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September 18, 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 IDT Energy, Inc.'s Brief in Response to the Petition for Interlocutory Review and Answers to Material Questions of the Office of Attorney General and Office of Consumer Advocate in the above-referenced matter. Copies of the Brief 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)  
Cheryl Walker-Davis, Director, Office of Special Assistants

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**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	:	
	:	

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**BRIEF OF IDT ENERGY, INC.  
IN RESPONSE TO THE PETITION FOR INTERLOCUTORY REVIEW AND ANSWERS TO  
MATERIAL QUESTIONS OF THE OFFICE OF ATTORNEY GENERAL AND OFFICE OF  
CONSUMER ADVOCATE**

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Attorneys for IDT Energy, Inc.

Dated: September 18, 2014

## **PRELIMINARY STATEMENT**

Pursuant to 52 Pa. Code § 5.302, IDT Energy, Inc. (“IDT”) hereby submits this Brief in Response to the Petition for Interlocutory Review and Answer to a Material Question (“Petition”) filed by the Office of Attorney General (“OAG”) and Office of Consumer Advocate (“OCA”) (collectively “Joint Complainants or “OAG/OCA”). For the reasons set forth below, IDT requests that the Pennsylvania Public Utility Commission (“Commission”) issue an Order which:

- 1) upholds the Administrative Law Judges’ (“ALJs”) dismissal of the Joint Complainants’ Telemarketer Registration Act (“TRA”) claim;
- 2) upholds the ALJs’ dismissal of Count VI of the Joint Complaint; and
- 3) upholds the ALJs’ dismissal of the Joint Complainants’ claims for restitution.

### **I. INTRODUCTION AND STATEMENT OF THE CASE**

On June 20, 2014, the OCA and OAG filed their Joint Complaint (“Complaint”) against IDT. The factual foundation for the Complaint was derived from 47 Formal Complaints filed against IDT with the Commission, 1917 customer complaints filed against IDT with the OAG, and 539 customer contacts to the OCA (of which 23 were written), all of which related to IDT’s variable electric generation supply prices during the Polar Vortex crisis.<sup>1</sup> On July 10, 2014, IDT filed its Answer and New Matter and Preliminary Objections to the Complaint, in which it vigorously denied the Complaint’s allegations of “slamming,” “deception,” “bad faith,” and other unfair trade practices. IDT further explained that the customer complaints underlying the OCA/OAG Complaint were not filed because of some simultaneous systematic wrongdoing by IDT but were rather the product of a simultaneous price event that affected the entire industry.

IDT’s Preliminary Objections sought outright dismissal of those Counts of the Complaint which were clearly legally insufficient on their face. Specifically, IDT sought dismissal of Count VI

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<sup>1</sup> See Complaint, at paragraphs 17-19. While the OCA and OAG have chosen to ignore certain realities of the events of the past year, the undeniable fact is that customer complaints underlying this proceeding are the direct product of the dramatic, unprecedented, and sustained spikes in wholesale electricity prices in the energy markets administered by PJM Interconnection, LLC (“PJM”) due to the Polar Vortex weather event of early 2014.

(Prices Not Conforming to Disclosure Statement) and Count VII (Failure to Comply with Telemarketer Registration Act), and sought dismissal of the Complaint's claims for restitution.

By Order issued on August 20, 2014 ("Preliminary Objections Order"), the presiding ALJs agreed that IDT had met the very high standard required for success on Preliminary Objections, and dismissed Count VI in its entirety, partially dismissed Count VII, and confirmed that the Commission did not have the authority to award the equitable relief of "restitution."<sup>2</sup>

The OCA/OAG Petition seeks "review of the Preliminary Objection Order to the extent it granted Preliminary Objections and limited the scope of the Joint Complaint." *See* Petition, at p. 2. The OCA/OAG assert that the "ALJs' Order has improperly limited the Commission's jurisdiction and authority to consider various claims ..." *Id.* For the reasons set forth below, the Commission should reject the OAG/OCA's requests to reverse the relevant holdings from the Preliminary Objection Order regarding Count VI, Count VII, as well as the claim for restitution.

## **II. LEGAL STANDARD FOR INTERLOCUTORY REVIEW**

The standards for interlocutory review of a material question are set forth in 52 Pa. Code §§ 5.302 and 5.303. Section 5.302(a) requires that the petitioner state "the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice - that is, that the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process.<sup>3</sup>

## **III. ARGUMENT**

### **A. First Material Question**

The OCA/OAG's first Material Question asks:

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<sup>2</sup> *See generally*, the Preliminary Objections Order.

<sup>3</sup> *Joint Application of Bell Atlantic Corporation and GTE Corporation*, Docket Nos. A-310200F0002, et al. (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pennsylvania Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. PUC v. C.S. Water and Sewer Associates*, 74 Pa. P.U.C. 716 (1991); *Re Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

“Does the Commission have authority and jurisdiction to determine whether a violation of the TRA has occurred when considering whether the Commission’s regulations - which require compliance with the TRA - have been violated?”

The first Material Question stems from the Preliminary Objections Order’s partial dismissal of Count VII of the Joint Complaint. Count VII is titled “Failure to Comply with Telemarketer Registration Act,” and it alleges that IDT violated one (and only one) specific aspect of the TRA. Count VII alleges that IDT violated the TRA because it “failed to provide customers with a contract that contained all of the required information set forth in §§ 2245(a)(7) and 2245(c) of the TRA ...”<sup>4</sup> These referenced sections of the TRA require sellers of goods and services through the use of telemarketing to reduce any such sale to a written contract and to obtain the customer’s signature on that requirement (the “signed contract requirement”).

IDT’s Preliminary Objections asserted that, as a matter of law, the TRA’s “signed contract” requirement *does not* apply to telemarketing sales made by electric generation suppliers. In support of this argument, IDT’s Preliminary Objections pointed out the TRA’s clear exception to the “signed contract” requirement, which is codified in § 2245(d)(1) of the TRA<sup>5</sup>, as follows:

*(d) “A signed, written contract is **not needed** if any of the following apply:*

*(1) the contractual sale is regulated under other laws of this Commonwealth.”*(Bold emphasis added).

In ruling on IDT’s Preliminary Objections, the ALJs determined that the Commission did not have jurisdiction to consider any claims under the TRA, and therefore did not reach the specific question of whether the Commission’s regulations require EGS telemarketing sales to be verified by written contracts signed by the enrolled customer.<sup>6</sup>

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<sup>4</sup> See Joint Complaint, at paragraph 73.

<sup>5</sup> 73 P.S. § 2245(d)(1).

<sup>6</sup> The ALJs went on to confirm that the Commission has the authority to hear cases brought pursuant to the Commission’s own telemarketing regulations, but it must be noted that the Joint Complaint does not allege any other violations of the Commission’s telemarketing regulations – it only alleges a violation of the Commission’s telemarketing

### There is No Compelling Reason to Answer to the First Material Question

In response to the ALJ's dismissal of the OAG/OCA's TRA claim, the Joint Complainants' first Material Question seeks broad guidance on the Commission's authority to determine whether violations of the TRA have occurred. The Joint Complainants present no compelling reasons why Interlocutory Review of this issue will "prevent substantial prejudice or expedite the conduct of this proceeding" as required by 52 Pa. Code § 5.302(a). Under this standard, a Material Question can only be "material" to the extent that it relates to a subject that is actually at issue in a proceeding. While the first Material Question asks for a broad ruling on the Commission's jurisdiction to determine TRA violations generally, the fact is that the Joint Complaint in this matter only asserts a violation of one specific aspect of the TRA – the "signed contract" requirement of § 2245(a)(7) of the TRA.<sup>7</sup> Because it is well settled that the signed contract requirement **does not** apply to EGSs, and because this requirement is the only violation of the TRA alleged, there is no compelling reason for the Commission to undertake a broad examination of whether it has the jurisdiction to determine whether violations of the TRA have occurred.

### The Commission Should Uphold the Dismissal of Count VII

To the extent that the Commission deems it necessary to review the first Material Question, the Commission need only answer the question in the context of the sole element of the TRA that is actually at issue in this case. That is, in responding to the Joint Complainants' first Material Question, the Commission need only dispose of the question as to whether it has authority to find that an EGS violated § 2245(a)(7) of the TRA.

As set forth above, the TRA contains an express exclusion from the written contract requirement for contractual sales that are "regulated under other laws of the Commonwealth." Sales of electricity generation supply are obviously regulated by the Commission pursuant to the Electricity

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regulations to the extent they require compliance with the TRA's written contract requirement. *See generally*, Count VII of the Joint Complaint.

<sup>7</sup> See 73 P.S. § 2245(a)(7).

Generation Customer Choice and Competition Act (66 Pa.C.S. § 2801, *et. seq.*) (“Choice Act”). Indeed, pursuant to its authority to implement the Choice Act, the Commission has promulgated detailed regulations regarding the standards and procedures for changing a customer’s electricity generation supplier (*See* 52 Pa. Code § 57.171 *et seq.*), and more recently, has enacted detailed regulations regarding telemarketing sales of electricity generation supply. *See* 52 Pa. Code § 111.10 (c). The Commission’s telemarketing regulations 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, and the Commission’s regulations at 52 Pa. Code § 111.7 authorize alternative means of verifying customer authorization to transfer their accounts.

The Commission unquestionably has the authority and the jurisdiction to enforce its own regulations regarding EGS telemarketing. However, the Commission **does not** have the authority to find that an EGS violated the TRA for failing to verify its customer enrollments with a signed written contract, which is the only alleged violation of the TRA in the Joint Complaint. The “signed contract” requirement does not apply to EGSs under the explicit terms of the TRA. Furthermore, the Commission’s own regulations do not require EGSs to reduce telemarketing sales to signed written contracts. The Commission’s regulations have always authorized the enrollment of customers based on oral or written authorization,<sup>8</sup> which clearly allow for verifying enrollments other than with signed written contracts, including the use of third-party verification processes.<sup>9</sup>

In alleging that the “signed contract” requirement applies to EGSs, the OAG/OCA rely on an Attorney General Advisory Opinion (“AG Opinion”) that was issued in 2010 in response to the Commission’s request for guidance on several unrelated aspects of the TRA.<sup>10</sup> As noted by the ALJs

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<sup>8</sup> *See* 52 Pa. Code § 57.174.

<sup>9</sup> *See* 52 Pa. Code § 111.7.

<sup>10</sup> The AG Opinion is included as an Exhibit to the OAG/OCA’s Response to IDT’s Preliminary Objections, and addresses the following four questions: 1) Is electric generation supply a “consumer good or service” as defined by the Telemarketer Act?, 2) Is an electric generation supplier excluded from the definition of “telemarketer” in the Telemarketer Act? If so, what is the scope of the exclusion under the Act, does it extend to an agent of a supplier, and does it matter that

in the Preliminary Objection Order, it is clear that the Attorney General was never asked to address the issue of whether EGSs are subject to the “signed contract” requirement of § 2245(a)(7) of the TRA, and therefore the Attorney General did not provide any guidance on this topic in the AG Opinion. The AG Opinion concluded that EGSs are “telemarketers” for all purposes of the TRA, except for the requirement to register with the Attorney General. The OAG/OCA interpret this finding as making EGSs bound by all requirements of the TRA, including the “signed contract” requirement. The OAG/OCA conveniently ignore the fact that the TRA clearly limits the scope of the signed contract requirement in § 2245(d), which lists five specific types of sales to which the written contract requirement does not apply. Even if the AG Opinion is interpreted as requiring EGSs to comply with all aspects of the TRA, the AG Opinion does not negate the exemptions to the signed contract requirement, or expand the applicability of that requirement to sales that the TRA expressly excluded.

Because the TRA contains an express exclusion from the “signed contract” requirement for contractual sales that are regulated under other laws of the Commonwealth, and because EGS sales are regulated by the Commission pursuant to the Choice Act, and because the Commission’s own regulations do not require EGS telemarketing enrollments to be reduced to signed written contracts, the Commission has no authority to find that an EGS violated the TRA for failing to reduce telemarketing sales to signed written contracts.

## **B. Second Material Question**

The second Material Question asks:

“Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an electric generation supplier (EGS) conform to the EGS disclosure statement regarding pricing?”

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the source of customer information used for telephone solicitation by a supplier or its agent is an electric distribution company?, 3) Is customer consent to release of information given to an electric distribution company to enable competitive solicitations “an express request” to receive telephone solicitations from electric generation suppliers or their agents within the meaning of the Telemarketer Act?, and 4) Is an electric generation supplier using customer information supplied by an electric distribution company for telephone solicitations shielded from liability under the “error” provision of the Telemarketer Act?

## There Is No Compelling Reason To Answer The Second Material Question

The second Material Question asks a hypothetical question that does not implicate any allegations that are actually included in the Joint Complaint. The Question asks if the Commission has jurisdiction to determine whether an EGS's prices conform to its disclosure statement, but as the ALJs correctly found, the Complaint contains no averments that IDT's prices did not conform to its disclosure statement. Instead, Count VI of the Complaint and the Affidavit referenced therein allege that IDT's prices did not reflect its *cost of service*, which is an entirely different inquiry (and one that is beyond the Commission's authority, as discussed more fully below).

The second Material Question stems from the Preliminary Objection Order's dismissal of Count VI of the Joint Complaint, which carries the heading "Prices Not Conforming to Disclosure Statement." While the heading of Count VI purports to allege that IDT's prices do not "conform to its disclosure statement," the body of Count VI only asserted that IDT's prices were not "reflective of the costs to serve its residential customers." Indeed, other than the heading of Count VI, there are no allegations anywhere in the 81 paragraphs of the Complaint that IDT's prices did not conform to its disclosure statement. To be more precise, it is undisputed that IDT's disclosure statement included the following verbatim passages:<sup>11</sup>

- "The price for electric generation sold is established on an approximately monthly basis based upon electric generation market pricing as furnished by PJM clearing house, transportation or transmission, and other market and business price related factors."
- "This price may be higher or lower than the EDC's price in any particular month," and
- "There is no ceiling price."

The Complaint simply does not contain any allegations upon which the Commission could rely to find that IDT's prices did not conform to the above-referenced terms of the disclosure statement, or any other aspect of the disclosure statement. As such, IDT sought dismissal of Count VI for legal insufficiency.

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<sup>11</sup> See Paragraph 53 of the Complaint and Appendix B to the Complaint

The ALJs agreed with IDT, and dismissed Count VI in its entirety. In seeking Interlocutory Review of the dismissal of Count VI, the Joint Complaints ignore the actual reasons why the ALJs dismissed the Count. The ALJ's correctly noted that "the gravamen of Count VI is clearly the rate at which IDT charged its variable rate customers, not conformance of those rates with the variable price provisions in the disclosure statement or billing practices."<sup>12</sup> The Preliminary Objections Order also noted that nothing in the Affidavit attached to the Joint Complaint correlated the prices charged by IDT to the Disclosure Statement. Instead, the Affidavit in question provides a rudimentary "cost to serve" analysis to assert that IDT's prices during a discrete period in time were allegedly in excess of the wholesale costs to acquire electricity during that time frame.

The ALJs recognized Count VI for what it was – an obvious attempt to have the Commission review the appropriateness of IDT's retail electricity prices on a cost-of-service basis, hidden beneath a misleading Count heading. The Complaint does not include any allegations that IDT's prices did not conform to its pricing statement, and therefore the second Material Question as framed is essentially a request for a declaratory ruling or advisory opinion regarding a claim that appears nowhere in the Complaint other than in a Count heading.

The OAG/OCA are not able to demonstrate any prejudice that justifies review of the second Material Question. As the ALJs noted, "multiple other Counts in the Complaint make averments regarding the Disclosure Statement."<sup>13</sup> In particular, Count V of the Complaint includes allegations that IDT's disclosure statement did not comply with the Commission's regulations, and Count V was not the subject of any Preliminary Objection. As such, the OAG/OCA will still be able to pursue their claims that IDT's disclosure statement was somehow improper or non-compliant with the Commission's regulations. Upholding the ALJs' dismissal of Count VI will only preclude them from attempting to seek Commission review of IDT's retail pricing, and foreclose the OAG/OCA's

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<sup>12</sup> Preliminary Objection Order, at p. 6

<sup>13</sup> Preliminary Objections Order, at p. 6

attempted “cost of service” line of inquiry. Because the second Material Question does not implicate any issue that is actually raised in the Complaint, and because the OAG/OCA will still have the ability to pursue legal claims regarding the compliance of IDT’s disclosure statement, there can be no “compelling reason” for the Commission to expend the time and resources to review the second Material Question.

The Commission Should Uphold The ALJs’ Dismissal Of Count VI

To the extent that the Commission deems it necessary to review the second Material Question, the Commission should uphold the ALJs’ dismissal of Count VI of the Complaint for legal insufficiency. Count VI of the Complaint asserts that IDT’s “prices charged to retail customers were not reflective of the cost to serve residential customers,” and quite obviously seeks Commission review of IDT’s retail electric generation supply pricing. The ALJs correctly found that the Commission did not have the jurisdiction to analyze an EGS’s prices or whether those prices reflected its costs of service. To the extent that the OAG/OCA are seeking review of that finding by the ALJs, there can be no doubt that the Commission should uphold the ALJ’s ruling that the Commission does not have the jurisdiction or authority to analyze whether an EGS’s prices reflect its cost of service.

While the Choice Act provides the Commission with authority to regulate EGSs for licensing and similar purposes, it clearly mandates that the Commission has no authority to regulate electricity generation prices offered by EGSs. *See* 66 Pa.C.S. § 2806(a). The Commission has reiterated this principle time and again.<sup>14</sup> The Commission has recognized that:

“This is as clear a mandate from the General Assembly as any government agency could hope to receive. There is no equivocation – all Pennsylvania electric customers shall have the ability to choose their electric generation supplier, and the Commission does not have

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<sup>14</sup> *See* Petition of PECO Energy Company for Approval of its Default Service Plan, Docket No. P-2012-2283641 (Order entered March 6, 2014), Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products, Docket No. M-2014-2406134 (Order entered February 20, 2014), and Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause, Docket No. M-2013-2362961 (Order entered November 14, 2013)

any authority over the generation of electricity, which necessarily includes the specific price charged to end-user customers.”<sup>15</sup>

In order to characterize Count VI as being valid, the OAG/OCA’s Response to IDT’s Preliminary Objections referenced a variety of wildly irrelevant allegations from other Counts of the Complaint that do nothing to support the legal sufficiency of Count VI. For instance, the OAG/OCA referenced the requirement that EGSs be responsible for actions of their agents (52 Pa. Code § 54.43(f)), the Commission’s regulations regarding EGS billing practices (52 Pa. Code §54.4) and the Commission’s EGS sales and marketing regulations (52 Pa. Code §111.1, et seq.). As the ALJs correctly held, none of these regulations are at issue in Count VI, and to the extent the Joint Complainants are alleging non-compliance with these sections, such allegations are included in other Counts of the Complaint, but not in Count VI. A separate Count of the Complaint - Count V – includes allegations that IDT’s Disclosure Statement failed to adequately state the conditions of variability and limits on variability as required by 52 Pa. Code § 54.5, and failed to provide accurate information about electric generation services using plain language, as required by 52 Pa. Code. § 54.43(1). While these regulations provide the Commission with jurisdiction to determine whether the language of an EGS disclosure statement was acceptable, they do not provide the Commission with the authority to exert jurisdiction over the appropriateness of EGS variable prices, which is what Count VI clearly seeks.

To the extent that the OAG/OCA attempt to frame Count VI as alleging that IDT’s billed prices did not conform to the prices set forth in its disclosure statement, rather than an attempt to evaluate IDT’s retail prices on a “cost of service” basis, such an argument is not grounded in reality. First of all, none of the 81 paragraphs of the Complaint actually make such an allegation. Secondly, Count VI does not reference any Commission regulations regarding conformance of prices to a disclosure

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<sup>15</sup> See Joint Statement of Chairman Robert F. Powelson and Commissioner Pamela A. Witmer *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (Order entered March 6, 2014).

statement -- it only references "cost of service." And finally, the IDT disclosure statement referenced in the Joint Complaint contains no specific price to which to compare billed prices. Rather, the IDT disclosure statement referenced in the Joint Complaint is for a month-to-month, variable price retail electricity supply product. The Commission's regulations in effect at the time the Joint Complaint was filed did not require variable price disclosure statements to include a specific starting price, or any price for that matter.<sup>16</sup> Because there is no specific price stated in IDT's disclosure statement, OAG/OCA cannot reasonably argue that Count VI was meant to outline a claim that IDT's prices deviated from the price stated in its disclosure statement.

### **C. Third Material Question**

The third Material Question asks:

"Does the Commission have the authority and jurisdiction to order equitable remedies including restitution?"

There should be no doubt that the form of restitution requested by the OAG/OCA is beyond the Commission's authority to award. Specifically, the Complaint requests the following relief:

"Order Respondent to provide appropriate restitution including without limitation refunding all charges to its customers that were over and above the Price to Compare in the customer's respective service territories from January, 2014 through the date of resolution of this matter, as well as any late, cancellation and/or termination fees and/or such other penalties charged to consumers as a result of the Respondent's charges and consumers' leaving Respondent to obtain generation services elsewhere."

In other words, the OAG/OCA seek restitution on behalf of an entire class of IDT's customers, which is clearly beyond the authority of the Commission to Order.

IDT, as an EGS, is not a public utility subject to Commission regulation of utilities, except in limited circumstances.<sup>17</sup> While the Choice Act provides the Commission with authority to regulate EGSs for licensing and similar purposes, it mandates that the Commission has no authority to regulate

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<sup>16</sup> Prior to July 14, 2014, the Commission's regulation at 52 Pa. Code § 54.5(c) only required EGS disclosure statements to state generation prices if applicable, and EGS variable pricing statements were required to include: (1) conditions of variability and (2) limits on price variability.

<sup>17</sup> See *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005).

electricity generation prices offered by EGSs. *See* 66 Pa.C.S. § 2806(a). As the ALJs correctly noted in the Preliminary Objections Order, restitution is an equitable remedy pursuant to which a person is restored to his or her original position prior to the loss or injury, or placed in the position he or she would have been had the breach not occurred.<sup>18</sup> Notably, the Commission has held that while it has approved settlements in which a respondent has agreed to pay restitution, the Commission lacks authority to impose such a remedy on an unwilling party. *See Roger McCall v. Pennsylvania Electric Co.*, Docket No. C-2009-2105240, (Opinion and Order entered June 7, 2010).

Indeed, the Commission has only exerted authority to order EGS to reverse charges to customers in one very narrow and limited situation. In its *Rulemaking Order Establishing Standards for Changing a Customer's Electric Supplier*, Docket No. L-00970121 (Order entered February 27, 1998), the Commission evaluated its authority to order EGSs to provide refunds to customers who were enrolled with an EGS without their authorization. While the Independent Regulatory Review Commission expressed doubts over the Commission's authority to implement and enforce such a provision, the Commission ultimately determined that it had the authority to order refunds to customers in the limited situation where a customer was enrolled with an EGS without the customer's consent, and only within the first two billing periods from the time that the customer should reasonably have known of the change of the EGS.<sup>19</sup> This limited refund authority related to the Commission's customer enrollment processes, however, should not be confused with the authority to order restitution to an entire class of customers for charges invoiced over an unlimited period of time. In enacting this regulation, the Commission determined that such refunds should only be issued in response to disputes filed within the time in which a customer should reasonably have known of a change of electric generation suppliers. The Commission did not authorize the issuance of refunds to customers who questioned an enrollment beyond the first two billing cycles, and the Commission certainly did not

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<sup>18</sup> *See* Preliminary Objections Order, at 13.

<sup>19</sup> *See* 52 Pa. Code § 57.177.

assert authority to order restitution to an entire class of customers for other violations of the Commission's regulations, as the OAG/OCA request.

Even in the context of individual complaints alleging that an EGS has billed a price that differed from a specific price in a disclosure statement, the Commission has refrained from asserting the authority to Order an EGS to provide restitution to a customer. Although the Commission has reiterated that it has the authority to enforce its rules regarding EGS billed prices matching their marketed prices, it has nevertheless stopped short of stating that it had the authority to order restitution in cases where such prices did not match. For instance, in *Gmrusa v. Dominion Retail*, Docket No. C-2009-2124359 (Order entered April 16, 2010), the Commission overturned the dismissal of a customer complaint regarding EGS charges differing from promised promises, and clarified that the Commission has the jurisdiction to enforce its regulations regarding EGS prices matching marketed and agreed upon prices. In so doing, however, the Commission did not indicate that it had the authority to award restitution to customers in connection with violations of such regulations.

As the ALJs correctly noted, the main case relied upon by the OAG/OCA for their "restitution" theory (*Utility.com*<sup>20</sup>) cannot be relied upon for the general proposition that the Commission has the authority to order restitution to EGS customers.<sup>21</sup> In the 2001 decision in *Utility.com*, the Commission examined how the proceeds of Utility.com's surety bond should be distributed following the company's sudden cessation of electric generation supply service. The OCA sought to have the bond proceeds distributed to Utility.com's customers to compensate them for "overpayments" and "lost savings." In what amounts to dicta, the Commission technically granted the OCA's claim because Utility.com did not answer the OCA's complaint and therefore the allegations of the OCA's complaint were deemed admitted. However, the Commission also noted that it did not need to address the merits of the OCA's claims because as a practical matter, the entire amount of Utility.com's bond would be

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<sup>20</sup> *OCA v. Utility.com*, 212 P.U.R. 4<sup>th</sup> 255 (2001).

<sup>21</sup> See Preliminary Objections Order, at 13.

consumed for the payment of gross receipts taxes and therefore no funds would remain to reimburse customers.<sup>22</sup> As the ALJs correctly found, *Utility.com* did not, and cannot, serve to grant the Commission the authority to award restitution, because the Commission's authority is limited to that which is expressly provided by statute. The power and authority exercised by an administrative commission must fall within the strict and exact limits of the statutory provisions under which it operates because such tribunals are "extra judicial."<sup>23</sup> It is well settled that the Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly as contained in the Public Utility Code.<sup>24</sup> Significantly, the Public Utility Code does not provide the Commission with the power to provide equitable relief.

The restitution sought by the OAG/OAG would also be improper because it would amount to regulation of EGSs prices, which the Commission has no authority to do. While the Electricity Generation Customer Choice and Competition Act provides the Commission with authority to regulate EGSs for licensing and similar purposes, it mandates that the Commission has no authority to regulate electricity generation prices offered by EGSs.<sup>25</sup> The Commission has recognized that:

"This is as clear a mandate from the General Assembly as any government agency could hope to receive. There is no equivocation – all Pennsylvania electric customers shall have the ability to choose their electric generation supplier, and the Commission does not have any authority over the generation of electricity, which necessarily includes the specific price charged to end-user customers."<sup>26</sup>

Because IDT is not a public utility except for the limited purposes of 66 Pa. C.S.A §§ 2809 and 2810, and insofar as the Commission does not have the authority to regulate EGS rates, the Commission may not regulate the prices that IDT charges for electric generation service.

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<sup>22</sup> See *Utility.com*, at p.8.

<sup>23</sup> *Process Gas Consumers Group v. Pennsylvania Public Utility Commission*, 511 Pa. 88, 511 A.2d 1315 (1986).

<sup>24</sup> *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

<sup>25</sup> See 66 Pa.C.S.A § 2806(a).

<sup>26</sup> See Joint Statement of Chairman Robert F. Powelson and Commissioner Pamela A. Witmer *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641 (Order entered March 6, 2014).

Since the Commission lacks the authority to regulate rates charged for electric generation service, 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 absolutely no justification in law or fact, and completely ignores the realities of a deregulated, competitive electricity supply market place. As the Commission has stated:

"EGSs must be able to accurately price their products to be able to cover the costs of generation supply as well as other additional costs incurred in offering service. Electric Distribution Companies ("EDCs") like PECO have no such need. ....Therefore, the fluctuations in PECO's PTC often bear no rational relationship to changes in wholesale electricity market prices ..."<sup>27</sup>

Finally, to the extent the Complaint requests an order of restitution pursuant to the UTPCPL, such an order is not within the Commission's jurisdiction or authority. It is well settled that the Commission lacks jurisdiction over claims under the UTPCPL.<sup>28</sup>

#### IV. CONCLUSION

For the reasons set forth above, IDT respectfully requests that the Commission decline to Answer the Material Questions, or in the alternative, uphold the rulings of the ALJs with respect to the dismissal of the Joint Complainants' Telemarketer Registration Act claim, the dismissal of Count VI of the Joint Complaint, and the ALJs' dismissal of Complainants' claims for restitution.

Respectfully Submitted,



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Dated: September 18, 2014

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<sup>27</sup> *Id.*

<sup>28</sup> 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).

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the enclosed Brief in Response to Petition for Interlocutory Review and Answers to Material Questions 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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September 18, 2014



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