamming¹⁸
- (3) new third-party verification platform¹⁹
- (4) increased I&E oversight²⁰
- (5) new training provisions²¹
- (6) moratorium on telemarketing and in-person marketing until quality assurance measures are approved by I&E²²
- (7) significant changes to Verde's executive leadership²³

¹⁷ Joint Petition, pgs. 5-6.

¹⁸ Joint Petition, pgs. 5-6.

¹⁹ Joint Petition, pgs. 8-9.

²⁰ Joint Petition, pg. 15.

²¹ Joint Petition, pgs. 9-12.

²² Joint Petition, pgs. 6-7.

²³ Verde Reply Comments, pgs. 10-11, Section E (filed November 30, 2020).

(8) payment of \$75,000.00 to PPL's hardship fund²⁴

(9) payment of \$1,000,000.00 civil penalty²⁵

I&E R. Exc. at 16-17 (citations in original).

Both I&E and Verde assert that the OCA's Exception No. 10, is without merit and should be denied. I&E R. Exc. at 16-17; Verde R. Exc. at 16-17.

b. Disposition

Upon review, we agree with I&E and Verde that the OCA's argument is without merit. Clearly a Settlement which holds Verde accountable for its unlawful conduct, by gaining agreement to rectify the conduct and by imposition of a significant penalty of \$1,000,000, is in the public interest. As previously discussed, *supra*. at Section C, we reject any argument by the OCA that the Settlement lacks substantial evidentiary support. Further, the fact that the OCA would advocate for stronger penalties in the circumstances does not articulate a basis upon which to reject the ALJ's Initial Decision adopting the Settlement. *See*, I.D. at 53.

Accordingly, we find no merit in the OCA's Exception No. 11. Therefore, we shall deny the Exception.

²⁴ Joint Petition, pg. 5.

²⁵ Joint Petition, pg. 5.

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

a. Exception and Replies

In its Exception No. 12, the OCA asserts that the ALJ erroneously concluded that the “Civil Penalty” provision in the Settlement is in the public interest and supported by substantial evidence. The OCA contends that the ALJ erred in evaluating the applicable civil penalty factors using the incomplete set of facts set forth by I&E and Verde. The OCA reiterates the arguments proffered in its Exception No. 3, which asserts the Settlement lacks substantial evidence to conclude the Settlement is in the public interest. The OCA contends that, absent the requisite substantial evidence, the factors to determine an appropriate civil penalty cannot be applied.

The OCA asserts that the Settlement should be rejected as the record in this matter lacks substantial evidence to determine whether the civil penalty provision satisfies the applicable factors under 52 Pa. Code §69.1201 (pertaining to factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission Regulations- statement of policy). OCA Exc. at 31-32, citing I.D. at 73.

In their Replies, I&E and Verde both assert that, contrary to the OCA’s argument, the ALJ properly found that the civil penalty was reasonable and in the public interest and supported by substantial evidence. I&E asserts that the ALJ’s thorough disposition of the issue refutes the OCA’s position. I&E notes:

In assessing the civil penalty amount, ALJ Pell properly set forth the standards found in Section 69.1201²⁶ of the Commission's regulations and provided detailed analysis of each standard over approximately 19 pages to find that the civil penalty amount and hardship contribution sufficiently addressed the conduct alleged in the Complaint.²⁷ 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.²⁸ After reviewing and addressing each factor, ALJ Pell properly found that the Settlement and all its terms were reasonable and in the public interest.²⁹ 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.

I&E R. E. at 17-18. (citations in original)

Both I&E and Verde assert that the OCA's Exception No. 12 is without merit and should be denied. I&E R. Exc. at 17-18; Verde R. Exc. at 17-20.

²⁶ 52 Pa. Code § 69.1201.

²⁷ Initial Decision, pgs. 56-75.

²⁸ Initial Decision, pgs. 56-75.

²⁹ Initial Decision, pg. 75.

b. Disposition

Upon review, we agree with I&E and Verde that the OCA's argument is without merit. As noted by I&E, the ALJ's disposition of the civil penalty was thoughtful and thorough, and in accordance with the Commissions policy statement and factors enumerated at 52 Pa. Code §69.1202. *See* I.D. at 56-75. Further, as previously discussed, *supra.* at Section C, we reject any argument by the OCA that the Settlement lacks substantial evidentiary support. Once again, the fact that the OCA would advocate for increased civil penalties in the circumstances does not articulate a basis upon which to reject the ALJ's Initial Decision approving the civil penalties set forth under the Settlement.

Accordingly, we find no merit in the OCA's Exception No. 12. Therefore, we shall deny the Exception.

III. Conclusion

Based on our review of the Settlement terms and conditions, as modified by the ALJ, and consistent with *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004), we find the Settlement to be based upon substantial evidence and in the public interest. Accordingly, we shall: (1) deny, the Exceptions of the OCA; and (2) adopt the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by the Office of Consumer Advocate at Docket No. C-2020-3017229, on February 10, 2022, are denied.

2. That the Initial Decision of Administrative Law Judge Christopher P. Pell, issued on January 21, 2022, at Docket No. C-2020-3017229 is adopted consistent with this Opinion and Order.

3. That the Joint Petition for Approval of Settlement filed on June 30, 2020, between the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement and Verde Energy USA, Inc., as modified, *infra.*, at Ordering Paragraph number ten, is approved.

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

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

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

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

7. That within ninety (90) days of the date of entry of a final Commission Order approving the Settlement, Verde Energy USA, Inc. be directed to file

a sworn certification with the Commission demonstrating the \$75,000 payment to PPL's Hardship Fund.

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

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

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

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

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

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

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

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

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

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

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

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: September 15, 2022

ORDER ENTERED: September 15, 2022