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April 28, 2015

VIA ELECTRONIC FILING

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

RE: Commonwealth of Pennsylvania, by Attorney General Kathleen Kane, Through the Bureau of Consumer Protection and Tanya J. McCloskey, Acting Consumer Advocate v. IDT Energy, Inc.
Docket No. C-2014-2427657

Dear Secretary Chiavetta:

Enclosed for filing please find the Answer of IDT Energy, Inc. to the Petition to Intervene of Anthony Ferrare in the above-referenced matter. Copies of the Answer have been served in accordance with the attached certificate of service. Please feel free to contact me if you have any questions or concerns.

Best Regards,

STEVENS & LEE



Michael A. Gruin

Encl.

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

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**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	:	
	:	

**ANSWER OF IDT ENERGY, INC. TO
PETITION TO INTERVENE OF ANTHONY FERRARE**

Pursuant to 52 Pa. Code § 5.66, IDT Energy, Inc. (“IDT”), hereby submits its Answer to the Petition to Intervene (“Petition”) filed by Anthony Ferrare “on behalf of himself and all others similarly situated” in the above-captioned proceeding. As set forth below, Mr. Ferrare’s Petition should be denied because 1) Mr. Ferrare has not demonstrated good cause for the lateness of his Petition; 2) it is well settled that individuals are not permitted to represent the interests of other customers in Commission proceedings and 3) Mr. Ferrare has not identified any interest of his that will be affected by Commission action in this case that is not adequately represented by existing participants. In short, Mr. Ferrare has asserted no legitimate basis for intervening in this proceeding, which has now been active for over ten months. To the extent that Mr. Ferrare believes he has a right or claim to assert before the Commission with respect to IDT’s actions, the proper vehicle to assert such a claim would be to file a Formal Complaint against IDT, not to seek a late-filed intervention in this wide-ranging proceeding in which the

interests of IDT's customers are being adequately represented by the multiple highly capable parties.

I. BACKGROUND AND PROCEDURAL HISTORY

The procedural history of this proceeding is lengthy and has been recounted in multiple procedural Orders. On June 20, 2014, the Office of Consumer Advocate ("OCA") and Office of Attorney General ("OAG") filed their Joint Complaint ("Complaint") against IDT. The factual foundation for the Complaint was derived from 47 Formal Complaints filed against IDT at the Commission, 1917 customer complaints filed against IDT with the OAG, and 539 customer contacts to the OCA, all of which related to IDT's variable electric generation supply prices during the well-documented Polar Vortex crisis. The Complaint included seven separate counts.

On July 10, 2014 IDT filed its Answer and New Matter and Preliminary Objections to the Complaint. The Office of Small Business Advocate ("OSBA") filed its Notice of Intervention on July 10, 2014. On July 21, 2014, the Joint Complainants filed their Joint Answer to IDT's Preliminary Objections and on July 30, 2014, the Joint Complainants filed their Joint Reply to IDT's New Matter. On July 31, 2014, the Commission's Bureau of Investigation and Enforcement ("I&E") filed its Notice of Intervention.

By Order issued on August 20, 2014 ("Preliminary Objections Order"), the presiding ALJs partially granted IDT's Preliminary Objections. A Prehearing Conference was held on August 25, 2014 to establish a procedural schedule for the proceeding. Counsel for IDT, the OCA, the OAG, the OSBA and I&E participated in the Prehearing Conference. On August 27, 2014, Procedural Order # 2 was issued in the proceeding, which established the deadlines for serving written testimony and a schedule for the evidentiary hearings.

Both IDT and the OCA/OAG filed Petitions for Interlocutory Review and Answer to Material Question(s), on September 8, 2014, to seek Commission review of certain aspects of the Preliminary Objections Order.

On October 31, 2014, the Joint Complainants pre-served the written direct testimony of approximately 215 customer witnesses. On November 25, 2014, the Joint Complainants filed a Memorandum of Law regarding the Admission of Pattern and Practice Evidence, and on December 10, 2014, IDT filed its Reply Memorandum of Law Regarding the Admission of Pattern and Practice Evidence.

On December 18, 2014, the Commission issued an Opinion and Order on the two Petitions for Interlocutory Review of Material Questions (“Material Question Order”). The Material Question Order held that:

- (1) The Commission does not have authority and jurisdiction to determine whether a violation of the Telemarketer Registration Act (“TRA”) has occurred, but the Commission does have authority jurisdiction and authority to determine whether IDT has violated Section 111.10 of the Commission’s Regulations (52 Pa. Code § 111.10);
- (2) The Commission does not have traditional ratemaking authority over competitive electric generation suppliers and does not regulate competitive supply rates, but the Commission has jurisdiction and authority to determine whether IDT billed customers in accordance with its Disclosure Statement, pursuant to Sections 54.4(a) and 54.5(a) of the Commission’s Regulations (52 Pa. Code §§ 54.4(a), 54.5(a); and
- (3) The Commission does not have authority to order “equitable” remedies including restitution, and Section 1312 of the Public Utility Code does not provide the Commission with the requisite authority to direct Electric Generation Suppliers to issue refunds to customers. But the Commission held that it does have authority to order EGS billing adjustments for an over bill of supply charges pursuant to 66 Pa. C.S. § 501.

Hearings for the Cross-Examination of customer witnesses took place during the week of February 17-20, 2014, at which time the testimonies of ninety-eight witnesses were moved into the record. Multiple rounds of discovery have been exchanged by the parties to date.

On April 8, 2015, nearly ten months after the proceeding was initiated, Mr. Ferrare filed his Petition to Intervene.

II. STANDARDS FOR INTERVENTION IN COMMISSION PROCEEDINGS

Section 5.72 of the Commission's regulations governs intervention. This Section provides that "a petition to intervene may be filed by a person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought." 52 Pa.Code § 5.72(a). Section 5.72 also provides that the right or interest supporting intervention may be one of the following:

- (1) A right conferred by statute of the United States or of the Commonwealth.
- (2) An interest which may be directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.
- (3) Another interest of such nature that participation of the petitioner may be in the public interest.

In the seminal case of *William Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975), the Pennsylvania Supreme Court concluded that one who seeks to challenge governmental action must show an interest in the case that is direct, immediate and substantial. The Commission has repeatedly used this standard to determine if a party has standing to intervene in Commission proceedings. In determining whether an interest is "substantial" and "direct" enough to qualify a petitioner for intervener status, the Commission has held that:

A “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A “direct” interest requires a showing that the matter complained of caused harm to the party’s interest. An “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interest sought to be protected by the statute or the constitutional guarantee in question.

PPL Electric Utilities Corp. Universal Service and Energy Conservation Plan for 2011-2013, Docket No. M-2010-2179796, (Order entered May 5, 2011 at p. 6), citing *William Penn Parking Garage v. City of Pittsburgh*.

The Commission’s regulations also outline the specific information that must be included in Petitions to Intervene. Under 52 Pa. Code § 5.73, Petitions to Intervene must set out clearly and concisely the following:

- (1) The facts from which the alleged intervention right or interest of the petitioner can be determined.
- (2) The grounds of the proposed intervention.
- (3) The petitioner’s position regarding the issues in the proceeding.

Petitions to Intervene are required to be filed within sixty days of the initiation of a proceeding. The Commission’s regulation at 52 Pa. Code §5.74 states that Petitions to Intervene shall be filed no later than the date fixed for the filing of responsive pleadings in an order or notice with respect to the proceedings but not less than the notice and protest period established under §§ 5.14 and 5.53 (relating to applications requiring notice; and time of filing) absent good cause shown. If “no deadline is set in an order or notice with respect to the proceedings”, then the regulation states that the time limits of 52 Pa. Code § 5.53 shall apply. Section 5.53 states that “A protest shall be filed within the time specified in the published notice of the application.

If no protest time is specified, the protest shall be filed within 60 days of publication of the notice.”

Interventions based on late-filed Petitions are only to be granted when (1) the petitioner has a reasonable excuse for missing the initial due date; (2) the proceeding is contested at the time of the filing of a petition for intervention; (3) a grant of intervention will not delay orderly progress of the case; and (4) the grant of intervention will not broaden significantly the issues or shift the burden of proof. *See, e.g., In re Pennsylvania American Water Co.*, Docket No. A-212285F0096, A-230073F00042002, 97 Pa. P.U.C. 157, (May 9, 2002), *citing Re S.T.S. Motor Freight, Inc.*, 54 Pa PUC 343 (1980).

III. ARGUMENT

A. Mr. Ferrare’s Has Not Provided Any Good Cause For Excusing The Lateness Of His Petition To Intervene

This proceeding was initiated on June 20, 2014, when the Joint Complaint was filed. Pursuant to 52 Pa. Code §5.74, Petitions to Intervene were due on August 19, 2014, absent good cause shown. Mr. Ferrare’s Petition to Intervene was not filed until April 8, 2015, nearly eight months after the deadline for intervention had passed. Mr. Ferrare’s Petition includes no explanation whatsoever to justify the lateness of his Petition. This lack of demonstration of good cause for the lateness of his filing alone warrants dismissal of the Petition.

Based on filings made in Mr. Ferrare’s class action suit in Federal District Court, Mr. Ferrare has been aware of this proceeding since September 4, 2014, at which time he could have filed a Petition to Intervene that would have only been a few weeks late. But instead, Mr. Ferrare made no attempt to intervene in this proceeding until a settlement was reached in a parallel proceeding brought by the Joint Complainants against Energy Service Providers Inc.,

d/b/a U.S. Gas & Electric.¹ Because nearly ten months have passed since this proceeding was initiated and nearly eight months have passed (if not more) since Mr. Ferrare became aware of this proceeding, and because Mr. Ferrare's Petition contains no justification whatsoever for the lateness of the Petition, his Petition should be dismissed as being untimely without reaching the substance of the Petition.

Even if the merits of Mr. Ferrare's Petition are reached, it is clear that the Petition should be dismissed, for the reasons set forth below.

B. Mr. Ferrare Has No Standing To Represent The Interests Of Other Individuals

It is well settled that a party may not claim standing in a Commission proceeding to vindicate the rights of a third party who has the opportunity to be heard. See *Mid-Atlantic Power Supply Association v. Pennsylvania Public Utility Commission*, 746 A.2d 1196 (Pa. Cmwlth. 2000), *Camille "Bud" George v. Pa. P.U.C.*, 735 A.2d 1282 (1999) and *Theresa Gavin v. PECO Energy Company*, Docket No. C-2012-2325258 (Initial Decision entered November 26, 2012, Final Order entered January 24, 2013). Likewise, the Commission's regulations allow individuals to represent themselves but they cannot be represented by people who are not attorneys. 52 Pa.Code §§ 1.21(a) and 1.22(a); see also, *William MacLuckie v. Palmco Energy PA, LLC*, Docket Number C-2014-2402558 (Opinion and Order entered December 4, 2014).

While Federal District Courts and the Pennsylvania Common Pleas Courts have jurisdiction and authority to adjudicate civil class-action civil lawsuits pursuant to the Federal Rules of Civil Procedure and the Pennsylvania Rules of Civil Procedure respectively, the Public Utility Code does not confer such authority on the Commission. Nothing in Section 701 or any other section of the Public Utility Code permits the filing of class action complaints by individuals or allows

¹*Tanya J. McCloskey, Acting Consumer Advocate, and Comm. of Pa. v. Energy Services Providers, Inc., d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-2427656, Joint Petition for Settlement filed on March 24, 2015. ("USG&E Proceeding")

individuals to represent the interests of other customers, similarly situated or not, before the Commission. The authority to represent the interest of the general public is only given to the statutory advocates, namely, the OCA, I&E, and the OSBA, all of whom are already actively participating in the proceeding.

In short, the law on this point is clear - Mr. Ferrare has no standing to seek intervention as a representative of the interests of others. To the extent that Mr. Ferrare seeks to intervene in this proceeding, he may only seek to do so to in his individual capacity. But, as discussed below in more detail, Mr. Ferrare should not be permitted to intervene even in his individual capacity, because he fails to meet the basic requirements for intervention in a Commission proceeding.

C. Mr. Ferrare Has No Interest That Will Be Directly Affected By The Outcome of This Proceeding That Is Not Being Adequately Represented

Under 52 Pa. Code § 5.73, petitions to intervene must set out clearly and concisely the following (emphasis added):

- (1) The facts from which the alleged intervention right or interest of the petitioner can be determined.
- (2) The grounds of the proposed intervention.
- (3) The petitioner's position regarding the issues in the proceeding

Mr. Ferrare's Petition is very sparse, and it does not set forth his position regarding the issues in the proceeding or explain why his interest is directly affected by the proceeding, why such interest is not adequately represented, or how he may be bound by the action of the Commission in the proceeding.

Mr. Ferrare's Petition does not come close to explaining how he has a substantial interest that would be directly affected by this proceeding that is not already being represented by active participants. Simply being a plaintiff in a class action against IDT does not constitute a

substantial interest that warrants intervention in this proceeding. Mr. Ferrare's intervention is quite obviously being filed by his attorneys to support *their* pecuniary interest in the class action case rather than to protect any direct interest of Mr. Ferrare's. The same attorneys have filed a similar Petition to Intervene in a parallel proceeding involving the Joint Complainants and Energy Service Providers, Inc. d/b/a U.S. Gas & Electric, in which they vehemently objected to a comprehensive settlement in that case.² The fact that Mr. Ferrare's attorneys have requested permission for Mr. Ferrare to intervene in this proceeding rather than file a Formal Complaint on his behalf against IDT speaks volumes about the true motivation behind the intervention. It is also telling that Mr. Ferrare's class action attorneys only filed the Petition to Intervene in this matter after the Petition for Settlement was filed in the *USG&E* proceeding.

Mr. Ferrare's Petition also fails to identify how a Commission action in this proceeding will bind his interests in any proceeding before the Commission, which is a baseline requirement for intervention under 52 Pa. Code § 5.72(a)(2). The current proceeding is a prosecution brought by the Joint Complainants in their representative capacities as government agencies on behalf of the public interest. In bringing this Complaint, the Joint Complainants are seeking to prove a number of alleged violations of the Commission's regulations and the Public Utility Code, purportedly on behalf of IDT's entire customer base, and to obtain relief that the Commission has the authority to order for such alleged violations.

The Joint Complainants' pursuit of remedies in the public interest does not in any way prohibit Mr. Ferrare from seeking his own relief from the Commission related to his individual circumstances and interests. Mr. Ferrare can pursue such claims against IDT by filing a Commission Formal Complaint against IDT under Section 701 of the Public Utility Code. In all

² See the Notice of Intervention filed by Thomas Sobiech, through counsel Jonathan Shub, Esq. and Scott George, Esq. of Seger Weiss, LLP and Troy M. Frederick, Esq., of Marcus & Mack, P.C.,

likelihood, such a Formal Complaint would be resolved long before the expected conclusion of this proceeding. To be clear, Mr. Ferrare's attempted intervention in this case is not analogous to a customer intervention in a utility rate case, in which the outcome of the rate case will be binding on the entire customer base going forward. Rather, this proceeding involves an examination of certain historical actions by IDT to determine if those historical actions violated the Public Utility Code or the Commission's regulations. No evidence has or will be submitted regarding IDT's interactions with Mr. Ferrare. If the Commission ultimately dismisses the Joint Complaint with no finding of wrongdoing by IDT regarding the specific allegations made by the Joint Complainants, this would not prevent Mr. Ferrare from filing his own Formal Complaint seeking relief from the Commission against IDT related to his specific allegations of violations. Similarly, if the Commission ultimately finds in favor of the Joint Complainants on some or all Counts of the Complaint, such findings may not be dispositive of all claims that Mr. Ferrare could assert in a Formal Complaint to the Commission either, and he would still be obligated to pursue a Formal Complaint to the Commission against IDT to obtain resolution regarding his specific circumstances.

To the extent the Mr. Ferrare claims to have a substantial interest in this proceeding based on his general status as a customer of IDT's who was affected by higher retail electricity charges during last year's Polar Vortex , such interest is already being adequately and vigorously represented by the Acting Consumer Advocate and three attorneys in her office, the Attorney General of Pennsylvania and two attorneys from her office, three attorneys from the Commission's own Bureau of Investigation and Enforcement, and an attorney for the Office of Small Business Advocate. The attorneys who are representing these statutory advocates have decades of combined experience in enforcement actions before the Commission, and the Joint

Complainants will be presenting the testimony of multiple expert witnesses in support of their position, so it cannot be reasonably argued that Mr. Ferrare's interest is not being adequately represented. Mr. Ferrare's Petition contains no explanation whatsoever as to why his interests differ from those being advocated by the OCA, the OAG, and BIE, and no discussion of why his independent participation in the case – ten months after it was filed – is necessary to protect his interest. Because Mr. Ferrare has not identified any interest of his that is not already being adequately represented by the existing parties, his Petition must be denied in accordance with the Commission's clear standards for intervening in open Commission proceedings.

IV. CONCLUSION

Regardless of how Mr. Ferrare's sparse Petition to Intervene is interpreted, he has not demonstrated that he meets the requirements for intervention in this proceeding. Mr. Ferrare's stated basis for intervening – that he seeks to intervene to protect the rights of putative members of a pending class action lawsuit against IDT – is clearly not a permissible basis for intervention in a Commission proceeding, as it is well settled that a party may not claim standing to vindicate the rights of a third party who has the opportunity to be heard. To the extent that Mr. Ferrare's Petition is interpreted as being a request to intervene to protect his own interest(s), Mr. Ferrare's Petition fails to identify or explain how a Commission action in this case could bind or affect his interests. Mr. Ferrare has the right to file his own Formal Complaint seeking relief from the Commission against IDT if he believes that IDT violated the Public Utility Code or Commission's regulations in its interactions with him. Such a Formal Complaint to the Commission could have been filed prior to the initiation of this proceeding, could be filed during the pendency of this proceeding, and could be filed after the conclusion of this

proceeding, and no Commission action in this proceeding will affect that right. Finally, to the extent Mr. Ferrare seeks to intervene based on general public interest or policy grounds, he does not qualify for intervention because the public interest is already being adequately represented by the OCA, the OAG, and I&E in this proceeding. For these reasons, IDT respectfully requests that Mr. Ferrare's Petition to Intervene be denied.

Respectfully submitted,

STEVENS & LEE



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COUNSEL FOR IDT ENERGY, INC.

DATE: April 28, 2015

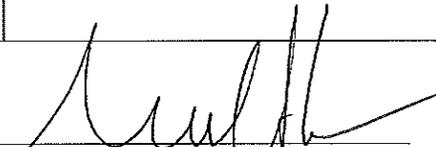
CERTIFICATE OF SERVICE

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

VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL

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April 28, 2015


Michael A. Grubin, Esq.