

COMMONWEALTH OF PENNSYLVANIA



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March 19, 2015

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

RE: Stephen Kiback, Jr. v. IDT Energy, Inc.  
Docket No. C-2014-2409676

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Reply Exceptions, in the above-referenced proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Barrett C. Sheridan".

Barrett C. Sheridan  
Assistant Consumer Advocate  
PA Attorney I.D. # 61138

Enclosures

cc: Honorable Joel Cheskis, ALJ  
[OSA ra-OSA@gov.com](mailto:OSA_ra-OSA@gov.com)  
Certificate of Service

189116

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

STEPHEN KIBACK JR. :  
Complainant :  
 :  
v. : Docket No. C-2014-2409676  
 :  
IDT ENERGY, INC. :  
Respondent :

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REPLY EXCEPTIONS OF THE  
OFFICE OF CONSUMER ADVOCATE

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## I. INTRODUCTION

The Office of Consumer Advocate (OCA) urges the Commission to adopt the well-reasoned Initial Decision (I.D.) issued by Administrative Law Judge (ALJ) Joel H. Cheskis on February 17, 2015. Based upon his review of the record, ALJ Cheskis determined that IDT's telemarketing sales agent failed to provide the formal complainant, Mr. Stephen Kiback, Jr., with accurate and truthful information in advance of Mr. Kiback's enrollment and purchase of electric supply service from IDT, a violation of the Commission's regulations. I.D. at 8, citing 52 Pa.Code § 111.10.<sup>1</sup> Further, ALJ Cheskis determined that IDT violated its obligation under Section 54.4(a) which requires that "EGS bills 'must reflect the marketed price and the agreed upon prices in the disclosure statement.'" I.D. at 13, quoting 52 Pa.Code § 54.4(a). ALJ Cheskis determined that IDT had committed these two violations in its sales, marketing, and billing of electric supply service to Mr. Kiback after careful review of the record evidence and assessment of the credibility of the testimony presented. ALJ Cheskis accepted Mr. Kiback's sworn testimony that IDT's telemarketing message that he would pay 10% less than PPL's price to compare convinced Mr. Kiback to enroll with IDT as credible and supportive of Mr. Kiback's burden of proof. After due consideration, ALJ Cheskis also accepted Mr. Kiback's complaint that the prices charged by IDT for service in January and February 2014 were not consistent with IDT's oral telemarketing message. Based on the record and finding of violations, ALJ Cheskis properly and reasonably recommends a \$1,000 civil penalty against IDT for each violation, for a total civil penalty of \$2,000.

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<sup>1</sup> The Commission's Interim Guidelines Order adopted November 4, 2010 imposed the same consumer protection obligations on EGS in their conduct of telemarketing sales. Interim Guidelines on Marketing and Sales Practices for Electric Generation Suppliers and Natural Gas Suppliers, Docket No. M-2010-2185981, Final Order at 34 (Nov. 4, 2010).

IDT presents three exceptions with subparts, all of which are variations on the following themes: 1) the Initial Decision is not supported by substantial evidence, 2) IDT's written disclosure statement renders irrelevant whether or not IDT's telemarketing agents misrepresented IDT's pricing to Mr. Kiback, 3) to promote the competitive electric supply market, a short time limitation should apply for consumers to raise complaints directed at the sales and marketing communications, and 4) the ALJ's recommended civil penalty and credit to Mr. Kiback should not be adopted.

The OCA respectfully submits that the Commission should reject each and every theory advanced by IDT to avoid accountability for the telemarketing communications which convinced Mr. Kiback that he would receive savings relative to PPL's price to compare if he purchased IDT's competitive electric supply service. Mr. Kiback's testimony was concise, adamant, and credible that the oral statements by IDT's telemarketing agents provided Mr. Kiback with a reason to switch to IDT and switch he did. I.D. at 4-5, 8-9, citing Tr. 13, 15, 19. ALJ Cheskis' determination that Mr. Kiback met his burden of proof and that IDT did not offer sufficient evidence to rebut Mr. Kiback's testimony is well supported by the record. Similarly, ALJ Cheskis correctly determined that IDT is required to provide adequate, accurate and truthful information as a licensed EGS and under anti-fraud in telemarketing provisions, so consumers may make informed decisions before they commit to purchase IDT's services. Moreover, IDT's position that consumer complaints must be raised within a few months of the marketing contact, to assure due process to the EGS and because the EGS's disclosure statement overrides any inconsistent marketing statements is contrary to Commission regulations and recent rulings.

ALJ Cheskis properly determined that IDT has violated two important consumer protections, that a civil penalty for each violation is warranted, and that IDT should provide an

adjustment for the two months when IDT did not bill Mr. Kiback consistent with IDT's marketing communications. ALJ Cheskis' Initial Decision is supported by the record and consistent with recent Commission orders. The Commission should deny IDT's Exceptions and adopt the well-reasoned and supported Initial Decision of ALJ Cheskis.

## II. REPLIES TO EXCEPTIONS

### OCA Reply to IDT Exception No. 1: ALJ Cheskis's Decision Sustaining Mr. Kiback's Formal Complaint Is Supported By Unrebutted and Substantial Evidence That IDT Violated The Commission's Regulations Regarding Telemarketing and Billing.

Mr. Kiback as the formal complainant provided sworn testimony regarding the marketing and pricing information provided by IDT's sales agents during telemarketing calls. After several calls from IDT, Mr. Kiback determined that IDT's offer of a fixed price supply service at prices 10% below PPL's price to compare was good reason to enroll with IDT. Mr. Kiback testified that he would not have switched for a variable rate service and he would not have switched without expectations of savings. Based on Mr. Kiback's direct testimony and replies to IDT's cross-examination, ALJ Cheskis found that Mr. Kiback had met his burden and that IDT's conduct in telemarketing and billing Mr. Kiback violated two Commission regulations. The OCA submits that the Initial Decision of ALJ Cheskis is fair and well-supported by his careful assessment of the credibility of Mr. Kiback's sworn testimony and the weight of the record evidence.

IDT excepts to the Initial Decision as unsupported by substantial evidence. IDT Exc. at 8-13. IDT suggests that Mr. Kiback's recollection is suspect due to the passage of time. Id. IDT states that in the absence of testimony regarding the "exact words that were spoken by the sales agent," the Initial Decision finding that IDT violated the Commission's telemarketing regulation is unsupported. Id. at 11-12. IDT suggests that the third party verification (TPV), as

completed by a woman and not Mr. Kiback, calls into question the reliability of Mr. Kiback's recollection and credibility of his testimony. Id. at 14-17.

A. The Initial Decision Is Supported By Substantial Evidence

The Commission should deny IDT's exception. ALJ Cheskis properly determined that the sworn testimony of Mr. Kiback qualified as substantial evidence that IDT's telemarketing sales agent violated an important consumer protection, adopted by the Commission as Section 111.10. I.D. at 3-11; 2 Pa.C.S. § 704; 52 Pa. Code § 110.10. "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. I.D. at 7 (citations omitted). Mr. Kiback provided clear and sufficiently specific evidence regarding the message conveyed by IDT in its sales and marketing to Mr. Kiback through several telemarketing contacts.

Yet to support its exception, IDT presents three lines of text from the hearing transcript and states "The foregoing passage, indented above, is the full extent of Mr. Kiback's description of the sales call." IDT Exc. at 9. The selected quotation, however, does not even provide the full second sentence, let alone capture the entirety of Mr. Kiback's testimony regarding his sales calls with IDT. As ALJ Cheskis identified in his Initial Decision, Mr. Kiback's testimony was clear:

Q. How long did that telephone call last?

A. Well, they called a couple of times. It wasn't only once. They just more or less made it sound good; that they could be 10 percent lower than PPL, which you did at the beginning, and then it just kept going up, like I said in my letter. In fact, I even give you the wattage in the letter.

Q. That's okay. That's okay, Mr. Kiback. I just want to focus more on this telephone enrollment, if I could. Are you sure that the agent told you that the rate would be beneath PPL, the PPL rate?

A. Sir, why would I change over to you if it would be the same or higher?

Q. **Let me ask you again. Are you sure that you heard the sales agent say that the IDT rate would be below the PPL rate?**

A. **Yes, sir, I did. That's why I switched over.**

Q. **Now, isn't it the case that the sales agent said that the rate would be below PPL's for a certain period of time of one to two months?**

A. **No, sir, they did not.** Well, now listen. If you heard me with the Judge, I give you approximately four or five months there and sometimes it went down from my first bill.

I.D. at 8-9, quoting Tr. 15-16 (emphasis added); *see also*, Tr. 19. Mr. Kiback's succinctly and firmly testified that the information provided by IDT in its sales and marketing caused him to understand that IDT's service would be priced consistently below PPL's rate and not just for some introductory period. IDT's suggestion that Mr. Kiback could only satisfy his burden of proof through the parroting word for word of the telemarketing agent's statements sets the bar so high as to be unachievable and is an improper attempt by IDT to avoid its responsibility to provide adequate, accurate and truthful information regarding the total cost to purchase competitive electric supply service, pursuant to the anti-fraud in telemarketing rules. See I.D. at 7-8, citing 52 Pa.Code § 110.10, 16 C.F.R. §§ 310.3(a)(1)(i)-(ii), 310.3(a)(2). Indeed, elsewhere in its exceptions, IDT suggests that sales and marketing calls may include "terminology and jargon" and so give rise to customer confusion. IDT Exc. at 19-20. The OCA submits that ALJ Cheskis' determination that Mr. Kiback provided substantial evidence to support his case is

soundly based.

In response to Mr. Kiback's testimony, IDT's sole witness, the vice-president of customer service and regulatory compliance, Mr. Stoughton, testified about the Company's policies regarding the provision of disclosure statements and welcome letters to new customers and sales agent training, in general. He provided no evidence or specific testimony about Mr. Kiback's solicitation. As ALJ Cheskis correctly held, "The disclosure statement and sales agreement sponsored by Mr. Stoughton that was admitted into the record are generic and not specific to Mr. Kiback." I.D. At 9.

During cross examination, however, Mr. Stoughton was asked about his knowledge of Mr. Kiback's specific solicitation. As ALJ Cheskis stated in his Initial Decision:

During that cross-examination, Mr. Stoughton admitted that the Company has no evidence regarding the specific sales call made to Mr. Kiback to specifically rebut what Mr. Kiback testified he was told by the sales agent. As Mr. Stoughton testified:

Q. Do you have recordings of every incoming and outgoing sales call performed by IDT?

A. No.

Q. Were you on the sales call or any sales call with Mr. Kiback?

A. No.

Q. Have you ever heard a recording of a sales call with Mr. Kiback specifically on it?

A. No.

Tr. 39. IDT's sole witness in this proceeding admits that he has neither knowledge nor evidence that contradicts Mr. Kiback's sworn testimony. As ALJ Cheskis correctly held:

As a result, IDT has provided no evidence to rebut Mr. Kiback's testimony that he was told during the sales call that he would be

charged by IDT a rate that was lower than PPL's rate. In particular, if no recording of the sales call is available, IDT could have presented the testimony of the sales agent that spoke with Mr. Kiback. At a minimum, IDT could have presented a copy of the sales script Mr. Stoughton averred the sales agents are trained to use. Such information is fundamental to rebut Mr. Kiback's testimony regarding what he was told when he was called by a telemarketer seeking to enroll him in IDT's electric generation service. Mr. Kiback's testimony is more credible when weighed against the paucity of evidence presented by IDT regarding the sales call.

I.D. at 10.

As set forth in the Initial Decision, if a complainant establishes a prima facie case, the burden of going forward with the evidence shifts to the utility. I.D. at 7. If a utility does not rebut that evidence, the complainant will prevail. Id. Mr. Kiback established a prima facie case through his testimony about his sales solicitation, thus the burden of going forward shifted to IDT. As ALJ Cheskis held, IDT failed to present evidence to meet its burden of going forward.

As he stated:

IDT has failed to rebut Mr. Kiback's testimony regarding information he was told when he was contacted by a telemarketer seeking to have him enroll with IDT. Record evidence demonstrating that Mr. Kiback was told that his rate would be less than PPL's violates the Commission's regulation regarding telemarketing because either IDT or its agent "failed to disclose truthfully and in a clear and conspicuous manner the total cost to purchase, receive or use" electric generation service from IDT and all material restrictions, limitations or conditions to receive electric generation service from IDT before Mr. Kiback consented to pay for the goods or services.

I.D. at 10.

Contrary to the way his sworn testimony is portrayed in IDT's Exceptions, Mr. Kiback presented clear and unambiguous testimony about what IDT promised him during his sales solicitations. As ALJ Cheskis held:

as Mr. Kiback testified, IDT's sales agent told him he would be charged 10% less than the PPL rate but that was not always the case. In fact, record evidence demonstrates that Mr. Kiback was charged more than IDT's sales agent represented to him he would be charged on two bills – January, 2014 and February, 2014. Tr. 9, 12-13 (comparing IDT's rate per kilowatt hour with PPL's rate per kilowatt hour).

I.D at 11.

The Company's Exceptions also take issue with the ALJ's analysis of how oral representations made during sales calls should be treated. In the Initial Decision, ALJ took notice of the Commission's statement in Yaglidereliler that if an EGS's "oral representations undermine the clarity of its written communications" then the EGS's "disclosure and marketing could be unclear, misleading, or deceptive in contravention of our Regulations." I.D. at 12, citing Yaglidereliler Corporation v. Blue Pilot Energy, LLC, Docket No. C-2014-2413732, Opinion and Order at 19 (Jan. 16, 2015) (Yaglidereliler). In Yaglidereliler, the Commission expressly stated that consumers have a need and right to be able to rely upon the oral communications of their prospective supplier:

Residential and small business customers, however, are not necessarily well-versed in gas procurement and pricing practices. For this reason, it is all the more important that they be able to rely on all the information provided by their prospective supplier, whether oral or written, and that all disclosures be clear and unequivocal. If the complainant [was] led to believe through oral communications that although variable, his rate would remain competitive and reasonable, that may have a bearing on the propriety of Blue Pilot's marketing practices.

Id. at 20. In the case at hand, ALJ Cheskis followed the Commission's framework and assessed the record evidence. The OCA submits that ALJ Cheskis did not err in concluding that Mr. Kiback had shown that IDT's sales and marketing message was misleading and untruthful.

Yaglidereliler aside, IDT did not rebut Mr. Kiback's testimony that he was told by

a sales agent that he would receive a rate lower than PPLs, because, as ALJ Cheskis stated IDT:

did not provide any recording, or any other evidence, regarding that portion of the sales call. In contrast, Mr. Kiback clearly stated that he would not have switched to IDT if he was not told by the sales agent that the rate would be less than PPL's rate. **Mr. Kiback's testimony regarding what he was told by the sales agent is credible.** The representations made by the sales agent failed to disclose truthfully in a clear and conspicuous manner the total cost to purchase electric generation service from IDT or any material conditions to receive such service from IDT.

I.D. at 12 (emphasis added).

ALJ Cheskis also specifically addressed the weakness of IDT's testimony and the absence of evidence contradicting Mr. Kiback's sworn statements. As he stated:

IDT witness Stoughton's testimony that the Company trains its telemarketing agent to explain to customers that IDT's prices are not or will not be guaranteed to be below the utility's prices and provides a detailed script to explain its promotions does not sufficiently rebut Mr. Kiback's testimony on this issue. Nor is it sufficient to negate a violation of the Commission's telemarketing regulations that Mr. Kiback was subsequently sent a disclosure statement and had a right to rescind the contract. Tr. 40. IDT has not provided any evidence to rebut Mr. Kiback's testimony. Therefore, substantial record evidence demonstrates that IDT violated Section 111.10(a)(3) of the Commission's regulations.

I.D. at 12.

Section 54.4 of the Commission's regulations require that EGS bills "must reflect the marketed prices and the agreed upon prices in the disclosure statement." 52 Pa.Code § 54.4(a). ALJ Cheskis found that the record evidence also supported a finding of violation by IDT:

In this case, the record evidence discussed above demonstrating that IDT's sales agent told Mr. Kiback that his rate would be less than PPLs but that his bills for January, 2014 and February, 2014 did not reflect as such supports a finding that IDT's prices billed did not reflect the marketed prices. As such, substantial record evidence demonstrates that IDT violated Section 54.4 of the

Commission's regulations regarding bill format.

I.D. at 13.

Mr. Kiback met his burden of proof by providing un rebutted and substantial evidence that IDT violated the Commission's regulations regarding telemarketing and billing. ALJ Cheskis specifically addressed the importance of accurate sales solicitations in his Initial Decision:

The conversation between the customer and the sales agent is critical in the development of a proper market for the competitive provision of electric generation service. Yet, in this case, un rebutted record evidence demonstrates that the total cost to purchase, receive or use electric generation service was not truthfully disclosed in a clear and conspicuous manner or that all material restrictions, limitations or conditions were disclosed. The fact that Mr. Kiback subsequently received a disclosure statement and had a right to rescind the contract does not negate the underlying violation of the Commission's telemarketing regulation by the sales agent. See, Tr. 40.

I.D. at 11. As ALJ Cheskis correctly held, Mr. Kiback has met his burden of proof and has provided un rebutted and substantial evidence that he was promised he would be charged 10% less per kilowatt hour by IDT than he would be by PPL.

B. Mr. Kiback Did Not File A Complaint Against IDT Until Its Actions Violated The Oral Promises Made To Him By IDT's Sales Agent.

In its Exceptions, IDT cites Mr. Kiback's "inaction" immediately following his enrollment as a reason to cast doubt on the veracity of his testimony. That there was a period of time following Mr. Kiback's enrollment during which IDT's actions were consistent with its promises does not shield the Company from liability for conduct which violates Commission regulations designed to protect consumers. Mr. Kiback filed his complaint against IDT after he determined that IDT's conduct violated the promises he was made by the Company's agents when he signed up. Only after a violation occurs can a consumer justifiably bring a complaint

against a company. Once Mr. Kiback became aware that IDT was charging him prices which violated the promises he was made, he filed a complaint with the Commission. Thus the length of time between when Mr. Kiback became a customer and when he filed his complaint is immaterial.

C. The Third Party Verification Is Separate And Distinct From The Sales Solicitation. That Mr. Kiback Was Not The Individual Who Completed It Is Irrelevant.

In its Exceptions, the Company claims that because Mr. Kiback was not the one whose voice appears on the third party verification, that this calls the accuracy of Mr. Kiback's recollections and testimony into doubt. As ALJ Cheskis held in his well-reasoned analysis of this issue, the conversation with the sales agent is a separate and distinct conversation from the conversation during the third party verification. I.D. at 11. IDT did not offer the third party verification tape into the record. As summarized above, what the record does contain is both Mr. Kiback's testimony regarding the substance of IDT's sales and marketing call and that the message conveyed by IDT's agent convinced him to become an IDT customer. The Initial Decision of ALJ Cheskis is soundly supported by his reading of the record and assessment of the credibility of Mr. Kiback's testimony.

OCA Reply to IDT Exception No. 2: ALJ Cheskis Properly Determined That Mr. Kiback Was Entitled To Rely Upon IDT's Telemarketing Sales Agent's Explanation Of IDT's Pricing

In the Initial Decision, ALJ Cheskis determined that IDT's sales agent provided untruthful and inadequate information during the sales call made to Mr. Kiback regarding the prices that IDT would charge if Mr. Kiback enrolled with IDT. I.D. at 7-13. ALJ Cheskis found Mr. Kiback's testimony that he was told by a sales agent that he would receive a rate 10% lower

than PPL's was credible and that Mr. Kiback was not billed by IDT consistent with the representation of its agent during the sales contact. I.D. at 7-12. ALJ Cheskis considered the testimony presented by IDT and found it insufficient to rebut Mr. Kiback's testimony that the IDT sales agent stated that IDT's pricing would always be below PPL's price to compare. I.D. at 10-12. ALJ Cheskis recommends that the Commission impose a civil penalty of \$1,000 for the failure of IDT's telemarketing sales agent to truthfully, and in a clear and conspicuous manner, disclose to Mr. Kiback the total cost to purchase, receive and use competitive electric supply from IDT. I.D. at 10-11, 17. The Commission should adopt ALJ Cheskis' decision as supported by both the record, law and policy.

IDT excepts to ALJ Cheskis' determination that IDT and its sales agent failed to provide accurate and truthful information during the sales contact. IDT Exc. at 17-23. IDT suggests that the Commission should find that consumers are subject to a limited window of time "to review their bills and disclosure statements and raise any concerns about their enrollment in a timely manner." *Id.* at 18. IDT asks the Commission to determine that once the consumer has received the disclosure statement and had time to review it, any information provided to the consumer during the sales contact is no longer actionable and its disclosure statement alone must be given binding force and effect. *Id.* at 19-23. IDT implies that the passage of time raises due process concerns.

The Commission should deny IDT's Exception No. 2. As ALJ Cheskis noted, the Commission has clearly stated that a consumer's understanding of the terms of service, including the EGS's pricing terms, may be shaped by both the oral communications made by the EGS's agent during the sales and marketing and written materials. I.D. at 11-12, citing Yagliderelirer. In Yagliderelirer, the Commission noted that oral representations by the EGS's agent could

possibly “undermine the clarity of its written communications” such that the EGS’s “disclosure and marketing could be unclear, misleading, or deceptive in contravention of our Regulations.” I.D. at 12, citing Yagliderelirer at 19; accord, William MacLuckie v. Palmco Energy, Docket No. C-2014-2402558, Opinion and Order at 20-22 (Dec. 4, 2014)(MacLuckie). In MacLuckie, the Commission stated:

*Because residential consumers in general are not necessarily experienced in gas procurement and pricing practices, it is all the more important that they be able to rely on all information from their prospective supplier through clear and unequivocal disclosures, whether oral or written. If Mr. MacLuckie were led to believe through oral communications that the possibility of an exorbitant increase was ridiculous because it would be against Palmco’s business interests, that may have a bearing on the propriety of Palmco’s marketing practices. He should be entitled to an opportunity to prove that fact.*

Id. at 21 (emphasis added). IDT’s position that oral marketing statements and written disclosure statements should be treated as separate and that the written disclosure statement supersedes prior information provided is contrary to recent Commission Orders.

The OCA submits that the Commission should also reject IDT’s position that limits on the ability of consumers to bring complaints based on sales and marketing communications exist or are necessary to promote Pennsylvania’s competitive electric supply market. In William Towne v. Great American Power, LLC, Docket No. C-2012-2307991, Order (Oct. 18, 2013)(Towne), the Commission held that the EGS’s telemarketing misconduct had the potential to harm development of the competitive market. Towne at 22. The Commission imposed a \$10,000 civil penalty on the EGS in Towne for the EGS’s repeated telemarketing calls which had the potential to mislead and lead to slamming. Id.

The Commission should reject IDT’s position that consumers may only challenge the accuracy and truthfulness of oral communications made by IDT sales agents within some

narrow window of time. In support, IDT cites to Commission regulations which address the time frames for consumers to rescind or raise concerns that they have been slammed by a supplier and supplier retention of third party verifications related to the enrollment process. IDT Exc. at 17-18. IDT asks the Commission to bar consumers from raising marketing-related complaints beyond the time the consumer receives the disclosure statement or the six-month period for TPV record retention. Id. at 18-19. IDT's position must be rejected. As a licensed EGS, IDT has an obligation to provide adequate and accurate information to consumers to enable them to make informed decisions about the purchase of electric supply service. 52 Pa. Code § 54.1. The "adequate and accurate customer information" that IDT must provide includes all "[w]ritten, oral, and electronic communications" used by IDT "to communicate to consumers prices and terms of service." 52 Pa. Code §§ 54.1, 54.2. IDT's obligations to provide consistent, accurate and adequate information extend from the earliest of sales and marketing communications to prospective customers through to IDT's billing of the agreed upon price for supply service. 52 Pa. Code §§ 54.4(a), 54.5(a), 54.7(a). The untruthful nature of a telemarketing message may only become apparent to a consumer when the consumer receives bills for services provided at prices contrary to those oral statements. IDT's request for some time limitations on its responsibility for inaccurate, untruthful statements made by its own agents could lead to the absurd result that after the passage of the designated time period, the Co. need not honor any of its promises or marketing statements and customers would have no recourse.

The Commission should also reject IDT's suggestion that it was not afforded due process. As discussed in OCA Reply Exception No. 1 above, Mr. Kiback presented sworn testimony that IDT sales agents called several times and he enrolled with IDT based on the understanding that IDT's billed prices would be below PPL's price to compare. IDT received

the same opportunity as the EGSs in the Dawes and Hoke cases to hear the consumer complainant testimony and present evidence in rebuttal. See Dawes v. Pennsylvania Gas & Electric, Docket No. F-2013-2361655, Initial Decision (Jan. 14, 2014)(Dawes I.D.), Final Order (Feb. 27, 2014); Hoke v. Ambit Energy, Docket No. C-2013-2357863, Initial Decision (Nov. 31, 2013)(Hoke I.D.), Final Order (Jan. 16, 2014). Factual and record differences account for the different outcomes in Dawes, Hoke and ALJ Cheskis' Initial Decision in this case, not the length of time between the sales and marketing contact and consumer complaint. In Dawes, the record included a TPV recording which proved pivotal. Dawes I.D. at 17-18. In Hoke, the complainant consulted the Commission's PaPowerSwitch website for information regarding the EGS's pricing, resulting in a comparison of unlike supply products and confusion. Hoke I.D. at 6. As ALJ Cheskis noted, IDT had the opportunity to introduce its third party verification recording or sales scripts or any other probative evidence to rebut Mr. Kiback's testimony. I.D. at 12-13, fn. 13. IDT's suggestion that it has not received due process is without merit.

The Commission should deny IDT's Exception No. 2 as contrary to IDT's clear obligations under the Public Utility Code and Commission's regulations to provide accurate and truthful information to consumers in all oral communications, including telemarketing calls. ALJ Cheskis' finding of a violation by IDT is well supported by the record evidence.

OCA Reply to IDT Exception No. 3: ALJ Cheskis' Determination That IDT Violated Two Commission Consumer Protection Regulations Supports Imposition Of Civil Penalties And A Credit To Mr. Kiback For Overbilling.

In the Initial Decision, ALJ Cheskis carefully evaluated the record evidence and determined that IDT had committed two violations of the Commission's regulations, Section 111.10(a)(3) and Section 54.4. I.D. at 8-13. Section 111.10 of the Commission's regulations

expressly requires EGSs to comply with the federal prohibition against telemarketing fraud. I.D. at 8, citing the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 and 16 CFR Part 310. Based on Mr. Kiback's sworn testimony and several statements during cross-examination, ALJ Cheskis held that Mr. Kiback had demonstrated that "IDT or its agent had 'failed to disclose truthfully and in a clear and conspicuous manner the total cost to purchase, receive, or use' electric generation service from IDT and all material restrictions, limitations or conditions to receive supply generation service from IDT before Mr. Kiback consented to pay for the goods or services" in violation of the telemarketing fraud prohibition in the Commission's regulation at 52 Pa. Code §§ 111.10(a)(3). I.D. at 11. ALJ Cheskis held that IDT's January and February 2014 bills to Mr. Kiback demonstrated that IDT had violated the Section 54.4(a) requirement that "EGS bills 'must reflect the marketed price and the agreed upon prices in the disclosure statement.'" I.D. at 13; 52 Pa.Code § 54.4(a). The OCA submits that ALJ Cheskis' Initial Decision is supported by the record and should be adopted by the Commission.

IDT's Exception No. 3 asks the Commission to find that IDT billed Mr. Kiback consistent with its disclosure statement and so there is no violation of Section 54.4. IDT Exc. at 23-25. At most, IDT contends the two violations found by the ALJ are "mutually exclusive." Id. at 25-26. IDT states that the record does not support a finding of a violation of either regulation and no civil penalty is appropriate. Id. at 23-27. Although IDT readily offered Mr. Kiback courtesy adjustments, IDT excepts to ALJ Cheskis' recommendation that IDT provide credits for two months of overbilling. Id.

The Commission should dismiss IDT's Exception No. 3 as contrary to the record and Commission regulations and policy.

IDT's position that it has not violated Section 54.4 because it billed Mr. Kiback in accord with the terms of its disclosure statement is flawed. As ALJ Cheskis noted, Section 54.4(a) states that "EGS prices billed must reflect the marketed prices and the agreed upon prices in the disclosure statement." IDT improperly asks the Commission to ignore that EGS billed prices must be consistent with *both* "the marketed prices" and the prices in the disclosure statement as "agreed upon." The Commission has affirmed in Yagliderelirer and other orders that the clarity and consistency of both the EGS's oral communications and written communications are subject to review to determine whether the EGS has complied with its obligations as licensed EGS and relevant Commission's orders regarding marketing and billing.

The OCA submits that ALJ Cheskis' determination that IDT violated two Commission regulations, the telemarketing anti-fraud provision adopted in Section 110.10 and the billing provision of Section 54.4(a) is well supported by the evidentiary record. IDT's suggestion that there is circularity is misplaced. As a licensed EGS, IDT is required to provide adequate, accurate and truthful information both during the sales and marketing contacts and through written communications, including disclosure statements and bills, after a customer enrolls. Non-compliance with individual regulations can support separate civil penalties. 66 Pa.C.S. § 3301(a). ALJ Cheskis' recommendation of a \$2,000 civil penalty is soundly supported by his review of IDT's conduct and the Commission's guidelines. I.D. at 13-17, citing 52 Pa.Code § 69.1201(c).

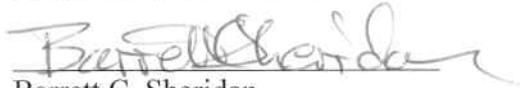
ALJ Cheskis also properly recommends that IDT be ordered to provide Mr. Kiback with a credit for IDT's overbilling of Mr. Kiback in January and February 2014. I.D. at 17-18. ALJ Cheskis' recommendation is within the Commission's authority and appropriate

based on the record. Id., citing Commonwealth of Pa., et al v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order (Dec. 18, 2014).

### III. CONCLUSION

As set forth above, the OCA respectfully requests that the Commission adopt the Initial Decision of Administrative Law Judge Joel H. Cheskis. The OCA requests that the Commission direct IDT to issue an appropriate credit for overbilling and direct IDT to pay an appropriate civil penalty, consistent with the Initial Decision.

Respectfully Submitted,



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March 19, 2015  
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CERTIFICATE OF SERVICE

Stephen Kiback, Jr. :  
 :  
 v. : Docket No. C-2014-2409676  
 :  
 IDT Energy, Inc. :

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Reply Exceptions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:


Dated this 19th day of March 2015.

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