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August 19, 2014

VIA ELECTRONIC FILING

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

**RE: Commonwealth of Pennsylvania, by Attorney General Kathleen Kane, Through the
Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer
Advocate v. IDT Energy, Inc.**
Docket No. C-2014-2427657

Dear Secretary Chiavetta:

Enclosed for filing please find the Pre-Hearing Conference Memorandum of IDT Energy, Inc. in the above-referenced matter. Copies of the Memorandum have been served in accordance with the attached certificate of service. Please feel free to contact me if you have any questions or concerns.

Best Regards,

STEVENS & LEE



Michael A. Gruin

Encl.

cc: Certificate of Service
Administrative Law Judges Joel Cheskis and Elizabeth Barnes (via email and US Mail)

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allegations of slamming, deceptive sales or other unfair trade practices, in addition to rate concerns. *See* Complaint at paragraphs 21-26. These identified percentages were only a small fraction of the overall number of contacts and complaints to the OCA and OAG, and were apparently not vetted in any way for validity.

Based on this rudimentary analysis of the customer complaints and contacts, as well as various assumptions about IDT's business practices, the Complaint went on to outline seven sweeping Counts of wrongdoing against IDT. For relief, the Complaint seeks, *inter alia*, revocation of IDT's license, restitution payments to IDT's customers equal to the difference between prices that IDT charged and the utility Price to Compare, civil penalties, and injunctive relief.

On July 10, 2014 IDT filed its Answer and New Matter and Preliminary Objections to the Complaint. IDT's Preliminary Objections sought outright dismissal of Count VI (Prices Not Conforming to Disclosure Statement) and Count VII (Failure to Comply with Telemarketer Registration Act), as well as a dismissal of the Complaint's claims for restitution. IDT's Answer and New Matter included a number of affirmative defenses, including that the Commission does not have jurisdiction to adjudicate claims under the Unfair Trade Practices and Consumer Protection Law and that the Complaint is barred in whole or in part by 66 Pa.C.S.A §§ 701 and 703.

The parties have exchanged one round of discovery to date. The OCA/OAG's discovery responses have for the first time provided IDT with insight into the specific customer complaints/contacts that form the basis of the Complaint. IDT's preliminary investigation has confirmed that the customers in question clearly filed their complaints as a result of the Polar Vortex price increase, that none of the customers in question were "slammed," and that IDT had in fact already resolved the large majority of those customers' concerns months ago. Now that

IDT has had the opportunity to investigate the facts underlying the Complaint and evaluate the legal underpinnings of the Complaint, it is clear that the facts and the law do no merit any further prosecution of this Complaint against IDT.

While the OCA and OAG have alleged that the sudden, temporary influx of customer calls and complaints to their offices in early 2014 was caused by some mass wrongdoing by IDT, it is obvious that impetus for the high volume of customer contacts to the OCA and OAG was the wholesale and retail price increases caused by the Polar Vortex. In other words, it is clear that these customer complaints were not filed because of some simultaneous, systematic wrongdoing by IDT – they were filed because of a simultaneous price event that affected the entire industry.

Contrary to the OCA and OAG’s allegation that IDT acted in “bad faith” in responding to customer concerns and complaints, the reality is quite the opposite. Even though IDT’s disclosure statements explicitly stated that there would be no ceiling on the variable rates that were permitted to be charged to retail customers, and even though IDT was required to pay the full amount of the dramatically increased wholesale electricity prices, IDT quickly acted voluntarily to address as many customers’ price concerns as possible, and settled over 99% of the informal and formal PUC complaints filed against IDT. To date, over 16,000 of IDT’s customers who were affected by the Polar Vortex price increases have been provided with refunds totaling nearly \$4,000,000.

With this context in mind, IDT believes no further prosecution of this Complaint is warranted and that all Counts of the Complaint should be dismissed.

II. REPRESENTATION AND SERVICE LIST

IDT is represented in this matter by Michael A. Gruin of Stevens & Lee. Copies of all documents should be served on IDT as follows:

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III. SPECIFIC ISSUES FOR RESOLUTION AND IDT'S POSITIONS ON EACH

A. What is the Proper Scope of this Proceeding?

IDT's Position: Both Complainants in this case claim to be representing the public interest, but the Complainants' pleadings are not clear regarding the scope of their prosecution and how many violations of the Code or the Commission's regulations that the Complainants are alleging. For purposes of discovery and to enable IDT to prepare its defense, it is critical to define the scope of this proceeding now. IDT objects to any attempt by the OCA and OAG to conduct an open-ended and ever-changing prosecution. This matter is not an investigation; it is a formal complaint. IDT's due process rights entitle it to know the allegations which it is obliged to defend so it can prepare its defense accordingly. Both prior to and since the filing of the Complaint, IDT has cooperated fully with the OAG and OCA in connection with their efforts to investigate the customer complaints and contacts that were received by their respective offices. But IDT objects to any attempt to turn this proceeding into a protracted "fishing expedition". The scope of this prosecution must be defined, and must be limited to the customer contacts and complaints identified in the Complaint, and whether or not the facts underlying those contacts/complaints warrant a finding of violations against IDT.

B. Whether The Office of Attorney General Has Standing to Participate in This Proceeding

IDT's Position: Upon information and belief, to be confirmed through discovery, the Attorney General is not acting as an advocate for the Commonwealth as a consumer of public utility services, and therefore may be precluded from being a complainant in this proceeding pursuant to 66 Pa.C.S.A. § 701.

C. Whether the Commission has Jurisdiction Over the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”)

IDT’s Position: It is clear that the Commission does not have jurisdiction to adjudicate claims brought under the Unfair Trade Practices and Consumer Protection Law. See *Mid-Atlantic Power Supply Association v. PECO Energy Company*, Docket No. P-00981615, 1999 Pa PUC Lexis 30 (entered May 19, 1999), and *Pettko v. Pennsylvania-American Water Company*, 39 A.3d 473 (Pa. Cmwlth. 2012), appeal denied, 616 Pa. 670, 51 A.3d 840 (2012). As such, any allegations regarding potential violations of the UTPCPL and requests for relief under the UTPCPL are beyond the scope of this proceeding.

D. Whether the OCA and OAG are Barred from Re-litigating Consumer Complaints Filed Against IDT That Have Already Been Resolved and/or Satisfied

IDT’s Position: The OCA/OAG Joint Complaint makes reference to a number of customer complaints filed against IDT with the Commission and the OAG’s office, and relies on allegations from those complaints for the Complaint’s factual foundation. As stated in IDT’s Answer and New Matter, nearly all of the formal and informal complaints filed against IDT at the Commission have been satisfied and/or resolved. Furthermore, IDT has resolved all of the OAG complaints that the OAG has provided to IDT, in compliance with the OAG’s requests to do so. To the extent that IDT demonstrates that a customer complaint filed in any forum has been satisfied or resolved the OCA and OAG should be precluded from relying on such customer complaints to prosecute the present Complaint. Furthermore, the OCA and OAG must be precluded from seeking restitution on behalf of any customer to whom IDT has already provided a refund.

E. Whether Count I of the Complaint (Misleading and Deceptive Promises of Savings) Can Be Sustained

IDT’s Position: Count I of the Complaint should be dismissed. IDT’s disclosure statement is provided to all newly enrolled customers, and clearly indicates that the customer will be charged a variable rate that may be higher or lower than the EDC’s price in any particular month, and that there is no ceiling price. Even if it were demonstrated that a customer believed he was to receive guaranteed savings, IDT’s disclosure statement clearly and unequivocally says otherwise, and the customer would have had multiple opportunities to terminate his enrollment both prior to and after initiation of service with IDT, with no penalty.

F. Whether Count II of the Complaint (Misleading and Deceptive Welcome Letter and Advertisements) Can Be Sustained

IDT's Position: Count II of the Complaint should be dismissed. IDT's disclosure statement, which is provided to all newly enrolled customers, clearly indicates that the customer will be charged a variable rate that may be higher or lower than the EDC's price in any particular month, and that there is no ceiling price. Even if it were demonstrated that a customer believed he was misled by advertising materials, the customer's disclosure statement clearly and unequivocally explained the terms of service, and the customer would have had multiple opportunities to terminate his enrollment both prior to and after initiation of service with IDT, with no penalty.

G. Whether Count III of the Complaint (Slamming) Can Be Sustained

IDT's Position: Count III of the Complaint should be dismissed. Each IDT enrollment initiated via a telemarketing or door-to-door sales agent is verified through a robust and highly credible third-party verification ("TPV") process, in accordance with the Commission's regulations. IDT intends to demonstrate that it has valid enrollment verifications for all customers that the Complainants allege were "slammed".

H. Whether Count IV of the Complaint (Lack of Good Faith Handling of Complaints) Can Be Sustained

IDT's Position: Count IV is meritless and should be dismissed. IDT, just like many other suppliers, EDCs, the Commission, the OCA, and the OAG, experienced unprecedented call volumes in early 2014 as a result of the unforeseen Polar Vortex wholesale and retail electricity price spikes. IDT quickly acted to voluntarily address as many customers' price concerns as possible, and quickly settled over 99% of the informal and formal PUC complaints filed against it. IDT also resolved each and every complaint that was forwarded to it by the OAG, as requested to do so by the OAG. It should be noted that the OAG has indicated that, for some reason, the OAG stopped forwarding customer complaints to IDT for resolution. Obviously, IDT is only able to satisfy complaints of which it is aware. To date, IDT has provided over 16,000 customers with refunds totaling nearly \$4,000,000.

I. Whether Count V of the Complaint (Failing To Provide Accurate Pricing Information) Can Be Sustained

IDT's Position: Count V of the Complaint should be dismissed. IDT's disclosure statement, which is provided to all newly enrolled customers, clearly indicates that the customer will be charged a variable rate that is based upon electric generation market pricing as furnished by PJM, transportation and transmission, and other market and business related price factors. This language is as clear, if not clearer,

than the other variable-priced EGS disclosure statements which have been upheld by the Commission in customer complaint cases. IDT fully complied with the Commission's regulations regarding disclosure statements, and therefore there is no legal basis for finding that IDT failed to provide customers with accurate pricing information.

J. Whether Count VI of the Complaint (Prices Nonconforming to Disclosure Statement) Can Be Sustained

IDT's Position: Count VI of the Complaint should be dismissed. IDT's disclosure statement, which is provided to all newly enrolled customers, clearly indicates that the customer will be charged a variable rate that is based upon electric generation market pricing as furnished by PJM, transportation and transmission, and other market and business related price factors. This language is as clear, if not clearer, than the other variable-priced EGS disclosure statements which have been upheld by the Commission in customer complaint cases. IDT fully complied with the Commission's regulations regarding disclosure statements, and therefore there is no legal basis for finding that IDT failed to provide customers with accurate pricing information.

K. Whether Count VII of the Complaint (Failure to Comply with Telemarketer Registration Act) Can Be Sustained

IDT's Position: As explained in IDT's Preliminary Objections, the Commission's regulations regarding telemarketing sales of electricity generation supply at 52 Pa. Code § 111.10 (c) do not require EGSs to obtain a customer signature on a contract, but rather require the EGS to send the customer a written disclosure statement, which IDT does in all cases, and the Commission's regulations at 52 Pa. Code § 111.7 authorize alternative means of verifying customer authorization to transfer their accounts. Furthermore, the TRA contains an express exclusion from the written contract requirement for contractual sales that are regulated under other laws of the Commonwealth, and sales by EGSs are clearly regulated by the Commission pursuant to the Electricity Generation Customer Choice and Competition Act. The OCA and OAG admit as much in paragraph 8 of the Complaint ("The Commission is responsible for regulating the service of electric generation suppliers, as it relates to their activities in the marketing and sales of electricity and electric services See 66 Pa.C.S.A § 2809"). As such, there is no legal basis for finding that IDT failed to comply with the TRA.

L. Whether the Commission has the Authority to Order a Licensed Electricity Generation Supplier to Pay Restitution to Customers

IDT's Position: As explained in IDT's Preliminary Objections, the Commission lacks the authority to regulate rates charged for electric generation service, and it also lacks the authority to order restitution as requested by the Complaint. Furthermore, even if the Commission did have such authority, the measure of restitution proposed

by the Complaint (i.e. refunding all charges in excess of the Price to Compare to all of IDT's customers) has no justification in law or fact, and completely ignores the realities of a deregulated, competitive electricity supply market place.

M. Whether this Matter Should Be Consolidated With Pending Customer Complaints Against IDT

IDT's Position: IDT opposes consolidation of this Complaint with other pending customer complaints. There are a limited number of customer complaints pending against IDT, and they are in various procedural postures and involve various different allegations. Furthermore, consolidating pending customer complaints with the present proceeding will greatly delay the resolution of those customer complaints, to the detriment of both the customers and IDT.

IV. WITNESSES

The witnesses that IDT will call will depend in large part on the issues that remain to be litigated after the pending ruling on IDT's Preliminary Objections and on IDT's anticipated motion for summary judgment. However, at this time IDT anticipates providing testimony from the following witnesses, if necessary:

Wayne Stoughton
Vice-President, Customer Service and Regulatory Affairs
20 West Third Street
Jamestown NY 07102
Telephone 973-438-3500

Mr. Stoughton is expected to testify about, *inter alia*, IDT's products and services, disclosure statement, customer enrollment processes, sales training and compliance, customer service processes, and responses to the Polar Vortex crisis.

Paul Toranzo,
Director, Sales Support
550 Broad Street
Newark, NJ 07102
Telephone 973-438-3500

Mr. Toranzo is expected to testify about, *inter alia*, IDT's relationships with third party marketing vendors, the services provided by those vendors, and IDT's oversight over those vendors.

Brad Martin
Vice-President, Marketing
550 Broad Street
Newark, NJ 07102
Telephone 973-438-3500

Mr. Martin is expected to testify about, *inter alia*, IDT's print, radio, and internet advertising and customer communications.

IDT reserves the right to identify and present the testimony of additional witnesses, as necessary, in direct, rebuttal, surrebuttal, and rejoinder phases of these proceedings, in accordance with the schedule adopted in this proceeding. IDT will supplement this Memorandum accordingly.

V. PROPOSED LITIGATION SCHEDULE

IDT proposes that all witnesses submit pre-served, written testimony, followed by in-person cross-examination at the evidentiary hearing in Harrisburg. IDT opposes the OCA and OAG's proposal to hold a number of "mini-hearings" to allow for customers to provide oral testimony without attending the evidentiary hearing. IDT also proposes that sufficient time be allotted between rounds of testimony to allow for discovery to be served and responded to between each round.

Public input hearings are not warranted for this matter. With respect to the remainder of the litigation schedule, it is likely that IDT will file a Motion for Summary Judgment seeking dismissal of some, if not all, Counts of the Complaint in the near future. Even if IDT's Motion is not granted in full, IDT's Motion for Summary Judgment is likely to narrow the issues in

controversy and streamline the proceeding considerably. Accordingly, IDT proposes the following litigation schedule:

August 25, 2014	Prehearing Conference
October 15, 2014	IDT Motion for Summary Judgment
November 4, 2014	OCA/OAG Reply to Motion for Summary Judgment
December 12, 2014(appx.)	Ruling on IDT Motion for Summary Judgment

If Necessary:

January 12, 2015	OCA/OAG/Intervenor Direct Testimony served
February 21, 2015	IDT Rebuttal Testimony served
March 27, 2015	OCA/OAG/Intervenor Surrebuttal Testimony served
April 30, 2015	IDT Rejoinder Testimony served
May 6-8, 2015	Evidentiary Hearings in Harrisburg
June 15, 2015 (apprx.)	Main Briefs
July 15, 2015 (apprx.)	Reply Briefs

VI. DISCOVERY

IDT does not propose any modifications to the Commission's discovery regulations, but is amenable to considering any reasonable modifications proposed by the other parties.

The parties have agreed upon a proposed Protective Order to govern the exchange and use of Confidential materials in the proceeding. A Motion for Protective Order will be filed in advance of the Prehearing Conference.

VII. SETTLEMENT

IDT believes it behooves all parties to initiate a dialogue about resolving the Complaint against IDT without protracted litigation. At this point, the Complaint and its accompanying press coverage have besmirched IDT's reputation, and IDT has a strong incentive to fully litigate this case to achieve vindication and restore its reputation. Nevertheless, because the facts of the case have already been substantially developed at this relatively early stage in the proceedings, IDT is amenable to exploring the possibility that a fair, reasonable, and expeditious resolution of the Complaint can be agreed upon.

Respectfully submitted,

STEVENS & LEE



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Fax (610) 988-0852
COUNSEL FOR IDT ENERGY, INC.

DATE: August 19, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the enclosed Prehearing Conference Memorandum upon the parties listed below, in accordance with the requirements of § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

Candis A. Tunilo, Esq. Kristine Robinson, Esq. Office of Consumer Advocate 555 Walnut Street Forum Place, 5 th Floor Harrisburg, PA 17101	Sharon Webb, Esq. Office of Small Business Advocate 300 North 2nd Street - #1102 Harrisburg, PA 17101
John M. Abel, Esq. Senior Deputy Attorney General Margarita Tulman, Esq. Deputy Attorney General Bureau of Consumer Protection Office of Attorney General 15 th Floor Strawberry Square Harrisburg, PA 17120	Wayne Scott, Esq. Michael Swindler, Esq. Stephanie Wimer, Esq. Bureau of Investigation & Enforcement Pennsylvania Public Utility Commission Commonwealth Keystone Building 400 North Street Harrisburg, PA 17120

August 19, 2014



Michael A. Gruin, Esq.