

COMMONWEALTH OF PENNSYLVANIA



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August 21, 2014

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

RE: Stephen Kiback, Jr. v. IDT Energy, Inc.
Docket No. C-2014-2409676

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Answer in Response to the Motion for Summary Judgment of IDT Energy, Inc., in the above-referenced proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Barrett C. Sheridan".

Barrett C. Sheridan
Assistant Consumer Advocate
PA Attorney I.D. # 61138

Enclosures

cc: Hon. Joel Cheskis, ALJ
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Stephen Kiback, Jr.	:	
	:	
v.	:	Docket No. C-2014-2409676
	:	
IDT Energy, Inc.	:	

ANSWER OF THE OFFICE OF CONSUMER ADVOCATE
IN RESPONSE TO THE
MOTION FOR SUMMARY JUDGMENT
OF IDT ENERGY, INC.

Pursuant to Sections 5.61 and 5.102 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Answers to Motions for Summary Judgment, 52 Pa. Code §§ 5.61 and 5.102, the Office of Consumer Advocate (OCA) provides the following Answer to the Motion for Summary Judgment filed by IDT Energy, Inc., (IDT or company) in the above-captioned proceeding.

The OCA opposes the Motion for Summary Judgment filed by IDT on July 29, 2014. Through its Motion, IDT requests that the Commission dismiss with prejudice the Formal Complaint of Mr. Stephen Kiback, Jr. without a hearing and further proceeding. In support of its Motion, IDT states that, based on the pleadings and an affidavit, there is no factual dispute and that Mr. Kiback is not entitled to relief as a matter of law. The OCA disagrees.

Mr. Kiback's verified Formal Complaint states that IDT induced him to switch to IDT with the promise of savings of 10% compared to PPL's price to compare. Mr. Kiback complains that IDT has overcharged him. Mr. Kiback's Formal Complaint raises questions concerning the

marketing and billing conduct of IDT as a licensed Electric Generation Supplier (EGS). There are genuine questions of material fact in dispute. As a licensed EGS, IDT is required to comply with the relevant provisions of the Public Utility Code, Commission orders, Commission regulations, and Pennsylvania consumer protection laws in the marketing, enrollment, and billing of electric supply customers. Based on the record, IDT is not entitled to grant of its Motion as a matter of law.

I. ANSWER

A. Legal Standard

The Commission's regulations set forth the standard for consideration of a motion for summary judgment, in relevant part as follows:

§ 5.102. Motions for summary judgment and judgment on the pleadings.

...
(d) Decisions on motions.

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

(2) *Standard for grant or denial in part.* The presiding officer may grant a partial summary judgment if the pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

52 Pa. Code § 5.102(d)(1), (2). The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that

there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

The Commission has interpreted 52 Pa. Code § 5.102(d)¹ in conformity with the Pennsylvania Rules of Civil Procedure (Pa. R.C.P.). South River Power Partners, L.P. v. West Penn Power Co., 86 Pa PUC 477, 483 (1996)(So. River Partners), *aff'd* 696 A.2d 926 (Pa. Cmwlt 1997), *app. den.* 705 A.2d 1313 (Pa. Supr. Ct. 1997); P.U.C., Bur. of Investigation and Enforcement v. Glacial Energy of Pa., Inc., Docket No. C-2012-2297092, Order at 8 (Pa. P.U.C. Mar. 26, 2014)(Glacial Energy). Under Pennsylvania law and Commission practice:

the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to a judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983); *Mertz v. Lakatos*, 381 A.2d 497 (Pa. Cmwlt. 1978). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Thompson Coal Company v. Pike Coal Company*, 412 A.2d 466 (Pa. 1979).

Glacial Energy at 9. The Commission should accept as true all well-pleaded facts in the non-movant's pleadings and give the non-moving party the benefit of all reasonable inferences. Wright v. North American Life Assurance Co., 372 Pa. Super. Ct. 272, 275 (1988); Bobb v. Kraybill, 354 Pa. Super. Ct. 361, 364 (1986); So. River Partners, 86 Pa PUC at 482.

The party opposing a motion for summary judgment "must allege facts showing that an issue for trial exists." Glacial Energy at 9, citing First Mortgage Co. of Pa. v. McCall, 459 A.2d 406, 408 (Pa. Super. 1983); Commw. v. Diamond Shamrock Chemical Co., 391 A.2d 1333, 1336 (Pa. Cmwlt. 1978). Following civil practice, the Commission has explained that "a non-moving party may not rely solely upon denials in its pleadings, but must submit some materials

¹ Formerly Sec. 5.102(c), through 2006 when the Commission last revised Section 5.102. Practice and Procedure before the Pa. P.U.C., Docket No. L-00020156, Final Rulemaking Order, 36 Pa.B. 2097 (2006).

to establish that a genuine issue of material fact exists.” Glacial Energy at 9, citing Nicastro v. Cuyler, 467 A.2d 1218, 1220 (Pa. Cmwlth. 1983); Pa. Gas & Water Co. v. Nenna & Frain, Inc., 467 A.2d 330, 333 (Pa. Super. 1983); Geriot v. Council of the Borough of Darby, 457 A.2d 202, 204 (Pa. Cmwlth. 1983); *see also*, Pa. R.C.P. No. 1035.3.

In ruling on a motion for summary judgment, the presiding officer’s role is not to decide issues of fact, but rather to determine whether such material issues of fact exist. Sanders v. Loomis Armored, 614 A.2d 320, 321 (1992); 52 Pa. Code § 5.102(d). Pursuant to Section 5.102(d), IDT must show both “that there is no genuine issue as to a material fact” and that IDT “is entitled to a judgment as a matter of law.” Id. “Summary judgment will be granted only where the right is clear and free from doubt.” Glacial Energy at 9.

B. Mr. Kiback’s Formal Complaint Challenges IDT’s Conduct In Marketing And Billing For Electric Supply Service

Mr. Kiback filed his verified Formal Complaint on March 3, 2014 with the PUC. Mr. Kiback’s Formal Complaint states that at the time he agreed to enroll with IDT for electric supply, “they said they would save me 10% over PP&L.” Complaint, ¶ 5. Mr. Kiback complains that IDT provided him with savings over PPL’s price to compare for only the first month of service. Otherwise, Mr. Kiback states that IDT billed him at increasing rates, including \$0.279 per kWh at a time when PPL was charging \$0.875 per kWh. Mr. Kiback. Mr. Kiback takes issue with the fairness of IDT’s statement that it “would take 2 or 3 months to transfer to another service....” Id. Mr. Kiback requests equitable relief to account for the savings promised but not realized.

The Commission should not grant IDT’s Motion, where there are genuine issues as to material fact in dispute regarding IDT’s conduct and compliance with the Public Utility Code, the Commission’s regulations, and IDT’s obligations as a licensed electric generation supplier

(EGS). IDT asks the Commission to grant its Motion based on IDT's disclosure statement and provision of a goodwill credit adjustment and refund to Mr. Kiback. IDT states that it does not control the time required for a customer to switch to another supplier. The OCA submits that these issues involve questions of material fact that are in dispute. Nor is IDT entitled to grant of its Motion as a matter of law.

Whether IDT provided Mr. Kiback with accurate and adequate information to make an informed decision about switching to IDT for electric supply service is an important and relevant question. See 66 Pa.C.S. § 2807(d)(2); 52 Pa. Code §§ 54.1, 54.43(1). Whether IDT complied with the Commission's Standards of Conduct for licensed EGSs is an important and relevant question, as non-compliance may result in suspension or revocation of IDT's license. 52 Pa. Code §§ 54.42(6), (7), 54.43. The Commission adopted those Standards for the protection of consumers. The Commission's Standards of Conduct hold the EGS responsible for "any fraudulent deceptive or other unlawful marketing or billing acts" whether by an IDT employee, agent or contractor. 52 Pa. Code § 54.43(f). Marketing includes telemarketing contacts. 52 Pa. Code § 54.31. At the time Mr. Kiback was solicited by IDT to enroll, the Commission's Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981, Order (Nov. 5, 2010) applied.

Mr. Kiback's Formal Complaint raises the question of whether IDT engaged in deceptive conduct while marketing its service to Mr. Kiback and/or whether IDT engaged in unlawful billing once Mr. Kiback enrolled. IDT's Motion admits that Mr. Kiback was solicited by telephone to enroll with IDT. Mr. Kiback complains that the prices billed by IDT have not matched the marketed price, i.e. the savings he was told to expect if he switched to IDT for electric supply. Further, there is a conflict regarding the variability of IDT's pricing. Mr.

Kiback understood that IDT's rates might vary but would be limited so as to provide 10% savings compared to PPL's rates.

IDT's Motion is supported by its Answer to Mr. Kiback's Formal Complaint and Affidavit of IDT witness Wayne Stoughton, with exhibits. The OCA submits that the IDT pleadings and affidavit show that there are material facts in dispute. For example, IDT cites to the variable rate terms set forth in its disclosure agreement "that was provided to Mr. Kiback upon his enrollment" as controlling. Motion, ¶ 23. However, the "disclosure statement" statement attached to the Stoughton Affidavit is at most a generic agreement template. See Motion, Exh. C, Att. 1. The document does not contain any information specific to Mr. Kiback's enrollment with IDT for electric supply. The Stoughton Affidavit states that Mr. Kiback was solicited and enrolled with IDT by telephone in early July 2011 and Mr. Kiback's account transfer was final in late August 2011. Motion, Exh. C, Affidavit ¶¶ 3, 7. Mr. Kiback did not have an IDT disclosure statement at the time of enrollment. The Stoughton Affidavit states "[s]ubsequent to his enrollment," IDT mailed him a copy. *Id.*, ¶ 4.

Chapter 54 requires continuity and consistency between the marketed or advertised price for IDT's service, the agreed upon price in the disclosure statement, and the billed price. 52 Pa. Code §§ 54.4(a), 54.5(a), 54.7(a); see Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order at 5 (Apr. 16, 2010)(Grmusa). IDT is not entitled to grant of its Motion as a matter of law, where there are material questions in dispute.

The OCA submits that IDT's Motion should be denied and Mr. Kiback should be afforded the opportunity of a hearing. In Grmusa, the Commission reversed the ALJ's grant of preliminary objections filed by the EGS, noting:

The Complaint alleged that the Complainant was charged a higher rate than what was represented to him by Dominion Retail. The

Commission's jurisdiction over electric generation suppliers, such as Dominion Retail, is contained within the Competition Act. 66 Pa. C.S. §§ 2801 *et seq.* Furthermore, the Commission has promulgated rules for EGSs to follow as a condition of receiving a license to operate. 52 Pa. Code § 54.43. One of these conditions is that an EGS' advertised prices must match its billed prices, and that billed prices must reflect marketed prices. 52 Pa. Code §§ 54.4(a) and 54.7(a). This Commission has set forth rules that EGSs must follow and has the obligation, and, therefore, the jurisdiction, to enforce those rules.

Grmusa at 5. The Commission remanded the Grmusa formal complaint for a full hearing to provide the complainant with an opportunity to be heard. The OCA submits that Mr. Kiback should be afforded the same opportunity to pursue his Formal Complaint against IDT.

C. The Other Elements Of Mr. Kiback's Formal Complaint Concern Questions Of Fact And The Reasonableness Of IDT's Conduct

Mr. Kiback's Formal Complaint asks for relief from IDT's overcharges. IDT's Motion alleges that Mr. Kiback's complaint should be dismissed as moot because IDT has provided Mr. Kiback with a credit adjustment and refund. Whether the credits calculated by IDT fulfill Mr. Kiback's request for relief is a genuine issue of fact in dispute that cannot be decided in IDT's favor based on its Motion. A unilateral claim of satisfaction set forth in a Motion for Summary Judgment cannot serve as a substitute for the Commission's certificate of satisfaction process. See 52 Pa. Code § 5.24(b).

Mr. Kiback complains of the unfairness of IDT's message that a switch to another supplier may take two or three months. IDT claims it is not responsible for the time frame to switch. Motion, ¶ 34. The OCA submits that Mr. Kiback should be allowed to explain at a hearing whether his claim of unfairness is directed at the conduct of the IDT customer service representative or the time frame for switching itself. Consumer contact with the EGS is part of the switching process, pursuant to Section 57.173, as in effect when Mr. Kiback filed his Formal

Complaint. 52 Pa. Code 57.173.² The OCA submits that there are material questions of fact unresolved.

II. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully request that IDT's Motion for Summary Judgment be denied.

Respectfully Submitted,



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²² The Commission's recent revisions took effect June 14, 2014, upon publication in the Pa. Bulletin. Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 57 Regulations Regarding Standards for Changing a Customer's Electricity Generation Supplier, Docket No. L-2014-2409383, Order (Apr. 4, 2014), 44 Pa.B. 3539 (June 14, 2014).

CERTIFICATE OF SERVICE

Stephen Kiback, Jr. :
 :
 v. : Docket No. C-2014-2409676
 :
 IDT Energy, Inc. :

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Answer in Response to the Motion for Summary Judgment of IDT Energy, Inc., upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 21st day of August 2014.

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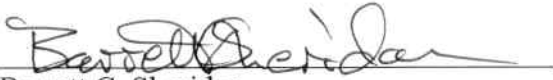
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