**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held June 30, 2016 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  John F. Coleman, Jr.  Robert F. Powelson  David W. Sweet |  |

Commonwealth of Pennsylvania, by C-2014-2427657

Attorney General Kathleen G. Kane, Through

The Bureau of Consumer Protection

And

Tanya J. McCloskey, Acting Consumer Advocate

v.

IDT Energy, Inc.

**TENTATIVE OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of presiding Administrative Law Judges (ALJs) Elizabeth H. Barnes and Joel H. Cheskis, issued November 19, 2015, and the Exceptions filed thereto by Mr. Anthony Ferrare on December 3, 2015. Replies to the Exceptions of Mr. Ferrare were filed by IDT Energy, Inc. (IDT, or the Company), and the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, (OAG) and Tanya J. McCloskey, Acting Consumer Advocate, (OCA) (collectively, OAG/OCA or the Joint Complainants), on December 18, 2015.

As will be discussed in more detail in this Opinion and Order, Mr. Ferrare is the lead plaintiff in a federal class action lawsuit filed against IDT. The lawsuit is based on the same, or substantially the same, conduct allegedly engaged in by IDT that is the subject of the proceedings before this Commission. The suit seeks damages for Mr. Ferrare and all others similarly situated, and is pending before the United States District Court, Eastern District of Pennsylvania, at Civil Action No. 14-4658.

On consideration of the Initial Decision, the Exceptions of Mr. Ferrare in opposition to approval of the Joint Petition for Approval of Settlement (Settlement) filed in this proceeding, and the Replies to the Exceptions, we shall tentatively adopt the Initial Decision, as modified, and as clarified by the condition of acceptance set forth in this Opinion and Order. The Exceptions of Mr. Ferrare shall be denied consistent with this approval. In light of the clarifications in this Opinion and Order, we shall provide the signatories to the Settlement seven days in which to file comments with this Commission in response to the clarification and condition set forth in this Opinion and Order.

**I. Background**

IDT is an electric generation supplier (EGS) licensed by the Commission pursuant to Section 2809 of the Public Utility Code (Code), 66 Pa. C.S. § 2809, to provide competitive electric generation supply to residential and commercial end-user customers throughout Pennsylvania. *See License Application of IDT Energy, Inc.* Docket No. A-2009-2134623 (Order entered January 15, 2010) (*IDT Licensing Order*).

Pursuant to the Electricity Generation Customer Choice and Competition Act (Act), 66 Pa. C.S. §§ 2801-2812, the generation of electricity is no longer regulated as a public utility function in Pennsylvania. Only the distribution of electricity is continued to be regulated as a natural monopoly subject to the direct jurisdiction of the Commission. 66 Pa. C.S. § 2802(16). Retail customers are provided direct access to the competitive market for the generation and sale or purchase of electricity. *See* 66 Pa. C.S. § 2802(12)-(13).

Since the deregulation of electric generation in Pennsylvania, the rates consumers pay in the retail electric generation market are governed by the terms of their contract with their supplier. *See, e.g., Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014) (*Variable Rate Order*), at 3. EGSs are, however, required to obtain licenses from the Commission, demonstrate financial responsibility, and comply with various statutory and regulatory requirements concerning service as are necessary for the protection of the public. *See* 66 Pa. C.S. §§ 2802(14), 2807(d)(2), and 2809; *also* 52 Pa. Code §§ 54.1-54.10.

This proceeding is a Joint Complaint filed with the Commission by the OAG and the OCA on June 20, 2014, against IDT. The Complaint was initiated as a result of consumer contacts and consumer complaints received by these agencies and by the Commission regarding the EGS service provided by IDT. IDT provides variable rate[[1]](#footnote-1) electric generation service to residential customers throughout Pennsylvania and uses a variety of marketing and advertising mediums to solicit residential customers for its variable rate plan including door-to-door, telephone, internet, mass mail and print solicitations. *See* Joint Formal Complaint (Complaint) of OAG and OCA, *infra*, at ¶¶ 11-12.

On or about February 10, 2014, the OCA began receiving a high volume of calls and written correspondence (approximately 3,000 contacts) from residential consumers on variable rate plans with EGSs regarding the level of electric generation charges on the consumers’ electric bills. Complaint at ¶ 15. As of May 5, 2014, the OCA collected information from 2,434 consumer contacts of which 539, or 22%, were customers of IDT. Complaint at ¶¶ 15-17.

The OAG/OCA Complaint averred that, upon information and belief, from January 1, 2014, to April 21, 2014, approximately 500 Formal Complaints were filed at the Commission by consumers regarding variable rates charged by EGS companies. Complaint at ¶ 21. Additionally, the OAG/OCA averred that, approximately, 6,500 informal complaints and nearly 10,000 inquiries were made by consumers to the Commission regarding variable rates charged by EGS companies. *Id*. Of the approximately 203 Commission Formal Complaints reviewed by the OAG/OCA, 47, or 23%, involved IDT as the EGS service provider. Complaint at ¶ 19.

From February 27, 2014, to June 4, 2014, the OAG received approximately 7,503 consumer complaints regarding variable rates charged by EGS providers. Of these 7,503 complaints, 1,917, or 26%, involved IDT. Complaint at ¶ 18.

Based, *inter alia*, on the foregoing, on June 20, 2014, the OAG and the OCA jointly filed the instant Complaint. The Complaint raised seven counts which are summarized below.

Count I – Misleading and Deceptive Promises of Savings, alleges, *inter alia*, that employees, agents, and/or representatives of IDT engaged in and continue to engage in activities that are fraudulent, deceptive, and/or in violation of the Commission’s Regulations, Orders, and the Unfair Trade Practices and Consumer Protection Law, 73 P. S. §§ 201-1 *et seq.*, (Consumer Protection Law or CPL), by promising savings to customers as an inducement to use IDT’s service, which savings may not, and for many customers, did not, materialize. Complaint at 7-8.

As explained in the factual background to the Complaint and expanded upon later therein, the OAG and the OCA note that a percentage of the IDT-related consumer complaints involved consumers’ understanding and/or belief that they would be provided a rate that was guaranteed to be at or below the “Price to Compare” (PTC), or savings over the PTC. *See* Complaint at ¶¶ 21-24.[[2]](#footnote-2)

In Count II – Misleading and Deceptive Welcome Letter and Advertisements, the Joint Complainants averred, *inter alia*, that IDT’s claims in its Welcome Letters to customers and Advertising Documents represent benefits of its services that the Company did not provide to its customers and EDC sponsorship that it does not have, in violation of the CPL. *See* Complaint at ¶¶ 36-39.

In Count III – Slamming, the Joint Complainants averred that certain consumers with whom they were in contact state that they did not consent to switch service to IDT. Complaint at ¶¶ 41-45.

Count IV – Lack of Good Faith Handling of Complaints, alleged that IDT has violated and continues to violate Commission Regulations by failing: (1) to adequately staff its call center; (2) to provide reasonable access to IDT’s representatives for purposes of submitting complaints; (3) to properly investigate consumer disputes; (4) to properly notify consumers of the results of its investigation of a dispute when such investigation was concluded; and (4) to utilize good faith, honesty, and fair dealing in its dealings with consumers. Complaint at ¶¶ 47-51.

In Count V – Failing to Provide Accurate Pricing Information, the Joint Complainants attached language from IDT’s Disclosure Statement provided to its customers. Based on review of this Disclosure Statement, the Joint Complainants alleged, *inter alia*, that IDT had violated and continues to violate the Commission’s Regulations by failing to provide pricing information requested by its consumers. They additionally alleged a violation of Commission Regulations on the part of IDT by its failing to provide pricing information in plain language and using common terms that consumers understand, such that consumers could not determine from the Disclosure Statement the price that they would or could be charged by IDT, or how the price would be calculated. Complaint at ¶¶ 59-61.

Based on the foregoing, the Joint Complainants asserted that IDT violated and continues to violate Commission Regulations by failing to provide information to its consumers in a manner that would allow them to compare offers. Complaint at ¶ 62.

In Count VI - Prices Nonconforming to Disclosure Statement, it was alleged that the prices charged by IDT to its customers in early 2014 were not reflective of the cost to serve its residential customers. Complaint at ¶ 65. The Joint Complainants additionally assert that the prices charged did not conform to the variable rate pricing provisions of the Company’s Disclosure Statement. Complaint at ¶ 67.

In Count VII, Failure to Comply With the Telemarketer Registration Act, the Joint Complainants state that IDT did not provide consumers with a contract that contained all of the required information set forth in Sections 2245(a)(7) and 2245(c) of the Telemarketer Registration Act (TRA), 73 P.S. §§ 2245(a)(7) and 2245(c). The TRA is incorporated by reference in the CPL, 73 P. S. § 2246. And, the Commission’s Regulations require compliance with the TRA and CPL. Complaint at ¶¶ 73-75, citing 52 Pa. Code §§ 54.43(f), 111.10(a).

For relief, the OAG and OCA requested that the Commission find that IDT violated the TRA, the CPL, and Commission Regulations, impose a civil penalty upon the Company for such violations, and suspend or revoke IDT’s license. Complaint at 16. The Joint Complainants further requested that the Commission order the Company to provide appropriate restitution to its customers, including, without limitation, refunding all charges that were over and above the PTC, as well as any fees and/or penalties that customers incurred as a result of leaving IDT to obtain service elsewhere. *Id*.

Additionally, the Joint Complainants sought an order directing IDT to prohibit its salespeople from making pricing promises to consumers that are deceptive and inaccurate and to cease and desist from switching customers without the customer’s explicit consent. The Complainants also requested the Commission issue an order that would permanently enjoin IDT from engaging in practices that violate the TRA and CPL, and direct IDT to implement proper consumer dispute procedures and adequately staff, train, and monitor its employees and/or agents in such procedures. Complaint at 17.

**II. History of the Proceeding**

As previously noted, the Complaint was filed on June 20, 2014, by the OAG and the OCA, at Docket Number C-2014-2427657. On July 10, 2014, IDT filed an Answer and New Matter in response to the Complaint. In its Answer, IDT admitted or denied the various averments made by the Joint Complainants. IDT specifically denied that its employees, agents and/or representatives had engaged or continue to engage in activities that are fraudulent, deceptive or in violation of the Commission’s Regulations and orders or the Unfair Trade Practices/Consumer Protection Law. IDT also denied that it switched customers without their consent or that it failed in any aspect of its customer service. Answer at 6-16.

In its New Matter, accompanied by a Notice to Plead, IDT averred, among other things, that customers received high bills in January and February of 2014 because of volatility in the wholesale energy market resulting from the very cold weather that resulted in record breaking use of natural gas and electricity. IDT further noted that the Company only ever offered a variable rate product for electric generation supply with no long-term contract, no deposits and no termination fees. IDT provided additional averments and requested that the Complaint be dismissed with prejudice. New Matter at 16-23.

On July 10, 2014, IDT also filed Preliminary Objections in response to the Complaint. In its Preliminary Objections, accompanied by a Notice to Plead, IDT argued that three of the seven counts averred in the Complaint should be dismissed or stricken with prejudice, and the request for an Order providing restitution should be denied because they all are legally insufficient or include impertinent material. Preliminary Objections at 6-12.

Also, on July 10, 2014, the Office of Small Business Advocate (OSBA) filed a Notice of Appearance, Notice of Intervention and Public Statement in this proceeding.

On July 21, 2014, the Joint Complainants filed an Answer to IDT’s Preliminary Objections. In their Answer, the Joint Complainants argued that IDT’s Preliminary Objections are unsupported and should be overruled.

On July 30, 2014, the Joint Complainants filed an Answer to IDT’s New Matter. In their Answer, the Joint Complainants denied acknowledging that the rates as high as those charged by IDT in early 2014 were the result of the wholesale electric prices or that such high prices absolve IDT of the alleged excessive charges to customers or alleged illegal marketing, and other, practices.

On July 31, 2014, the Commission’s Bureau of Investigation and Enforcement (I&E) filed a Notice of Intervention in this proceeding.

On August 20, 2014, the ALJs issued an Order Granting in Part and Denying in Part IDT’s Preliminary Objections. In this Order, the ALJs recommended that one count of the Complaint be stricken because the Commission lacks authority to regulate IDT’s prices and that one count of the Complaint be stricken in part because the Commission lacks authority to hear cases brought under the TRA. All other counts alleged in the Complaint were allowed to proceed to a hearing.

On September 3, 2014, an Order Granting Motion for Protective Order was issued. On September 8, 2014, the Joint Complainants and IDT separately filed Petitions for Interlocutory Review and Answer to Material Question with the Commission regarding various issues decided in the August 20, 2014 Order Granting in Part and Denying in Part Preliminary Objections. On September 18, 2014, both Parties filed briefs opposing the Petition for Interlocutory Review filed by the other Party.

By Secretarial Letter of September 30, 2014, the Commission waived the thirty-day period for consideration of petitions seeking interlocutory Commission review pursuant to 52 Pa. Code § 5.303. *See* 52 Pa. Code §§ 1.2(c); *also* *C.S. Warthman Funeral Home, et al. v. GTE North, Inc.*, Docket No. C-00924416 (Order entered June 4, 1993).

On November 26, 2014, IDT filed an unopposed Motion for Continuance of Evidentiary Hearings scheduled for December 8-12, 2014. That Motion was granted via Order dated December 9, 2014, that rescheduled the hearings for February 17-20, 2015.

On December 18, 2014, the Commission issued an Order in response to the Petitions for Interlocutory Review and Answer to Material Question filed by both the Joint Complainants and IDT. The Commission determined, *inter alia*, that it (1) can direct an EGS to provide refunds to customers in certain circumstances, (2) does not have jurisdiction over the Unfair Trade Practices/Consumer Protection Law (UTP/CPL) or the TRA, but can enforce its own regulations with regard to telemarketing and prohibiting deceptive practices, (3) does have jurisdiction to determine whether EGS billed prices reflect the EGS’s disclosure statement, and (4) cannot order equitable remedies including restitution but can order an EGS to credit or adjust for an overbill. *See*, Commonwealth of Pennsylvania, *et al*. v. IDT Energy, Inc., Docket Number C-2014-2427657 (Order entered Dec. 18, 2014) (*December 18th Order*).

Evidentiary hearings for the admission of consumer direct testimony into the record and cross examination were held on February 17-20, 2015, as scheduled. The pre-served written direct testimony of 125 consumer witnesses were admitted into the record during the hearing, along with various cross examination and redirect exhibits.

On April 8, 2015, Anthony Ferrare, a former customer of IDT, filed a Petition to Intervene. On April 28, 2015, both IDT and the Joint Complainants filed Answers to the Petition opposing Mr. Ferrare’s intervention for various reasons. By Order dated May 1, 2015, the ALJs granted Mr. Ferrare’s Petition to Intervene, noting, in particular, that Mr. Ferrare was not permitted to represent the interests of “all others similarly situated,” as he requested in his Petition. Pursuant to the agreed-upon schedule modification, Mr. Ferrare pre-served written, direct testimony on May 27, 2015.

On July 2, 2015, the Joint Complainants and IDT advised the presiding ALJs that a settlement in principle had been reached and requested that the litigation schedule be suspended. At that time, I&E indicated it would neither support nor oppose the Settlement; the OSBA indicated it had not determined its position on the Settlement; and, counsel for Mr. Ferrare indicated that he could not determine whether to join or oppose the Settlement until he had received additional information from IDT.

On July 31, 2015, Mr. Ferrare filed a Motion to Compel seeking an Order compelling IDT to respond to informal discovery exchanged as part of Mr. Ferrare’s evaluation of the Settlement to determine whether he would join or oppose the Settlement. On August 7, 2015, the ALJs issued an Order Granting Motion to Compel that directed IDT to provide Mr. Ferrare the information he requested informally so he could evaluate the Settlement.

On August 4, 2015, the Joint Complainants, IDT and the OSBA (jointly, the Settling Parties) submitted the Settlement. Attached to the Settlement was a Stipulation of Facts in Support of the Settlement and Conclusions of Law along with a Statement in Support of the Settlement submitted by each of the Settling Parties. The Settlement indicated that I&E neither joins nor opposes the Settlement and that Mr. Ferrare will be opposing the Settlement while discovery responses obtained from IDT are being reviewed.

On August 26, 2015, Mr. Ferrare filed an *Amicus Curiae* brief opposing the Settlement. In his brief, Mr. Ferrare provided several arguments in support of his position that the Settlement should be rejected because it is not in the public interest. Mr. Ferrare filed an Amended *Amicus Curiae* brief on September 1, 2015, correcting redactions to the proprietary version of the brief.

On September 8, 2015, IDT and the Joint Complainants filed separate briefs in reply to Mr. Ferrare’s *Amicus Curiae* brief. In its Reply Brief, IDT argued the Settling Parties have demonstrated that the Settlement is in the public interest and should be approved. In their reply to Mr. Ferrare’s *Amicus Curiae* brief, the Joint Complainants also argued that Mr. Ferrare’s arguments should be rejected.

Also, on September 8, 2015, IDT filed a Motion to Strike portions of Mr. Ferrare’s *Amicus Curiae* brief seeking to have stricken portions of Mr. Ferrare’s brief that include hearsay and non-record evidence. Mr. Ferrare filed an Answer to IDT’s Motion to Strike on September 15, 2015.

On September 16, 2015, the ALJs issued an Order Denying Request to Remove Confidential Designation. The Order severed Mr. Ferrare’s request to remove the designation of certain information as confidential from disposition of the Settlement. In doing so, the Order determined that IDT’s arguments in favor of maintaining the confidential designation outweigh Mr. Ferrare’s arguments for having such designations removed. Similarly, on September 21, 2015, the ALJs issued an Order Denying Motion to Strike in which they determined that although there were technical deficiencies in the *Amicus Curiae* brief filed by Mr. Ferrare, in general, those arguments would not be stricken given the public import associated with this case.

The record in this case closed on September 21, 2015, the same date the Order Denying Motion to Strike was issued. By Initial Decision issued November 19, 2015, the presiding ALJs recommended approval of the Settlement in its entirety and without modification and concluded that the Settlement was in the public interest and supported by substantial evidence. I.D. at 1, 8. As noted, on December 3, 2015, Exceptions were filed by Mr. Ferrare. Replies to Exceptions were filed by the Joint Complainants and IDT on December 18, 2015.

**III. Discussion**

Initially, we note that any issue or Exception that we do not specifically address should be deemed to have been duly considered and rejected without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally*, *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In their Initial Decision, the ALJs made thirty Findings of Fact and reached twenty-three Conclusions of Law. I.D. at 8-12, 64-68. 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.

1. **Terms and Conditions of the Settlement**

The Settling Parties agreed to the Settlement which resolves all issues among the Settling Parties. The Settlement includes three primary subject areas: (1) refunds; (2) civil penalties and contributions to Hardship Funds; and (3) modifications to business practices.

The Settling Parties state that the Settlement represents a compromise of the allegations in the Joint Complaint, and that while IDT and the Joint Complainants may disagree with the allegations as to the Company’s conduct, both acknowledge the importance to consumers and the retail market of full and accurate information and disclosures to consumers, as well as the assurance of fair and transparent marketing and billing practices. Settlement ¶ 37 at 10. The Settling Parties further state that the Settlement was achieved after an extensive investigation into IDT’s marketing and billing practices, including informal and formal discovery and the filing of direct testimony of 215 consumers, as well as direct testimony by several of the Joint Complainant’s witnesses. Settlement ¶ 52 at 32.

The Settlement consists of the Joint Petition containing the terms and conditions of the Settlement, Exhibit A which is a Stipulation of facts in Support of the Settlement and three appendices. Appendices A through C to the Settlement are the Statements in Support of the Settlement submitted by the Joint Complainants, IDT and the OSBA.

The essential terms and conditions of the Settlement are set forth in Section II. Settlement ¶¶ 38-51 at 11-32. The Settling Parties agreed to the following terms and conditions, with the original paragraph numbers maintained, as follows:

1. Refunds.

38. Refund Pool – Upon the effective date of the Commission’s final order in this proceeding, the Company agrees to pay the total sum of $6,577,000 in refunds (hereinafter “Refund Pool”), which will take into account prior cash refunds provided to customers by the Company. Prior to settlement, the Company voluntarily provided $4,177,000 in cash refunds to customers. Therefore, the net Refund Pool amount due upon the effective date of the Commission’s final order in this proceeding is $2,400,000.

a. Refunds shall be provided to IDT customers on variable rate plans and billed for usage in January, February or March 2014. The OAG and OCA shall determine the refund amount to offer eligible IDT customers based on the individual customer’s usage, price charged and refund amounts already received directly from IDT. The refund determinations will be designed so as to fully utilize the Refund Pool after accounting for any administration fees not otherwise paid by IDT pursuant to this Settlement.

b. IDT shall honor all commitments to customers enrolled in IDT’s promotional programs, including but not limited to IDT’s one month free program, two months free program and discount dining card promotion, who meet the eligibility requirements whether or not the customer has received a refund.

39. Administration of Refund Pool

a. OAG and OCA shall retain, with the concurrence of the Company, a third-party Administrator of the Refund Pool to administer the distribution of refunds referenced in Paragraph 38. The first $75,000 of costs and expenses of the Administrator of the Refund Pool shall be paid by IDT. If the costs and expenses of the Administrator exceed $75,000, any such costs and expenses in amounts that exceed $75,000, shall be paid out of the Refund Pool.

b. IDT shall deposit the net Refund Pool amount due identified above with the Administrator within five business days after OAG and OCA identify to IDT the Administrator retained.

c. IDT shall fully and timely cooperate with OAG, OCA and the Administrator by providing all residential and small business customer information necessary to calculate each customer’s refund amount. Such information shall include, but not be limited to, customer billing rates, usage and addresses.

d. The Settlement Administrator shall use best efforts to distribute funds from the Refund Pool within one hundred and eighty (180) days of the Commission’s final order in this proceeding. The Settlement Administrator shall provide monthly reports to OCA, OAG, IDT, and designated Commission staff of funds distributed that include at a minimum, the customer’s name and other available identifying information, the amount of funds dispersed to each customer and the period for which the funds were dispersed.

e. If any funds remain in the Refund Pool, they shall be provided to EDCs’ hardship funds and allocated by the ratio of the Company’s customers in the EDC’s territory to the total amount of Company customers in Pennsylvania as of January 1, 2014.

f. Any unclaimed funds from the Refund Pool shall be forwarded to the Pennsylvania Department of the Treasury pursuant to unclaimed property requirements for the customer(s) entitled to the refund.

40. Additional Refund Method – Any customer of the Company that was enrolled with the Company prior to the date of this Settlement that does not receive or accept an offer of funds from the Refund Pool pursuant to ¶¶ 38(a) and 39(d) hereof shall be entitled to seek a refund as follows:

a. The customer may contact the Company directly with complaints and request for a refund.

b. The Company shall use its best efforts to investigate the customer’s complaint.

c. The Company shall use its best efforts to negotiate an agreement pursuant to which the customer will agree to accept a refund from the Company in exchange for the release of any claims or causes of action that the customer has or may have against the Company.

d. If the customer is not satisfied with the Company’s investigation and/or the Company’s settlement offer, the customer may file a formal complaint with the Pennsylvania Public Utility Commission.

e. For one year after the Commission’s final order in this proceeding, the Company shall provide quarterly reports to the OAG, OCA and designated Commission staff, setting forth the names of the complainants, the general nature of the complaints, and the disposition thereof.

41. Release – No customer shall be paid any funds from the Refund Pool 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 Joint Complaint over which the Commission has jurisdiction, including but not limited to, claims regarding the Company’s prices not conforming to its Disclosure Statement or marketing statements.

B. Penalty and Contribution to EDC Hardship Funds.

42. IDT shall pay a civil penalty in the amount of $25,000 to the General Fund. IDT shall not claim a tax deduction for the $25,000 civil penalty.

43. IDT shall make a contribution of $75,000 to the EDCs’ hardship funds. The contribution shall be allocated by the ratio of IDT customers in the EDC’s territory to the total amount of IDT customers in Pennsylvania as of January 1, 2014.

C. Modifications to Business Practices. In addition to complying with all Commission regulations, Orders and policies, IDT shall implement the following modifications to its business practices in Pennsylvania and with respect to Pennsylvania customers[[3]](#footnote-3):

44. Product Offering:

a. For a period of 21 months beginning on a date mutually agreeable to IDT and the Joint Complainants, but not later than 10 days following the final approval of this Settlement Agreement by the Commission, IDT will not sell variable rate electricity products in Pennsylvania and will offer only fixed rate products pursuant to which the customer’s price is fixed for six months or longer. This restriction will not apply to IDT’s plans with existing customers.

b. If IDT offers variable rate products to consumers in the Commonwealth, after the time period set forth in Paragraph 44(a) above, IDT agrees that it will not charge Pennsylvania customers cancellation or termination fees for the Company’s variable rate products.

45. Marketing:

a. IDT shall comply with all Pennsylvania laws, including the Public Utility Code, 66 Pa. C.S. § 101 *et seq*., the Consumer Protection Law, 73 P.S. § 201-1, *et seq*., the TRA, 73 P.S. § 2241, *et seq*. and other applicable laws, as well as Commission regulations, Orders and policies.

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

c. IDT, its agents, employees and representatives shall not make representations, either directly or by implication, about savings that consumers may realize by switching to IDT except when comparing the rate offered by IDT to the customer’s current Price to Compare (PTC), or any published future PTC or when referencing an explicit, affirmative guaranteed savings program. If the IDT agent, employee or representative compares the rate offered by IDT to the customer’s current PTC or a published PTC, the IDT agent, employee or representative shall also provide the term that the referenced PTC will be in effect to the consumer and inform the consumer that savings beyond that period are not guaranteed.

d. If IDT offers variable rate products to residential or small business consumers in the Commonwealth, after the time period set forth in Paragraph 44(a) above, IDT, its agents, employees and representatives shall refrain from using terms in their variable rate marketing campaigns, such as “risk free,” “competitive,” “guaranteed,” or any other terminology that represents, explicitly or by implication, that the price offered will be lower than the EDC’s Price to Compare, except when referencing an explicit, affirmative guaranteed savings program.

e. If IDT offers variable rate products to consumers in the Commonwealth, after the time period set forth in Paragraph 44(a) above, IDT, its agents, employees and representatives shall refrain from using terms in their variable rate marketing campaigns, such as “trial period” or “introductory rate,” without a clear and conspicuous disclosure of the material terms and conditions thereof, including and without limitation to, a full description of the price that will be charged after the expiration of that introductory or trial period, the circumstances under which the consumer can cancel, and the consequences of cancellation.

f. IDT, its agents, employees and representatives shall not make representations, either directly or by implication, about “special programs” for which a Pennsylvania consumer qualifies, unless IDT provides documentation to the consumer explaining in detail the “special program,” including but not limited to the parameters of the program, term of the program and eligibility requirements for acceptance into the program.

g. (1) Except as set forth herein, IDT, its agents, employees and representatives shall not make representations, either directly or by implication, about the Price to Compare increasing or the Price to Compare being a variable rate; notwithstanding the foregoing, nothing herein shall prohibit IDT, its agents, employees and representatives from making truthful statements about the current level of the EDC’s Price to Compare (PTC) or future PTC if that information is publically available. If an IDT agent, employee or representative identifies the current PTC or a published future PTC, the IDT agent, employee or representative shall also provide the term that the referenced PTC will be in effect; and

(2) IDT, its agents, employees and representatives shall not make any representations whatsoever about how a consumer’s utility purchases electricity.

h. IDT specifically commits to complying with 52 Pa. Code §§ 57.175 and shall not enter into a sales agreement or change the commodity provider for any consumer that is not personally accepted by the EDC Customer of Record or by a person purporting to be authorized to act on behalf of the Customer of Record. IDT Third Party Verifications shall require affirmative representation by the person consenting to the change that the person is either the EDC Customer of Record or has been authorized by the Customer of Record to act on behalf of the Customer of Record; otherwise, IDT shall not proceed with the switch.

i. IDT specifically commits that its sales representatives will comply with the provisions of 52 Pa. Code §§ 111.9 and 111.10. Every communication by an IDT sales representative with a potential customer shall begin with the sales representative stating:

My name is [Sales Representative’s Name]. I am calling on behalf of IDT Energy, Inc. IDT can provide you with your electricity. I do not work for or represent your electric utility.

j. The IDT salesperson shall explain that if the consumer switches to IDT, his or her electric bill will contain IDT’s charges for generation as well as delivery charges from his or her electric utility.

k. If IDT offers variable rate products to residential or small business consumers in the Commonwealth, after the time period set forth in Paragraph 44(a) above, the IDT salesperson must state the following during any variable rate sales contacts:

After \_\_\_ month(s) [if Introductory Price period is applicable], the price you pay under this variable rate contract can change every month. This is not a fixed rate contract. Variable means the price can go up or down. There is no limit on how high the price can go.

l. During a variable rate sales contact or on any variable rate advertising, if IDT makes a representation to the residential or small business consumer that they may cancel their contract at any time, IDT must also state that cancellations will be handled promptly, but it may take several days to switch suppliers.

m. If IDT offers a guaranteed rate for a certain time period, IDT is prohibited from stating that it has no term plans.

n. Regarding all in-person sales solicitations, the IDT salesperson shall provide the Disclosure Statement before presenting a contract to the residential or small business consumer and inform the consumer that the document sets out his or her rights and obligations.

o. IDT shall comply with the applicable Commission regulations for the provision of a disclosure statement and contract summary to newly enrolled customers, including but not limited to 52 Pa. Code § 111.11. IDT shall retain records in accordance with the Commission’s requirements, including but not limited to confirmations of mailing of disclosure statements to newly enrolled customers, which shall include at a minimum the date that the Disclosure Statement and Welcome documents were deposited with U.S.P.S. (or such other mail delivery service as the Company may employ) and the customer name and address stated on the envelope containing the documents.

p. IDT, its agents, employees and representatives shall deposit with the United States Postal Service (or such other mail delivery service the Company may employ) its Disclosure Statement and Welcome documents by the end of the next business day after a telemarketing sales contact that resulted in the sale.

q. The Disclosure Statement shall contain at least the following information:

1. The terms of the product.

2. A detailed description of the product, which shall match the oral description given in the telemarketing solicitation. This description may be satisfied with appropriate use of the Schumer box.

r. Regarding online enrollments, within 90 days after approval of the Settlement, IDT shall revise its website to clearly and conspicuously display its Disclosure Statement and all contract terms and conditions as one or multiple unavoidable separate screens, which require the consumer to scroll to the end of the document and click a button indicating he or she has reviewed the documents and agrees to the terms and conditions, during the electronic customer enrollment process. IDT shall require new customers to click a screen button acknowledging that they have reviewed the terms and conditions. IDT shall offer a screen prompt enabling the consumer to print the terms and conditions.

s. In all advertising to residential or small business consumers, IDT shall include a clear and conspicuous display of IDT’s brand identification information and clear and conspicuous notice that IDT is independent of the consumer’s electric utility, but not formally name the electric utility. Further, IDT shall include clear and conspicuous language that the consumer is not required to switch to an alternate generation supplier, but if the consumer chooses to switch, he or she will continue to receive one bill from his or her electric utility and the bill will reflect IDT’s generation charges, unless IDT is providing direct billing.

t. In all of the Company’s variable rate product marketing materials that offer terms of service for acceptance by residential and small business consumers and Welcome documents to consumers that have enrolled in variable rate products with IDT, the Company shall provide a statement of the average price per kWh, as required by 52 Pa. Code § 54.7(b)(2). The Company shall use 24 months of price data to calculate the average price per kWh. If the Company offers variable rate products after the time period specified in Paragraph 44(a) above, the Company shall also provide a statement of the total impact of the Company’s average price under the program for the levels of monthly usage of 500 kWh, 1,000 kWh and 2,000 kWh. The information would be organized as follows:

|  |  |  |  |
| --- | --- | --- | --- |
| Monthly Usage | 500kWh | 1,000 kWh | 2,000 kWh |
| IDT Average Price | $xxx | $xxx | $xxx |

This information shall also be conveyed to the residential or small business consumer during the sales contact.

46. Third Party Verifications:

a. For live Third Party Verifications (“TPVs”), the Company representative shall provide the following explanation, in a slow and audible manner, to residential and small business consumers prior to beginning the TPV process:

You are going to hear a series of questions to confirm your understanding of the agreement. If the representative speaks too quickly, please interrupt and tell the representative to speak more slowly. If you do not understand a question, please interrupt and say that you do not understand the question. If you have a question of your own, please interrupt and ask your question.

b. IDT shall add the following questions to all TPVs, whether via live agent or an Interactive Voice Response system:

* What is your name? (live agent only)
* What is your address? (live agent only)
* Do you understand that IDT is not your electric utility?
* Do you understand that you are not required to switch to IDT in order to continue receiving electric service?
* Does your name appear on the electric bill?

If the consumer answers that his or her name does not appear on the electric bill, the TPV representative shall request that the consumer verify that he or she is authorized by the person whose name is on the bill to consent to changes in electric generation service for the account.

If the consumer answers that he or she is the customer of record or authorized to act on behalf of the customer of record and the sales solicitation is for a variable rate product, IDT shall also add the following questions to the TPV:

* Do you understand that you are agreeing to a variable rate that changes on a month-to-month basis?
* Do you understand that a variable rate can go up as well as go down?
* Do you understand that there is no cap on the price? (If IDT’s product in fact has no cap)

c. IDT shall fully comply with the Commission’s regulations for third-party verifications, including but not limited to 52 Pa. Code § 111.7 and agrees that all TPVs will be performed outside the physical presence of the IDT sales representative. The IDT in-person sales representative shall leave the premises during the TPV in accordance with the Commission’s regulations.

d. IDT sales representatives shall not prompt consumers’ responses to TPV questions or instruct the consumers as to the manner in which to respond to TPV questions. If the sales representative interrupts the TPV in this manner, the TPV shall immediately be terminated and the sale shall not be consummated unless a new TPV is initiated and successfully completed.

47. Disclosure Statement: Within 10 business days of the Commission’s final Order in this proceeding, IDT shall provide to OAG and OCA its current Disclosure Statement and Schumer Box, drafted pursuant to the Commission’s Final-Omitted Rulemaking at Docket No. L-2014-2409385.

a. Further, IDT shall provide to the OCA and the Commission any subsequently amended Disclosure Statements for use in the Commonwealth for the period of five years.

b. In addition to adhering to the Commission’s regulations, Orders and policies regarding the requirements for disclosure statements, term and conditions, and marketing materials, if IDT offers variable rate products pursuant to Paragraph 44(a) above, IDT shall:

1. Include the following language in at least 12-point bold font in the “Price Structure” section of the Company’s Disclosure Statement and, if possible, the Schumer Box for all variable rate products:

[For variable rate programs:] After \_\_\_ month(s) [if Introductory Price period is applicable], the price you pay under this variable rate contract can change every month. This is not a fixed rate contract. Variable means the price can go up or down. There is no limit on how high the price can go.

[For fixed rate programs with ETFs:] You may cancel this contract at any time upon 30 days’ notice to IDT, for which you may be separately billed an early termination fee of $\_\_\_.

2. Under the heading “Cancellation/Early Termination Fees” of the Disclosure Statement, IDT shall state the following in at least 12-point bold font:

You may cancel this contract at any time without an early termination fee. All cancellations will be handled promptly, but it may take several days to switch suppliers.

c. IDT shall not state or represent to customers in the Company’s variable rate programs that the price IDT will charge will be “market-based” or set on “market conditions” unless IDT also provides a specific explanation by means of a formula, or other explanation immediately following such representation in a manner readily understandable for the customers that specifies with particularity what such “market” may consist of, some representation of what components of the price fluctuate with that market and publicly available sources of information for such market factors so that a customer can calculate the price and any applicable charges in terms of dollars and cents or cents per kWh.

d. The parties agree that the Disclosure Statement language stated in Paragraph 47(b) above is not a change in contract terms pursuant to 52 Pa. Code § 54.10. IDT, however, will notify all of its customers enrolled in variable rate programs as of the date of the execution of the Settlement of the Company’s fixed rate product offer identified in Paragraph 44(a) above, and direct customers to review the updated Disclosure Statement online or via hard copy. IDT shall provide the website to view the Disclosure Statement online and a telephone number that customers may call to request a hard copy. These notifications may be provided to customers using on-bill messages and shall begin on the first billing cycle following the execution of the Settlement for which the EDCs will permit such messaging.

e. Customers who choose to switch to a fixed rate plan will be charged no fee for switching to the fixed rate plan. The Customer’s choice to switch to a fixed rate plan would become effective immediately upon contacting IDT to request the switch.

f. IDT’s website will be updated regularly to indicate IDT’s current fixed price offering in each EDC territory.

48. Training: IDT shall ensure that its training program for internal and external sales representatives meets the requirements of this section.

a. Within 60 days of the Commission’s final Order in this matter, IDT shall provide to the Commission, OAG and OCA a detailed description of the training IDT will implement.

b. After a 30-day review period, the Company will meet with OAG, OCA and designated Commission staff to review and discuss the training.

c. IDT’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;

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, with particular emphasis on the following:

i. As soon as possible and prior to describing any products or services offered for sale by IDT, a sales representative shall:

A. Produce identification, to be visible at all times thereafter, which prominently displays the full name of the marketing representative, displays a photograph of the marketing representative and depicts the legitimate trade name and logo of IDT; and provides IDT’s telephone number for inquires, verification and complaints.

B. Identify the reason for the visit and state that IDT is an independent energy marketer, and identify himself or herself as a representative of IDT; explain that he or she does not represent the distribution utility; and explain the purpose of the solicitation.

C. Offer a business card or other material that lists the agent’s name, identification number and title, and IDT’s name and contact information, including telephone number.

ii. During the sales presentation, the marketing representative must also state that if the customer purchases electricity from IDT, that the customer’s utility will continue to deliver their energy and will respond to any leaks or emergencies.

iii. The representative will provide the customer with written information regarding IDT’s products and services immediately upon request, which shall include IDT’s name and telephone number for inquiries, verification and complaints. Any written materials, including contracts, sales agreements, and marketing materials, must be provided to the customer in the same language utilized to solicit the customer.

iv. Where it is apparent that the customer’s language skills are insufficient to allow the customer to understand and respond to the information conveyed by the marketing representative or where the customer or another third party informs the marketing representative of this circumstance, the marketing representative shall terminate contact with the customer in accordance with 52 Pa. Code § 111.9.

v. The marketing representative shall leave the premises of a customer when requested to do so by the customer or the owner or occupant of the premises.

4. An express warning that deceptive sales practices will not be tolerated by IDT’s management;

5. 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

6. A description of the quality assurance, monitoring, auditing and reporting practices IDT maintains to identify and prevent improper sales practices.

d. The training, at a minimum, shall include the following:

1. Initial training and subsequent refresher training on at least a quarterly basis for all IDT internal sales representatives and customer service representatives and third-party sales agents in the modifications listed in this Settlement Agreement and the implementation thereof;

2. Initial training and subsequent refresher training on at least a quarterly basis for all IDT internal sales representatives and third-party sales agents in Pennsylvania laws applicable to IDT, including but not limited to the Public Utility Code, the Consumer Protection Law and the TRA; and

3. Initial training and subsequent refresher training on at least a quarterly basis for all IDT internal sales representatives and third-party sales agents on current Pennsylvania Public Utility Commission regulations, policies and Orders.

e. IDT 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.

f. Individual marketers retained by IDT shall be required to successfully complete IDT’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 IDT’s training materials before marketing to and enrolling customers on behalf of IDT.

g. IDT specifically commits to the best of its ability, to implement the provisions of this Settlement in a timely manner. Additionally, until the provisions in this Settlement are fully implemented, IDT commits to abiding by the spirit of the Settlement in its marketing and billing practices in the Commonwealth.

49. Compliance Monitoring: IDT shall increase internal quality control efforts to include at least the following:

a. IDT shall record all telephonic communications between Pennsylvania customers and IDT’s customer service representatives.

b. IDT shall require its telemarketers to record all communications with residential and small business consumers in Pennsylvania that result in a sale.

c. IDT shall maintain such recordings in accordance with the Commission’s requirements.

d. IDT shall implement a provision in its contracts with telemarketers to require the telemarketers to provide recordings of the entire sales presentation to each consumer to IDT within ten business days of the sale.

e. IDT shall, on a monthly basis, review a random sample of calls recorded pursuant to the prior paragraph from each of IDT’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 sales for each sales representative conducting sales solicitations for IDT to Pennsylvania customers.

2. Whenever such sample reveals one or more non-compliant sales calls by an agent, third-party contractor or sales representative, IDT shall investigate whether any of the 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.

3. Such investigation, at a minimum, shall include a review of the sales calls and call notes for the ten Pennsylvania consumers enrolled before the call in question and the ten Pennsylvania consumers enrolled after the call in question.

4. If IDT identifies additional non-compliant sales calls, IDT shall implement remedial steps as described in Paragraph 49(e)(7) below.

5. Additionally, IDT 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 IDT 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 ten business days.

6. Any substantiated consumer complaint about a IDT sales representative or other information indicating that a IDT sales representative has violated any term of this Settlement Agreement or otherwise engaged in improper sales practices shall trigger an investigation by IDT into whether any of the other IDT customers enrolled by that sales representative were subjected to sales practices that violated the terms of this Settlement Agreement or were otherwise improper.

i. Such investigation shall, at a minimum, include examination of customer enrollment records, sales service call notes for the ten Pennsylvania consumers enrolled by the sales representative immediate prior to and subsequent to the enrollment that triggered the investigation.

7. In the event IDT 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, IDT shall take prompt remedial actions, which at a minimum shall include:

i. For the first violation, provide additional training and re-training;

ii. For two violations in a six-month period, suspend the sales representative for a period of no fewer than 3 days; and

iii. For any violations in excess of two within a six-month period, disqualify the sales representative for one week, and for external sales representatives, IDT will have the representative removed from its account.

8. IDT specifically commits, to the best of its ability, to implement the provisions of this Settlement in a timely manner. Additionally, until the provisions in this Settlement are fully implemented, IDT commits to abiding by the spirit of the Settlement in its marketing and billing practices in the Commonwealth.

50. Reporting: Within 30 days of implementation of the training and compliance monitoring described above and quarterly thereafter for a period of five years, IDT shall provide to the Commission and OCA:

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 Paragraph 49(e) of this Settlement and including a description of the audit(s) or investigation(s) performed as well as the results thereof and

b. The reports, as required by 52 Pa. Code §§ 56.151 and 56.152, of all customer complaints and disputes received by IDT during the reporting period.

51. Customer Service:

a. IDT shall employ regulatory personnel whose duties include, at a minimum:

1. Compliance with Chapter 56 of the Commission’s regulations, including but not limited to, prompt investigation of all customer complaints, providing the customer with information necessary to make an informed judgment and issue a report to the customer within 30 days;

2. Resolution of customer complaints fairly and expeditiously; and

3. Training customer service representatives in accurately recording the reason for a customer’s call in a customer contact log and ensuring compliance with the training described in this Settlement Agreement.

b. IDT shall at all times maintain a staff of customer service representatives necessary to:

1. Within normal business hours, provide consumers with reasonably timely access to a “live” customer service representative, whether the consumer seeks such access via telephone and/or e-mail. Reasonably timely access shall mean that the average hold times for consumers calling the Company shall be no more than 10 minutes, and consumer emails shall be answered within 24 hours unless sent on weekends or holidays in which case shall be responded to within 24 hours of the first business day following the weekend or holiday;

2. Provide a timely response to any voice mail messages left on its customer service toll-free number outside of normal business hours, but not, later than 24 hours after the message was left, unless the message is left on a weekend or holiday in which case shall be responded to within 24 hours of the first business day following the weekend or holiday;

3. Provide for the check of its voice mail message system at the beginning of each day’s normal business hours;

4. Use reasonable measures to prevent its voice mail customer service message system from becoming “full” such that consumers cannot leave a voice mail message; and

5. Respond to all inquiries made by letter within five business days of receipt of said letter.

c. IDT shall develop and implement an action plan for handling periods of high call volumes. Such action plan will, at a minimum:

1. Provide for the answering of overflow calls to IDT’s system by additional customer service staff or temporary services;

2. Provide a detailed description for use by all such staff or temporary services answering calls regarding inputting of the nature of customer calls;

3. Provide clear and consistent information to all such staff or temporary services answering calls to convey to customers with the same or similar issues; and

4. Provide clear and consistent information to all such staff or temporary services answering calls regarding relief that will be provided by IDT to convey to customers.

d. If IDT experiences a period of high call volumes in which it could not and did not comply with the provisions of this Settlement Agreement, IDT shall within 30 days provide to the Commission, OAG and OCA a report of the occurrence, an explanation of underlying reasons for the occurrence and a description of all remedial measures implemented by IDT.

Settlement at 11-32.

In addition to the specific terms to which the Settling Parties have agreed, the Settlement contains certain general, miscellaneous terms. The Settlement is conditioned upon Commission approval of the terms and conditions without modification. The Settlement establishes the procedure by which any of the Settling Parties may withdraw from the Settlement and proceed to litigate this case, if the Commission should act to modify the Settlement. Settlement ¶ 56 at 33. In addition, the Settlement states that the Settlement does not constitute an admission against, or prejudice to any position which any of the Settling Parties may adopt during subsequent litigation of this case, in the event the Settlement is rejected by the Commission. Settlement ¶ 57 at 33.

The Settling Parties respectfully requested that the ALJs and the Commission approve the proposed Settlement, without modification and that the Joint Complaint be marked satisfied. Settlement at 35.

1. **Legal Standards**

This Commission has a policy of encouraging settlements. *See* 52 Pa. Code § 5.231(a); *also* 52 Pa. Code §§ 69.401 *et seq*., relating to settlement guidelines for major rate cases, and our Statement of Policy relating to the Alternative Dispute Resolution Process (Mediation), 52 Pa. Code § 69.391, *et seq*. Settlementslessen the time and expense that Parties must expend litigating a case and, at the same time, conserve administrative resources. This Commission has stated that results achieved through settlement are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401.

This Commission’s evaluation of whether to approve a settlement is not based on a “burden of proof” standard, as is utilized for contested matters. *See* I.D. at 15; *Pa. PUC, et al. v. City of Lancaster - Bureau of Water*, Docket Nos. R-2010-2179103, *et* (Order entered July 14, 2011), at 11.[[4]](#footnote-4) The Commission must review proposed settlements to determine whether the terms 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 Assocs.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC LBPS v. PPL Utilities Corporation*, Docket No. M-2009-2058182 (Order entered November 23, 2009); *Pa. PUC v. Phila. Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Warner v. GTE North, Inc*., Docket No. C-00902815 (Order entered April 1, 1996); 52 Pa. Code § 69.1201.

We evaluate whether a proposed settlement satisfies the “public interest” standard by a preponderance of the evidence of benefits, and such burden can be met by showing a likelihood or probability of public benefits that need not be quantified or guaranteed. *Popowsky v. Pa. PUC*, 594 Pa. 583, 937 A.2d 1040 (2007) (*Popowsky*) (“substantial” public interest standard discussed in the context of a merger reviewed under Section 1103 of the Code, 66 Pa. C.S. § 1103). The pertinent inquiry of a reviewing court in the context of the analysis of the public interest of Section 1103 of the Code, *supra*, is stated as follows:

In summary, as indicated in [*City of York*](http://www.lexis.com/research/buttonTFLink?_m=189f8ae45877d46c6f56f559107faa6d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b594%20Pa.%20583%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=110&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b449%20Pa.%20136%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAb&_md5=5b248d8ec02e01a6a662663dd52b614a)*,* the appropriate legal framework requires a reviewing court to determine whether substantial evidence supports the Commission's finding that a merger will affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way. In conducting the underlying inquiry, the Commission is not required to secure legally binding commitments or to quantify benefits where this may be impractical, burdensome, or impossible; rather, the PUC properly applies a preponderance of the evidence standard to make factually-based determinations (including predictive ones informed by expert judgment) concerning certification matters.

*Popowsky*, 594 Pa. at 611, 937 A.2d at 1057.

This Commission has historically defined the public interest as including ratepayers, shareholders, and the regulated community. *See* [*Pa. PUC v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. R-00953409 (Order entered September 29, 1995).](http://www.lexis.com/research/buttonTFLink?_m=61ce868366ad7f2d1aa43dd057107ec5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2008%20Pa.%20PUC%20LEXIS%20689%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1995%20Pa.%20PUC%20LEXIS%20193%2cat%2034%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=27&_startdoc=21&wchp=dGLzVzt-zSkAz&_md5=e81fc73a633f87cfde4afd3daa047b96) What is in the public interest is decided by examining the effect of the proposed Settlement on these “stakeholder” entities. *Id*. The public interest is best served, however, by ensuring that the underlying transaction complies with applicable law. *See Dauphin County Indus. Dev. Auth. v. Pa. PUC*, 2015 WL 5238841, 2015 Pa. Commw. LEXIS 381 (September 9, 2015) (Commonwealth Court Order reversing Commission approval of a joint settlement due to the Court’s plenary review and disapproval of the Commission’s interpretation of Section 2807(f)(5) of the Act, 66 Pa. C.S. § 2807(f)(5)).[[5]](#footnote-5)

Additionally, we note that the statutory provisions of Sections 501 and 2809 of the Code, 66 Pa. C.S. §§ 501, 2809, apply to this Commission’s regulation of EGS companies. *See, e.g., Comm. of Pa., et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*). We have recently, in the *IDT Order*, interpreted our general authority pursuant to Section 501 of the Code, to apply to, *inter alia*, billing and other disputes arising between an EGS and a customer. As a general rule, the interpretations of the agency charged with a statute’s administration and execution are entitled to great weight and the Legislature is presumed to favor public interests over private interests. *See, e.g., Chappell v. Pa. PUC*, 425 A.2d 873 (Pa. Cmwlth. 1981); *also* *Muscarella v. Comm. of Pa.*, 87 A.3d 966 (Pa. Cmwlth. 2014), citing *Community Car Pool Service, Inc. v. Pa. PUC*, 533 A.2d 491 (Pa. Cmwlth. 1987); *Carol Lines, Inc. v. Pa. PUC*, 477 A.2d 601 (Pa. Cmwlth. 1984); 1 Pa. C.S. §§ 1921(c)(8), 1922(5).

In furtherance of the statutory provisions of the Code that are applicable to this Commission’s review of settlements, we have, as cited above, promulgated detailed Regulations which specifically identify those standards and considerations that will govern our review. Pursuant to the *Commission Settlement Guidelines*, it is noted that “these factors and standards will be utilized by the Commission in determining if a fine 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 the settlement agreement is in the public interest.” 52 Pa. Code § 69.1201(a). These guidelines further state that “when applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest.” 52 Pa. Code § 69.1201(b).

Based on the foregoing, we shall review the Initial Decision, the Exceptions and Replies to Exceptions, and give due consideration to the concerns raised by Mr. Ferrare according to the above-cited statutory provisions and Commission Regulations.

1. **Positions of the Parties**

In their Statement in Support of the Settlement, the Joint Complainants provided extensive discussion of the various provisions of the Settlement in support of their position that the Joint Petition is in the public interest and should be adopted without modification. In particular, the Joint Complainants noted that the Settlement addresses the numerous complex issues raised in this case and, taken as a whole, constitutes a reasonable compromise. The Joint Complainants noted the importance of the matters at issue to Pennsylvania consumers and to the retail market and that full and accurate information and disclosures to consumers, as well as fair and transparent marketing and billing practices, are of paramount importance both to consumer protections and the continued development of a retail choice market. Joint Complainants Statement in Support at 4-5.

The Joint Complainants stated that the Settlement is in the public interest and should be approved without modification because a total of $6,577,000 in refunds will be provided to customers that were on a variable rate plan in January, February or March 2014 based on usage, prices charged and any refund already received. The Joint Complainants noted that the Refund Pool will assist affected customers in restoring some of their financial losses incurred as a result of IDT’s alleged conduct. The Joint Complainants also noted the use of a third-party administrator to administer the funds and the $25,000 civil penalty and $75,000 contribution to the EDCs’ hardship funds as being in the public interest. The Joint Complainants also addressed the ten *Rosi* factors, or *Commission Settlement Guidelines*,[[6]](#footnote-6) in support of their position that the Settlement should be adopted without modification stating that the scope of conduct complained of in this proceeding is unique and unlike other complaint proceedings against EGSs that this Commission has decided. The Joint Complainants noted that the Settlement will provide refunds to customers sooner than if the case was fully litigated and that the civil penalty will deter future similar conduct. *Id.* at 9‑18.

The Joint Complainants also discussed the numerous modifications to business practices contained in the Settlement. The Joint Complainants referenced the testimony of several consumer witnesses as they relate to the modifications to business practices, specifically noting the changes to the product offering, IDT’s marketing practices, the use of third party verifications, IDT’s disclosure statement, training of sales and customer service representatives, implementation of various reporting requirements and improvements to IDT’s customer service operations, all as reasons why the Settlement is in the public interest. The Joint Complainants specifically noted that IDT has agreed to refrain from selling variable rate products in Pennsylvania for a period of twenty-one months as being appropriate, reasonable and in the public interest. According to the Joint Complainants, the agreed to modified practices should lead to more fully informed consumers and a better functioning retail choice market. *Id.* at 18-26.

In its Statement in Support of the Settlement, IDT asserted that the Settlement should be approved because it provides a fair, reasonable and expeditious resolution of a very complicated and highly contested proceeding stemming from the polar vortex crisis of early 2014. IDT stated that the Settlement recognizes that the Company has issued refunds totaling approximately $4,177,000 to affected Pennsylvania customers and that the Settlement provides for significant additional relief of an additional $2,400,000 in refunds. IDT noted the Parties have exchanged voluminous amounts of discovery and submitted numerous complex pleadings and participated in a four-day hearing for the purpose of cross-examining customer-witnesses. According to IDT, as part of this Settlement it has also agreed to pay a significant portion of the costs of administering the refunds, plus a $75,000 contribution to EDC hardship funds and a civil penalty of $25,000 to the General Fund. IDT added that the Settlement confirms IDT’s agreement to make modifications to its product offering and business practices, including refraining from offering a variable rate product in Pennsylvania for twenty-one months. IDT Statement in Support at 1-8.

In addition, IDT maintained that the Settlement is in the public interest because it is a complete and final resolution of this proceeding, effectively addresses the issues that were the subject of the Joint Complaint, avoids the time and expense of litigation and possible appeals, and provides immediate, concrete benefits to IDT’s customers that would otherwise be unavailable in the near term and should be approved without modification. IDT further submitted that approval of this Settlement is consistent with the factors and standards for evaluating litigated and settled proceedings as articulated in the *Rosi* factors. IDT discussed each of the factors as they relate to the Settlement, noting again the significant rate relief provided to customers and modifications to business practices required in the Settlement. IDT noted that the Settlement includes ongoing compliance and reporting requirements to allow the implementation of the modifications to be verified. IDT noted as well that the Settlement is especially beneficial because of the unique and complex issues involved, the amount of time required to litigate the case to conclusion, the considerable uncertainty over the outcome because of the number of issues of first impression and the substantial amount of immediate customer refunds to be issued as a result of the Settlement. Finally, IDT argued that the Settlement is reasonable and in the public interest because it avoids the significant time, expense and uncertainty of continued litigation. *Id.* at 8-16.

In its Statement in Support, the OSBA stated the Settlement is in the public interest and should be adopted without modification, noting the comprehensive list of issues that were resolved through the negotiation process. The OSBA noted that the refunds and modifications to business practices provided by the Settlement were of particular significance to the OSBA when it concluded that the Settlement was in the best interest of IDT’s small business customers. The OSBA also noted the customer witness testimony submitted into the record as being critical for the purpose of providing substantial evidence in the record. The OSBA further noted the use of a third-party administrator to oversee the refund pool, the distribution of remaining refunds to EDC’s hardship funds and IDT’s agreement to not accept any new Pennsylvania customers for a period of twenty-one months except for fixed products in limited circumstances as reasons why it believes the Settlement is in the public interest and should be approved in its entirety. OSBA Statement in Support at 1-4.

I&E did not file a Statement in Support of the Settlement. As noted previously, I&E neither joined nor opposed the Settlement.

In his *Amicus Curiae* Brief, Mr. Ferrare raised several objections to the Settlement. Initially, Mr. Ferrare argued that the Settlement should be rejected because it is not in the public interest. In making this argument, Mr. Ferrare addressed the *Rosi* factors, noting in particular that IDT should be prohibited from offering variable rate electricity plans in Pennsylvania indefinitely. Mr. Ferrare also took issue with the fact that the number of customers affected and the duration of the violation have been treated as confidential in this proceeding and that, if that information was made public, “the public would be justifiably outraged” because the Settlement is a “windfall for the Company enabling it to buy off its obviously larger liability, by forcing customers to sign releases, for literally pennies on the dollar.” Mr. Ferrare also argued that the Settlement is not in the public interest because IDT’s compliance history includes a recent settlement of other allegations brought against the Company. Mr. Ferrare argued that the $25,000 civil penalty is not a sufficient deterrent and cites to its other arguments as “relevant factors” to be considered when discussing *Rosi*. *Amicus Curiae* Brief at 5-12.

Next, Mr. Ferrare argued that the Settlement should be rejected and is not in the public interest because the Commission lacks the authority to order and/or permit an EGS such as IDT to refund moneys relating to rate disputes as such actions are clearly beyond the scope of the Commission’s authority. Mr. Ferrare maintained that the Commission lacks authority to order and/or permit the parties to require IDT’s customers to sign a general release of claims against the Company in order to receive money from the proposed Settlement fund as the Commission clearly does not have jurisdiction or authority over private breach of contract claims related to rate disputes. Mr. Ferrare further argued that the Settlement should be rejected because the Commission and the OCA lack jurisdiction and authority to represent consumers who have not filed complaints with the Commission against an EGS because EGSs are corporations, not public utilities. Mr. Ferrare reiterated his position that the Settlement should be rejected because his experts, as well as the OCA’s experts, determined that the monetary damages resulting from the excessive rates charged by IDT were higher than the $6,577,000 in refunds that IDT has agreed to pay in the Settlement.[[7]](#footnote-7) *Amicus Curiae* Brief at 12-21.

1. **ALJs’ Recommendation**

On review and consideration of the Positions of the Parties in this proceeding, and on application of the *Commission Settlement Guidelines,* the ALJs adopted the Settlement in its entirety and without modification concluding that the Settlement was in the public interest and supported by substantial evidence. *See* I.D. at 35-64. In adopting the proposed Settlement, the ALJs rejected each of the arguments in opposition to the Settlement as expressed by Mr. Ferrare.

With regard to refunds, the first aspect of the Settlement, the ALJs found that these provisions of the Settlement are in the public interest and support adoption of the Settlement without modification because many customers who complained about IDT’s service during January, February, and March 2014 will be afforded some financial relief from IDT in the form of refunds. The ALJs found that the refund provisions in the Settlement are consistent with recent Commission precedent. For example, the ALJs noted that in response to a Petition for Interlocutory Review filed in this proceeding that questioned, among other things, whether the Commission has authority under Section 1312 of the Public Utility Code to order EGSs to issue refunds to customers, the Commission relied on its plenary authority under Section 501 of the Public Utility Code to direct an EGS to issue a credit or refund for an over bill. *December 18th Order* at 17, *citing*, 66 Pa.C.S. § 501 (“in addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders or otherwise, all and singular, the provisions of this part, and the full intent thereof”). According to the ALJs, the Commission noted that it’s “powers have been interpreted broadly to include both the express powers conferred by the Code and those implied powers necessarily implicit in the Code.” In this regard, the ALJs stated:

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission’s Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service.

These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission’s regulations, including the Chapter 54 billing and disclosure regulations.

I.D. at 36-43.

With regard to the second aspect of the Settlement, the civil penalty and contribution to hardship funds, the ALJs found these provisions in the Settlement are in the public interest and support adoption of the Settlement without modification. The ALJs explained that the Settlement provides that IDT shall pay a civil penalty in the amount of $25,000 to the General Fund and shall not claim a tax deduction for the amount. The ALJs noted that the Settlement further provides that IDT shall make a contribution of $75,000 to the EDCs’ hardship funds and that the contribution shall be allocated by the ratio of IDT customers in the EDCs’ territory to the total amount of IDT customers in Pennsylvania as of January 1, 2014. The ALJs found this provision of the Settlement is also in the public interest and supports adopting the Settlement without modification. The ALJs asserted that this was particularly true because of the strain placed on hardship funds and low-income consumers as a result of the increased bills consumers paid during the months at issue in this case. According to the ALJs, the hardship funds benefit all low-income consumers in the EDCs’ territories, not solely the customers of IDT. I.D. at 43-45.

With regard to the third aspect of the Settlement, the modifications to the business practices, the ALJs found that these provisions of the Settlement are in the public interest and support adopting the Settlement without modification. The ALJs explained that this Settlement provides extensive modifications to IDT’s business practices. Specifically, the ALJs stated that the Settlement provides significant detail regarding changes to IDT’s product offering, marketing practices, third party verification process, disclosure statement, training of internal and external sales representative, compliance monitoring, reporting requirements and customer service. According to the ALJs, these provisions in the Settlement address in great detail the issues raised in the Joint Complaint as demonstrated by the consumer testimony record evidence. I.D. at 47-51.

After considering and applying the *Commission Settlement Guidelines*, *or Rosi factors*, the ALJs concluded that the entire Settlement as submitted is in the public interest and should be adopted without modification. The ALJs found that based on their analysis of the *Rosi* factors as applied to this case, the refund and contribution to EDCs’ hardship funds provisions in the Settlement are reasonable and in the public interest. The ALJs concluded that the refunds that IDT previously provided directly to customers combined with the Refund Pool will help restore the financial losses incurred by IDT’s consumers that were alleged to have been charged extraordinarily high prices in early 2014. According to the ALJs, the Settlement will provide refunds to customers sooner than otherwise may occur in a fully litigated proceeding and the contribution to EDCs’ hardship funds will assist customers in need with payment of their electric bills. Further, the ALJs asserted that the extensive modifications to business practices articulated in the Settlement also satisfy the *Rosi* factors because they will help protect IDT’s current and possible future customers and will better inform customers of the products and services provided by IDT. Finally, the ALJs concluded that Mr. Ferrare’s arguments to the contrary were without merit and thus were rejected. See I.D. at 51-63.

1. **Exceptions and Replies**
2. **Ferrare Exception No. 1 – General Release**

In Exception No. 1, Mr. Ferrare reiterates his objection to approval of the Settlement, to the extent the Settlement includes the provision that would obligate the participating customer to sign a general release as a condition of receiving refunds from the Settlement Refund Pool as he argues it is beyond the jurisdiction and practice of the Commission to adjudicate and/or interfere with private causes of action such as breach of contract. Mr. Ferrare points out that IDT did not require its customers to execute general releases when it voluntarily decided to refund or provide rebates for the first $4,177,000 to its customers. Mr. Ferrare states that it is his position that the Commission should not now require the Company’s customers to waive private causes of action to be reimbursed for the Company’s misconduct and that requiring customers to do so exceeds the Commission’s jurisdiction. Exc. at 2-3.[[8]](#footnote-8)

Mr. Ferrare views it as critical that the ALJs elected not to delve deeply into the mechanics or functioning of the Refund Pool in relation to his concerns that approval of the Settlement is not in the public interest based on the Commission’s lack of jurisdiction over private causes of action. According to Mr. Ferrare, the ALJs have ignored the fact that the Commission does not have jurisdiction over private causes of action against the Company, or that their approval of this Settlement may limit those causes of action, in order to preserve the agreed to changes in the Company’s business practices in Pennsylvania over which the Commission does have jurisdiction. The benefits of the proposed Settlement do not, in Mr. Ferrare’s view, alter the legal analysis that the Commission does not possess the requisite jurisdiction for approval of the Settlement with the objectionable condition. Mr. Ferrare observes, “The PUC either has jurisdiction over private causes of action or it does not.” Exc. at 4-5.

Finally, Mr. Ferrare argues that the uncertainty of the legal ramifications of a general release in this proceeding present insufficient grounds for the Commission to exceed its authority in such a manner especially when, as is the case here, there is a pending federal class action lawsuit being litigated against the Company in the United States District Court for the Eastern District of Pennsylvania. As such, Mr. Ferrare requests that the Commission reverse the approval of the proposed Settlement. Exc. at 5-6.

In its Replies to Exceptions, IDT states that the Commission has the authority to approve a Settlement under which customers must sign general releases in order to receive refunds from the Refund Pool and that Mr. Ferrare’s argument on this point is misguided and erroneous. According to IDT, the Commission clearly has the authority to approve settlements that include the issuance of voluntary refunds in exchange for the execution of a general release. IDT points out that there is precedent that clearly shows that the inclusion of a general release in a settlement agreement is not a bar to Commission approval. *Id*., citing *Pa. PUC v. Verizon Pa., Inc*., Docket No. M-00021592 (Order entered January 25, 2002); 2002 WL 17299987 (*Verizon –Structural Separation Implementation Settlement*). IDT R. Exc. at 3-4.

Next, IDT asserts that in arguing for disapproval of the Settlement, Mr. Ferrare incorrectly characterizes the Settlement as requiring consumers to waive private causes of action against the Company. IDT states that Mr. Ferrare intentionally mischaracterizes the Settlement’s actual provisions regarding the issuance of refunds to customers. According to IDT, per the Settlement, customers are given options to seek rate adjustments or refunds as they can choose to receive a refund from the pool under the oversight of the OCA and OAG, in exchange for the execution of a general release. IDT notes that if they decline to participate in the Refund Pool, customers still have the right to seek a refund directly from the Company and file a formal complaint with the Commission if they are not satisfied with the Company’s response. IDT asserts that the Settlement provides options, and nothing in the Settlement forces customers to waive their private causes of action against IDT as Mr. Ferrare alleged. IDT R. Exc. at 4.

IDT states next that Mr. Ferrare’s Exception also makes the erroneous argument that because the Commission does not have jurisdiction over private causes of action against EGSs, the Commission is precluded from approving a settlement that includes a general release provision. IDT avers that the Settlement does not ask the Commission to limit any individuals’ cause of action against IDT but rather includes a voluntary refund procedure under which specified customers will be given the opportunity to participate in a Refund Pool administered by the OCA and OAG. According to IDT, no customer is compelled in any way to participate in the Refund Pool or execute a general release, and the Settlement clarifies that customers who choose not to participate in the Refund Pool are able to pursue an alternative method to obtain a refund. IDT R. Exc. at 4-5.

Finally, IDT states that other than his misguided “lack of jurisdiction” argument that mischaracterizes the Settlement’s actual terms, Mr. Ferrare has provided no reasons why the Settlement’s refund provisions are not in the public interest. As such, IDT avers that his objections to the Settlement’s refund provisions should be rejected. IDT R. Exc. at 6.

In their Replies to Exceptions, the Joint Complainants submit that the ALJs did not err in approving the Settlement as the Commission has not adjudicated or interfered with Mr. Ferrare’s private causes of action. The Joint Complainants first note that to the extent Mr. Ferrare’s Exception regarding the release language in the Settlement purports to be made on behalf of all IDT customers, it must be rejected pursuant to the ALJs’ Order granting his Petition to Intervene, wherein the ALJs held that Mr. Ferrare was permitted to intervene on his own behalf only. According to the Joint Complainants, Mr. Ferrare’s Exception should be limited to determining whether the Commission has adjudicated or interfered with Mr. Ferrare’s private causes of action. Joint Complainants R. Exc. at 3-4.

The Joint Complainants assert that even if eligible for a refund, Mr. Ferrare would still not be bound by the release provisions of the Settlement should the Commission approve the Settlement. The Joint Complainants explain that the Settlement permits each individual customer who is offered a refund to choose whether to accept the refund in exchange for releasing his or her claims against IDT. That release, states the Joint Complainants, is limited to claims related to the conduct alleged in the Joint Complaint over which the Commission has jurisdiction. According to the Joint Complainants, if a customer refuses the refund or is not offered a refund pursuant to the Settlement, the customer does not provide any release of claims to IDT. As such, the Joint Complainants assert that Mr. Ferrare can choose to forego the refund and pursue his claims against the Company through the Additional Refund Method outlined in paragraph forty of the Settlement, through the Class Action or by filing a Formal Complaint at the Commission. The Joint Complainants maintain that the Commission is not requiring customers to release their claims against IDT; it is the customers that may choose to do so if they deem it to be in their best interests. Joint Complainants R. Exc. at 5.

Next, the Joint Complainants point out that whether IDT previously required customers to sign a general release upon receiving a refund is not relevant to this Settlement. The Joint Complainants state that while some settlements that the Commission has approved do not contain general releases, that fact does not support a finding that the Commission lacks jurisdiction to do so. According to the Joint Complainants, the Commission, in fact, has the jurisdiction to approve a settlement that contains a general release. *See* *e.g. Pa. PUC v. Bell Atlantic Co. of Pa,* Docket No. R-811819 (Order entered November 14, 1988); *Pa. PUC v. Verizon Pa., Inc*., Docket No. M-00021592 (Order entered January 25, 2002). Joint Complainants R. Exc. at 5-7.

**Disposition**

As a preliminary matter, we note that to the extent Mr. Ferrare’s Exceptions are objecting to the terms of the Settlement, not only as they apply to him, but also, as they apply to other IDT customers, the Order Granting Intervention limited Mr. Ferrare’s participation in this proceeding to advocating strictly on his own behalf.[[9]](#footnote-9) As such, any claims Mr. Ferrare has made regarding the potential impacts of the Settlement on other IDT customers are beyond the scope of the Order Granting Intervention and will not be considered.

To determine whether the Settlement should be approved, we must decide whether the proposed terms and conditions are in the public interest. *See, e.g.,* [*Pa. PUC v. C.S. Water and Sewer Associates*, *supra*;](http://www.lexis.com/research/buttonTFLink?_m=8f7710ade25b5eb7871173b2f3b59ffe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20173%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=4&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b74%20Pa.%20PUC%20767%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=0fa8a6e34e5ecac1bf3e1aa67a3298ef) [*Pa. PUC v. Phila. Elect. Co.*, 60 Pa. P.U.C. 1 (1985).](http://www.lexis.com/research/buttonTFLink?_m=8f7710ade25b5eb7871173b2f3b59ffe&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20173%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20Pa.%20PUC%201%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=ca77a1cbe0cf8f56d36f029f1dc49a1f) Our assessment of the benefits of the terms and conditions meeting the criteria of what is in the public interest need not be quantifiable. Popowsky. We must, as the circumstances dictate, exercise our informed judgment and evaluate the public interest so as to take into consideration the various interests and concerns of the stakeholders involved. *Id*.

On consideration of the positions of the Parties and our review of the analysis of the presiding ALJs, we shall adopt their reasoning and their conclusion that the terms and conditions of the Settlement establish by a preponderance of the relevant evidence, substantial benefits to the public interest that are achieved by the Settlement. We conclude, therefore, that approval of the Settlement is in the public interest as it creates overall benefits to the various stakeholders involved, represents a reasonable compromise of the litigated positions of the Parties, and will promote the goals of the General Assembly to establish a robust competitive market for electric generation supply to Pennsylvania retail consumers. 66 Pa. C.S. §§ 2802(5), (7).

Exception No. 1 of Mr. Ferrare is focused on the language in paragraph 41 of the Settlement, which contemplates the execution of a “Release of Claims” in exchange for payment from the Refund Pool. The pertinent section is reprinted below:

41. Release – No customer shall be paid any funds from the Refund Pool 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 Joint Complaint over which the Commission has jurisdiction, including but not limited to, claims regarding the Company’s prices not conforming to its Disclosure Statement or marketing statements.

It is important to note that the issues brought before the Commission with regard to the Settlement in this proceeding by Mr. Ferrare have recently been adjudicated and decided by the Commission in a prior proceeding involving Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric (PGE). *See Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656 (Order entered March 9, 2016)(*PG&E Order)*. In the *PG&E Order* we stated the following in regard to Exception No. 1:

We disagree that adopting a Settlement requiring a customer who elects to receive a refund from the Refund Pool to sign a release as a condition of obtaining payment is an impediment to the authority of this Commission to approve the Settlement. We disagree, based on three primary considerations:

First, the parties to a proceeding before the Commission may resolve their disputes according to terms and conditions that are mutually agreeable as between them. This is entirely consistent with the policy of the Commission to encourage settlements.[[10]](#footnote-10) Moreover, the *quid pro quo* involved in signing a release to resolve a claim is well-recognized by Pennsylvania courts. *See Buttermore v. Aliquippa Hospital*, 522 Pa. 325, 329-30, 561 A.2d 733, 735 (1989) (Parties with possible claims may settle their differences upon such terms as are suitable to them. . . . They may agree for reasons of their own that they will not sue each other or any one for the event in question).

Second, nothing in the Settlement or the Initial Decision suggests or requires the Commission to adjudicate and/or interfere with private causes of action such as breach of contract. Rather, in adjudicating the Settlement, the Commission is adjudicating a Complaint brought by the entity designated by statute to represent consumers of public utility services before the Commission against an EGS licensed by the Commission. Furthermore, the Complaint being adjudicated includes allegations that the Commission-licensed supplier violated Pennsylvania law, including the Commission’s marketing and billing regulations applicable to EGSs.[[11]](#footnote-11) Consequently, the Commission possesses the requisite jurisdiction over both the Parties to this proceeding and the subject matter of the Complaint that the Settlement proposes to resolve. *See* Finding of Fact #3.

Third, the Settlement does not compromise any customer’s right to pursue a claim against Pa. G&E outside of this Commission proceeding. Based on the terms of the Settlement, customers are free to accept a refund and sign a release or reject a refund and pursue a separate claim against Pa. G&E in another forum. The overriding conclusion here is that each customer will have the right to determine whether the conditions of obtaining payment from the Refund Pool are satisfactory in order to resolve his or her claims against the Company. If a customer is not willing to resolve his or her claim under the Settlement terms and conditions, the customer is free to pursue other rights against Pa. G&E.

For these reasons, we believe the Commission has the authority to approve the Settlement.

Consistent with our determination in the *PG&E Order*, we conclude here that we have the authority to approve the Settlement and we shall thus reject Mr. Ferrare’s Exception No. 1. However, as we directed in the *PG&E Order*, we find it necessary to clarify our adoption of the Initial Decision in this case and modify the proposed Settlement obligations of the OAG and OCA regarding notice to consumers who elect to receive payment from the Refund Pool. Specifically, we propose to direct that, as an express condition of our approval of the Settlement, the OAG and OCA shall certify to the Commission that the following notice has been provided to each consumer who voluntarily elects to receive payment from the Refund Pool and signs a “Release of Claims:”

**Signing the Release of Claims and receipt of payment from the Refund Pool may affect your right to recover amounts for the same conduct of IDT Energy, Inc. that could result from legal proceedings against this supplier in a court of law.**

We note that this directive is entirely consistent with the OAG/OCA’s position in their Answer to Mr. Ferrare’s Petition to Intervene, wherein they stated the intent to provide customers with information that is necessary for them to make informed decisions regarding whether to accept the refund in exchange for a release of their claims. The OAG/OCA should advise in their comments if they object to this notice language and if so, they should propose alternative language.

1. **Ferrare Exception No. 2 – Commission Authority Over EGSs**

In his Exception No. 2, Mr. Ferrare states that the ALJs erred in finding the Commission has authority to order and/or permit EGSs to refund moneys related to rate disputes as such actions are clearly beyond the scope of the Commission’s authority. Mr. Ferrare explains that in *Delmarva Power & Light Co. v. Commonwealth*, 582 Pa. 338, 870 A.2d 901 (2005) (*Delmarva*), the Pennsylvania Supreme Court determined that the Commission’s Fiscal Office could not assess EGSs for the administrative expenses of the Commission, the OCA or the OSBA as EGSs were not public utilities. Mr. Ferrare states that as was the case in *Delmarva,* “[t]he Code’s definition of ‘public utility’ states plainly and clearly that ‘the term does not include…(vi) [EGSs], except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 3810 (relating to revenue neutral reconciliation).” According to Mr. Ferrare, based on this unambiguous language, it is clear that the General Assembly did not intend for EGSs to be characterized as public utilities for most purposes. Mr. Ferrare asserts that because the General Assembly specifically did not state that an EGS was a public utility for the purposes of refunds under 66 Pa. C.S. § 1312, the Commission lacks the jurisdiction and authority to order and/or permit an EGS to issue refunds related to rate disputes. Exc. at 6‑8.

Mr. Ferrare next takes the position that the exercise of our plenary authority under Section 501 of the Code, 66 Pa. C.S. § 501, to direct a refund as part of the proposed Settlement is also an overreach. Exc. at 8-9, citing *Virgilli v. Southwestern Pa. Water Auth*., 427 A.2d 1251 (Pa. Cmwlth. 1981) (*Virgilli*); also Exc. at 9 citing *Susquehanna Area Regional Airport Auth. v. Pa. PUC*, 911 A.2d 612, 617 at n.8 (Pa. Cmwlth. 2006).

In conclusion, Mr. Ferrare takes the position that the Commission is not a court of law, does not have the discretion of a court of law and lacks regulatory authority over an EGS’s rates and, likewise, the Commission lacks the authority to force consumers to waive private causes of action against the Company. Exc. at 9.

In its Replies to Exceptions, IDT states that in addition to being legally flawed, this argument of Mr. Ferrare is hypocritical and exposes the true intention behind his objections to the Settlement, which is to scuttle the Settlement to selfishly preserve the financial value of his speculative class action lawsuit, to the detriment of customers who would otherwise have the opportunity to receive refunds under the Settlement. IDT explains that under the Settlement, if approved by the Commission, all of IDT’s customers who were on variable rates in January, February and March of 2014 immediately would be eligible to participate in a Refund Pool of $2,400,000. According to IDT, Mr. Ferrare’s “cynical advocacy” challenging the Commission’s jurisdiction to approve this Settlement should negatively color the Commission’s consideration of the entirety of his Exceptions and his overall opposition to the Settlement. IDT R. Exc. at 6.

Next, IDT asserts that Mr. Ferrare’s argument on this point is flawed because it focuses on the Commission’s authority to order an EGS to issue a refund to customers, whereas the relevant inquiry is whether the Commission has the ability to approve a Settlement under which an EGS voluntarily agrees to issue refunds to customers. IDT points out that the Commission already has confirmed in this proceeding that “nothing precludes an EGS from agreeing to issue refunds as part of a settlement of a Commission proceeding arising pursuant to the Code” citing *December 18th Order* at 16 and citing *Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC,* Docket No. C-2012-2257858 (Order entered December 19, 2013)(*Public Power*). According to IDT, this finding is the law of the case and is binding on the Parties, including Mr. Ferrare. As such, IDT opines that Mr. Ferrare’s argument that the Commission lacks the authority to approve the Settlement must be rejected. IDT R. Exc. at 7.

In response to Mr. Ferrare’s characterization of this proceeding as being a “rate dispute,” IDT states that this proceeding clearly is not a “proceeding involving rates.” Rather, it is a proceeding alleging violations of the Code and the Commission’s Regulations. IDT notes that the Commission has the jurisdiction to approve settlements of proceedings involving allegations of violations of the Code and its Regulations, and routinely does so. Next, IDT asserts that Mr. Ferrare’s attempts to stretch the holding of the *Delmarva* decision to an illogical extreme, when he asserts that “the PUC lacks the jurisdiction and authority to order and/or permit an EGS to issue refunds related to rate disputes.” According to IDT, while *Delmarva* makes it clear that EGSs are deemed to be public utilities only for the limited purposes described in Sections 2809 and 2810 of the Code, nothing in the *Delmarva* opinion can reasonably be interpreted as forbidding EGSs from voluntarily issuing refunds to customers in order to resolve their concerns or disputes. IDT R. Exc. at 7-8.

In its Replies to Exceptions, the Joint Complainants state that nothing precludes an EGS from agreeing to issue refunds as part of any settlement, and, nevertheless, the Commission specifically has authority to issue refunds for the violations alleged in the Joint Complaint. The Joint Complainants assert that the Commission has already determined this issue in this proceeding in the *December 18th Order* at 16 and has also approved the issuance of refunds that an EGS agreed to as part of a settlement to resolve a complaint. *See Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. HIKO Energy, LLC,* Docket No. C-2014-2427652 (Order entered December 3, 2015) (*HIKO Energy*); *see also* *Public Power*; *see also Pa. PUC Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric,* Docket No. M-2013-2325122 (Order entered October 2, 2014)(*October 2014 Order)*. As such, the Joint Complainants submit that the ALJs did not err in approving the Settlement in which IDT agreed to provide refunds. Joint Complainants R. Exc. at 7-8.

Next, the Joint Complainants aver that Mr. Ferrare mischaracterizes the allegations in the Joint Complaint by summarizing the alleged violations as “rate disputes” and by relying on the holding in *Delmarva.* In their Joint Complaint, the Joint Complainants reiterate that they have alleged that IDT engaged in misleading and deceptive practices in violation of the Commission’s Chapter 54 regulations, switched customer accounts without their consent and charged prices that did not conform to its disclosure statement. According to the Joint Complainants, it is neither proper to characterize these allegations as “rate disputes” nor to compare the issues in this case to the issue in *Delmarva*. The Joint Complainants opine that refunds are appropriate in this settled proceeding and the Commission is within its authority to approve this Settlement. Joint Complainants R. Exc. at 8-10.

**Disposition**

Based upon our review and consideration of the evidence of record, and consistent with our determination in the *PG&E* Order, we find that the Replies of both IDT and the Joint Complainants are convincing. As such, we shall deny this Exception. Under the applicable provisions in the Settlement, the Company will voluntarily issue refunds to customers as part of a comprehensive settlement of these proceedings. As noted in our *Commission Settlement Guidelines*, we will provide Parties the necessary flexibility to resolve a dispute so as to avoid the uncertainty of a litigated disposition. Based on the foregoing, the objections of Mr. Ferrare in this area have been extensively addressed by this Commission in the *IDT Order* and in *Blue Pilot*.

In the *PG&E Order* we stated the following in regard to Exception No. 2:

Notwithstanding that the instant proceeding has resulted in a settlement under which the EGS will voluntarily provide rebates and/or refunds to consumers, we must emphasize to Mr. Sobiech that our authority in the area of billing disputes between an EGS and a consumer does not derive from the “refund” authority of Section 1312 of the Code, 66 Pa. C.S. § 1312, that applies to “public utilities.” As explained in the *IDT Order*, the *FES Declaratory Order*, and *Blue Pilot*, the authority derives from Section 501 of the Code, 66 Pa. C.S. § 501. The authority of the Commission to direct a billing adjustment, even in a litigated context, has been reaffirmed in a recent proceeding, *Kiback v. IDT Energy, Inc.*, Docket No. C‑2014-2409676 (Order entered August 20, 2015).

In the *IDT Order* we concluded, *inter alia*, that Section 501 of the Code provided authority to correct an overbilling by an EGS company to a customer.

We expressly concluded that directing a billing adjustment for an EGS over bill of supply charges is within the Commission’s Section 501 powers to carry out the consumer protections in the Act that are applicable to competitive electricity generation supply service. *See IDT Order* at 17-18. As a billing adjustment is a potential remedy in a litigated setting, a voluntary refund of disputed EGS charges is also an outcome that can be accomplished in the context of a comprehensive settlement.

Additionally, we agree with the positions of the Joint Complainants that the ALJs’ discussion of the Consumer Protection Law was not in express reliance on those statutory provisions, but necessary to place the issues before them in the proper context for purposes of reviewing the terms of the Settlement. *See Kiback v. IDT Energy, Inc.*, *supra*, at 33, n. 10.

Finally, we conclude that Mr. Sobiech’s reliance on *Delmarva* and *Virgilli* are injected out of context. *See* discussion of Exception No. 4, *infra*. Contrary to the position of Mr. Sobiech, the *Virgilli* court has expressly recognized that courts have construed the Code as creating many areas of concurrent jurisdiction between the Commission and the Commonwealth’s courts. *See Virgilli,* citing*, e.g.,* [*Rogoff v. Buncher*, 395 Pa. 477, 151 A.2d 83 (1959)](http://www.lexis.com/research/buttonTFLink?_m=6c86a0ebdd81f5241ccf0e9b55c1efcc&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b58%20Pa.%20Commw.%20340%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=12&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b395%20Pa.%20477%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAl&_md5=6ddedba56ea0f3a6b3ffa0accc13ef99); [*Leveto v. National Fuel Gas Distribution*, 366 A.2d 270 (Pa. Super. 1976)](http://www.lexis.com/research/buttonTFLink?_m=6c86a0ebdd81f5241ccf0e9b55c1efcc&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b58%20Pa.%20Commw.%20340%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=13&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b243%20Pa.%20Super.%20510%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAl&_md5=71005e9fe3e4d9980645d6f55f10c085).

Consistent with our determination in the *PG&E Order*, we conclude here that the Commission has the authority to approve the Settlement and will reject Mr. Ferrare’s Exception No. 2.

1. **Ferrare Exception No. 3 – Insufficient Refunds**

In his Exception No. 3, Mr. Ferrare states that the ALJs erred in approving the Settlement as the Settlement Fund is grossly insufficient compared to the amount of actual damages caused by the Company and the number of Pennsylvania consumers the Company harmed. Mr. Ferrare asserts that while both the Joint Complainants and IDT acknowledge that the number of affected customers is significant, neither have disclosed the actual number of affected customers to the Commission or the public. Mr. Ferrare asserts that it is unconscionable that the Company and the Joint Complainants are permitted to hide the underlying details of this proposed Settlement from public scrutiny behind the veil of “confidentiality”. Mr. Ferrare objects to this information being confidential as this information does not expose the Company’s trade secrets or anything else that would cause the Company to lose its competitive edge. According to Mr. Ferrare, if the Joint Complainants are permitted to advertise and tout this Settlement as a victory for Pennsylvania consumers, the number of affected consumers and the amount of the financial harm caused by the Company should be disclosed to the public as well. Mr. Ferrare alleges that given the significant number of customers who were impacted, the staggering amount of the overcharges and the miniscule Refund Pool, the Settlement is nothing more than a windfall for the Company enabling it to buy off its obviously larger liability, by forcing customers to sign releases, for literally pennies on the dollar. Exc. at 10-12.

In its Replies to Exceptions, IDT states first that Mr. Ferrare’s argument about the sufficiency of the Refund Pool relies almost entirely on piecemeal information and assumptions that are not part of the record in this proceeding and therefore should not be considered in evaluating the Settlement. IDT points out that Commission determinations must be supported by substantial evidence of record and it is not appropriate for exceptions to reference information which is not in the record. According to IDT, the record in this case is limited to: (1) the Joint Stipulation of Facts in Support of the Settlement; (2) the materials from the February 17-20, 2015, evidentiary hearings, including the Consumer Direct Testimonies and exhibits that were moved into the record at that time; and (3) the additional Consumer Testimonies and accompanying exhibits that the Joint Complainants and IDT moved to admit by Joint Motion on August 4, 2015. IDT avers that Mr. Ferrare’s Exception No. 3 does not reference the record in this case, but instead references various pieces of extraneous data about IDT’s customer base and pricing that was taken from “testimony” that is clearly not in the record. IDT notes that the “testimony” referenced by Mr. Ferrare was never authenticated and never offered for admission into the record and, as such, should not be considered in evaluating the Settlement. IDT R. Exc. at 8-9.

IDT further states that not only is the “testimony” referenced by Mr. Ferrare not part of the record in this case, Pennsylvania Rule of Evidence 802 and the Commission’s Regulations would have prohibited its admission had Mr. Ferrare attempted to admit it. IDT avers that unauthenticated written statements such as the “testimonies” referenced in Mr. Ferrare’s Exception No. 3 constitute inadmissible hearsay. IDT claims that these “testimonies” were never authenticated by a witness, and never subject to cross-examination. IDT further claims that had this proceeding not settled, the Company would have challenged the accuracy of the statements, opinions and conclusions of the Joint Complainants witnesses through cross-examination, cross-examination exhibits and rebuttal testimony. According to IDT, there is simply no precedent for the Commission, in the context of evaluating a Settlement, to consider passages from unauthenticated pre-served testimony by witnesses who were not subject to cross-examination, when the Parties agreed not to move the testimony into the record and when no other Party was provided the opportunity to file rebuttal in response. Therefore, IDT asserts that the data referenced in Mr. Ferrare’s third Exception must be disregarded in its entirety. IDT R. Exc. at 10-11.

Next, IDT states that Mr. Ferrare’s argument is flawed because it wrongly interprets the Settlement as involving a finding of wrongdoing and liability against IDT, and it overlooks many important factors when evaluating the size of the Refund Pool. IDT opines that Mr. Ferrare’s conclusion that “over-charges” occurred is merely an unsubstantiated opinion that is contradicted by the evidence of record. IDT asserts that the fact is that no finding of liability has been made against IDT as the Settlement Petition and Joint Stipulation of Facts both explicitly state that the Settlement’s provisions should not be construed as an admission of any liability by IDT. *See* Settlement Petition at ¶ 37 and Stipulation of Facts at 1. According to IDT, Mr. Ferrare ignores the fact that the retail electricity prices charged in January and February 2014 reflected the wholesale energy market volatility resulting from the very cold weather that the region endured over those two months. IDT maintains that this volatility was unforeseen by all industry participants and was completely unprecedented. IDT further notes that Mr. Ferrare ignores the fact that IDT voluntarily issued rate adjustments to thousands of customers who were affected by the unprecedented electricity prices long before this proceeding was initiated even though IDT’s disclosure statements placed no ceiling on the variable rates permitted to be charged to retail customers. IDT R. Exc. at 11-12.

In their Replies to Exceptions, the Joint Complainants first state that Mr. Ferrare’s argument to the refund amount exceeds his permitted scope of intervention in this proceeding as Mr. Ferrare was permitted to intervene only on his own behalf. As such, the Joint Complainants assert that this Exception should be limited to determining whether the refund amount offered to Mr. Ferrare under the Settlement is sufficient compared to the harm that IDT caused Mr. Ferrare. The Joint Complainants explain that at this point it has not been determined what amount of refund Mr. Ferrare will be offered under the Settlement, if any, as refund eligibility shall be determined based on the individual customer’s usage, price charged, and refund amount already received. According to the Joint Complainants, if Mr. Ferrare is unsatisfied with the refund offered he can choose to forego the refund and pursue his claims against the Company through the Additional Refund Method outlined in Paragraph 40 of the Settlement or through the Class Action or by filing a formal complaint at the Commission. Joint Complainants R. Exc. at 11.

Next, the Joint Complainants submit that the Settlement adequately considers the extent of harm suffered by individual customers as refunds shall be provided to IDT customers who were on variable rate plans and billed for usage in January, February or March 2014. The Joint Complainants further submit that the Settlement results from compromises of the factual allegations in the Joint Complaint and was reached after extensive discovery, both formal and informal. The Joint Complainants assert that they utilized all the information received from IDT and the Company’s customers to tailor the provisions within the Settlement to fully resolve all of the allegations in the Joint Complaint. As such, the Joint Complainants opine that the Settlement must be considered in its entirety as the Settlement is comprehensive, appropriate and reasonable under the circumstances and is in the public interest. The Joint Complainants further maintain that the Settlement protects the interests of consumers through: (1) continued government monitoring of the Company; (2) comprehensive injunctive relief that requires IDT to implement various modifications to its business practices; (3) a swift resolution of this matter; and (4) significant relief to eligible customers in the form of refunds. Joint Complainants R. Exc. at 11-12.

**Disposition**

Based upon our review of the record, and consistent with the *PG&E Order,* we agree with the ALJs’ recommendation to approve the Settlement and, thus, we shall deny Mr. Ferrare’s Exception on this issue. In support of our denying this Exception, we refer to our *PG&E Order* wherein we stated:

A comparison of the number of customers affected, as drawn from the Findings of Fact concerning the number of witness statements, with the amount to be placed in the Refund Pool, in addition to amounts that have been previously rebated to Pa. G&E’s customers, leads us to conclude that the Settlement is sufficiently supported. [[12]](#footnote-12) These comparisons, along with the informed judgment of the statutory advocates, convince us that the Settlement is clearly in the public interest, notwithstanding the lack of mathematic or numerical precision for which it suffers criticism by Mr. Sobiech. The overall benefits that support a finding of the meeting of the public interest standard need not be set forth with mathematic certainty. *Popowsky.*

Consistent with our determination in the *PG&E Order*, we conclude here that we have the authority to approve the Settlement and that the Settlement Fund is sufficient. Therefore, we shall reject Mr. Ferrare’s Exception No. 3.

1. **Ferrare Exception No. 4 – Jurisdictional Authority**

In his Exception No. 4, Mr. Ferrare states that the ALJs erred in finding that the Commission and the OCA have the jurisdiction over and authority to represent consumers who have not filed complaints with the Commission against EGSs which are corporations and not public utilities. Mr. Ferrare asserts that EGS companies are not “public utilities” within the definition found in the Code. Rather, argues Mr. Ferrare, EGS companies are “corporations.” He goes on to question the authority of the OCA to legally represent EGS customers who are not, in his view, “consumers” within the definition of consumers found in 71 P.S. § 309-1. *Id*. Mr. Ferrare argues that “consumer” is defined in the statute as follows:

**§ 309-1. Definitions (Adm. Code § 901-A)**

As used in this article:

“COMMISSION” means the Pennsylvania Public Utility Commission.

“CONSUMER” means any person (i) who makes a direct use or is the ultimate recipient of a *product or a service supplied by any person or public utility subject to the authority of the commission* or (ii) *who may be a direct user or ultimate recipient of a product or service supplied by any person or public utility subject to the authority of the commission and may be affected in any way by any action within the authority of the commission*. The term “consumer” includes any “person,” “corporation” or “municipal corporation” as defined in section 2 of the act of May 28, 1937 (P.L. 1053, No. 286), known as the "Public Utility Law."

“PUBLIC UTILITY” means public utility as defined in section 2(17), act of May 28, 1937 (P.L. 1053, No. 286), known as the “Public Utility Law.”

71 P.S. § 309-1 (emphasis added). Exc. at 14-15.

Mr. Ferrare relies on the holding in *Delmarva* to take the position that an EGS is neither a “person” nor a “public utility” within the definitions of those terms as they are set forth in the applicable legislation related to entities over which the Commission may exercise authority for purposes of financial assessments, 66 Pa. C.S. § 510. Mr. Ferrare carries over this reasoning to also argue for the inapplicability of those terms to EGS companies or their end-user customers, for purposes of representation before the Commission by the OCA. Exc. at 15-16.

In its Replies to Exceptions, IDT states that this argument by Mr. Ferrare appears to be made on behalf of other customers of EGSs, rather than on his behalf, and as such, Mr. Ferrare has no standing to make this argument. IDT asserts that it is clear that Mr. Ferrare is attempting to advocate the interests of customers other than himself in arguing that the Commission and the OCA lack jurisdiction over customers who have not filed complaints. IDT opines that his Exception on this point fails due to lack of standing and should be rejected. IDT further asserts that Mr. Ferrare continues to misconstrue this proceeding as a “rate dispute” and misinterprets the Code and the holding in *Delmarva.* IDT claims that this is not a rate dispute but rather a formal complaint proceeding alleging violations of the Commission’s Regulations regarding marketing and billing practices. IDT R. Exc. at 15-17.

In their Replies to Exceptions, the Joint Complainants state that the OCA has the authority to represent consumers of EGSs in proceedings related to Commission Regulations governing the retail market and quality of service issues. The Joint Complainants submit that Mr. Ferrare’s assertions are not supported by law and, if interpreted as suggestion by Mr. Ferrare, such interpretations would create a result that is not in the public interest. The Joint Complainants point out that the Code specifically recognizes EGSs as public utilities for purposes of, *inter alia*, Section 2809 of the Code, 66 Pa. C.S. § 2809. The Joint Complainants note that Section 2809 of the Code establishes the requirements for EGSs, including licensing requirements. According to the Joint Complainants, EGSs are recognized as public utilities for the purpose of Section 2809, which specifically requires EGSs to obtain a license from the Commission, perform properly the service proposed in their license application and conform to the provisions of the Commission’s Regulations and Orders, including the Commission’s Regulations regarding standards and billing practices. Joint Complainants R. Exc. at 13-15.

Next, the Joint Complainants note Mr. Ferrare’s reliance on *Delmarva* stating that he has misinterpreted *Delmarva,* wherein the Pennsylvania Supreme Court held that EGSs are considered public utilities for purposes of quality of service, including standards and billing practices for residential utility service. According to the Joint Complainants, the Court’s Opinion in *Delmarva* directly supports the conclusion that the OCA is authorized to represent EGS consumers. As such, the Joint Complainants opine that the OCA has the authority to represent consumers before the Commission in this proceeding. The Joint Complainants explain that under Mr. Ferrare’s interpretation, if a customer chooses an EGS, the OCA would not have the authority to represent that consumer’s interest in any proceedings relating to quality of service and standards and billing practices under any circumstance. The Joint Complainants maintain that would create a result that is not in the public interest. Joint Complainants R. Exc. at 15-17.

**Disposition**

Upon our consideration of the evidence of record, and consistent with our determination in the *PG&E Order*, we shall deny the Exception of Mr. Ferrare on this issue. In the *PG&E Order* we stated the following:

As an initial observation, we find the distinctions as argued by Mr. Sobiech between a “public utility,” “person,” and “corporation,” as the terms are set forth in the Code and in 71 P.S. § 309-1, to be without merit. For reasons discussed above, pertaining to the authority and to the jurisdiction of the Commission, we find that an EGS is a “person” within the definition of 71 P.S. § 309-1, under the authority of the Commission which directly provides a product or service to an ultimate recipient of a product or service in this matter.

We also find the attack on the statutory authority of the OCA in this matter to be sufficiently foreclosed. The Office of Consumer Advocate was legislatively established in 1976 as an arm of the Department of Justice to represent consumers of public utility services in proceedings before the Commission and before *any other agency or court in regard to any matter which involves regulation by the Commission*. *See Widoff, Consumer Advocate et al., Petitioners v. The Disciplinary Bd. of the Supreme Court of Pa. et al.*, 420 A.2d 41 (Pa. Cmwlth. 1980). Whether this proceeding were prosecuted before an administrative agency, such as the Commission, or filed with a court, the OCA has been duly authorized to represent the interest of consumers. As discussed above, as an EGS, Pa. G&E is subject to regulation (albeit limited) by the Commission. As such, we shall deny the Exception No. 4 of Mr. Sobiech.

Consistent with our determination in the *PG&E Order*, we conclude here that the Commission has the authority to approve the Settlement and that the Commission and the OCA have the authority to represent consumers who have not filed complaints with the Commission against EGSs. Therefore, we shall adopt the recommendation of the ALJs and reject Mr. Ferrare’s Exception No. 4.

**F. *Commission Settlement Guidelines***

The ALJs discussed the pertinent *Commission Settlement Guidelines*, or *Rosi* factors, at pages 51-63 of the Initial Decision. We concur with the ALJs’ analysis in determining the amount of the penalty against IDT in this proceeding as well as their discussion addressing the public interest benefits in support of granting the Joint Petition for Approval of Settlement. For the sake of brevity, the ALJs’ analysis and discussion of the *Commission Settlement Guidelines* are incorporated herein by reference.

**IV. Conclusion**

Based on the foregoing, we shall deny the Exceptions of Anthony Ferrare, and adopt the ALJs’ Initial Decision as clarified and modified by this Opinion and Order which shall be issued in Tentative Form to allow the parties the opportunities to file comments addressing any concerns they may have to the modification to the Settlement that requires Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate, or their successors in office, to certify to the Commission that a notice will be provided to each consumer who voluntarily elects to receive payment from the Refund Pool and signs a Release of Claims, consistent with the discussion herein; **THEREFORE**,

**IT IS ORDERED**:

1. That the Exceptions filed by Anthony Ferrare on December 3, 2015, are denied.
2. That the Initial Decision issued on November 19, 2015, by Administrative Law Judges Elizabeth H. Barnes and Joel H. Cheskis, is adopted, subject to the modification and clarification expressed in this Opinion and Order which shall be issued in Tentative Form.
3. That the Joint Petition for Approval of Settlement dated August 4, 2015, and submitted at Docket Number C-2014-2427657 by the Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane, Tanya J. McCloskey, Acting Consumer Advocate, IDT Energy, Inc., and the Office of Small Business Advocate is, hereby, approved, subject to the condition that Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate, or their successors in office, shall certify to the Commission that the following notice has been provided to each consumer who voluntarily elects to receive payment from the Refund Pool and signs a Release of Claims:

**Signing the Release of Claims and receipt of payment from the Refund Pool may affect your right to recover amounts for the same conduct of IDT Energy, Inc. that could result from legal proceedings against this supplier in a court of law.**

1. That the Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane, Tanya J. McCloskey, Acting Consumer Advocate, IDT Energy, Inc., and the Bureau of Investigation and Enforcement, shall have seven (7) days from the date of entry of this Opinion and Order to file comments with the Commission in response to the clarification and condition set forth in Ordering Paragraph No. 3 of this Opinion and Order.
2. That should comments be filed with the Commission pursuant to Ordering Paragraph No. 4, above, the matter shall be disposed of through an appropriate Final Order.
3. That should no comments be filed with the Commission pursuant to Ordering Paragraph No. 4, above, it is further ordered:

(a) That this Tentative Opinion and Order shall become final without further action by the Commission.

(b) That the Stipulation of Facts in Support of the Settlement submitted on August 4, 2015, as Exhibit A to Joint Petition for Approval of Settlement is admitted into the record of this proceeding.

(c) That the Formal Complaint filed by the Commonwealth of Pennsylvania by Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate, against IDT Energy, Inc. on June 20, 2014, is hereby marked satisfied.

(d) That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within thirty (30) days from the entry of the Final Commission Opinion and Order, IDT Energy, Inc. shall pay a civil penalty in the amount of $25,000 by sending a certified check or money order, payable to the “Commonwealth of Pennsylvania,” to the following address:

Secretary

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

(e) That a copy of this Opinion and Order be served upon the Financial and Assessment Chief, Office of Administrative Services.

(f) That IDT Energy, Inc. is directed to file a sworn certification with the Commission showing its compliance with the term of this settlement regarding a $75,000 contribution to EDCs’ hardship funds within thirty (30) days of the date of entry of the Final Order in this proceeding.

(g) That IDT Energy, Inc. shall comply with all directives, conclusions and recommendations in the Joint Petition for Approval of Settlement as approved and adopted in this Opinion and Order that are not the subject of individual ordering paragraphs as if they were the subject of specific ordering paragraphs.

(h) That upon filing of the certification described in Ordering Paragraph No. 3, above, this Docket No. C-2014-2427657 shall be marked closed.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: June 30, 2016

ORDER ENTERED: June 30, 2016

1. As the name implies, a variable rate may be defined as “[a]n all-inclusive, per-kWh price that can change by the hour, day, month, etc., according to the terms and conditions in the supplier’s disclosure statement. . . . [T]he rate may change with market conditions.” *See* [www.PAPowerSwitch.com](http://www.PAPowerSwitch.com). [↑](#footnote-ref-1)
2. 52 Pa. Code § 69.1803 defines PTC as follows: “*PTC—Price-to-compare*—A line item that appears on a retail customer’s monthly bill for default service. The PTC is equal to the sum of all unbundled generation and transmission related charges to a default service customer for that month of service.” [↑](#footnote-ref-2)
3. To the extent that the modifications to business practices described herein reference compliance with statutes, Commission regulations, Orders and policies, such references are not to be interpreted as an acknowledgement that IDT did not previously comply with such statutes, Commission regulations, Orders or policies. [↑](#footnote-ref-3)
4. The burden of proof is met when the party on whom the burden is placed meets that burden by a preponderance of the evidence. A preponderance of the evidence is established by presenting evidence that is more convincing, by even the smallest amount, than that presented by the other parties to the case. [*Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).](http://www.lexis.com/research/buttonTFLink?_m=470ca40ed8631ccf658db98795d0e691&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2011%20Pa.%20PUC%20LEXIS%201391%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=11&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b364%20Pa.%2045%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=11&_startdoc=11&wchp=dGLzVzt-zSkAz&_md5=3b55efab80a5f76c487e3a484311d5fd) Also, the Commission’s decision must be based on substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Dutchland Tours, Inc. v. Pa. PUC,* 337 A.2d 922 (Pa. Cmwlth. 1975). [↑](#footnote-ref-4)
5. Application for Reargument or Rehearing *En Banc* filed September 23, 2015. [↑](#footnote-ref-5)
6. *See*, 52 Pa. Code § 69.1201(c), *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations – statement of policy*; *See also, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-0092409 (Final Order entered February 10, 2000). These factors are commonly referred to either as the “*Rosi* factors” or “*Commission Settlement Guidelines*.” [↑](#footnote-ref-6)
7. Mr. Ferrare also argued in his *Amicus Curiae* Brief that the confidential designation should be removed from certain information provided in this case. This issue was severed from disposition of the Settlement and addressed in an Order Denying Request to Remove Confidential Designation issued on September 16, 2015, to promote clarity and efficiency in the Initial Decision. [↑](#footnote-ref-7)
8. Mr. Ferrare states that he does not except to the agreed-to changes in the way IDT does business in Pennsylvania. Exc. at 4. [↑](#footnote-ref-8)
9. Additionally, because Mr. Ferrare is not an attorney, the Commission’s Regulations prohibit him from representing other IDT customers. *See* 52 Pa. Code §§ 1.21 and 1.22. Further, Mr. Ferrare’s attorney did not enter his appearance on behalf of any other IDT customers in this proceeding. [↑](#footnote-ref-9)
10. 52 Pa. Code § 5.231(a). [↑](#footnote-ref-10)
11. The relevant Commission regulations are found in Chapter 54, Title 52 of the Pennsylvania Code. [↑](#footnote-ref-11)
12. A Pa. G&E Customer List was also filed (under proprietary seal) with the Commission as part of this proceeding. [↑](#footnote-ref-12)