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August 25, 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 Motion to Compel of IDT Energy, Inc. in the above-referenced matter. Copies of the Motion 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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Wilkes-Barre • Princeton • Cherry Hill • New York • Wilmington

A PROFESSIONAL CORPORATION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF PENNSYLVANIA, by  
Attorney General KATHLEEN G. KANE,  
Through the Bureau of Consumer Protection

And

Docket No. C-2014- 2427657

TANYA J. McCLOSKEY, Acting Consumer  
Advocate

Complainants

v.

IDT ENERGY, INC.

Respondent

**NOTICE TO PLEAD**

**To: John Abel, Esq. Counsel for Commonwealth of Pennsylvania, and Candis Tunilo, Esq., Counsel for The Office of Consumer Advocate**

You are hereby notified to file a written response to the attached Motion to Compel of IDT Energy, Inc. within five (5) days from the date of service of this notice. If you do not file a written response denying the enclosed Motion to Compel within five (5) days of service, the presiding officers may rule in favor of IDT Energy, Inc. on the attached Motion without a hearing. All pleadings, such as Answers to Motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned counsel for IDT Energy, Inc. Failure to respond to this Motion could result in an Order which requires responses to IDT Energy, Inc.'s Interrogatories.

STEVENS & LEE

DATE: August 25, 2014

  
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COUNSEL FOR IDT ENERGY, INC.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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COMMONWEALTH OF PENNSYLVANIA, by  
Attorney General KATHLEEN G. KANE,  
Through the Bureau of Consumer Protection

And

TANYA J. McCLOSKEY, Acting Consumer  
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IDT ENERGY, INC.

Respondent

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Docket No. C-2014- 2427657

**MOTION TO COMPEL OF  
IDT ENERGY, INC.**

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In accordance with 52 Pa. Code § 5.342(g), Respondent IDT Energy, Inc. (“IDT”) files this Motion to Compel, requesting the dismissal of the Objections filed by the Office of Consumer Advocate (“OCA”) and Commonwealth of Pennsylvania, through Attorney General Kathleen Kane (“Attorney General”) to IDT’s Interrogatories II-1 and II-4, and compelling the OCA and the Attorney General to provide Answers to the aforesaid Interrogatories. In support thereof, IDT states as follows:

1. On June 20, 2014, the OCA and Attorney General filed a Joint Complaint (“Complaint”) against IDT.
2. The Complaint stated that the OCA had received approximately 3000 contacts from consumers regarding Electric Generation Supplier variable rates, and that as of May 5, 2014, the OCA had collected information from approximately 2,434 of those contacts. Of the referenced 2,434 contacts, approximately 539 or 22% were from customers of IDT. See Complaint, at paragraphs 15-17.

3. The Complaint also stated that “From February 27, 2014 to June 4, 2014, the Attorney General received approximately 39,607 telephone calls and 7,503 customer complaints related to variable rates charged by EGSs. Of the 7503 customer complaints, 1,917 or nearly 26% were against Respondent”. See Complaint, at paragraph 18.

4. The Complaint made numerous allegations about IDT’s marketing and sales practices based on the OCA and OAG’s review of these customer contacts, including that IDT’s marketing and sales practices and materials were deceptive and/or caused a likelihood of confusion amongst its customers.

5. On August 4, 2014, in order to continue gathering information needed to prepare its defense of the Joint Complaint, IDT served its second set of Interrogatories and Requests for Production of Documents upon the OCA and OAG.

6. On August 13, 2014 the OCA and OAG served objections to two of IDT’s Interrogatories, specifically IDT Interrogatories II-1 and II-4.

7. IDT Interrogatory II-1 states:

“Referencing paragraph 15 of the Complaint, please provide a breakout of the approximately 3000 contacts from customers regarding variable rates, listing the names of all EGSs that were identified by customers by name, and the number of customers that referenced each EGS.”

8. IDT Interrogatory II-4 states:

“Referencing paragraph 18 of the Complaint, please provide a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.”

9. Full copies of Interrogatories II-1 and II-4 are attached hereto as Exhibit A.

10. A full copy of the OCA and OAG's Objections to Interrogatories II-1 and II-4 is attached hereto as Exhibit B.

11. The OCA and OAG each raise the same three objections to the Interrogatories in question: 1) the Interrogatories will not lead to relevant information or admissible evidence regarding the allegations against IDT, 2) the Interrogatories are beyond the scope of permissible discovery because they seek attorney work product, and 3) the information requested by the Interrogatories is protected by the "investigative privilege".

12. As set forth below, there is no legitimate basis for the OCA and OAG to refuse to provide the information requested by Interrogatories II-1 and II-4, and their objections should be dismissed and they should be compelled to provide answers to the Interrogatories in question.

**The information sought by IDT is calculated to lead to the discovery of admissible evidence.**

13. Under the Commission's regulations, the scope of permissible discovery is broad. Section 5.321(c) of the Commission's regulations states:

" Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. **It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.**" (Emphasis added.)

14. The information requested by IDT in Interrogatories II-1 and II-4 is clearly related to the subject matter involved in the proceeding, and specifically is related to IDT's defense of the Joint Complaint. This information is necessary to allow IDT to develop its defense of the Complaint, and is sought for the purpose of discovering potentially admissible evidence regarding the suppliers operating in Pennsylvania who may have utilized marketing materials and disclosure statements similar to IDT.

15. The Interrogatories seek a very minimal amount of additional information about the numbers of complaints and contacts received by OCA and OAG - data which is specifically referenced in the Complaint. The Interrogatories seek only the numbers of complaints and customer contacts received by the OAG and OCA regarding EGS variable rates, broken out by named EGS.

16. The Complaint filed by the OCA and OAG relates to the business practices of IDT, a licensed EGS subject to the oversight by the Public Utility Commission. The foundation for the filing of this Complaint was a number of customer complaints received by the OCA and OAG over the course of several months against IDT and against other similarly regulated suppliers.

17. It is evident from the face of the complaint that the OCA and OAG counted the total number of complaints received against suppliers regarding variable rates and then identified how many complaints were filed against each licensed supplier. See Complaint, at paragraphs 15-18. See also the Joint Complaints filed by the OAG and COA against Blue Pilot Energy, Respond Power, HIKO, and Energy Service Providers, wherein the OCA and OAG similarly calculated the percentages of complaints and contacts that related to those Respondents.

18. When read in tandem, the Joint Complaints filed against IDT, Blue Pilot, Respond, Hiko, and Energy Service Providers provide a partial breakdown of the universe of complaints and contacts received by the OCA and OAG regarding EGS variable pricing in early 2014.

19. With Interrogatories II-1 and II-4, IDT is simply seeking the remainder of the breakdown of the complaints and contacts received by the OCA and OAG, by supplier. IDT is not asking for copies of the complaints, notes related to those complaints, internal OCA or OAG evaluations of the complaints, analyses of the complaints, names of customers, or any other

details about the contacts/complaints; IDT is simply seeking the raw number of complaints and/or contacts related to each licensed supplier.

20. The number of complaints and contacts that the OCA and OAG received about other suppliers will be crucial to allow IDT to prepare its defense of the Complaint.

21. A major part of this case will involve determining what constitutes an acceptable EGS disclosure statement and acceptable EGS marketing materials, and whether those materials are deceptive or create a likelihood of confusion. In making this determination, IDT's disclosure statement and marketing materials cannot be examined in a vacuum. It will be important to examine other marketing materials and disclosure statements that were available in the Pennsylvania marketplace for purposes of comparison and to determine whether customers may have been confused by such other materials rather than IDT's materials.

22. It is now apparent that the OCA and OAG intend to prosecute this case under a "pattern and practice" theory, i.e., that the customer complaints and contacts related to IDT demonstrate a wider "pattern and practice" of alleged wrongdoing. IDT submits that in order to defend against this novel theory of demonstrating violations against IDT before the Commission, IDT should be entitled to wide latitude to receive the information in the possession of the OCA and OAG about electricity suppliers' practices and customer responses to those practices.

23. In order to defend against this "pattern and practice" prosecution, it will be relevant to examine the standard practices in the industry. For instance, this could entail examining other suppliers' disclosure statements and marketing materials, and analyzing how many complaints were received against suppliers with different types of language in their disclosure statements and materials.

24. The comparison of complaints against IDT to complaints against other suppliers will be an important part of this case, with respect to, *inter alia*, the baseline of customer

understanding of the enrollment process, the likelihood of confusion about the roles of EGSs v. EDCs, customer comprehension of various types of disclosure statement language, and the adequacy of specific language in disclosure statements. This information will be important for IDT's witnesses to review in order to rebut the broad "pattern and practice" allegations of the OCA and OAG.

25. With respect to their listing of complaints and contacts related to various licensed EGSs, the OCA and OAG are essentially sitting upon a unique and valuable survey of the retail electricity supply market in Pennsylvania, and the customer communication aspects of the marketplace in particular, and they are refusing to share it with IDT. IDT has the right to evaluate which other companies were the subject of complaints to the OCA and OAG, in order to investigate those companies' business practices for purposes of context and comparison to IDT's business practices, and to provide context for interpretation of the Commission's regulation of suppliers.

26. This information is crucial for the development of IDT's defense against the allegations of misleading marketing materials and misleading disclosure statements, and therefore the disclosure of this information is well within the permissible scope of discovery.

**Simple listings of numbers of complaints received by the OCA and OAG do not constitute "attorney work product"**

27. The OCA and OAG strain credulity by asserting that a simple list of the complaints/contacts received by their offices constitutes "attorney work product".

28. The OCA and OAG are correct when they state that the Commission regulation regarding work product at 52 Pa. Code 5.323(a) is consistent with Pa. R.C.P. 4003.3. However, in reciting the text of Pa. R.C.P. 4003.3 on page 4 of their Objection, they omit the critical introductory sentence of the Rule. That introductory sentence states that:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 **even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent.** (Emphasis added)

29. Therefore, to the extent that the OCA and OAG are alleging that list of complaints was prepared by and OCA or OAG attorney "in anticipation of litigation", it is clear that such preparation would not insulate the list from discovery unless the list included the "mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes, or summaries, legal research or theories."

30. To the extent that the lists of complaints was prepared by an attorney, and included notes summaries, mental impressions etc., IDT's Interrogatories do not seek such notes, summaries, mental impressions, etc..., and therefore the OCA and OAG could simply redact such items from the list that it provides to IDT.

31. Furthermore, to the extent that the OCA and OAG lists were compiled by representatives of the OCA and OAG other than an attorney, the limitations on disclosure are even more narrow, and only mental impressions, conclusions, or opinions, respecting the value or merit of a claim or defense or respecting strategy or tactics is prohibited from disclosure. Again, IDT's Interrogatories do not seek such mental impressions, conclusions, or opinions.

32. Upon information and belief, the lists of complaints and contacts being requested by IDT were administratively compiled by the staffs of the OCA and OAG, and the lists do not contain any notes, summaries, mental impressions, conclusions, or other protected materials that would prevent disclosure under 4003.3.

33. The Explanatory Notes to Pa. R.C.P. 4003.3 make it clear that the rule was radically changed to limit the scope of the attorney work product doctrine. The Explanatory Notes state that "The Rule is carefully drawn and means exactly what it says. It immunizes the

lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, **nothing more.**" (emphasis added).

34. Under any reasonable and rational interpretation, simple administratively compiled listing of complaints and contacts received by the OCA and OAG cannot be considered to constitute a lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories. Accordingly, the requested lists are not prohibited from disclosure under the attorney work product doctrine.

**Simple listings of numbers of complaints received by the OCA and OAG are not barred from disclosure under an "investigative privilege".**

35. In support of their assertion of an investigative privilege that would foreclose the disclosure of the lists of complaints, the OCA and the OAG cite two Pennsylvania appellate cases and a Federal District Court case that involve request to obtain documents that were utilized in criminal prosecutions. See In Re. Buchanan, 583 Pa. 620, 880 A.2d. 568 (2005), Commonwealth v. Kauffman, 431 Pa. Super. 527, 605 A.2d 1243 (1992) and Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.E. PA 1993).

36. The OCA and OAG characterize these cases as enunciating a broad right of investigating agencies to limit the disclosure of documents that could provide some insight into the "evaluative" process of the prosecuting agency. But the cases cited by the OAG and OCA say nothing of the sort, and clearly indicate that requests to obtain materials should be evaluated pursuant to a balancing test, focused primarily on whether the release of the requested material would hinder an ongoing criminal investigation.

37. The Court in Commonwealth v. Kauffman stated that:

"The federal courts, on occasion, have identified a common law "executive" or "governmental" privilege which they have relied upon to protect information from being discovered during ongoing government investigations. Thus, in Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D.Pa.1973), the federal court for the eastern district of Pennsylvania defined the "executive privilege" as "the

government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest.” Id. at 342 (footnote omitted). . . . . **This privilege, however, is not absolute but qualified; and, when asserted, requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government.** Frankenhauser v. Rizzo, supra at 343–344. See: Reese v. City of Pittsburgh, 1 Pa.D. & C.3d 704 (Allegheny Co.1976) (rejecting claim of governmental privilege where plaintiff, who was allegedly assaulted by police officer, sought access to police personnel records and internal affairs investigative reports). See also: Crawford v. Dominic, 469 F.Supp. 260 (E.D.Pa.1979).” See Commonwealth v. Kauffman, 605 A.2d at 1247.

38. These cases provide several examples of particular situations that may require the application of the balancing test, such as requests for information regarding confidential informants, requests for autopsy reports, and requests for information regarding arrest warrant affidavits.

39. For instance, in the lead case cited by the OCA and OAG, (Commonwealth v. Kauffman), the Pennsylvania Supreme Court directed to trial court determine whether the Commonwealth can establish that the release of a report in fact poses a threat of “substantially hindering or jeopardizing the ongoing investigation” such that release of the information should be prohibited.

40. Even if the OCA and OAG have potential criminal investigations open against other EGSs, the OCA and the OAG fail to provide any explanation whatsoever as to how the release of a simple list of complaints received by their office, which they have already openly acknowledged exist, could possibly hinder their ongoing investigations of other suppliers.

41. Furthermore, IDT is willing to accept a “Confidential” or even “Highly Confidential” designation for the lists in question, such that IDT would be prohibited from revealing the contents of the lists or utilizing them in any way that is not authorized by the terms of a Commission Protective Order.

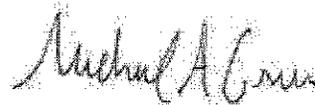
42. Therefore, even if it is accepted for arguments sake that the release of rudimentary listing of EGSs and number of complaints received about each could somehow jeopardize the ongoing investigation of those EGSs, the OCA and OAG fail to explain how the release of such lists subject to a Protective Order could not alleviate any concerns they have about hindering an ongoing investigation.

**Conclusion**

43. For the reasons set forth above, IDT respectfully requests that the Objections of the OCA and the OAG be dismissed, and that the OCA and OAG be compelled to provide responses to IDT's Interrogatories Set II-1 and II-4, subject to appropriate confidentiality protections.

Respectfully submitted,

STEVENS & LEE



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DATE: August 25, 2014

2. Referencing paragraph 16 of the Complaint, please clarify the statement that “the OCA had collected information from approximately 2,434 of its customer contacts”. Please identify the types of information that were generally “collected” from these customers, and explain the types of information that were reduced to written summaries or notes.

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4. Referencing paragraph 18 of the Complaint, please provide a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.



**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

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**JOINT OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA AND THE  
OFFICE OF CONSUMER ADVOCATE TO IDT ENERGY,  
INC. INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS  
SET II**

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Pursuant to 52 Pa. Code § 5.342(c), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Attorney General) and the Office of Consumer Advocate (OCA) submit these Objections to IDT Energy, Inc.'s (IDT or the Company) Interrogatories and Requests for Production of Documents Set II directed to the Attorney General and the OCA (collectively Joint Complainants).

**I. INTRODUCTION**

On August 4, 2014, IDT served Interrogatories and Requests for Production of Documents Set II on the Joint Complainants. IDT's Interrogatories Set II consists of ten Interrogatories and one Request for Production. Joint Complainants communicated their



objections to IDT on August 7, 2014. Joint Complainants and counsel for IDT further discussed the objections on August 12, 2014, but no resolution was reached. As such, the OCA submits an objection to IDT Interrogatory Set II-1 and the Attorney General submits an objection to IDT Interrogatory Set II-4 because the Interrogatories seek information that is beyond the permissible scope of discovery, and the information sought is protected by privilege.

## II. OBJECTIONS

In proceedings before the Public Utility Commission (Commission), a participant may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). Section 5.321 outlines the scope of discovery as follows:

- (c) *Scope.* Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

Further, Section 5.361 of the Pennsylvania Code specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
  - (1) Is sought in bad faith.
  - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.

- (3) Relates to a matter which is privileged.
- (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a).

Joint Complainants assert that IDT Interrogatories Set II-1 and II-4 seek information that is not permitted because (1) it will not lead to relevant information or admissible evidence regarding the allegations against IDT; (2) it is beyond the scope of permissible discovery because it seeks attorney work product; and (3) it is protected by the investigative privilege. As such, IDT Interrogatories Set II -1 and II-4 should be stricken.

A. OCA Objection to IDT Set II-1

The OCA asserts that IDT Interrogatory Set II-1 seeks information that is not permitted because (1) it will not lead to relevant information or admissible evidence regarding the allegations against IDT; (2) it is beyond the scope of permissible discovery because it seeks attorney work product; and (3) it is protected by the investigative privilege. As such, IDT Interrogatory Set II -1 should be stricken.

IDT's Interrogatory Set II-1 states:

Referencing paragraph 15 of the Complaint, please provide a breakout of the approximately 3000 contacts from customers regarding variable rates, listing the names of all EGSs that were identified by customers by name, and the number of customers that referenced each EGS.

The OCA objects to IDT Interrogatory Set II-1 insofar as it requires the OCA to provide the names of all EGSs that were identified by customers by name and the number of customers that referenced each EGS. Such information will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint. The information regarding the total number of customer contacts received by the OCA in the Joint Complaint was provided to show the percentage of total customer contacts specific to IDT in relationship to the

contacts received. The allegations of violations in the Joint Complaint are specific to IDT's billing and marketing practices in Pennsylvania. The Public Utility Code and the Commission's regulations require compliance thereto by each Electric Generation Supplier (EGS) licensed to conduct business in Pennsylvania. See e.g. 66 Pa. C.S. Ch. 28; 52 Pa. Code Ch. 54 and 111. The Commission's regulations further require compliance with the Consumer Protection Law, 73 P.S. § 201-1, *et seq.* and hold each EGS liable for improper conduct of its employees, agents and representatives. See e.g. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). As such, information about contacts that the OCA received regarding EGSs other than IDT will not lead to relevant information or admissible evidence regarding the specific allegations of violations in the Joint Complaint against IDT. IDT seeks to obtain information that is outside the scope of discovery. See 52 Pa. Code § 5.321(c).

Additionally, the information that IDT seeks is attorney work product, which is beyond the permissible scope of discovery. Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3, which codifies the attorney work product privilege and states as follows:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. IDT is asking the OCA to disclose the names of all EGSs identified by customers by name and number. Work done at the OCA by the attorney or at the attorney's discretion as it related to other EGSs by way of summary or otherwise clearly falls within the scope of the attorney work product privilege.

In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well

established. See e.g. Sedat, Inc. v. Dep't of Envtl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow a defendant access to such privileged information would allow him to "gain insight into the agency's legal and factual research and reasoning, enabling [him] to litigate 'on wits borrowed from the adversary.' Worse yet, [he] could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." Sedat, 163 Pa. Commw. at 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office." 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991).

Furthermore, the information was aggregated so that the Acting Consumer Advocate could carry out her duties. The OCA statute states: "it shall be [the Consumer Advocate's] duty, in carrying out the responsibilities under this act, to ... initiat[e] proceedings if in his judgment such may be necessary ... ." 71 P.S. Sec. 309-4(a). Further, subpart (b) states that "[t]he Consumer Advocate may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not ... to initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceedings on the interest of consumers."

The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See e.g. In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also Commonwealth v. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (Held that this privilege "requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government"). The investigative privilege has been defined as "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993).

The consumer contacts that the OCA received about other EGSs is protected information gathered solely for the purpose of allowing the Acting Consumer Advocate to exercise her statutory authority to determine whether or not to initiate proceedings in the interest of consumers. Disclosure of such information would be contrary to the public interest, because it would prevent the free flow of information to the OCA, inhibiting the OCA's ability to gain the necessary information that is required in order to determine whether to initiate proceedings in the interest of the public. Thus, the requested information is protected from discovery under the investigative privilege, and therefore, not discoverable.

Based on the foregoing, the information sought by IDT in IDT Interrogatory Set II-1 is discovery that is not permitted pursuant to 52 Pa. Code §§ 5.323(c) and 5.361(a)(3). The OCA's objection thereto should be sustained, and IDT Set II-1 should be stricken.

A. Attorney General Objection to IDT Set II-4

The Attorney General asserts that IDT Interrogatory Set II-4 seeks information that is not permitted because (1) it will not lead to relevant information or admissible evidence regarding

the allegations against IDT; (2) it is beyond the scope of permissible discovery because it seeks attorney work product; and (3) it is protected by the investigative privilege. As such, IDT Interrogatory Set II-4 should be stricken.

IDT's Interrogatory Set II-4 states:

Referencing paragraph 18 of the Complaint, please provide a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.

The Attorney General objects to IDT Interrogatory Set II-4 insofar as it requires the Attorney General to provide the names of all EGSs that were identified by customers by name and the number of customers that referenced each EGS. Such information will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint. The information regarding the total number of consumer complaints received by the Attorney General in the Joint Complaint was provided to show the percentage of total consumer complaints specific to IDT in relationship to the consumer complaints received. The allegations in the Joint Complaint are specific to IDT's billing and marketing practices in Pennsylvania. The Public Utility Code and the Commission's regulations require compliance thereto by each EGS licensed to conduct business in Pennsylvania. See e.g. 66 Pa. C.S. Ch. 28; 52 Pa. Code Ch. 54 and 111. The Commission's regulations further require compliance with the Consumer Protection Law, 73 P.S. § 201-1, *et seq.* and hold each EGS liable for improper conduct of its employees, agents and representatives. See e.g. 52 Pa. Code §§ 54.43(f) and 111.12(d)(1). As such, the disclosure of the names of other EGSs and the numbers of complaints against each EGS other than IDT cannot lead to relevant information or admissible evidence regarding the allegations in the Joint Complaint against IDT. IDT seeks to obtain information that is outside the scope of discovery. See 52 Pa. Code § 5.321(c).

Additionally, the Attorney General objects to this Interrogatory because the information that IDT seeks is protected from disclosure by the attorney work product privilege. Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3, which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. IDT is requesting the Attorney General to disclose the names of all EGSs that were identified by customers by name and the number of customers that referenced each EGS. Work done by an attorney at the Attorney General's office, or done at that attorney's direction as it related to other EGSs by way of summary or otherwise, clearly falls within the scope of attorney work product privilege.

In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. See e.g. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow a defendant access to such privileged information, would allow him to "gain insight into the agency's legal and factual research and reasoning, enabling [him] to litigate 'on wits borrowed from the adversary.' Worse yet, [he] could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled." Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan concurring). Moreover, when a

representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office." 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4th 216, 219 (Com. Pl. 1991).

The Attorney General also objects to this Interrogatory because the information that IDT seeks is protected from disclosure by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See e.g. In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also Commonwealth v. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (Held that this privilege "requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government"). The investigative privilege has been defined as "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993).

The disclosure of the information requested by IDT in IDT Interrogatory Set II-4 is contrary to public policy and implicates the investigative privilege. IDT's request is not solely factual data related to IDT's case. IDT's request seeks a protected evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the preparation of filing suit against IDT. The Attorney General's evaluation in bringing this case will be chilled by disclosing the information IDT seeks in this Interrogatory. Thus, the

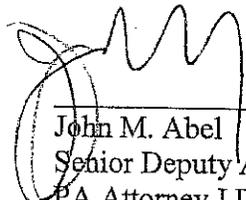
requested information is protected from discovery under the investigative privilege, and therefore, not discoverable.

Based on the foregoing, the information sought by IDT in IDT Interrogatory Set II-4 is discovery that is not permitted pursuant to 52 Pa. Code §§5.323(c) and 5.361(a)(3). The Attorney General's objection thereto should be sustained, and IDT Set II-4 should be stricken.

### III. CONCLUSION

WHEREFORE, the Joint Complainants respectfully request that these Objections be sustained.

Respectfully submitted,



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PA Attorney I.D. 47313

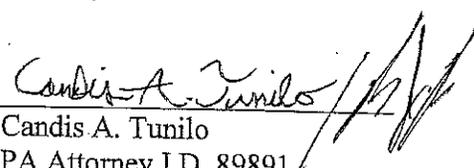
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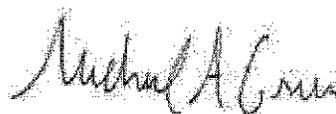
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the enclosed Motion to Compel 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**

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August 25, 2014



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Michael A. Gruin, Esq.