



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE
ATTORNEY GENERAL

Bureau of Consumer Protection
Public Protection Division
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: (717) 787-9707
Fax: (717) 705-3795
July 30, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor (filing room)
PO Box 3265
Harrisburg, PA 17105-3265

Re: Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane,
Through the Bureau of Consumer Protection and Tanya J. McCloskey,
Acting Consumer Advocate v. IDT Energy, Inc.: Docket No. C-2014-2427657;
JOINT REPLY TO NEW MATTER

Dear Secretary Chiavetta:

Enclosed please find the Joint Reply to the New Matter filed in the above-captioned docket. Copies of this document have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Sincerely,

A handwritten signature in cursive script that reads "Margarita Tulman".

Margarita Tulman
Deputy Attorney General

Enclosures

cc: Honorable Elizabeth H. Barnes (*with enclosures*)
Honorable Joel H. Cheskis (*with enclosures*)
Certificate of Service (*with enclosures*)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by Attorney
General KATHLEEN G. KANE, Through the
Bureau of Consumer Protection,

And

TANYA J. McCLOSKEY, Acting Consumer
Advocate,

Complainants

v.

IDT Energy, Inc.,

Respondent

Docket No. C-2014-2427657

JOINT REPLY OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE OF
CONSUMER ADVOCATE TO NEW MATTER OF
IDT ENERGY, INC.

Pursuant to Section 5.63 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Replies to New Matter, 52 Pa. Code § 5.63, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following Joint Reply to the New Matter of IDT Energy, Inc. (Respondent or IDT), in the above-captioned proceeding. The Joint Complainants incorporate herein all paragraphs and allegations in their Joint Complaint filed in this action as though the same were fully set forth herein at length, and aver the following:

1. Respondent's introduction paragraph requires no responsive pleading. By way of

further answer, the Joint Complainants incorporate herein paragraphs 1 through 81 of their Joint Complaint and the allegations contained therein.

2. Denied as stated. The OCA has not acknowledged that rates as high as those charged by Respondent in early 2014 were the result of the wholesale electricity prices in the energy markets administered by PJM. Joint Complainants are without information sufficient to form a belief regarding the averments of the Commission, and therefore, the averments are denied.

3. It is denied that the Commission's Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134, Order (adopted Feb. 20, 2014/entered March 4, 2014) (March 4 Order Seeking Comments)¹ is authoritative precedent to the resolution of this matter or otherwise absolves Respondent of the violations alleged in the Joint Complaint. It is specifically denied that the record high costs in the PJM administered energy markets in early 2014 absolves IDT of the charges to customers during early 2014 that did not conform to IDT's marketed prices, its Disclosure Statement, or its sales representations. See Joint Complaint at Counts I, II, V and VI and App. A, B and C.

4. It is denied that the Motion accompanying the March 4 Order Seeking Comments is authoritative precedent to the resolution of this matter or otherwise absolves Respondent of the violations alleged in the Joint Complaint. It is specifically denied that the "wholesale energy market volatility" or spike in wholesale market prices in early 2014 absolves IDT of the charges to its customers during early 2014 that did not conform to IDT's marketed prices, its Disclosure

¹ Of note, the Commission sought Comments from interested parties in its March 4 Order Seeking Comments. On April 3, 2014, the OCA submitted Comments jointly with AARP, the Pennsylvania Utility Law Project and Community Legal Services, Inc. to the March 4 Order Seeking Comments. The Commission has not acted on the Comments submitted by interested parties to the March 4 Order Seeking Comments.

Statement, or its sales representations. See Joint Complaint at Counts I, II, V and VI and App. A, B and C.

5. It is denied that the Motion accompanying the March 4 Order Seeking Comments is authoritative precedent to the resolution of this matter or otherwise absolves Respondent of the violations alleged in the Joint Complaint. It is specifically denied that the cited prices and charges absolve IDT of Respondent's charges to customers during early 2014 that did not conform to IDT's marketed prices, its Disclosure Statement, or its sales representations. See Joint Complaint at Counts I, II, V and VI and App. A, B and C.

6. It is denied that the Motion accompanying the March 4 Order Seeking Comments is authoritative precedent to the resolution of this matter or otherwise absolves Respondent of the violations alleged in the Joint Complaint. It is specifically denied that the cited statements were specific to IDT or relevant to the Joint Complainants' averments that IDT's charges to customers during early 2014 did not conform to IDT's marketed prices, its Disclosure Statement or its sales representations. See Joint Complaint at Counts I, II, V and VI and App. A, B and C.

7. It is denied that the cited testimonies were specific to IDT or relevant to Joint Complainants' averments that the Respondent's charges to customers during early 2014 did not conform to IDT's marketed prices, its Disclosure Statement, or its sales representations. See Joint Complaint at Counts I, II, V and VI and App. A, B and C. It is specifically denied that the cited testimonies are controlling in this matter.

8. It is denied that the cited testimony is controlling in this matter or relevant to Joint Complainants' averments that the Respondent's charges to customers during early 2014 did not conform to IDT's marketed prices, its Disclosure Statement, or its sales representations. See Joint Complaint at Counts I, II, V and VI and App. A, B and C.

9. It is denied that the letter referenced by Respondent addresses the retail prices charged by IDT to customers in early 2014 or IDT's promises of savings to customers by Respondent's agents or in Respondent's marketing materials. See Joint Complaint at Counts I, II, V and VI and App. A, B and C.

10. No response is required, as the Joint Complaint is of record in this matter and speaks for itself. By way of further answer, it is specifically denied that purported "unprecedented and anomalous wholesale electricity prices of January and February 2014" in any way absolves Respondent of the violations alleged in the Joint Complaint.

11-13. Respondent provides purported facts in these paragraphs that are based on information in the possession of Respondent and are therefore, denied. Strict proof thereof is demanded at hearings in this matter.

14. Denied. By way of further answer, it is denied that IDT's Disclosure Statement "clearly and unequivocally states that customers will be charged a variable rate for electricity generation supply, that the rate may be higher or lower than the EDC's in any given month, and that the price has no ceiling." Joint Complainants incorporate Paragraphs 59 through 62 and Paragraphs 65 through 67 of their Joint Complaint herein.

15-26. Respondent provides purported facts in these paragraphs that are based on information in the possession of Respondent and are therefore, denied. Strict proof thereof is demanded at hearings in this matter. By way of further answer, it is specifically denied that the referenced statements by Commissioners in a Joint Motion absolve Respondent of the violations alleged in the Joint Complaint. Also, it is specifically denied that IDT's prices charged to its customers in January and February 2014 were consistent with the terms of Respondent's

Disclosure Statement. Joint Complainants incorporate Paragraphs 65 through 67 of their Joint Complaint herein.

27. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, the Commission's regulations require compliance with the Consumer Protection Law, 73 P.S. § 201-1, *et seq.* See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). These regulations, in pertinent part, establish standards and practices for marketing and sales activities for EGSs and their agents to ensure the fairness and integrity of the competitive electric generation market. The Commission has directed that EGSs and their agents comply with the standards set forth in the regulations when engaged in sales and marketing activities involving residential customers. See 52 Pa. Code § 111.1. The Commission in its own regulations has required that an EGS may not engage in misleading or deceptive conduct as defined by State or Federal law, or by Commission rule, regulation or order. See 52 Pa. Code §§ 54.122(3) and 111.12(d)(1). The Consumer Protection Law defines such conduct, and it would not be a reasonable interpretation for the Commission's regulations to compel compliance with this law and at the same time, withhold from the Commission the authority to make determinations pursuant to this law insofar as the law is incorporated into the Commission's regulations.

To promote consistency and uniformity in this industry and to maximize the ability to obtain effective and adequate relief on behalf of consumers who have been injured by violations of the Consumer Protection Law, the Commission must first determine whether the conduct alleged constitutes a violation of State or Federal law, including the Consumer Protection Law, or Commission regulation or order. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1); see also Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 133, 420 A.2d 371, 376 (1980). As a

preliminary matter, the Commission must invoke the statute and case law under the Consumer Protection Law, interpret it, and apply it harmoniously where appropriate. See Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972); Pettko v. Pennsylvania American Water Company, 39 A.3d 473, 484 (Pa. Commw. Ct. 2012). Moreover, since the adjudication of MAPSA v. PECO Energy Co., Docket No. P-00981615, in 1999, the Commission added the requirement that EGSs comply with the Consumer Protection Law to the Commission's regulations. Furthermore, the Commonwealth Court decided Harrisburg Taxicab, wherein the Court held that the Commission's decision to incorporate another agency's regulations into the Commission's own regulations is in no way inappropriate and such overlap does not divest the Commission of its statutory authority or duty. Harrisburg Taxicab & Baggage Co. v. Pa. PUC, 786 A.2d 288, 292-93 (Pa. Commw. Ct. 2001) (Harrisburg Taxicab). See also City of Philadelphia v. Pa. PUC, 702 A.2d 1139 (Pa. Commw. Ct. 1997). By allowing the Commission to adjudicate these disputes in the first instance, all rights of the parties will be preserved, as well as providing any subsequent reviewing court the benefit of the Commission's opinion. County of Erie v. Verizon North, Inc., 879 A.2d 357 (Pa. Commw. Ct. 2005). As such, the Commission has the jurisdiction to determine if Respondent violated the Consumer Protection Law in determining whether Respondent violated the Commission's regulations.

28. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, the exception that the Respondent relies on is Section 2245(d)(1) of the Telemarketer Registration Act, (TRA) 73 P.S. § 2241, *et seq.*, which states that a written contract is not needed if the sale of the good or service is regulated under other laws of the Commonwealth. 73 P.S. § 2245(d)(1). However,

EGSs are subject to all requirements of the TRA, except the requirement that they register with the OAG.

On February 8, 2010, Attorney General Thomas W. Corbett issued an advisory opinion in response to then Commission Chairman James H. Cawley's request for an "opinion regarding the applicability of the [TRA] to electric generation suppliers as defined in the Electricity Generation Customer Choice and Competition Act." See Request for Opinion, 2010 Pa. AG LEXIS 1 (Feb. 8, 2010) (AG Opinion). In response to Chairman Cawley's question whether the EGSs are excluded from the definition of "telemarketer" in the TRA, AG Corbett replied:

[E]lectric generation suppliers engaged in telemarketing are telemarketers for all purposes of the [Telemarketer Registration] Act except the requirement of Section 3(a), 73 P.S. § 2243(a), that telemarketers register with this Office, from which electric generation suppliers are excluded because they are licensed by the PUC under the Competition Act, 66 Pa. C.S. § 2809(a). Agents of suppliers, such as individuals and businesses initiating or receiving calls pursuant to contracts with suppliers, are not excluded from the definition of "telemarketer" and therefore must register.

AG Opinion at *4-5. Clearly, it is intended that all provisions of the TRA, except the registration requirement, apply to EGSs. Furthermore, the Commission incorporated the TRA into its regulations, and it, therefore, has the authority to make determinations pursuant to the TRA in order to determine if Respondent violated the Commission's regulations. See 52 Pa. Code § 111.10(a)(1); Harrisburg Taxicab, 786 A.2d at 292-92. As such, the Commission does have jurisdiction to determine if Respondent violated the TRA as part of determining whether Respondent violated the Commission's regulation requiring compliance with the TRA.

29-30. Denied as stated. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, it is specifically denied that the Commission does not have authority to order IDT to provide restitution of its charges for electricity generation supply to its customers. As a creature of

statute, the Commission has those powers granted to it by the General Assembly, one power of which is to enforce the Public Utility Code and the Commission's regulations and Orders. See 66 Pa. C.S. § 501. The Commission has the authority to order monetary and equitable relief and has done so in other instances. See 66 Pa. C.S. § 103(c); OCA v. Utility.com, Inc., 212 P.U.R.4th 255 (2001) (Utility.com Final Order). In the Utility.com case, the OCA sought refunds of overpayments for service not received and for "lost savings" on behalf of customers. Utility.com Final Order at 262. In the Recommended Decision, ALJ Turner opined:

The ALJ opined that lost savings could be viewed as damages for breach of contract, and noted that the Commission does not exercise its jurisdiction over matters of damages. However, the ALJ notes that "the provisions of [the Public Utility Code] are cumulative and in addition to [the] rights of action and remedies" that exist under other statutory or common law. 66 Pa. C.S. § 103. Therefore, based on OCA's arguments, the ALJ recommends that the Commission find that it does have jurisdiction over lost savings.

See OCA v. Utility.com, Inc., 2001 Pa PUC LEXIS 32, *23 (June 4, 2001). The Commission sustained the OCA's claims for refunds and lost savings.² Utility.com Final Order at 262. The Commission has ordered equitable relief in other cases as well. See e.g. Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40; 46 Pa. PUC 19 (1972) (Commission directed Respondent, who was authorized to transport as a class D carrier, to refund overcharges to his customers); Ely v. Pennsylvania Water, Docket No. C-20055616, Order at 1 (July 10, 2006) (Commission determined this was a classic case for the application of equitable estoppel when Respondent damaged Complainants' asphalt driveway while replacing a water line on the neighboring property and made countless verbal assurances that the driveway would be restored); C.S. Warthman Funeral Home, et. al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993)

² The Commission noted that there were no funds remaining from Utility.com's bond to pay refunds and lost savings and encouraged the OCA to seek alternative means of collection of these funds. Utility.com Final Order at 262.

(Complainants were permitted to introduce into evidence the letter and promise of Respondent that it would provide toll free calling to support a claim of equitable estoppel).

In addition, the Commission clearly has the authority over EGS marketing and billing practices. EGSs are considered public utilities for the purposes described in Section 2809 of the Public Utility Code (relating to requirements for EGSs). See 66 Pa. C.S. § 102; see also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 909-10 (Pa. 2005). Section 2809(e) of the Public Utility Code states:

Form of regulation of electric generation suppliers. – The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ... assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.

66 Pa. C.S. § 2809(e). Section 2809(e) allows the Commission to forbear from applying the Public Utility Code but does not limit the Commission in this instance. Moreover, with regard to standards and billing practices, the Commission must impose requirements assuring they are maintained by EGSs. 66 Pa. C.S. § 2809(e). Chapter 54 of the Commission’s regulations also relates to EGSs’ billing practices. See 52 Pa. Code Ch. 54. Section 54.43(f) states that “[a] licensee is responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the licensee, its employes (*sic*), agents or representatives.” 52 Pa. Code § 54.43(f).

Joint Complainants seek to ensure that the advertised and disclosed prices of Respondent are in accordance with the billed prices and to prevent unjust enrichment for, *inter alia*, deceptive and misleading marketing and billing practices. As such, the Commission has the authority to order the restitution Joint Complainants request for IDT’s customers.

31. No response is required, as the Joint Complaint is of record in this matter and

speaks for itself. By way of further answer, the Joint Complainants incorporate Paragraphs 3 through 7 above herein. Additionally, the case cited by IDT is currently before the Commonwealth Court, and therefore, it is not appropriate to cite as precedent. See McCloskey v. Pa. PUC, 569 C.D. 2014 (Advanced Form Brief submitted on July 10, 2014).

32. Denied. Respondent's allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, the alleged filing and resolution of formal complaints with the Commission by consumers against Respondent is irrelevant and has little bearing to the Joint Complainants' causes of action and requested relief. All the allegations of the Joint Complaint are to be considered and appraised in light of the nature of the case. See e.g. Hock v. L.B. Smith, Inc., 69 Pa. D. & C.2d 420 (Columbia Co. 1974). This is a public action being brought by the Joint Complainants for injunctive relief, along with civil penalties and restitution. See gen'ly Joint Complaint. Joint Complainants, however, have not sought to reopen cases against Respondent that have been resolved to the satisfaction of the consumers that filed the Formal Complaints.

Under the Administrative Code of 1929, the OCA is authorized to represent the interest of consumers before the Commission in any matter properly before the Commission. 71 P.S. § 309-4(a). The OCA "may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not to participate in or initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceeding on the interest of consumers." 71 P.S. § 309-4(b).

This is an action being brought by the Attorney General "in the name of the Commonwealth," as authorized by the Consumer Protection Law, when she has reason to believe

that any person is using or is about to use any unlawful method, act or practice and she further determines the proceedings would be in the “public interest.” 73 P.S. § 201-4. The Attorney General is not acting on behalf on any one single claimant, but pursuant to her *parens patriae* powers. See e.g. Commonwealth v. Foster, 57 Pa. D. & C.2d 203 (Allegheny Co. 1972) (Characterizes the Commonwealth’s action by the Attorney General under the Consumer Protection Law as *parens patriae*).

The Attorney General does not act as the private attorney for any given customer but instead is authorized to bring a proceeding on behalf of the public at large “to protect the citizenry.” Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc., 393 Pa. Super. 339, 346, 574 A.2d 641, 644 (1990) aff’d 529 Pa. 512, 605 A. 2d 798 (1990). Proceedings brought by the Attorney General focus on unfair and deceptive methods, acts and practices. 73 P.S. §§ 201-3, 201-4. Plainly, the conduct alleged here falls within the ambit of “trade and commerce” as defined by the Consumer Protection Law; there is no exclusion under that law for EGSs. 73 P.S. § 201-2(3). See e.g. Commonwealth v. Allstate Ins. Co., 729 A.2d 135, 140 (Pa. Commw. Ct. 1999) (Holding that “there is nothing in any of the language of the Consumer Protection Law that insurance companies are not covered by its provisions, and the General Assembly could have included such language if it desired”). The mere fact that some consumer complaints have been satisfied, as the Respondent contends, in no way absolves IDT for its conduct under the law to the extent it engaged in a broader array of unfair and deceptive business practices.

The Joint Complainants are seeking to address the consumer and public interest, based on the Commission’s regulations and the Consumer Protection Law, a statute that has long been liberally construed for the purpose of benefiting the public at large by eradicating unfair or

deceptive business practices. See e.g. Commonwealth v. Monumental Props., 459 Pa. 450,460, 478, 329 A.2d 812, 816, 826 (1974) (The Consumer Protection Law covers generally all unfair and deceptive acts or practices in the conduct of trade or commerce). Additionally, the Commission has recognized that where there is one complaint made to the Commission, there are likely substantially more of the same nature that have not been formally made. See e.g. Arthur Rand v. GTE North, 1999 Pa. PUC LEXIS 55, *9-10 (March 19, 1999). Furthermore, the Commonwealth Court has held that to allow a defendant to “avoid liability under the [Consumer Protection] Law by discontinuing its actions even after proceedings are commenced and claim that the matter is moot” would frustrate the purpose of the Consumer Protection Law. See Commonwealth v. Percudani, 844 A.2d 35, 46 (Pa. Commw. Ct. 2003).

33. It is denied that objections to standing are appropriately raised in New Matter. By way of further answer, objections to standing should be raised in Preliminary Objections. See 52 Pa. Code § 5.101(a)(7). To the extent that a response may be required, Joint Complainants incorporate Paragraph 32 above herein.

34. Denied. Respondent’s allegations constitute conclusions of law which require no response and are, therefore, deemed denied. By way of further answer, the Joint Complainants may request that the Commission to consolidate all *similar* pending formal complaints against Respondent with the Joint Complaint. The Commission’s regulations permit consolidation when proceedings involve common questions of law or fact. 52 Pa. Code § 5.81. To the extent that pending formal complaints involve similar questions of law or fact, Joint Complainants assert that they may be consolidated with this matter for purposes of judicial efficiency. Furthermore, the Joint Complainants incorporate Paragraph 32 above herein.

WHEREFORE, Joint Complainants respectfully request that Respondent's New Matter to the Joint Complaint be overruled and that judgment is entered against Respondent, in favor of Joint Complainants, and that your Honorable Commission grant relief as requested in said Joint Complainants' Complaint.

Respectfully submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

Margarita Tulman
Deputy Attorney General
PA Attorney I.D. 313514

Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 705-3795
jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General
Bureau of Consumer Protection

DATE: July 30, 2014



Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Robinson
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
krobinson@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Michael A. Gruin, Esq.
Stevens & Lee
17 N. 2nd Street, 16th Fl.
Harrisburg, PA 17101
mag@stevenslee.com
(E-Mail & First-Class Mail)

Sharon Webb, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101
jorevan@pa.gov
swebb@pa.gov
(E-Mail & First-Class Mail)

SERVICE BY FIRST CLASS MAIL, POSTAGE PREPAID

Wayne Stoughton
IDT Energy Inc.
20 West Third St., Suite 10
Jamestown, NY 14702-0400
(First-Class Mail Only)



Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. # 89891
E-Mail: CTunilo@paoca.org

Kristine E. Robinson
Assistant Consumer Advocate
PA Attorney I.D. # 316479
E-Mail: KRobinson@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
185176