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February 27, 2015

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

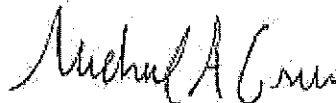
**RE: Joseph J. Woitko, Jr. v. IDT Energy Inc.**  
**Docket No. C-2014-2413734**

Dear Secretary Chiavetta:

Enclosed for filing please find the Memorandum of Law of IDT Energy, Inc. in the above-captioned matter. A copy of the Memorandum has been served upon the Complainant in accordance with the attached Certificate of Service. If you have any questions, please do not hesitate to contact me. Thank you.

Best Regards,

STEVENS & LEE



Michael A. Guin

Enclosure

cc: Administrative Law Judge Conrad Johnson, Pennsylvania Public Utility Commission,  
Piatt Place, 301 5th Avenue, Suite 220, Pittsburgh, PA 15222, (via electronic mail and Federal  
Express)

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOSEPH J. WOITKO, JR.	:	
Complainant	:	
	:	
v.	:	Docket No. C-2014-2413734
	:	
IDT ENERGY, INC.	:	
	:	
Respondent	:	

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**MEMORANDUM OF LAW OF  
RESPONDENT IDT ENERGY, INC.**

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In accordance with the directive of presiding Administrative Law Judge Conrad Johnson (“ALJ Johnson”) at the January 6, 2015 evidentiary hearing, Respondent IDT Energy, Inc. (“IDT”) hereby submits its Memorandum of Law in the above-captioned matter.

**I. BACKGROUND AND PROCEDURAL HISTORY**

Complainant Joseph Waitko, Jr. (“Complainant”) filed a Formal Complaint (“Complaint”) against IDT on or about March 14, 2014. The Complaint was served on IDT on April 2, 2014. The Complaint alleged that IDT engaged in “price gouging” by increasing the prices that IDT charged the Complainant for electric generation supply without warning. The Complaint also alleged that IDT committed “Fraud and Fraud in the Inducement to Contract for Electric Power Services”. For relief, the Complainant requested that the Pennsylvania Public Utility Commission:

- 1) Order IDT Energy to cease and desist price gouging;
- 2) Order IDT Energy to issue a refund to the Complainant for the difference between the rate he had previously been charged and the rate that he was charged for his billing cycle reflected on his February 24, 2014 electricity bill,
- 3) Void the contract between the Complainant and IDT,
- 4) Fine IDT and civilly and criminally prosecute IDT for violations of the law, and

5) Order any additional relief that is fair and just pursuant to law.

On April 18, 2014, IDT filed a Certificate of Satisfaction based on the issuance of two refunds to the Complainant (one for each of his two accounts) totaling \$305.42, receipt of which was confirmed by the Complainant by letter dated March 29, 2014.

On or about April 25, 2014, the Complainant filed Objections to the Certificate of Satisfaction in which the Complainant indicated that the acceptance of the aforementioned refunds was not intended to represent a satisfaction of his Complaint. *See*, IDT Exhibit 4 and N.T. pp. 75-78.

On May 5, 2014, IDT filed its Answer to the Complaint.

The evidentiary hearing in this matter was held on January 6, 2015. The Complainant appeared and provided testimony on his behalf and moved his Formal Complaint into evidence. IDT presented the testimony of Wayne Stoughton, IDT Vice President of Customer Service and Regulatory Compliance, and moved six Exhibits into evidence.

## **II. SUMMARY OF ARGUMENT**

As discussed further below, the gravamen of Mr. Woitko's complaint is that the rate charged to him by IDT was too high, which is an issue that is beyond the Commission's subject matter jurisdiction. It is well settled that the Commission does not have traditional ratemaking authority over competitive electricity generation suppliers and cannot regulate electricity supply rates. *See, e.g., Nadav v. Respond Power, LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014).

Mr. Woitko enrolled with IDT in July of 2011, and he was a customer of IDT for 32 billing cycles. Mr. Woitko acknowledged that he never contacted IDT to express any concerns about IDT's rate or his electric bills in 2011, 2012, or 2013, and he admitted

that he was satisfied with IDT's rates until February of 2014. While Mr. Woiko's Complaint alleged that he was "fraudulently induced" to enroll with IDT for electric generation supply, Mr. Woitko candidly admitted that he recalled no details about his enrollment with IDT in July of 2011. N.T., p. 13. Conversely, IDT submitted evidence which proves that Mr. Woitko was mailed a copy of IDT's disclosure statement shortly after his enrollment, and the disclosure statement clearly indicated that IDT's price for electric generation supply varied from month to month based on market conditions, and that the price could be higher or lower than the utility's price in any given month, with no ceiling. IDT Ex. 2.

Based on a review of the record, it is clear that Mr. Woitko has failed to submit substantial evidence sufficient to carry his burden of proving a violation by IDT. It is apparent that Mr. Woitko's complaint stems solely from the rate he was charged for electric generation supply in the month of February of 2014, nearly three years after he enrolled with IDT. Because Mr. Woitko's allegations are solely about the rate charged to him by IDT, Mr. Woitko's complaint must be dismissed. Furthermore, the evidence in the record demonstrates that IDT billed Mr. Woitko in accordance with the terms of its Disclosure Statement, and there is no evidence in the record whatsoever to support a finding that IDT's billed prices differed from its marketed prices or that IDT's sales agent deceived or misled Mr. Woitko at the time of his enrollment.

### **III. PROPOSED FINDINGS OF FACT**

1. The Complainant's Electric Distribution Company ("EDC") is PPL Electric Utilities ("PPL"). N.T. p. 10 and Complaint.
2. In 2011, Mr. Woitko received telephone calls from various companies seeking to enroll him as a customer for electric generation supply. N.T. p. 11.
3. Mr. Woitko testified that "he could not separate one company for another". N.T. p. 11.

4. The Complainant enrolled with IDT for Electric Generation Supply service in July of 2011. See IDT Exhibit 1 and N.T. pp. 58-59.
5. The Complainant was enrolled as a result of an outbound telemarketing call. N.T. p. 58
6. Mr. Voitko's enrollment with IDT was verified by third-party verification call. N.T. pp. 89-90.
7. Mr. Voitko testified that he did not recall the details of his conversation with the IDT sales agent who enrolled him. Specifically, he stated :

“That was a long time ago. I don't remember the details of it. But it seemed like the best offer for the time so I took it. Now, you're asking me, you know, do I remember the exact words of what took place, you know, a number of years ago. No.” N.T. p. 13.
8. The Complainant enrolled two separate accounts with IDT. N.T. p. 58
9. The Complainant began receiving Electric Generation Supply service from IDT on August 22, 2011. See IDT Exhibit 1.
10. Mr. Voitko does not recall receiving a letter from PPL to confirm that he had enrolled with IDT. N.T. p. 25.
11. Mr. Voitko did not pay much attention to the IDT charges on his bill. N.T. p. 26.
12. Mr. Voitko did not have any issues with his electric bill and was satisfied with the rates charged by IDT until February 2014. N.T. pp. 27-28.
13. Every customer that enrolls with IDT is mailed a welcome letter and a disclosure statement. N.T. p. 59.
14. Every customer that enrolls with IDT is mailed a letter from their utility company to confirm their request to change suppliers. N.T. p. 59.
15. The IDT disclosure statement in effect at the time of the Complainant's enrollment explained that IDT's rate is a variable rate that varies from month to month, that it could be higher or lower than the utility's rate in any given month, and that there is no ceiling to the rate. N.T. pp. 60-61 and IDT Exhibit 2.
16. The IDT disclosure statement was provided to the Commission at the time IDT received its license from the Commission. N.T. p 61.
17. IDT mailed the Complainant two separate disclosure statements shortly after his telephonic enrollment, via first class U.S. mail. N.T. pp. 61-62.

18. If an IDT disclosure statement is not delivered to a customer, it is returned to IDT as undelivered. N.T. p. 62.
19. If an IDT disclosure statement is returned as undelivered, IDT researches the reasons why it was not delivered, corrects any deficiencies, and mails the customer another copy of the disclosure statement. N.T. p. 62.
20. IDT has no record of either of the disclosure statements that were mailed to Mr. Woitko being returned as undeliverable. N.T. p. 62.
21. Mr. Woitko was a customer of IDT's for 32 billing cycles, from August 2011 until April of 2014. N.T. p. 62, 65 and IDT Exhibit 1.
22. During the entire time that Mr. Woitko was enrolled with IDT, his PPL electricity bills reflected both IDT's rates and PPL's price to compare. N.T. p. 65
23. Mr. Woitko did not contact IDT with any concerns about his IDT service or billings in 2011, 2012, or 2013. N.T. pp. 30.
24. IDT does not read customers' meters or issue bills to customers, rather, those functions are provided by the customer's EDC. N.T. p. 64.
25. IDT prepares its billing based on meter read information provided by the customer's EDC, and IDT's charges are presented to the customer on a consolidated EDC bill. N.T. p. 64.
26. Each of IDT's sales agents follows a rigorous training regimen regarding the marketing of IDT's services. N.T. p. 66.
27. IDT's sales agents receive classroom training and daily training to reinforce IDT's policies. N.T. p. 66.
28. IDT sales agents are required to explain that IDT is a competitive supplier and not affiliated with the customer's utility. N.T. p. 65
29. IDT sales agents explain that IDT offers a market based variable rate for electricity generation supplier that can be higher or lower than the utility's price to compare in any given month. N.T. p. 65
30. IDT sales agents explain that customer can terminate their IDT service at any time with no fee or penalty. N.T. p. 65.
31. On March 11, 2014, Mr. Woitko mailed a letter to IDT to requesting cancellation of his IDT service and transfer back to PPL for electric generation supply. N.T. p. 68 and IDT Exhibit 3.

32. Upon receiving Mr. Voitko's March 11, 2014 letter, IDT contacted PPL via an electronic data interchange to transfer his service back to PPL. N.T. p. 69.
33. An IDT customer service representative contacted Mr. Voitko by telephone on March 27, 2014. At that time, an IDT customer service representative offered to provide him a good will refund on both of his accounts to help reduce the impact of unprecedented higher electricity costs in January and February 2014. N.T. p. 81.
34. Mr. Voitko called the IDT customer service center on March 31, 2014 to accept the good will refund offered by IDT. N.T. p. 81
35. Mr. Voitko's accounts were switched back to PPL for electric generation supply effective April 23, 2014. N.T. p. 38 and IDT Exhibit 1.
36. In February and March 2014, IDT's call center experienced an unprecedented number of calls due to the Polar Vortex. N.T. p. 70.
37. Prior to February 2014, IDT typically received about 10,000 inbound customer service telephone calls per month, with an average hold time of approximately 30 seconds. N.T. pp. 70-71.
38. During February, 2014, IDT's call center handled approximately 37,000 inbound customer service calls, and in March 2014, IDT's call center handled approximately 46,000 inbound customer service calls.
39. The retail prices that IDT Energy charges its customers for electric generation supply are based in large part on IDT Energy's wholesale costs of acquiring electricity. N.T. 73
40. In early 2014 there were dramatic, unprecedented spikes in wholesale electricity prices in the energy markets administered by PJM Interconnection, which resulted in higher than normal retail prices for many Pennsylvania retail electricity customers who were on variable rate plans. N.T. p. 74
41. During this period, commonly referred to as the Polar Vortex, IDT Energy's wholesale costs of acquiring electricity escalated dramatically, which resulted in increases to IDT Energy's variable retail prices for several months in early 2014. N.T. p. 74
42. These large wholesale price spikes affected many suppliers, and Pennsylvania customers of many different suppliers saw their prices for electricity increase drastically in early 2014. N.T. p. 74
43. The Commission has issued several orders over the past year which clearly recognized that the Polar Vortex caused wholesale prices to increase. N.T. p. 74 and *See, e.g., Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134

(Order entered March 4, 2014), *Petition of Duquesne Light Company For A Waiver Of The Three Business Day Switching Requirements Under 52 Pa. Code s 57.174*, Docket No. P-2014-2448863 (Order entered December 4, 2014).

44. When Mr. Voitko enrolled with IDT in 2011, IDT did not foresee that the prices of wholesale electricity would spike so dramatically in 2014.
45. IDT issued goodwill refunds to Mr. Voitko in the amounts of \$170.56 and \$134.86, which were calculated by rolling Mr. Voitko's electricity generation supply rates back to a rate similar to the rate that Mr. Voitko was charged in months preceding the Polar Vortex. N.T. pp. 75 and IDT Exhibits 4, 5 and 6.
46. IDT believed the issuance of the refund checks satisfied Mr. Voitko's Complaint, and Mr. Voitko received and cashed the refund checks. N.T. pp. 77-78 and IDT Exhibit 6.

#### **IV. ARGUMENT**

##### **A. A complaint based solely on rates charged for electric generation supply is beyond the jurisdiction of the Commission**

This Complaint is one of many filed by customers who experienced temporary retail electric price spikes in the wake of the Polar Vortex episode of early 2014. The Commission explained this episode as follows:

“During the month of January 2014, wholesale prices for hourly energy supply in the day ahead and the real time markets increased exponentially in response to a combination of sustained cold weather. New records were set for winter electricity use in Pennsylvania and throughout the service area of PJM Interconnection, LLC (PJM). During this period, PJM recorded 8 of the top 10 highest hourly usage periods ever observed. This high demand, in combination with particularly high forced outage rates for a number of generators, produced record high costs in the PJM-administered energy markets.

As a result of these high PJM energy market prices, many electric generation suppliers (EGSs) serving Pennsylvania customers with variable-priced 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. In many cases, EGSs voluntarily absorbed losses during this period in order to maintain long term contractual relationships with their customers.....Due to the foregoing events as well as higher than usual energy use due to prolonged cold weather, some Pennsylvania retail electric customers received very high electric bills in amounts two to three times (and even higher) than what they would normally be billed during this time of year.”

*Review of Rules, Policies and Consumer Education Measures Regarding Variable*

*Rate Retail Electric Product*, Docket No. M-2014-2406134, Order entered March 4, 2014 (“*Variable Rate Order*”).

In reviewing complaints filed by customers affected by the Polar Vortex price spikes, the Commission has made it clear that it does not have the authority to regulate the rates of competitive electricity suppliers. See, e.g. *Nadav v. Respond Power, LLC*, Docket No. C-2014-2429159 (Order entered December 19, 2014), and *CRH Catering Company, Inc. v. Blue Pilot Energy, LLC*, Docket Nos. C-2014-2415277, et al. (Order entered February 24, 2015). Rather, the Commission has stated that its review is limited to determining whether a supplier complied with the Public Utility Code, the Commission’s regulations, and the supplier’s disclosure statement in its service and billing to customers. See, *Commonwealth, et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014).

In support of his Complaint, Mr. Voitko provides no evidence other than his belief that the rate charged by IDT was too high. Mr. Voitko testified that he was generally satisfied with IDT’s service and rate until he received his bill in February of 2014, and that his complaint relates solely to “that super increase in rates”. N.T. p. 28. Mr. Voitko also admitted that he did not make any complaints about his IDT service prior to January 2014. N.T. p. 30. Because Mr. Voitko’s complaint relates solely to the rate he was charged by IDT, and because the Commission has made it clear that it does not have the authority to regulate the rates of competitive electricity suppliers, Mr. Voitko’s complaint must be dismissed.

**B. IDT billed Mr. Voitko in accordance with the terms of its Disclosure Statement**

In reviewing Mr. Voitko’s allegations regarding the rate he was charged, the appropriate inquiry is limited to determining whether Mr. Voitko was billed in

accordance with the terms of IDT's disclosure statement. 52 Pa.Code § 54.42 provides that EGSs must comply with the applicable requirements of the code and Commission regulations and orders. 52 Pa.Code § 54.4(a) states that EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement. 52 Pa.Code § 54.5(c)(2) provides that the contract's terms of service shall be disclosed, including a variable pricing statement if applicable including conditions and limits on variability.

IDT submitted affirmative evidence which demonstrates that that Mr. Woitko was billed in accordance with the terms of IDT's disclosure statement. The IDT disclosure statement that was mailed to Mr. Woitko after his enrollment included the following pricing terms:

"IDT Energy offers a variable price for all electric generation sold under this Agreement. 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 and transmission, and other market and business price related factors. This price may be higher or lower than the EDC's price in any given particular month. There is no ceiling price...." IDT Exhibit 2.

IDT's disclosure statement also notifies customers that they may cancel their enrollment with IDT at any time with no fee or cancellation penalty. IDT Exhibit 2. The IDT disclosure statement was provided to the Commission at the time IDT received its license from the Commission. N.T. p 61.

Mr. Woitko alleged that he did not receive a copy of IDT's disclosure statement after he enrolled, but IDT's witness testified that Mr. Woitko was mailed two separate disclosure statements shortly after his telephonic enrollment via first class U.S. mail. N.T. pp. 61-62. IDT's witness also testified that if an IDT disclosure statement is not delivered to a customer, it is returned to IDT as undelivered, and then IDT researches the

reasons why it was not delivered, corrects any deficiencies, and mails the customer another copy of the disclosure statement. N.T. p. 62. IDT has no record of either of the disclosure statements that were mailed to Mr. Woitko being returned as undeliverable. N.T. p. 62. Under Pennsylvania law, Mr. Woitko is presumed to have received IDT's disclosure statement. The mailing of a document in the ordinary course of business creates a rebuttable presumption that the document was in fact received. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 444 A.2d 658 (Pa. Super. 1982). There shall be a rebuttable presumption that a disclosure statement correctly addressed to a customer with sufficient first class postage attached shall be received by the customer 3 days after it has been properly deposited in the United States mail. 52 Pa. Code 111.11(c).

Mr. Woitko's account history (IDT Exhibit 1) reflects the rates that Mr. Woitko was charged during the 32 billing cycles that IDT provided his electric generation supply. During the years 2011-2013, the price that IDT charged Mr. Woitko ranged from a low of .0687 per kWh to a high of .1103 per kWh, and only exceeded .10 per kWh for a period of two months. For the billing period ended February 21, 2014, the price charged to Mr. Woitko temporarily spiked to \$.28 per kWh for the reasons explained in the Commission's *Variable Rate Order*, but then IDT quickly and sharply reduced its price down to \$.13 per kWh the following month.

While the temporary spike in the retail electricity price charged to Mr. Woitko and other variable rate customers during the Polar Vortex was unfortunate, the price charged was clearly permissible under the terms of IDT's disclosure statement and there is no legal basis for the Commission to find that the price charged was unlawful. In order

to mitigate the impact of the retail price spike, IDT issued goodwill refunds to Mr. Woitko in the amounts of \$170.56 and \$134.86, which were calculated by rolling Mr. Woitko's electricity generation supply rate back to a rate similar to the rate that Mr. Woitko was charged in months preceding the Polar Vortex. N.T. p. 75 and IDT Exhibits 4, 5 and 6. This goodwill gesture on the part of IDT does not in any way allow for a conclusion that the prices that IDT charged were improper or unlawful. In short, the Complainant has not submitted any evidence which would allow for a conclusion that IDT's billed prices deviated from the terms of its disclosure statement, and to the extent the Complaint makes such allegations, such allegations should be rejected.

**C. Mr. Woitko did not submit any evidence which could support a finding that IDT's agents engaged in deceptive or misleading marketing practices or that IDT's billed prices did not reflect its marketed prices**

The Commission's regulation at 52 Pa.Code § 54.43(1)(f) provides that EGSs are responsible for any fraudulent deceptive or other unlawful marketing or billing acts performed by the EGS, their employees, agents or representatives. In this case Mr. Woitko provided no evidence whatsoever which could support a finding that IDT's agents engaged in deceptive or misleading sales practices.

Mr. Woitko enrolled with IDT for Electric Generation Supply service in July of 2011. See IDT Exhibit 1 and N.T., pp. 58-59. Mr. Woitko was enrolled as a result of an outbound telemarketing call. N.T. p. 58. The Commission's regulations do not require a signed agreement in order for a customer to switch electric generation suppliers, but rather permit a supplier to use a written, oral or electronic transaction process for a customer to authorize the transfer of the customer's account to the supplier, and require all enrollments to be verified by some appropriate method that confirms the customer's

consent to the transaction. 52 Pa. Code § 111.7 and *Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 4, 2010). Mr. Voitko's enrollment was verified by a third-party verification call recording. N.T. pp. 89-90.

To the extent that Mr. Voitko is alleging that he was deceptively enrolled, or that the prices he was charged by IDT differed from the prices explained by the IDT sales agent, such allegations must fail for lack of evidence. Mr. Voitko candidly admitted that he did not recall any details of the sales call that resulted in his enrollment. When asked by his own attorney whether he remembered the conversation that resulted in his enrollment with IDT, Mr. Voitko stated as follows:

"That was a long time ago. I don't remember the details of it. But it seemed like the best offer for the time so I took it. Now, you're asking me, you know, do I remember the exact words of what took place, you know, a number of years ago. No." N.T. p. 13.

As the party seeking relief from the Commission, Mr. Voitko bears the burden of proving his claim by substantial evidence. 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 decision of the Commission must be supported by substantial evidence. 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).

As set forth above, Mr. Wotiko plainly stated that he did not recall any details of the sales call that resulted in his enrollment with IDT, so it is impossible for the Commission to conclude that there is substantial evidence in the record to prove a violation of any kind by IDT. Even if some of Mr. Wotiko's testimony is interpreted as implicating deceptive or misleading statements by IDT's sales agents, such testimony is directly contradicted by Mr. Wotiko's own actions, or more specifically, his inaction. Mr. Wotiko was enrolled with IDT for 29 months before he received the bill that triggered his complaint. During this entire time, IDT's charges were plainly reflected on Mr. Wotiko's PPL utility bill. N.T. p. 65. Yes, despite this fact, Mr. Wotiko never contacted IDT with any concerns about his IDT service or billings in 2011, 2012, or 2013, and he testified that he was generally satisfied with his IDT service and rates. N.T. pp. 27-30. The fact that Mr. Wotiko only contacted IDT to complain about his bill in February 2014 demonstrates that Mr. Wotiko's complaint is about his rates – not his enrollment.

The Commission's regulatory regime for the competitive electric supply market places a duty on customers to raise concerns about their enrollment in a timely manner. For instance, the Commission's Regulations at 52 Pa. Code § 57.177(b) absolves a customer from the responsibility for paying an EGS's charges in cases of unauthorized enrollment only if the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS. *See also, Rulemaking Order Establishing Standards for Changing a Customer's Electric*

*Supplier*, Docket No. L-00970121 (Order entered February 27, 1998). Likewise, the Commission's regulations require EGSs to maintain a record of a verification of a customer's enrollment with and EGS for a period of six billing cycles, to enable compliance with the Commission's customer dispute regulations. See 52 Pa. Code § 57.177 and *Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 4, 2010). These rules work hand in hand with the fundamental principle that the rates that consumers pay in the retail electric market are governed by the terms of their contract with their EGS. *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014).

The Commission has stated that "consumers do bear some responsibility to make choices that are appropriate for their individual circumstances." *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991, Opinion and Order (entered October 18, 2013) at 22. Consumers must be aware of the terms of service they agree to when entering into a contract for energy services, just as they would do for any other contract they would agree to.

If customers were permitted to claim years after their enrollment that the oral statements of a sales agent differed from the express terms of the supplier's disclosure statement, and that such oral statements controlled the terms of their enrollment, the entire competitive electricity market in Pennsylvania would be thrown into disarray. If vaguely remembered oral statements from years prior were permitted to trump the express terms of a supplier's written disclosure statement, the disclosure statement would effectively be meaningless. As a result, suppliers could be subjected to complaints or

claims for refunds whenever a customer identified a competitive price that beat their current supplier's price, because a customer could simply allege that the sales agent promised the customer a different price when they first enrolled.

In this case, the issue of allowing oral sales representations to trump a written disclosure statement is likely moot, because there is no evidence in the record to allow the Commission to make any conclusions regarding the sales representations that led to Mr. Woitko's enrollment. But to the extent that Mr. Woitko attempts to argue this point, any allegations related to his enrollment with IDT must be viewed in light of his acknowledged satisfaction with IDT's rates and services from 2011-2013 and the lack of any contact to IDT to express any concern whatsoever with his rates until February of 2014.

## **V. PROPOSED CONCLUSIONS OF LAW**

1. 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).

2. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. 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).

3. The decision of the Commission must be supported by substantial evidence. 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).

4. IDT is an Electric Generation Supplier ("EGS") licensed by the Commission pursuant to 66 Pa. C.S. § 2809(e). *See 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 entered January 15, 2010).

5. The Commission does not have traditional ratemaking authority over competitive electric generation suppliers and does not regulate competitive supply rates. *See* 66 Pa. C.S. §§ 102; 2806; 2809; 2810 and *Commonwealth of Pennsylvania, et. al. v. IDT Energy Inc.*, Docket No. C-2014-2427657 (Opinion and Order on Interlocutory Review entered December 18, 2014) ("*IDT Interlocutory Review Order*").

6. EGSs are not "public utilities" under the Public Utility Code except for the limited purposes of 66 Pa. C.S. § 2809 and § 2810. *See IDT Interlocutory Review Order* and *Delmarva Power & Light Co. v. Pa. P.U.C.*, 582 Pa. 338, 870 A.2d 901 (2005) (holding that the definition of "public utility" at 66 Pa. C.S. § 102 does not include EGSs

except for the limited purposes set forth in 66 Pa. C.S. § 2809 regarding licensing requirements and 66 Pa. C.S. § 2810 regarding revenue neutral reconciliation).

7. The Commission's subject matter jurisdiction over EGSs is set forth in Sections 2807 and 2809 of the Public Utility Code, 66 Pa. C.S. §§ 2807; 2809.

8. The Commission has jurisdiction and authority to determine whether IDT billed customers in accordance with its Disclosure Statement. See 52 Pa. Code §§ 54.4(a), 54.5(a) and *Commonwealth et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order entered December 11, 2014).

9. The rates that consumers pay in the retail electric market are governed by the terms of their contract with their EGS. *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered March 4, 2014).

10. The Commission has stated that "consumers do bear some responsibility to make choices that are appropriate for their individual circumstances." *William Towne v. Great American Power, LLC*, Docket No. C-2012-2307991, Opinion and Order (entered October 18, 2013) at 22.

11. Under the Commission regulations that were in effect at the time of the Complainant's enrollment in 2011, EGSs were required to notify the customer's electric distribution company of the customer's selection "...by the end of the next business day following the customer contact." See former 52 Pa. Code 57.173 and *Final Order on Interim Guidelines Regarding Standards For Changing a Customer's Electricity Generation Supplier*, Docket No. M-2011-2270442 (October 24, 2012).

12. Under the Commission regulations that were in effect at the time of the Complainant's enrollment in 2011, EDCs were required to mail a 10-day confirmation

letter to the customer "...by the end of the next business day following the receipt of the notification of the customer's selection of an EGS." This regulation also stated that "[t]he 10-day waiting period shall begin on the day the letter is mailed. See former 57.173(2) and *Final Order on Interim Guidelines Regarding Standards For Changing a Customer's Electricity Generation Supplier*, Docket No. M-2011-2270442 (October 24, 2012).

13. The Commission regulations provide a 3-day right of rescission period following receipt of the disclosure statement. 52 Pa. Code 54.5(d).

14. 52 Pa.Code § 54.4(a) states that EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement.

15. 52 Pa.Code § 54.5(c)(2) provides that the contract's terms of service shall be disclosed, including a variable pricing statement if applicable including conditions and limits on variability.

16. Under the Commission regulations that were in effect at the time of the Complainant's enrollment in 2011 (52 Pa. Code § 54.5), an EGS disclosure statement for a variable priced product was required to include the following elements:

- (1) Generation charges disclosed according to the actual prices.
- (2) A variable pricing statement including:
  - (i) Conditions of variability (state on what basis prices will vary).
  - (ii) Limits on price variability:
- (3) An itemization of basic and nonbasic charges distinctly separate and clearly labeled.
- (4) The length of the agreement, including:
  - (i) The starting date.

- (ii) The expiration date, if applicable.
- (5) An explanation of sign-up bonuses, add-ons, limited time offers, other sales promotions and exclusions, if applicable.
- (6) An explanation of prices, terms and conditions for special services, including advanced metering deployment, if applicable.
- (7) The cancellation provisions, if applicable.
- (8) The renewal provisions, if applicable.
- (9) The name and telephone number of the default service provider.
- (10) Customer contact information that includes the name of the EDC and EGS, and the EGS's address, telephone number, Commission license number and Internet address, if available. The EGS's information must appear first and be prominent.
- (11) A statement that directs a customer to the Commission if the customer is not satisfied after discussing the terms of service with the EGS.
- (12) The name and telephone number for universal service program information.

See *Final-Omitted Rulemaking Order Regarding the Provisions of Notices of Contract Expiration or Changes in Terms for Residential & Small Business Customers*, Docket No. L-2014-2409385 (Order entered April 3, 2014).

17. Pursuant to the Commission's Regulations at 52 Pa. Code § 57.177(b), when a customer alleges they have been switched to an EGS without their consent, if the customer's dispute has been filed within the first two billing periods since the customer should reasonably have known of a change of the EGS and the dispute investigation establishes that the change occurred without the customer's consent, the customer is not responsible for EGS bills rendered during that period. *Rulemaking Order Establishing*

*Standards for Changing a Customer's Electric Supplier*, Docket No. L-00970121 (Order entered February 27, 1998).

18. A record of a verification of a customer's enrollment with an EGS must be maintained in a system that is capable of retrieving that record by customer name for a period of time equivalent to at least six billing cycles, to enable compliance with the Commission's customer dispute regulations (52 Pa. Code § 57.177 and § 59.97). *Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 4, 2010);

19. The Commission's regulations do not require a signed agreement in order for a customer to switch electric generation suppliers, but rather permit a supplier to use a written, oral or electronic transaction process for a customer to authorize the transfer of the customer's account to the supplier, and require all enrollments to be verified by some appropriate method that confirms the customer's consent to the transaction. 52 Pa. Code § 111.7 and *Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers*, Docket No. M-2010-2185981 (Order entered November 4, 2010).

20. The mailing of a document in the ordinary course of business creates a rebuttable presumption that the document was in fact received. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 444 A.2d 658 (Pa. Super. 1982).

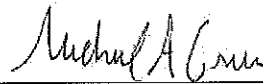
21. There shall be a rebuttable presumption that a disclosure statement correctly addressed to a customer with sufficient first class postage attached shall be received by

the customer 3 days after it has been properly deposited in the United States mail. 52 Pa. Code 111.11(c).

WHEREFORE, for all of the reasons stated herein, Respondent IDT Energy, Inc. respectfully requests that the Complaint be dismissed, with prejudice.

Respectfully submitted,

STEVENS & LEE



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DATE: February 27, 2015

COUNSEL FOR IDT ENERGY, INC.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOSEPH J. WOITKO, JR.	:	
Complainant	:	
	:	
v.	:	Docket No. C-2014-2413734
	:	
IDT ENERGY, INC.	:	
	:	
Respondent	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Memorandum of Law upon the party listed below, in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a party).

VIA First Class U.S. Mail

Joseph A. Woitko, Esq.  
Counsel for Joseph J. Woitko, Jr.  
1199 Berwick Street  
Beaver Meadows, PA 18216



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Michael A. Gruin

DATED: February 27, 2015