

STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com

December 10, 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 Reply Memorandum of Law Regarding the Admission of Pattern and Practice Evidence. Copies of the Memorandum have been served in accordance with the attached certificate of service. Please feel free to contact me if you have any questions or concerns.

Best Regards,

STEVENS & LEE



Michael A. Guin

Encl.

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

Philadelphia • Reading • Valley Forge • Lehigh Valley • Harrisburg • Lancaster • Scranton
Wilkes-Barre • Princeton • Cherry Hill • New York • Wilmington

A PROFESSIONAL CORPORATION

SL1 1339703v1 107998.00002

and 111.12, and Section 2807(d)(1) of the Public Utility Code.¹ The Complaint did not allege any specific incidents of violations against individual customers, but instead alleged generalized misconduct based upon a cursory review of Formal Complaints filed against IDT at the Commission, customer complaints filed against IDT with the OAG, and customer contacts to the OCA. All of the aforesaid customer complaints and contacts related to IDT's variable rate increase during the well-publicized 2014 Polar Vortex crisis, during which unprecedented increases in wholesale electricity prices caused variable-rate retail electricity prices to sharply spike.² At the time of the Polar Vortex, all of IDT's customers in Pennsylvania were on variable-priced enrollments for electric generation supply. As a result, many of IDT's customers saw their prices for electric generation supply increase in January and February 2014.³

The Complaint filed by the OCA and OAG attempts to make IDT a scapegoat for the unprecedented wholesale electricity prices that rippled throughout the industry in early 2014. In furtherance of that goal, the OCA and OAG have solicited customers who initially filed complaints solely about IDT's prices, and have shaped those complaints into testimony about IDT's marketing practices. The OCA and OAG now assert that they will be asking the Commission to conclude that IDT engaged in a "pattern and practice" of wrongdoing, and will be asking the Commission to make this sweeping conclusion based on hearsay evidence from a

¹ The Joint Complaint also alleges that IDT violated the Unfair Trade Practices and Consumer Protection Law (73 P.S. § 201-1, et seq.) ("UTCPL") and the Telemarketer Registration Act (73 P.S. § 2241, et seq.) ("TRA"). The Presiding Officers have already determined that the Commission lacks the jurisdiction to adjudicate claims under the UTCPL and the TRA in the August 20, 2014 Orders in the present case and in the parallel OCA/OAG complaint against Energy Service Providers Inc. at Docket No. C-2014-2427656.

² See generally, Answer and New Matter of IDT Energy, filed July 10, 2014, at pages 16-20. See also, e.g., *Petition of PPL Electric Utilities Corporation for Temporary Waivers from Certain Technical Requirements of 52 Pa. Code §§ 57.174 and 57.179*, Docket No. P-2014-2445072 (Order entered December 4, 2014, at pg. 2 ("As a result of these high energy wholesale market prices, many EGSs serving Pennsylvania customers with variable-price retail supply contracts needed to increase their retail prices to customers in order to recover the higher wholesale electric energy costs they incurred in January 2014."))

³ See generally, Answer and New Matter of IDT Energy, filed July 10, 2014,

discrete number of customers that represents a tiny fraction of IDT's Pennsylvania customer base.

The Joint Complainants have pre-served the written "testimony" of 216 customer witnesses. The "testimonies" in question are actually handwritten customer responses to a template questionnaire that was generated by the Joint Complainants and mailed to the customer-witnesses months after this litigation was commenced. The Joint Complainants solicited these questionnaire responses from the 216 customer-witnesses by way of a form letter mailed under the letterhead of the OAG.⁴ The customer responses to the questionnaires do not conform to the technical requirements for testimony set forth in 52 Pa. Code § 5.412, and in most cases they lack responses to many of the questions posited. The level of detail of the "testimonies" varies considerably. Some customers include fairly detailed recollections of their enrollment with IDT, some contain almost no information, and some acknowledge that the customer cannot recall various aspects of their enrollment. Many of the statements vaguely recount conversations which allegedly took place years ago.

IDT strongly refutes the allegations made in the written statements that were solicited by the OAG/OCA. Many of the allegations are contradicted by previous statements made by the customers, and IDT believes that many of the assertions made in these statements will be clarified, modified, or retracted outright during cross-examination. Therefore, it is absolutely critical that IDT be given the opportunity to cross-examine each and every one of the customer witnesses, if it so chooses. As explained below, the OCA/OAG proposal to allow unauthenticated witness statements to be admitted into the record and to form the basis for a "pattern and practice" of violations directly conflicts with the Commission's long-standing principles relating

⁴ A copy of the form letter is attached hereto Exhibit A hereto. The use and content of this letter are relevant to the analysis of the admissibility of the customer-testimonies, for reasons explained in the Argument section below.

to authentication of witness statements, cross-examination of witnesses, and the burden of proving violations by substantial evidence of record.

II. Summary of Argument

The Joint Complainants' Memorandum of Law implicates two overlapping, but distinct, evidentiary issues regarding the written customer statements upon which the Joint Complainants seek to rely to prove their case. First, the Joint Complainants' Memorandum addresses the question of admissibility of the customer statements, and whether the statements may be admitted into the evidence without authentication and without cross-examination. As set forth below, it is absolutely clear that there is no legal basis for admitting the statements into evidence without authentication and without cross-examination, and that basing findings of law or fact on such unauthenticated statements would constitute reversible error.

Second, the Memorandum addresses the use of the 216 customer statements to support a finding of a "pattern and practice" of violations by IDT, beyond any violations specifically alleged by the statements themselves. This issue goes to the Complainants' burden of proof and the amount of evidence upon which the Commission must rely in order to find that a violation has occurred. As set forth below, it is clear that allegations made by customers regarding their specific enrollments or dealings with an Electric Generation Supplier ("EGS") cannot form the basis for a finding of violations related to other unspecified customers' enrollments or dealings with that EGS.

In an apparent attempt to minimize the scrutiny applied to their solicited customer statements, the Joint Complainants are asking the Commission to disregard the Public Utility Code, its own regulations, and decades of relevant precedent and instead be governed by the rules that apply to Federal District Courts adjudicating FTC consumer-protection prosecutions and/or Common Pleas Courts adjudicating class action suits. The Joint Complainants candidly

admit there is no Commission precedent for the evidentiary interpretations that they espouse, and they cannot point to a single Commission or Pennsylvania Appellate Court decision which even suggests that the Commission is the appropriate forum for a hearsay-based “pattern and practice” prosecution of the kind described in their Memorandum. The Joint Complainants’ position on the admission of hearsay evidence must be rejected because (a) The Pennsylvania Supreme Court has explicitly not adopted the residual exception to hearsay upon which the Joint Complainants rely, (b) the Commission has likewise never adopted the residual exception and refrains from making conclusions of fact based on hearsay, (c) even Federal Courts are very hesitant to apply the residual exception, and have rejected its use in cases when invoked for the same reasons that the Joint Complainants seek to invoke it here, (d) the FTC cases cited by the Joint Complainants to justify the use of the residual exception are not relevant to Pennsylvania proceedings and are easily distinguishable from the case at bar, and (e) the geographic efficiency and other justifications for use of the residual exception are not present in this case.

III. ARGUMENT

A. Written customer statements cannot be admitted into the record without authentication and cross-examination

The Joint Complainants argue that written consumer statements should be admitted into the record without authentication and without cross-examination. The Joint Complainants’ legal rationale for this position is fatally flawed and without precedent in Pennsylvania, and therefore must be rejected.

Unauthenticated written statements are hearsay

Unauthenticated written statements such as those being proffered by the Joint Complainants constitute inadmissible hearsay, plain and simple. The “testimonies” proffered by the Joint Complainants are written statements, other than those made by a declarant while

testifying at trial, that are being offered into evidence to prove the truth of the matters asserted therein. As such, they constitute hearsay under Pennsylvania Rule of Evidence 801.

Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay into evidence. It has long been recognized in Pennsylvania that hearsay rules are not mere “technical rules of evidence” but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. See, e.g., *Loudon v. Viridian Energy*, PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012), *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, PA PUC No. C-2014-2408057 (Order entered July 30, 2014). A finding based solely on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d. 366 (Pa. Cmwlth 1976).

Rule 901 of the Pennsylvania Rules of Evidence provides for the necessity of authentication of documentary evidence. Under the Commission’s regulations, written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony is called to authenticate the testimony as a witness with knowledge of the authenticity of the document pursuant to P.R.E. 901(b)(1). Without such authentication, the witness statements such as the ones proffered by the Joint Complainants are inadmissible as hearsay.

Pennsylvania does not recognize the residual exception to hearsay

The Joint Complainants’ Memorandum of Law appears to acknowledge that the written witness statements constitute hearsay, but argue that the “residual exception” to the hearsay rule permits the statements to be admitted into the record without authentication or cross-examination. The “residual exception” is the sole legal basis offered by the Joint Complainant’s

in support of their argument for the admission of the written witness statements without authentication or cross-examination. In furtherance of this argument, the Joint Complainant's point to a number of Federal Appellate cases involving prosecutions by the Federal Trade Commission ("FTC") in which the courts allowed the admission of consumer affidavits into the record without cross-examination. In all of those cases, the courts permitted admission of the affidavits pursuant to Federal Rule of Evidence 807 (formerly F.R.E. 803(24)), which codifies the "residual exception" to the hearsay rule. The Joint Complainants' argument, however, suffers from a fatal defect. The Joint Complainants fail to recognize **that the Pennsylvania Supreme Court has expressly chosen not to adopt F.R.E. 807 and its "residual exception" to hearsay.** See P.R.E. 804(b)(5) and 807 and *Commonwealth v. Stallworth*, 566 Pa. 349, 781 A.2d 110, 128, n.2 (2001) ("Pennsylvania has not adopted...the residual exception). Indeed, *none* of the cases cited by the Joint Complainants involved application of the rules of evidence that apply in the Commonwealth of Pennsylvania, and *the fact is that no court or administrative agency in Pennsylvania has ever held that the residual exception applies in Pennsylvania, even in informal administrative hearings.*⁵

Perhaps recognizing the weakness of their argument that the customer statements qualify for an exception to hearsay, the Joint Complainants go on to argue that the customer statements can be admitted without cross-examination and relied upon by the Commission notwithstanding the fact that they constitute hearsay. The Joint Complainants in effect argue that because the Commission is not bound by the technical rules of evidence, the Commission should ignore the Supreme Court's express rejection of the residual exception and rely on hearsay evidence to decide this case. But the Commission has routinely and consistently rejected this

⁵ The Pennsylvania Rules of Evidence contain other enumerated exceptions to the prohibition on hearsay, but none of those exceptions apply to the written customer statements that the Joint Complainants seek to admit in this case, and the Joint Complainants do not assert that any other exceptions would apply.

interpretation. “[a]lthough the Pennsylvania Rules of Evidence are relaxed in an administrative proceeding, crucial findings of fact may not be established solely by hearsay evidence.” *Pa. P.U.C., Bureau of Investigation & Enforcement v. Yellow Cab Co. of Pittsburgh*, No. 2012-2249031, 2013 WL 5912555 (Pa. P.U.C. Oct. 8, 2013).

The circumstances permitting use of the residual exception are not present

As set forth above, if the Commission would rely on the residual exception to admit hearsay evidence, it would be the first adjudicatory body in the Commonwealth of Pennsylvania to do so. But even if the Commission would have a relevant Pennsylvania legal precedent for applying the residual exception in this case, it must be noted that Federal Courts have expressed serious skepticism towards the residual exception, and have emphasized that the exception can be applied only in very limited circumstances:

“Rule 807 “is to be utilized only rarely, and is not to be taken as a ‘broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). In order to be admitted under Rule 807, there must be a “clear basis of trustworthiness” to support the out-of-court statement. The burden is on the party seeking to invoke the residual exception to clearly demonstrate the existence of the requisite guarantees of trustworthiness.” *Reassure Am. Life Ins. Co. v. Warner*, 2010 WL 4782776, *2 (S.D.Fla.2010) (Martinez, J.) (quoting *NLRB v. United Sanitation Serv.*, 737 F.2d 936, 941 (11th Cir.1984); *United States v. Mathis*, 559 F.2d 294, 299 (5th Cir.1977); and *In re Terazosin Hydrochloride Antitrust Litigation*, No. 99–MDL–1317, 2005 WL 5955699, at *5 (S.D.Fla.2005).

In support of their position, the Joint Complainants point to several Federal cases in which the courts admitted customer affidavits pursuant to the residual exception, but the circumstances underlying those rulings were far different than the ones present in this case. The Joint Complainants place great emphasis on the *Figgie* case from the U.S. Court of Appeals for the Ninth Circuit. (*FTC v. Figgie International, Inc.*, 994 F. 2d 595 (9th Cir. 1993). In *Figgie*, the Ninth Circuit admitted letters that consumers provided at the time they purchased the product at issue. The letters were admitted not to prove liability or wrongdoing by Figgie, but instead were admitted during the remedy phase of the case in order to establish the prices that customers paid

for Figgie's product. In the *Figgie* case, the letters were sent by consumers without solicitation by the FTC. By contrast, the Joint Complainants in the present case actively solicited their customer statements using template questionnaires which were specifically framed to elicit responses sought by the Joint Complainant's in furtherance of their theory of the case. The fact that the statements were solicited using leading questions about events that took place many months or years prior distinguishes the statements from those used in *Figgie*, and calls into question the trustworthiness of the statements. The Joint Complainants offer nothing to guarantee to the trustworthiness of these hearsay statements, except by pointing to other similarly elicited hearsay statements as "corroboration". Respectfully, this circular rationale falls far short of the "guarantee of trustworthiness" required by the *Figgie* court and the other courts referenced by the Joint Complainants. The OCA and OAG have not offered any guarantees of trustworthiness that justify admitting the statements into evidence without authentication or cross-examination.

The other FTC cases referenced by the Joint Complainants –*Amy Travel Service Inc.*⁶ from the 7th Circuit and *Kitco*⁷ from the Minnesota District Court – are similarly distinguishable from the present case. *Amy Travel* involved the admission of consumer complaint letters to demonstrate the requisite customer harm for restitution, not defendant liability, and a key factor relied upon by the court to admit the letters was the fact that the customer-affiants were located throughout the country, unlike in this case. *Kitco* also involved the admissibility of customer affidavits to establish the total amount of customer injury, not liability, and the court ruled that it would be too expensive and time consuming to call witnesses from all parts of the United States merely to establish total consumer injury. In the present case, all of the customer witnesses reside in Pennsylvania, and accommodations have been made for them to testify by telephone, so

⁶ *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 576 (7th Cir. 1989)

⁷ *FTC v. Kitco of Nevada, Inc.*, 612 1282, 1294 (D. Minnesota 1985)

no unreasonable efforts would need to be undertaken to obtain more probative evidence, i.e., authentication of the written testimony followed by cross examination.

It also must be noted that numerous Federal Courts have rejected the FTC's attempts to admit customer letters under the residual exception in circumstances very similar to those present in the case at bar. For instance, in *FTC v. Washington Data Resources*, 2011 WL 2669661 (M.D. Fla. July 7, 2011), the U.S. District Court for the Middle District of Florida rejected the FTC's attempts to introduce letters which were obtained by way of outreach by the FTC to certain consumers to procure a declaration for the purpose of litigation, much like in the present case. Furthermore, the Court in *Washington Data Resources* noted that the statements were not trustworthy because the FTC sought to use them to establish more than merely the extent of consumer injury. Rather, the FTC offered them as "substantive evidence of the defendants' alleged deceptive statements and marketing material, the defendants' course of dealing with a consumer, and the defendants' failure to deliver promised services" – which are the exact same reasons that the Joint Complainants seek to offer the customer statements in the present case.

State Courts have also rejected attempts by an Attorney General to introduce customer affidavits under the residual exception in consumer protection proceedings because of circumstances that are nearly identical to those present in the case at bar. In *People v. Shifrin*, -- P.3d --, 2014 WL 785220 (Colo. App. Feb. 27, 2014), the Colorado Court of Appeals ruled that customer affidavits were not admissible because:

- The affiants knew that litigation was pending. (citing *Fed. Trade Comm'n v. E.M.A. Nationwide, Inc.*, No. 1:12-cv-2394, 2013 WL 4545143, at *2 (N.D. Ohio Aug. 27, 2013) (excluding consumer complaints under Rule 807 where "the complaints list events that, perhaps not created in anticipation of litigation, were created with knowledge that litigation was possible").
- The affiants stood to receive substantial restitution based on their affidavits. (Contrasting *Figgie Int'l*, 994 F.2d at 608 (consumer complainants "had no motive to lie to the FTC regarding the price they paid for their heat detectors"), with

E.M.A. Nationwide, 2013 WL 4545143, at *2 (“consumers often made the complaints with hopes of receiving some type of refund or other financial benefit”).

- The affidavits were not written spontaneously or independently, but were obtained by representatives of the Attorney General's office. (citing *Iams Co. v. Nutro Prods., Inc.*, No. C-3-00-566, 2004 WL 5780001, at *5 (S.D.Ohio July 26, 2004) (mystery shopper reports were unlike the complaint letters in *Figgie Int'l*, 994 F.2d at 608, which “were sent independently to the FTC from unrelated members of the public”).
- The Attorney General's office procured the affidavits to further its position in the litigation. (citing *Fed. Trade Comm'n v. Wash. Data Res.*, No. 8:09-cv-2309-T-23TBM, 2011 WL 2669661, at *5 (M.D.Fla. July 7, 2011) (“[T]he declarations proffered by the Commission derive from the Commission's contacting certain consumers and procuring a declaration for the purpose of litigation.”).

All four of the above-referenced factors are present in the case at bar. In short, even if Pennsylvania did recognize the “residual exception” (which it clearly does not), the narrow circumstances permitting admission of evidence pursuant to the residual exception are not present in this case. For all of the reasons set forth above, there is no legal basis to admit unauthenticated written customer statements into the record without cross-examination, and the Joint Complainants’ proposal to do so must be rejected.

B. Any findings of violation against IDT must be based on facts which appear in the record

The Joint Complainants’ Memorandum of Law provides an extended analysis of the use of customer affidavits in FTC “pattern and practice” consumer protection prosecutions in various Federal District Courts. This analysis is so completely irrelevant to the case at bar, and so distracts from the appropriate principles governing this proceeding, that it is necessary to revisit the baseline legal standards that have governed the Commission adjudication of Complaints for decades.

A Complaint to the Commission must set forth an act or thing done or omitted by a regulated entity, in violation of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission. 66 Pa. C.S. § 701. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950). The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528 (1980), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

Furthermore, the decision of the Commission must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare, White Haven Center*, 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984).

In accordance with these well-settled principles, for each violation that the Joint Complainants seek to prove against IDT, they must submit substantial evidence to support a finding that IDT committed that violation. Neither the Public Utility Code, nor the Commission’s regulations, nor the Commission’s Orders permit the Commission to conclude that a regulated entity has committed a violation without proof that such a violation occurred.

The Joint Complainants' "pattern and practice" theory is nothing more than an attempt to achieve findings of violations beyond which they are able to prove with evidence in the record. The Joint Complainants readily admit that there is no precedent for the Commission to find that a regulated entity engaged in a "pattern and practice" of violations by extrapolating the "pattern and practice" from a discrete number of individual customer testimonies.⁸ Indeed, the Joint Complainants cannot point to a single example of the Commission making such a finding of a "pattern and practice" of violations against a Respondent.

In support of their position that the Commission can base a determination of liability on evidence from "a representative sample of consumers", the Joint Complainants make the novel (to put it mildly) argument that the Commission should unilaterally adopt the practices of Common Pleas Courts in adjudicating civil class-action civil lawsuits, as outlined in Rules 1701-1717 of the Pennsylvania Rules of Civil Procedure.⁹ The Joint Complainants fail to provide any legal authority whatsoever for the Commission to take such an unprecedented step, other than to argue that the use of sampling evidence is "commonplace in Pennsylvania jurisprudence". It is debatable how "commonplace" the use of sampling evidence is to provide liability in Pennsylvania. But there can be no debate that the Pennsylvania Public Utility Commission is not authorized to unilaterally adopt the processes and evidentiary procedures that have been established for class action litigation in Pennsylvania. The Pennsylvania Rules of Civil Procedure that apply to class action lawsuits plainly and obviously do not apply to Commission proceedings, and cannot be used as a basis to rewrite longstanding Commission standards regarding the admissibility of evidence and the burden of proof. Rules 1701-1714 of Pennsylvania Rules of Civil Procedure are narrowly tailored to apply only to class actions, and

⁸ See OCA/OAG Joint Memorandum of Law, at p. 3 ("This type of case involving pattern of, inter alia, deceptive and misleading conduct and large volumes of consumer complaints and testimonies is of first impression to this Commission.")

⁹ See Joint Complainants' Memorandum of Law, at footnote 4

set forth a detailed procedural process for pleadings, class certification, definition of the class, notice to potential class members, conduct of the hearings, and disbursement of monetary awards. Obviously, none of these processes have been followed to date in the present case. The Explanatory Comments to the Rules state that the rules governing class actions “are the culmination of more than a two year study of a vast array of resource material embodying practically every point of view.” The Rules of Civil Procedure plainly do not indicate that those rules apply to Commission proceedings, and likewise, the Commission’s regulations plainly do not adopt the Rules of Civil Procedure for class actions.

In short, to the extent that the Joint Complainants intend to prove multiple violations by IDT, it is incumbent upon the Joint Complainants to submit substantial evidence of each and every specific violation alleged. The Joint Complainants cannot expect to prove a discrete number of violations and then ask the Commission to speculate that more violations must have occurred. Such a request would directly violate the bedrock principle that Commission findings cannot be based on a “mere trace of evidence or a suspicion of the existence of a fact sought to be established”. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); and *Murphy v. Comm., Dept. of Public Welfare*, , 85 Pa. Cmwlth Ct. 23, 480 A.2d 382 (1984).

The Commission has never seen fit to find violations or assess civil penalties based on assumptions about how customers might have been affected by a utility’s actions, without any evidence of violation against specific customers. Section 69.1201 of the Commission’s regulations outlines the specific factors and standards that the Commission is to use in evaluating cases involving violations of the Public Utility Code and the Commission’s regulations. 52 Pa. Code § 69.1201(c)(5) authorizes the Commission to consider the number of customers affected

by a violation in determining an appropriate sanction for the violation. The Commission routinely considers the number of customers affected when determining an appropriate civil penalty for proven violations, but the Commission has expressly refrained from speculating about the number of possibly affected customers if there is no evidence in the record to demonstrate how many customers were in fact affected by a violation. See, e.g., *Eckroth v. Verizon Pa. Inc.*, Docket No. C-2011-2279168 (Order entered April 18, 2013) (“In this case, the number of customers affected by Verizon PA’s actions is unknown. Although the Complainant testified that his neighbors experienced similar problems and that they switched to RCN as a result, we find that this testimony is hearsay and may not be relied upon.”)

In sum, the Formal Complaint in this matter was based in large part “upon information and belief”, because the Joint Complainants’ allegations of wrongdoing by IDT were (and are) merely speculative. It is certainly permissible to make allegations “upon information and belief” in the filing of a Formal Complaint to the Commission. But in order to meet their burden of proof, the Joint Complainants must produce substantial evidence to support a finding of each violation alleged against IDT. The Joint Complainants have not provided any legal basis for the Commission to modify this longstanding statutorily mandated principle.

C. The Joint Complainants’ vague “public policy” arguments do not trump IDT’s due process rights

The Joint Complainants in this case seek revocation or suspension of IDT’s license. It is apparent that the Joint Complainants wish to achieve that result based on its unprecedented “pattern and practice” theory and based on hearsay evidence. The Joint Complainants cite “solid public policy” reasons for allowing them to achieve findings of violations against IDT without individual proof of each violation. See Joint Complainants’ Memorandum of Law, at p. 7.

Respectfully, the Joint Complainants vague “public policy” argument for modifying the rules of evidence and their burden of proof cannot be used as a basis to violate IDT’s due process rights. “[G]overnment licenses to engage in a business or occupation create an entitlement to partake of a profitable activity, and therefore, are property rights.” *Philadelphia Entertainment and Development Partners, L.P. v. Pennsylvania Gaming Control Bd.*, 34 A.3d 261 (Pa.Cmwlth.2011), citing *City of Phila. Bd. of License & Inspection Review v. 2600 Lewis, Inc.*, 661 A.2d 20, 22 (Pa.Cmwlth.1995) and *Young J. Lee, Inc. v. Dep’t of Revenue, Bureau of State Lotteries*, 504 Pa. 367, 474 A.2d 266 (1983). The principle that due process is fully applicable to adjudicative hearings involving substantial property rights before administrative tribunals is well established. See *Soja v. Pennsylvania State Police*, 455 A.2d 613, 500 Pa. 188 (1982), citing *Conestoga Nat’l Bank of Lancaster v. Patterson*, 442 Pa. 289, 275 A.2d 6 (1971); *Wiley v. Woods*, 393 Pa. 341, 141 A.2d 844 (1958); *Commonwealth ex rel. Chidsey v. Mallen*, 360 Pa. 606, 63 A.2d 49 (1949); *Pennsylvania State Athletic Comm. v. Bratton*, 177 Pa.Super.Ct. 598, 112 A.2d 422 (1955).

In *Soja*, the Pennsylvania Supreme Court noted that the prerequisites of due process have been frequently articulated as follows:

“[The] essential elements [of due process] are ‘notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause’: 12 Am.Jur. § 573, pp. 267, 268; *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 373 Pa. 105, 109, 95 A.2d 664; *Carter v. Kubler*, 320 U.S. 243, 88 L.Ed. 26, 64 S.Ct. 1; *Ohio Bell Telephone v. Public Utilities Commission of Ohio*, 301 U.S. 292, 81 L.Ed. 1093, 57 S.Ct. 724; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U.S. 88, 57 L.Ed. 431, 33 S.Ct. 185; *Jordan v. American Eagle Fire Insurance Company* [83 U.S.App.D.C. 192], 169 F.2d 281, 288.” Moreover, “[i]n almost every setting where important decisions turn on questions of fact, due process requires **an opportunity to confront and cross-examine adverse witnesses.**” *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). (Emphasis added).¹⁰

¹⁰ *Soja v. Pennsylvania State Police*, 455 A.2d 613, 615, 500 Pa. 188, 194 (1982)

The *Soja* court when on to cite the United States Supreme Court's explanation of importance of cross-examination to due process:

“Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictive-ness, intolerance, prejudice or jealousy. We had formalized these protections in the requirements of confrontation and cross examination. They have ancient roots.” *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).¹¹

Because the Joint Complainants are seeking severe sanctions against IDT, up to and including revocation of IDT's license, IDT is entitled to full due process, including the rights of confrontation and cross-examination. The Joint Complainants' have simply not submitted any legal or public policy basis for altering the Commission's long-standing principles relating to authentication of witness statements, cross-examination of witnesses, and the burden of proving violations by substantial evidence of record.

III. CONCLUSION

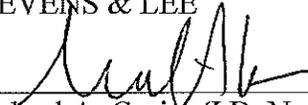
The Joint Complainants' Memorandum is troubling in the extent to which it would trample IDT's due process rights in furtherance of the goal of making IDT a scapegoat for the Polar Vortex. As set forth above, the Joint Complainants are asking to the Commission to take the unprecedented step of extrapolating a wide-ranging “pattern and practice” of wrongdoing against IDT based on a limited number of customer statements representing a tiny fraction of IDT's customer base. And, even more egregiously, the Joint Complainants are asking the Commission to make such an unprecedented finding based largely on *hearsay evidence*, which the Commission never has done, by relying on a hearsay exception that no Court or agency in

¹¹ *Id.*

Pennsylvania has ever recognized. The Joint Complainants have provided no cogent rationale whatsoever to deviate from the Commission's longstanding adjudicatory standards which forbid making factual findings based on hearsay and which require every violation to be proven by the preponderance of substantial evidence in the record.

Respectfully submitted,

STEVENS & LEE



Michael A. Gruin, (I.D. No. 78625)
17 N. 2nd St., 16th Fl
Harrisburg, PA 17101
Tel. (717) 255-7365
Fax (610) 988-0852
COUNSEL FOR IDT ENERGY, INC.

DATE: December 10, 2014

DATE

Bureau of Consumer Protection—Harrisburg Office
15th Floor, Strawberry Square, Harrisburg, Pennsylvania 17120
Telephone: 717-787-9707 or 1-800-441-2555
Facsimile: 717-705-3795

[Consumer Name]
[Address 1]
[City], [State] [Zip Code]

Re: Consumer Testimony in OAG & OCA v. IDT Energy, Inc.

Dear [Title] [Consumer Last Name]:

The Office of Attorney General's Bureau of Consumer Protection (BCP) and the Office of Consumer Advocate (OCA) filed a Formal Complaint against [Respondent Name] at the Pennsylvania Public Utility Commission. We are contacting you because you filed a complaint with the BCP or contacted the OCA about your problems with [Respondent]. We now need your written testimony to submit in that case.

You can help us – and other consumers -- by providing your story in writing in a way that we may use it as evidence. Please answer the questions in the attached form as completely as possible, even if you have already provided us with the information. We may then use your information by asking that it be included in the record to support our claims. If the other parties or the judges have follow-up questions for you, we may arrange to have you available by telephone or in person, at a location near you, to testify to additional information. We will contact you in late October, if this becomes necessary. Please complete and mail the enclosed form using the self-addressed stamped envelope **on or before Friday, September 26, 2014**.

BCP, by law, cannot act as your private individual counsel, but can answer questions about this case and your involvement. Please call (717) 787-9707 or (800) 441-2555 if you have questions. Regardless of the ultimate outcome, we greatly appreciate concerned citizens such as you for making the effort to help us and other affected Pennsylvania consumers.

Very truly yours,

Margarita Tulman
Deputy Attorney General

Enclosures



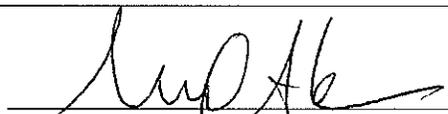
CERTIFICATE OF SERVICE

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

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

Candis A. Tunilo, Esq. Kristine Robinson, Esq. Office of Consumer Advocate 555 Walnut Street Forum Place, 5 th Floor Harrisburg, PA17101	Sharon Webb, Esq. Office of Small Business Advocate 300 North 2nd Street - #1102 Harrisburg, PA 17101
John M. Abel, Esq. Senior Deputy Attorney General Margarita Tulman, Esq. Deputy Attorney General Bureau of Consumer Protection Office of Attorney General 15 th Floor Strawberry Square Harrisburg, PA 17120	Wayne Scott, Esq. Michael Swindler, Esq. Stephanie Wimer, Esq. Kourtney Myers, Esq. Bureau of Investigation & Enforcement Pennsylvania Public Utility Commission Commonwealth Keystone Building 400 North Street Harrisburg, PA 17120

December 10, 2014


Michael A. Gruh, Esq.