

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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January 26, 2015

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 Second Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, 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	:	

SECOND PREHEARING MEMORANDUM
OF JOINT COMPLAINANTS COMMONWEALTH
OF PENNSYLVANIA AND THE OFFICE OF CONSUMER ADVOCATE

Pursuant to Section 333 of the Public Utility Code, 66 Pa. C.S. § 333, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), provide the following information:

I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Public Utility Commission (Commission) pursuant to, *inter alia*, the Public Utility Code, 66 Pa. C.S. Ch. 28, and the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111. The Joint Complaint includes seven separate counts and alleges that IDT Energy, Inc. (Respondent or 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 (TRA). With respect to relief, the Joint Complainants request that the Commission find, *inter alia*, that Respondent violated the Public Utility Code 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 Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate (OSBA) intervened in the proceeding.

On July 10, 2014, IDT filed Preliminary Objections to the Joint Complaint and an Answer with New Matter to the Joint Complaint generally denying the alleged violations. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, Administrative Law Judges Joel H. Cheskis and Elizabeth Barnes (ALJs) granted in part and denied in part IDT's Preliminary Objections. Specifically, the ALJs found: 1) that the Commission lacks jurisdiction to hear complaints under the TRA even though compliance with these Acts is required by the Commission regulations; 2) that the Commission lacks jurisdiction to determine if the prices charged to customers conformed to the disclosure statement provided to the customer; and 3) that the Commission lacks jurisdiction to consider the equitable remedy of restitution, but could order refunds pursuant to 66 Pa. C.S. § 1312. On September 8, 2014, Joint Complaints filed a Petition for Interlocutory Review and Answer to

Material Questions with the Commission.¹ Specifically, Joint Complaints sought for the Commission to answer the following questions: (1) 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 these laws—have been violated; (2) Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing; and (3) Does the Commission have the authority and jurisdiction to order equitable remedies including restitution. Also on September 8, 2014, IDT filed a Petition for Interlocutory Review and Answer to Material Question with the Commission seeking for the Commission to answer whether it has the authority under Section 1312 of the Public Utility Code to order electric generation suppliers to issue refunds to customers. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and IDT filed a Brief in Opposition. Also on September 18, 2014, IDT filed a Brief in Support of its Material Question and Joint Complainants filed a Brief in Opposition to IDT's Material Question. On July 30, 2014, Joint Complainants filed a Reply to IDT's New Matter.

On August 25, 2014, an initial Prehearing Conference was convened and a litigation schedule was adopted for the submission of consumer testimony. Pursuant to the litigation

¹ On September 8, 2014, Joint Complainants also filed Petitions for Interlocutory Review and Answers to Material Questions in three other cases. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655 (Blue Pilot); Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, Docket No. C-2014-2427656; Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659.

schedule, on October 31, 2014, Joint Complainants served consumer direct testimony from over 200 consumer witnesses. Hearings for cross examination of the consumer witnesses were initially scheduled for December 8-12, 2014, and a Further Prehearing Conference to determine the remainder of the litigation schedule was scheduled for December 30, 2014.

Pursuant to the ALJs' direction during a conference call with the parties on October 31, 2014, the Joint Complainants filed a Memorandum of Law Regarding the Admission of Pattern and Practice Evidence November 25, 2014. On November 26, 2014, IDT filed a Motion for Continuance of the evidentiary hearings. IDT's Motion for Continuance was granted by Order dated December 9, 2014, and the evidentiary hearings were rescheduled for February 17-20, 2015. On December 10, 2014, IDT filed a Reply Memorandum of Law Regarding the Admission of Pattern and Practice Evidence.

On December 18, 2014, the Commission issued an Order (December 18 Order) in which it addressed the Petitions for Interlocutory Review and Answer to Material Question(s) filed by the Joint Complainants and IDT. The Commission determined that while it does not have the authority under Section 1312 of the Public Utility Code to order electric generation suppliers to issue refunds to customers, the Commission can direct EGSs to issue refunds for "slamming" or direct refunds when a customer has, otherwise, been switched to an EGS without the customer's consent pursuant to 52 Pa. Code § 57.177(b). December 18 Order at 16-17. Additionally, the Commission noted that it has plenary authority under 66 Pa. C.S. § 501 to direct an EGS to issue a credit or refund for an over bill. Id. at 17. The Commission further stated:

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission's Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission's Regulations, including the Chapter 54 billing and disclosure regulations. Having the authority to order EGS

credits and/or refunds carries out these statutorily-prescribed consumer protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission's Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission's Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act.

Id. at 17-18. (Internal footnotes omitted.)

Additionally, the Commission determined that while it does not have the authority or jurisdiction to determine whether a violation of the TRA has occurred, it does have the authority and jurisdiction to determine whether IDT has violated its regulations at 52 Pa. Code § 111.10, which requires EGSs to comply with the TRA provisions, except for the registration requirement. Id. at 23.

The Commission also determined that it has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing, but it does not have the authority and jurisdiction to order equitable remedies including restitution. Id. at 24-26.

On January 9, 2015, the ALJs issued a Further Prehearing Conference Order, rescheduling the Further Prehearing Conference for January 27, 2015. Joint Complainants submit this Second Prehearing Memorandum accordingly.

II. ISSUES

A. Misleading and Deceptive Promises of Savings, Welcome Letter and Advertisements

Whether IDT engaged in misleading and deceptive conduct in violation of the Public Utility Code, 66 Pa. C.S. § 2809, and the Commission's regulations at 52 Pa. Code Chapters 54 and 111. See Joint Complaint at Counts I and II. See also December 18 Order at 24, FN 16.

B. Slamming

Whether IDT engaged in slamming in violation of the Public Utility Code, 66 Pa. C.S. § 2807(d)(1), and the Commission's regulations, 52 Pa. Code §§ 54.42(a)(9), 54.43(f) and 111.12(d)(1). See Joint Complaint at Count III.

C. Handling of Customer Complaints

Whether Respondent failed to adequately handle customer complaints and use good faith, honesty and fair dealing with Respondent's residential customers with complaints in violation of the Commission's regulations at 52 Pa. Code Ch. 56 and IDT's Licensing Order, License Application of IDT Energy, Inc. for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as a Supplier of Retail Electric Power, Docket No. A-2009-2134623, Order (Jan. 15, 2010). See Joint Complaint at Count IV.

D. Pricing Information and Disclosure Statement

Whether Respondent's Disclosure Statement complies with the Public Utility Code, 66 Pa. C.S. § 2809, and the Commission's regulations at 52 Pa. Code §§ 54.5(c), 54.43(1), 54.43(f) and 111.12(d)(1). Whether IDT's prices charged in early 2014 conformed to IDT's variable rate pricing provision in its Disclosure Statement in compliance with the Public Utility Code, 66 Pa. C.S. § 2809, and the Commission's regulations at 52 Pa. Code §§ 54.4 and 54.5. See Joint Complaint at Counts V and VI and App. B and C. See also December 18 Order at 24-25.

E. Failure to Comply with the Commission's Regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a).

Whether Respondent violated and continues to violate the Commission's regulations at 52 Pa. Code §§ 54.43(f) and 111.10(a).

F. Remedies

By way of remedies for Respondent's violations of the Public Utility Code and the Commission's regulations and Orders, Joint Complainants seek refunds to customers, civil penalties and if warranted, suspension or revocation of Respondent's license. Further, Joint Complainants request that the Commission order IDT to discontinue the prohibited conduct and implement procedures to ensure compliance with all applicable laws and the Commission's regulations and Orders.

III. SERVICE ON JOINT COMPLAINANTS

As identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, the OCA will be represented in this case by Candis A. Tunilo and Kristine E. Robinson, Assistant Consumer Advocates. Copies of all documents should be served on the OCA as follows:

Candis A. Tunilo
Kristine E. Robinson
Assistant Consumer Advocates
Office of Consumer Advocate
5th Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101-1923
Telephone: (717) 783-5048
Facsimile: (717) 783-7152
E-mail: ctunilo@paoca.org
krobinson@paoca.org

The BCP will be represented in this case by John M. Abel and Margarita Tulman, Deputy Attorneys General. Copies of all documents should be served on the BCP as follows:

John M. Abel
Senior Deputy Attorney General
Margarita Tulman
Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection
15th Floor, Strawberry Square
Harrisburg, PA 17120
Telephone: (717) 787-9707
Facsimile: (717) 787-1190
E-mail: jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

IV. DISCOVERY MODIFICATIONS

Joint Complainants do not propose any modifications to the discovery rules at this time.

V. SETTLEMENT

The parties are engaged in ongoing settlement discussions. The Joint Complainants are willing to continue to engage in settlement discussions in this matter.

VI. PROPOSED SCHEDULE

Joint Complainants and IDT have reached an agreement for the second half of the litigation schedule as follows:

Direct Testimony - April 21, 2015

Rebuttal Testimony- June 5, 2015

Surrebuttal Testimony- July 1, 2015

Hearings- July 15-17, 2015 (tentative)²

I&E and OSBA have indicated their agreement with this schedule. Joint Complainants will work with the ALJs and the parties to determine the dates for filing briefs in this proceeding and submit that these dates be determined at the conclusion of the hearings.

VII. WITNESSES

On October 31, 2014, Joint Complainants served 215 pieces of testimony from consumer witnesses. Additionally, as identified in Joint Complainants' Prehearing Memorandum dated August 19, 2014, the Joint Complainants intend to present the direct, rebuttal, and surrebuttal testimonies, as may be necessary, of Dr. Steven L. Estomin and Ms. Barbara R. Alexander. These witnesses will present expert testimony in written form and may also attach various exhibits, documents, and explanatory information which will assist in the presentation of the Joint Complainants' case. Their contact information is as follows:

Steven L. Estomin, Ph.D.
Exeter Associates, Inc.
10480 Little Patuxent Parkway
Suite 300
Columbia, Maryland 21044
E-mail: sestomin@exeterassociates.com

² IDT continues to work on confirming the availability of its witnesses for these dates.

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, ME 04364
E-mail: barbalex@ctel.net

In order to expedite the resolution of this proceeding, the Joint Complainants continue their request that copies of all interrogatories, testimony, and answers to interrogatories be mailed directly to the witnesses identified above as well as mailing a copy to counsel for the Joint Complainants.

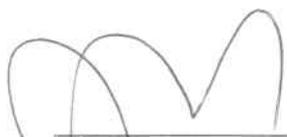
Also as identified Joint Complainants' Prehearing Memorandum dated August 19, 2014, Joint Complainants also intend to present the direct, rebuttal, and surrebuttal testimonies, as may be necessary, of:

Heather M. (Weaver) Troutman
Consumer Protection Agent
15th Floor, Strawberry Square
Harrisburg, PA 17120
E-mail:³ htroutman@attorneygeneral.gov

Joint Complainants will present Ms. Troutman's testimony in written form, and she may attach various exhibits, documents, and explanatory information, which will assist in the presentation of the Joint Complainants' case.

³ Please note Ms. Troutman's email address has changed.

Respectfully Submitted,



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

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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, Second Prehearing Memorandum of Joint Complainants Commonwealth of Pennsylvania and the Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 26th day of January 2015.

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