

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
800-684-6560

FAX (717) 783-7152  
consumer@paoca.org

September 18, 2014

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

RE: 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

Secretary Chiavetta:

Enclosed please find the Joint Brief of the Commonwealth of Pennsylvania and the Office of Consumer Advocate in Opposition to the Petition of IDT Energy, Inc. for Interlocutory Review and Answer to a Material Question, in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. #89891

Enclosures

cc: Honorable Elizabeth Barnes, ALJ  
Honorable Joel Cheskis, ALJ  
Certificate of Service

\*185194

**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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JOINT BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AND THE OFFICE OF  
CONSUMER ADVOCATE IN OPPOSITION TO THE PETITION OF  
IDT ENERGY, INC. FOR INTERLOCUTORY REVIEW  
AND ANSWER TO A MATERIAL QUESTION

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Pursuant to Section 5.302(b) of the Pennsylvania Public Utility Commission’s (Commission) regulations regarding Interlocutory Review, 52 Pa. Code § 5.302(b), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively Joint Complainants) provide the following Joint Brief in Opposition to the Petition of IDT Energy, Inc. (Respondent or IDT) for Interlocutory Review and Answer to a Material Question (Petition) in the above-captioned proceeding.

Joint Complainants submit that IDT’s Petition for Interlocutory Review should be denied. IDT has not met its burden of presenting a compelling reason why the Commission should answer Respondent’s Material Question in order to prevent substantial prejudice or expedite the

conduct of the proceeding, as required by 52 Pa. Code § 5.302(a). Should the Commission, however, determine that review is necessary as pursuant to Section 5.302(a), the Joint Complainants respectfully request that the Commission answer IDT's Material Question in the positive – that the Commission possesses the authority to order Electric Generation Suppliers (EGSs) to issue refunds to customers.

## **I. INTRODUCTION**

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes seven separate counts and alleges that IDT violated Pennsylvania law and Commission Orders and regulations. Specifically, the seven Counts in the Joint Complaint are: (1) misleading and deceptive promises of savings; (2) misleading and deceptive welcome letter and advertisements; (3) slamming; (4) lack of good faith handling of complaints; (5) failing to provide accurate pricing information; (6) prices nonconforming to disclosure statement; and (7) failure to comply with the Telemarketer Registration Act. See gen'ly Joint Complaint.

With respect to relief, the Joint Complainants request that the Commission find that Respondent violated the Public Utility Code, the Consumer Protection Law, the TRA, and the Commission's regulations and Orders; provide restitution to Respondent's customers; impose a civil penalty; order Respondent to make various modifications to its practices and procedures; and revoke or suspend Respondent's EGS license, if warranted.

On July 10, 2014, IDT filed its Answer and New Matter to the Joint Complaint, wherein the Respondent generally denied any violations of the Public Utility Code or the Commission's regulations or Orders. See gen'ly IDT Answer and New Matter. On July 30, 2014, Joint Complainants filed a Joint Reply to New Matter.

Also on July 10, 2014, IDT filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, IDT sought: dismissal of Joint Complaint Counts VI, VII and Joint Complainants' claim for restitution for legal insufficiency and dismissal of Count VI for inclusion of impertinent material. See gen'ly IDT POs. On July 21, 2014, Joint Complainants filed a Joint Answer to IDT's Preliminary Objections asserting that Respondent's Preliminary Objections should be overruled because the alleged violations and relief sought in Joint Complaint are supported by the Public Utility Code, Commission regulations and Orders, and appellate case law. See gen'ly Joint Ans. to IDT POs.

This matter was referred to the Office of Administrative Law Judge and assigned to Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs). A Prehearing Conference was scheduled and convened on August 25, 2014. Thereafter, a partial litigation schedule was adopted, and a Second Prehearing Conference was scheduled for December 30, 2014. See Procedural Order #2 (entered Sept. 3, 2014).

By Order entered August 20, 2014, the ALJs granted in part and denied in part IDT's Preliminary Objections. See gen'ly Order on Preliminary Objections (entered Aug. 20, 2014) (August 20 Order). In the August 20 Order, the ALJs struck Counts VI in its entirety and struck Count VII in part. Specific to IDT's Petition is the ALJs' determination regarding IDT's Third Preliminary Objection. In its Third Preliminary Objection, IDT sought dismissal of Joint Complainants' request for restitution in the Joint Complaint for lack of Commission authority to

award such relief. See gen'ly IDT POs at 10-12. In their Answer to IDT's Preliminary Objections, Joint Complainants asserted that the Commission has jurisdiction to award equitable remedies, such as restitution. See Joint Answer to IDT POs at 15-20, citing 66 Pa. C.S. § 103(c); OCA v. Utility.com, Inc., 212 P.U.R.4<sup>th</sup> 255 (2011); Pa. PUC v. Reed, 1972 Pa. PUC LEXIS 40, 46 Pa. PUC 19 (1972); Ely v. Pennsylvania Water, Docket No. C-20055616, Order (July 10, 2006); C.S. Warthman Funeral Home, et al. v. GTE North, Inc., Docket No. C-00924416 (June 4, 1993).

The ALJs granted in part IDT's Third Preliminary Objection, finding that the Commission lacks authority to award damages for lost savings for breach of contract.<sup>1</sup> See August 20 Order at 14.<sup>2</sup> The ALJs denied in part IDT's Third Preliminary Objection, however, finding that the Commission has the authority to direct refunds under 66 Pa. C.S. §§ 1312(a) and 3301. See August 20 Order at 15-16. Specifically, the ALJs found:

Section 1312 gives the Commission jurisdiction to order IDT to issue refunds. To hold otherwise would be contrary to the public interest. To the extent that the Commission would not be allowed to direct EGSs like IDT to issue refunds to its customers under Section 1312 when, after notice and an opportunity to be heard, refunds are deemed appropriate, it would likewise lose its ability to regulate EGSs for other purposes essential to the public interest, such as ensuring adherence to the Commission's telemarketing regulations, as discussed above, and issuing civil penalties. See, 66 Pa.C.S. § 3301.

August 20 Order at 15-16.

On September 8, 2014, IDT filed the instant Petition, posing its Material Question as follows:

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<sup>1</sup> To be clear, Joint Complainants do not seek damages for breach of contract in this action. Rather, as stated in the Joint Complaint and explained in their Answer to IDT's Preliminary Objections, Joint Complainants seek restitution in this matter in order to restore IDT's customers to the position they would have been in had IDT kept its pricing promises and charged prices in accordance with those marketed and described in IDT's Disclosure Statement.

<sup>2</sup> Also on September 8, 2014, Joint Complainants filed their Petition for Interlocutory Review and Answer to Material Questions in this matter, wherein they seek review of the ALJs' dismissal of Count VI, partial dismissal of Count VII and dismissal of Joint Complainants' prayer for restitution.

Does the Commission have the authority under Section 1312 of the Public Utility Code to order electric generation suppliers to issue refunds to customers?

See Petition at 1.

Joint Complainants submit this Brief in Opposition to IDT's Petition. As discussed below, IDT has not met the standard for its Petition pursuant to 52 Pa. Code § 5.302(a), as Respondent has not presented a compelling reason why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding. Should the Commission, however, determine that review is necessary as pursuant to Section 5.302(a), the Joint Complainants respectfully request that the Commission answer IDT's Material Question in the positive – that the Commission possesses the authority to order refunds in this matter.

## **II. DISCUSSION**

### **A. IDT Fails To Provide Compelling Reasons For Interlocutory Review.**

The Commission's regulation provides the standard for consideration of a Petition for Interlocutory Review as follows:

During the course of a proceeding, a participant may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition shall be in writing with copies served on all participants and the presiding officer and shall state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

52 Pa. Code § 5.302(a). "Substantial prejudice" is such error and any prejudice flowing therefrom that could not be satisfactorily cured during the normal Commission review process. Re Knights Limousine Service, Inc., 59 Pa. PUC 538, 539 (1985); Pa. P.U.C. v. C.S. Water and Sewer Assoc., 74 Pa. PUC 716 (1991). In Pa. PUC v. Wynnewood Sewer Corp., the Commission stated "we do not routinely grant interlocutory review except upon a showing by a petitioner of extraordinary circumstances or compelling reasons." Pa. PUC v. Wynnewood

Sewer Corp., Docket No. R-00963708, Order at 5 (Dec. 6, 1996). In other words, the standard for the Commission to allow interlocutory review is high.

IDT offers two reasons why interlocutory review is needed to prevent substantial prejudice and to expedite the conduct of this proceeding. First, IDT asserts that will greatly expedite the conduct of the proceeding and is necessary in order to establish the proper scope of discovery and testimony in this matter and will prevent recurring discovery disputes and relevancy objections. See Petition at 2-3. Second, IDT asserts that a determination of the issue will clarify the extent of any potential liability faced by Respondent and may increase the probability of a settlement. Id. at 3.

Regarding IDT's first reason for seeking interlocutory review, Joint Complainants submit that IDT's interest in establishing the scope of discovery and litigation does not meet the standard for interlocutory review to prevent substantial prejudice. The Commission's rules for discovery are already quite broad, as they permit "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... ." 52 Pa. Code § 5.321(c). As such, seeking Interlocutory Review in order to establish the scope of discovery is not a compelling reason.

Further, the Commission has repeatedly ruled that the mere desire to avoid litigation of an issue is not justification for interlocutory review. See e.g. Saucon Creek Assoc., Inc. v. Boro. of Hellertown, 69 Pa. PUC 467, 469 (1989) (Claim of burden and expense of further litigation did not justify interlocutory review or jurisdictional question which should be determined on the facts of the case); Wynnewood at 6 (No interlocutory review of question whether customer complaints re odor should be addressed as part of rate case); Petition of West Penn Power Co. for Interlocutory Review and Answer to Material Question, 2010 Pa. PUC LEXIS 1212, \*15

(Nov. 8, 2010) (No interlocutory review will be granted when the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process). In the present case, IDT's ability to litigate its position regarding refunds remains unimpaired by the August 20 Order.<sup>3</sup> IDT may seek review of any award of refunds the ALJs may recommend in their initial decision in this matter via exceptions and reply exceptions to the Commission. As such, any error or prejudice flowing from the August 20 Order to IDT may be cured in the regular course of this litigation.

Regarding IDT's second reason for seeking interlocutory review, Joint Complainants submit that the intimation that the grant of IDT's Petition might predispose IDT to engage in settlement negotiations fails to meet the standard for interlocutory review. Such intimation by IDT does not reach the level of "extraordinary circumstances or compelling reasons" why review will prevent "substantial prejudice or expedite the conduct of the proceeding" required by the Commission's regulation and interpretation thereof. See 52 Pa. Code § 5.302(a); Wynnewood at 5. The Commission's policy to encourage settlements is long-established. See 52 Pa. Code § 5.231(a). There simply is no nexus between the purposes for granting interlocutory review and a purported impetus necessary to begin settlement negotiations.

IDT's stated reasons for seeking interlocutory review do not meet the Commission's standards for the grant thereof. As such, the Commission should decline IDT's Petition seeking interlocutory review.

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<sup>3</sup> The August 20 Order, however, puts Joint Complainants out of court with regard to their prayer for relief in the form of restitution. As such, Joint Complainants have a compelling reason to seek interlocutory review of the ALJs' determination regarding restitution and filed for interlocutory review on September 8, 2014. In their Brief in Support of their Joint Petition for Interlocutory Review and Answer to Material Questions filed September 18, 2014, Joint Complainants discuss the Commission's authority and jurisdiction to direct equitable remedies including restitution.

B. Should The Commission Grant IDT's Petition, It Should Be Determined That The Commission Has The Authority To Order Refunds In This Matter.

In its Petition, IDT presents a single "material question" for the Commission to answer:

Does the Commission have the authority under Section 1312 of the Public Utility Code to order electric generation suppliers to issue refunds to customers?

See Petition at 1. IDT recommends that the Commission answer in the negative. Id.

If the Commission grants interlocutory review, the Joint Complainants submit that the Commission should answer IDT's question in the affirmative and find – as the ALJs found in the August 20 Order – that the Commission has the authority to order refunds in this matter. As discussed below, the Public Utility Code, Commission rulemakings and Orders support a finding that the Commission possesses such authority and jurisdiction to order IDT to issue refunds to customers. The Commission should answer IDT's question in the affirmative and so allow for the full development of the record to support the Commission's review of the important issues presented by the Joint Complaint.

The Commission has explained its authority regarding Chapter 28 of the Public Utility Code as follows:

Section 2809(e) provides that the Commission may forbear from applying the provisions of "this part [the Public Utility Code, 66 Pa. C.S. §§ 101-3315], which it determines are unnecessary due to competition among electric suppliers". 66 Pa. C.S. § 2809(e). In addition, the Commission is directed in that same provision to "impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring adequate reserve margins and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential services) are maintained." Also, at Section 2809(b), the Commission is authorized to license only those individuals that are found to be "fit, willing and able to properly conform to the provisions of this title [Title 66 Public Utilities] and the lawful orders and regulations of the Commission under this title, including the Commission's regulations regarding standards and billing practices... ." If these criteria cannot be met by the license applicant, then the Commission is directed to deny the license.

From the above recitation of statutory authority, it is indisputably clear that the

Commission has the legal authority and administrative discretion to require, to the extent deemed necessary given competition among electric generation suppliers, EGS compliance with the Public Utility Code, Commission's orders and the Commission regulations, particularly Chapter 56. Moreover, it is equally clear that the Commission is not constrained in its use of regulatory remedies to obtain compliance from EGSs.

The Commission thus has the authority to impose any sanction on an EGS that it can legally impose on an EDC, or any other public utility to enforce compliance with the law, including, but not limited to, the levying of fines, the payment of restitution to customers, and the suspension or revocation of a license. As licensees, all EGSs must comply with Commission orders, regulations and provisions of the Public Utility Code that the Commission deems are applicable

EDC Procedures for Processing Pilot Customer Supplier Selections, 1998 Pa. PUC LEXIS 49, \*13-14 (Jan. 15, 1998). See also Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901, 911 (Pa. 2005) (Pursuant to Section 2809(e), the Commission may only impose on EGSs "those requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) requirements are maintained. In the present action, Joint Complainants seek for the Commission to use its authority in Section 2809(e) to ensure that quality of service and the standards and billing practices for residential utility service are maintained. As such, the ALJs correctly found that the Commission has the authority to direct refunds in this matter.<sup>4</sup>

More specifically, the multiple Counts set forth in the Joint Complaint span the range of interaction between IDT and prospective and enrolled consumers, including marketing to prospective customers, enrolling customers, billing customers and handling of customer disputes.

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<sup>4</sup> Although not expressly stated, it appears the ALJs' reliance on Sections 1312 and 3301 in finding that the Commission possesses the authority to direct IDT to make refunds stems from the authority granted to the Commission in Section 2809(e). Section 2809(e) permits the Commission to impose on EGSs the requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) requirements are maintained.

See gen'ly Joint Complaint. For example, the Joint Complaint alleges in Count III that IDT switched consumers without valid authorization or “slammed” some consumers. The Commission’s regulations provide for a refund to consumers that were slammed. See 52 Pa. Code § 57.177(b). The refund provision is in addition to other remedies available to the Commission such as civil penalties and suspension or revocation of the EGS’s license. 52 Pa. Code § 57.177(e). In promulgating these regulations, the Commission responded to IRRC’s concern regarding Commission authority to direct refunds as follows:

First, IRRC questions the Commission's statutory authority to implement and enforce the provision. IRRC views the refund provision as a penalty and notes that section 1928 of the Rules of Statutory Construction, 1 Pa.C.S. § 1928, requires the strict construction of the penal provisions. IRRC goes on to comment that nothing in the act permits the Commission to penalize a supplier by taking 3 months of revenue. Furthermore, it is IRRC's position that the Commission cannot impose such a penalty based on its general rulemaking authority.

We do not view the refund provision as a penalty. The provision is intended to provide relief to the adversely affected customer and make the customer whole. That is, the customer is being refunded the money paid or credited the amount owed for a service that was never requested. In addition, the Commission imposed a penalty for the unauthorized switch, it would be in the form of a fine under 66 Pa.C.S. § 3301.

Currently, under Chapter 56, the Commission routinely orders that refunds be given to customers in situations deemed appropriate. In the case of an unauthorized switch of an EGS, we believe the customer is due a refund for the unordered service so long as the customer's claim is filed promptly.

See Ensuring Customer Consent to a Change of Electric Supplier (Antislamming), 28 Pa. B. 5770, 5774-75 (1998). As such, Joint Complainants submit that the Commission has the authority to direct refunds should Joint Complainants prove their allegations of slamming in Count III in the Joint Complaint.

Further, Joint Complainants allege that IDT wrongly collected payment from consumers based on billed prices that were not consistent with IDT’s marketed and/or disclosed and agreed

upon prices. See gen'ly Joint Complaint at Counts I, II, V and VI. The Commission has stated that it has both the statutory authority and subject matter jurisdiction to preside over a consumer's complaint against an EGS that includes a request for a refund and fines. See e.g., Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Order (April 16, 2010) (Grmusa Order). In Grmusa, the complainant alleged that the EGS Dominion Retail enticed him to switch from Duquense Light to Dominion Retail with promises of 10% savings; the complainant asked for a refund and fines. Grmusa v. Dominion Retail, Inc., Docket No. C-2009-2124359, Initial Decision at 1 (Dec. 1, 2009) (Grmusa I.D.). The presiding officer granted the EGS's preliminary objections that challenged the Commission's jurisdiction over the EGS's pricing and private contract and the sufficiency of the complaint. Id. at 2-3, 7-9. The Commission reversed the Grmusa I.D. and remanded the matter for further hearings, 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.

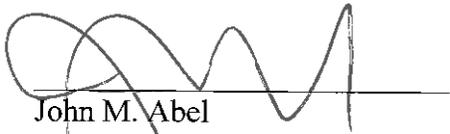
Grmusa Order at 5. The Commission has clearly and categorically recognized its authority and jurisdiction over complaints that request relief, including refunds, for alleged violations of an EGS's obligation to match the billed price to the marketed price. As such, Joint Complainants submit that the Commission has the authority to direct refunds should Joint Complainants prove their allegations that IDT's billed prices were not consistent with IDT's marketed and/or disclosed and agreed upon prices in Counts I, II, V and VI in the Joint Complaint.

The Joint Complainants submit that it has been clearly established that the Commission has the authority to direct an EGS to provide refunds. As stated by the ALJs in the August 20 Order: “[t]o hold otherwise would be contrary to the public interest” and would strip the Commission of “its ability to regulate EGSs for other purposes essential to the public interest” and would “create an unreasonable result.” August 20 Order at 15-16. As such, should the Commission determine to answer IDT’s material question, the Commission should answer IDT’s material question in the positive and find that it has the authority to direct IDT to make refunds to customers should it be found that IDT violated the Public Utility Code or the Commission’s regulations or Orders.

### III. CONCLUSION

WHEREFORE, Joint Complainants respectfully request that the Commission deny IDT's Petition for Interlocutory Appeal and Answer to a Material Question. If the Commission undertakes interlocutory review, however, Joint Complainants respectfully request that the Commission answer IDT's Material Question in the positive and find that the Commission possesses the authority to direct IDT to make refunds should Joint Complainants prove the allegations in the Joint Complaint.

Respectfully submitted,



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

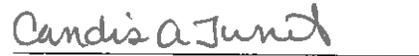
Margarita Tulman  
Deputy Attorney General  
PA Attorney I.D. 313514

Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
T: (717) 787-9707  
F: (717) 787-1190  
jabel@attorneygeneral.gov  
mtulman@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General  
Bureau of Consumer Protection

DATE: September 18, 2014  
190982



Candis A. Tunilo  
PA Attorney I.D. 89891

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

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

Counsel for:

Tanya J. McCloskey  
Acting Consumer Advocate

CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427657
v.	:	
	:	
IDT ENERGY, INC.,	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Brief of the Commonwealth of Pennsylvania and the Office of Consumer Advocate in Opposition to the Petition of IDT Energy, Inc. for Interlocutory Review and Answer to a Material Question, in the manner and upon the persons listed below:

Dated this 18th day of September 2014.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Michael Swindler, Esq.  
Stephanie M. Wimer, Esq.  
Wayne T. Scott, Esq.  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

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

Michael A. Gruin, Esq.  
Stevens & Lee  
17 N. 2<sup>nd</sup> Street, 16<sup>th</sup> Fl.  
Harrisburg, PA 17101

Sharon Webb, Esq.  
Office of Small Business Advocate  
Commerce Building, Suite 1102  
300 North Second Street  
Harrisburg, PA 17101

*Candis A Tunilo*

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

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

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