

**STEVENS & LEE**  
**LAWYERS & CONSULTANTS**  
17 North Second Street  
16th Floor  
Harrisburg, PA 17101  
www.stevenslee.com

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

May 27, 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 Motion to Compel of IDT Energy, Inc. in the above-referenced matter. Copies of the Motion 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**

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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	:	

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**NOTICE TO PLEAD**

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***To: John Abel, Esq. Counsel for Commonwealth of Pennsylvania, and Candis Tunilo, Esq., Counsel for The Office of Consumer Advocate***

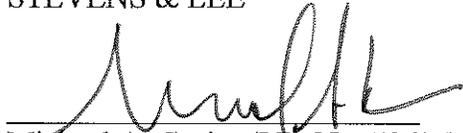
You are hereby notified to file a written response to the attached Motion to Compel of IDT Energy, Inc. within five (5) days from the date of service of this notice. If you do not file a written response denying the enclosed Motion to Compel within five (5) days of service, the presiding officers may rule in favor of IDT Energy, Inc. on the attached Motion without a hearing. All pleadings, such as Answers to Motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned counsel for IDT Energy, Inc. Failure to respond to this Motion could result in an Order which requires responses to IDT Energy, Inc.'s Interrogatories.

DATE: May 27, 2015

STEVENS & LEE



Michael A. Gruin, (I.D. No. 78625)

17 N. 2<sup>nd</sup> St., 16<sup>th</sup> Fl

Harrisburg, PA 17101

Tel. (717) 255-7365

Fax (610) 988-0852

COUNSEL FOR IDT ENERGY, INC.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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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	:	

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**MOTION TO COMPEL OF  
IDT ENERGY, INC.**

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In accordance with 52 Pa. Code § 5.342(g), Respondent IDT Energy, Inc. (“IDT”) files this Motion to Compel, requesting the dismissal of the Objections filed by the Office of Consumer Advocate (“OCA”) and Commonwealth of Pennsylvania, through Attorney General Kathleen Kane (“OAG) to IDT’s Interrogatories VI-3 and VI-4, and compelling the OCA and the OAG to provide Answers to the aforesaid Interrogatories. In support thereof, IDT states as follows:

1. On June 20, 2014, the OCA and OAG filed a Joint Complaint (“Complaint”) against IDT.
2. The Complaint stated that the OCA had received approximately 3000 contacts from consumers regarding Electric Generation Supplier variable rates, and that as of May 5, 2014, the OCA had collected information from approximately 2,434 of those contacts. Of the referenced 2,434 contacts, approximately 539 or 22% were from customers of IDT. See Complaint, at paragraphs 15-17.

3. The Complaint also stated that “From February 27, 2014 to June 4, 2014, the OAG received approximately 39,607 telephone calls and 7,503 customer complaints related to variable rates charged by EGSs. Of the 7503 customer complaints, 1,917 or nearly 26% were against Respondent”. See Complaint, at paragraph 18.

4. On April 30, 2015, the Joint Complainants served the Direct Testimony of Dr. Stephen Estomin, Barbara Alexander, Ashley Everette, and Heather Troutman.

5. In his Testimony, Dr. Estomin opines that IDT’s charged rates “that were not determined by market price related factors since the rates were well in excess of what the market would dictate.” See Estomin Direct Testimony, at p. 6.

6. On May 7, 2015, in order to gather information necessary for the preparation of its Rebuttal Testimony (IDT’s only round of written testimony in this proceeding), IDT served its sixth set of Interrogatories and Requests for Production of Documents upon the OCA and OAG.

7. On May 18, 2015, the OCA and OAG served objections to two of IDT’s Interrogatories, specifically IDT Interrogatories VI-3 and VI--4.

8. IDT Interrogatory VI-3 states:

“Based on the information collected from the 2434 customers from whom the OCA collected information, as referenced in the OCA’s response to IDT Interrogatory II-2, please indicate how many EGSs were identified as:

- a. charging rates in excess of \$.20/kWh
- b. charging rates in excess of \$.25/kWh
- c. charging rates in excess of \$.30/kWh

9. IDT Interrogatory VI-3 states:

“Of the 7503 complaints received by the OAG, as referenced in the Complaint, please indicate how many EGSs were identified as:

- a. charging the complaining customer a rate in excess of \$.20/kWh

- b. charging the complaining customer a rate in excess of \$.25/kWh
  - c. charging the complaining customer a rate in excess of \$.30/kWh
10. Full copies of Interrogatories VI-3 and VI-4 are attached hereto as Exhibit A.
11. A full copy of the OCA and OAG's Objections to Interrogatories VI-3 and VI-4 is attached hereto as Exhibit B.
12. The OCA and OAG raise three objections to the Interrogatories in question: 1) the Interrogatories will not lead to relevant information or admissible evidence regarding the allegations against IDT, 2) the Interrogatories are beyond the scope of permissible discovery because they seek attorney work product, and 3) the information requested by the Interrogatories is protected by the "investigative privilege".
13. As set forth below, there is no legitimate basis for the OCA and OAG to refuse to provide the information requested by Interrogatories VI-3 and VI-4, and their objections should be dismissed and they should be compelled to provide answers to the Interrogatories in question.

**The information sought by IDT is calculated to lead to the discovery of admissible evidence.**

14. Under the Commission's regulations, the scope of permissible discovery is broad. Section 5.321(c) of the Commission's regulations states:

" Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. **It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.**" (Emphasis added.)

15. Relevant evidence is evidence tending to prove or disprove an alleged fact or evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than without the evidence. See Order Denying IDT's Motion to Compel, issued September 8, 2014 in this proceeding.

16. The information requested by IDT in Interrogatories VI-3 and VI-4 is relevant in that it could tend to disprove Dr. Estomin's conclusion that IDT's charged rates "were well in excess of what the market would dictate."

17. The information sought by IDT Interrogatories VI-3 and VI-4 is calculated to the lead to the discovery of admissible evidence regarding what prices the market would dictate, and is necessary to allow IDT to develop its Rebuttal to Dr. Estomin's Testimony.

18. IDT is aware that the presiding ALJ's issued an Order denying a previous IDT Motion to Compel in connection with Interrogatories that sought information about the numbers of complaints and customer contacts received by the OAG and OCA regarding EGS variable rates, broken out by named EGS. In denying IDT's previous Motion to Compel, the ALJ's held that "materials and practices of other EGSs have no relevance to whether IDT's materials and practices violate the Public Utility Code." See Order Denying Motion to Compel issued September 8, 2014.

19. IDT respectfully submits that Interrogatories VI-3 and VI-4 are different in both scope and purpose from the Interrogatories at issue in IDT's previous Motion to Compel, and therefore the grounds for denying IDT's previous Motion to Compel are not present here.

20. Contrary to the Joint Complainants' assertions in their Objections, the purpose of IDT Interrogatories VI-3 and VI-4 is not to obtain information about other EGSs' marketing practices or disclosure statements. The Interrogatories in question do not relate to the EGS

billing and marketing practices, and the Interrogatories do not even seek the names of other EGSs or any documents related to any other EGSs.

21. Rather, IDT's Interrogatories seek information about the extent to which electric generation supply rates exceeded of \$.20, \$.25, and \$.30 per kWh during the Polar Vortex, to allow IDT to evaluate, and possibly rebut, Dr. Estomin's opinion that IDT's rates "were in excess of what the market would dictate."

22. Clearly, an examination of the rates that were actually charged in the Pennsylvania marketplace during early 2014 is relevant to the issue of whether the rates that IDT charged were in excess of what the market would dictate. If rates equal to or exceeding IDT's were present in the market during that time, it calls into question Dr. Estomin's allegation that IDT's rates "were in excess of what the market would dictate."

23. The Joint Complainants have the information requested by IDT in their possession, as demonstrated by the Joint Complainants' response to IDT Interrogatory II-2, attached hereto was Exhibit C.

24. At a minimum, IDT should be permitted to evaluate this rate information - which was provided by customers to the Joint Complainants - to determine if the information corroborates or contradicts Dr. Estomin's conclusions.

25. Preventing IDT from obtaining this information will seriously impair IDT's ability to prepare its Rebuttal Testimony, whereas allowing IDT to obtain this information will not prejudice the Joint Complainants in any way, as the Joint Complainant's have not indicated that such information would be unduly burdensome to compile.

26. It should be noted that IDT tailored its Interrogatories very narrowly, such that the Joint Complainants only need to provide tabulated numbers without revealing the names of any suppliers. IDT narrowly tailored its requests in light of the ALJ's prior ruling and in order to

address the Joint Complainant's expected (but meritless) concerns about "attorney work product" and the "investigative privilege". As discussed below, the OCA and OAG have raised those same concerns anyway, but those concerns have even less merit than when the OCA/OAG raised them in response to IDT's previous Motion to Compel.

**Simple tabulations of the number of suppliers identified as charging rates in excess of certain thresholds do not constitute "attorney work product"**

27. The OCA and OAG strain credulity by asserting that a statement of the number of suppliers identified by customers as charging rates in excess of certain thresholds constitutes "attorney work product".

28. The OCA and OAG are correct when they state that the Commission regulation regarding work product at 52 Pa. Code 5.323(a) is consistent with Pa. R.C.P. 4003.3. However, in reciting the text of Pa. R.C.P. 4003.3 on page 6 of their Objections, they again omit the critical introductory sentence of the Rule, even though IDT pointed out that omission in its previous Motion to Compel. The introductory sentence to Pa. R.C.P. 4003.3 states that:

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 **even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent.** (Emphasis added)

29. Therefore, to the extent that the OCA and OAG are alleging that the number of suppliers identified as charging rates in excess of certain thresholds was prepared by and OCA or OAG attorney "in anticipation of litigation", it is clear that such preparation would not insulate the list from discovery unless the list included the "mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes, or summaries, legal research or theories."

30. IDT's Interrogatories simply ask for a basic tabulation of facts in the possession of the Joint Complainants, i.e., the number of suppliers that were identified by complaining customers as charging rates in excess of three thresholds. IDT is not asking for conclusions,

opinion, notes, mental impressions etc., that could implicate the work product doctrine. To the contrary, IDT tailored its request narrowly so as to enable the Joint Complainants to provide the requested information without implicating the work product doctrine.

31. Furthermore, if the numbers of suppliers identified by customers as charging rates in excess of certain thresholds were compiled by representatives of the OCA and OAG other than an attorney, the limitations on disclosure are even more narrow, and only mental impressions, conclusions, or opinions, respecting the value or merit of a claim or defense or respecting strategy or tactics is prohibited from disclosure. Again, IDT's Interrogatories do not seek such mental impressions, conclusions, or opinions.

32. Upon information and belief, the information regarding the number of suppliers who charged various rates was administratively compiled by the staffs of the OCA and OAG, and the lists do not contain any notes, summaries, mental impressions, conclusions, or other protected materials that would prevent disclosure under 4003.3.

33. The Explanatory Notes to Pa. R.C.P. 4003.3 make it clear that the rule was radically changed to limit the scope of the attorney work product doctrine. The Explanatory Notes state that "The Rule is carefully drawn and **means exactly what it says. It immunizes the lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories, **nothing more.****" (emphasis added).

34. Under any reasonable and rational interpretation, simply stating the number of suppliers that were identified as charging rates in excess of three thresholds cannot be considered to constitute a lawyer's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research and legal theories. Accordingly, the requested figures are not prohibited from disclosure under the attorney work product doctrine.

**The numbers of suppliers who were identified as charging rates in excess of certain thresholds are not barred from disclosure under an “investigative privilege”.**

35. In support of their assertion of an investigative privilege that would foreclose the disclosure of the information requested by IDT, the OCA and the OAG cite two Pennsylvania appellate cases and a Federal District Court case that involve request to obtain documents that were utilized in criminal prosecutions. See In Re. Buchanan, 583 Pa. 620, 880 A.2d. 568 (2005), Commonwealth v. Kauffman, 431 Pa. Super. 527, 605 A.2d 1243 (1992) and Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.E. PA 1993).

36. The OCA and OAG characterize these cases as enunciating a broad right of investigating agencies to limit the disclosure of documents that could provide some insight into the “evaluative” process of the prosecuting agency. But the cases cited by the OAG and OCA say nothing of the sort, and clearly indicate that requests to obtain materials should be evaluated pursuant to a balancing test, focused primarily on whether the release of the requested material would hinder an ongoing criminal investigation.

37. The Court in Commonwealth v. Kauffman stated that:

“The federal courts, on occasion, have identified a common law “executive” or “governmental” privilege which they have relied upon to protect information from being discovered during ongoing government investigations. Thus, in Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D.Pa.1973), the federal court for the eastern district of Pennsylvania defined the “executive privilege” as “the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest.” Id. at 342 (footnote omitted). . . . . **This privilege, however, is not absolute but qualified; and, when asserted, requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government.** Frankenhauser v. Rizzo, supra at 343–344. See: Reese v. City of Pittsburgh, 1 Pa.D. & C.3d 704 (Allegheny Co.1976) (rejecting claim of governmental privilege where plaintiff, who was allegedly assaulted by police officer, sought access to police personnel records and internal affairs investigative reports). See also: Crawford v. Dominic, 469 F.Supp. 260 (E.D.Pa.1979).” See Commonwealth v. Kauffman, 605 A.2d at 1247.

38. These cases provide several examples of particular situations that may require the application of the balancing test, such as requests for information regarding confidential informants, requests for autopsy reports, and requests for information regarding arrest warrant affidavits.

39. For instance, in the lead case cited by the OCA and OAG, (Commonwealth v. Kauffman), the Pennsylvania Supreme Court directed the trial court determine whether the Commonwealth can establish that the release of a report in fact poses a threat of “substantially hindering or jeopardizing the ongoing investigation” such that release of the information should be prohibited.

40. Even if the OCA and OAG have potential criminal investigations open against other EGSs, the OCA and the OAG fail to provide any explanation whatsoever as to how the release of the numbers of EGSs who charged rates in excess of certain thresholds – **without revealing the name of any EGS-** could possibly hinder their ongoing investigations of other suppliers.

41. Furthermore, IDT is willing to accept a “Confidential” or even “Highly Confidential” designation for the lists in question, such that IDT would be prohibited from revealing the responses to its Interrogatories or utilizing them in any way that is not authorized by the terms of a Commission Protective Order.

42. Therefore, even if it is accepted for argument’s sake that the release of rudimentary figures requested by IDT could somehow jeopardize the ongoing investigation of those EGSs, the OCA and OAG fail to explain how the release of such lists subject to a Protective Order could not alleviate any concerns they have about hindering an ongoing investigation.

**Conclusion**

43. For the reasons set forth above, IDT respectfully requests that the Objections of the OCA and the OAG be dismissed, and that the OCA and OAG be compelled to provide responses to IDT's Interrogatories Set VI-3 and VI-4, subject to appropriate confidentiality protections.

Respectfully submitted,

STEVENS & LEE



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

DATE: May 27, 2015

# **EXHIBIT A**

3. Based on the information collected from the 2434 customers from whom the OCA collected information, as referenced in the OCA's response to IDT Interrogatory II-2, please indicate how many EGSs were identified as:

- a. charging rates in excess of \$.20/kWh
- b. charging rates in excess of \$.25/kWh
- c. charging rates in excess of \$.30/kWh

4. Of the 7503 complaints received by the OAG, as referenced in the Complaint, please indicate how many EGSs were identified as:

- a. charging the complaining customer a rate in excess of \$.20/kWh
- b. charging the complaining customer a rate in excess of \$.25/kWh
- c. charging the complaining customer a rate in excess of \$.30/kWh

## **EXHIBIT B**



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

KATHLEEN G. KANE  
ATTORNEY GENERAL

Bureau of Consumer Protection  
Public Protection Division  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, Pennsylvania 17120  
Telephone: (717) 787-9707  
Fax: (717) 705-3795  
May 18, 2015

Michael Gruin, Esq.  
Stevens & Lee  
17 N. 2<sup>nd</sup> Street, 16<sup>th</sup> Fl.  
Harrisburg, PA 17101

Re: Commonwealth of Pennsylvania and the Office of Consumer Advocate v. IDT Energy, Inc.

Dear Mr. Gruin:

Enclosed please find Joint Objections of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to IDT Energy, Inc. Interrogatories and Requests for Production, Set VI, Nos. 3 and 4.

Also enclosed is a copy of the Certificate of Service for these Objections, which has been filed with Secretary Chiavetta of the Pennsylvania Public Utility Commission.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. M. Abel', written over the typed name.

John M. Abel  
Senior Deputy Attorney General

Enclosures

cc: Secretary Chiavetta (COS only)  
Certificate of Service

**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	:	

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**JOINT OBJECTIONS OF THE COMMONWEALTH OF PENNSYLVANIA AND THE  
OFFICE OF CONSUMER ADVOCATE TO IDT ENERGY, INC.'S  
INTERROGATORIES AND REQUESTS FOR  
PRODUCTION OF DOCUMENTS – SET VI-3 AND VI-4**

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Pursuant to 52 Pa. Code §§ 5.342(c) and 5.349(d), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (Attorney General) and the Office of Consumer Advocate (OCA) (collectively Joint Complainants) submits these Objections to IDT Energy Inc.'s (IDT Energy or the Company) Interrogatories and Requests for Production of Documents Set VI to the Joint Complainants (IDT Energy Inc.'s Set VI), questions 3 and 4.

**I. INTRODUCTION**

On May 7, 2015, IDT Energy served IDT Energy Inc.'s Set VI on the Joint Complainants. IDT Energy Inc.'s Set VI consists of thirty-three Requests. The Joint

Complainants communicated their objections to questions 3 and 4 to IDT Energy on May 14, 2015 and requested that IDT Energy withdraw the objectionable discovery requests. Thereafter, IDT Energy rejected the Joint Complainants request to withdraw IDT Energy's Set VI-3 and 4. As such, the Joint Complainants submit the following objections pursuant to 52 Pa. Code §§ 5.342(e) and 5.349(d):

## II. OBJECTIONS

The Pennsylvania Public Utility Commission's (Commission) regulations allow a participant to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Id.

Section 5.361 of the Pennsylvania Code, however, specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
  - (1) Is sought in bad faith.
  - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
  - (3) Relates to a matter which is privileged.
  - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a).

The Joint Complainants object to IDT Energy's Set VI-3 and 4, because the requests seek information that is not relevant and will not lead to admissible evidence in this proceeding,

constitute attorney work product and is protected by the investigative privilege. IDT Energy's Set VI-3 provides:

3. Based on the information collected from the 2434 customers from whom the OCA collected information, as referenced in the OCA's response to IDT Interrogatory II-2, please indicate how many EGSs were identified as:
  - a. charging rates in excess of \$.20/kWh
  - b. charging rates in excess of \$.25/kWh
  - c. charging rates in excess of \$.30/kWh

IDT Energy's Set VI-4 provides:

4. Of the 7503 complaints received by the OAG, as referenced in the Complaint, please indicate how many EGSs were identified as:
  - a. charging the complaining customer a rate in excess of \$.20/kWh
  - b. charging the complaining customer a rate in excess of \$.25/kWh
  - c. charging the complaining customer a rate in excess of \$.30/kWh

**A. IDT Energy's Set VI-3 and 4 seek information that is not permitted, because they will not lead to relevant information or admissible evidence in this proceeding.**

The Company's discovery requests seek additional details regarding the number of electric generation suppliers (EGSs) who were identified as charging prices in excess of various specified rates per kWh. The Joint Complainants submit that these discovery requests seek information that is not permitted because they will not lead to relevant information or admissible evidence regarding the allegations against IDT Energy. Specifically, information regarding the practices of other EGSs will not lead to relevant information or admissible evidence regarding the allegations against IDT Energy in the Joint Complaint or defenses that IDT Energy has asserted. Discovery that is not relevant or not reasonably calculated to lead to admissible evidence is not permitted under the Commission's Regulations. 52 Pa. Code § 5.321(c). The allegations of violations in the Joint Complaint are specific to IDT Energy's billing and marketing practices in Pennsylvania. The Administrative Law Judges (ALJs) have already held

in this proceeding that information regarding the billing and marketing practices of other EGSs is not relevant in this type of proceeding. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, (Order entered Sept. 8, 2014) (IDT Order). See also Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection And TANYA J. McCLOSKEY, Acting Consumer Advocate v. HIKO Energy, LLC, Docket No. C-2014-2427652, (Order entered Sept. 2, 2014) (HIKO Order); See also Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement v. HIKO Energy LLC, Docket No. C-2014-2431410, (Order entered December 30, 2014) (I&E Order).<sup>1</sup> In this proceeding, IDT Energy filed a Motion seeking an Order compelling the Joint Complainants to respond to the following interrogatories:

IDT II-1 – Referencing paragraph 15 of the Complaint, please provide a breakout of the approximately 3000 contacts from customers regarding variable rates, listing the names of all EGSs that were identified by customers by name, and the number of customers that referenced each EGS.

IDT II-4 – Referencing paragraph 18 of the Complaint, please provide a breakout of the approximately 7,503 consumer complaints related to variable rates charged by EGSs, listing the names of all EGSs that were identified by customers by name, and the number of complaints against each EGS.

See IDT Order at 3. In the IDT Order, the ALJs held:

The names of other EGSs and the number of contacts and complaints filed against EGSs other than IDT is not relevant to whether IDT's Disclosure Statement is misleading or deceptive in anyway and, therefore, in violation of a Commission Order or regulation prohibiting such activities. As the Joint Complainants

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<sup>1</sup> Additionally, during the hearings in the I&E proceeding on April 20, 2015, the ALJs granted HIKO's Motion to Strike statements by I&E witness Dan Mumford in his Surrebuttal testimony that related to the actions of other EGSs.

averred in the Complaint, Section 54.43(f) of the Commission's regulations, for example, states that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by *its employees, agents and representatives*. 52 Pa.Code § 54.43(f) (emphasis added). Similarly, the Joint Complainants also cite to Section 111.10 which requires *a supplier and its agents* to comply with regulations that govern marketing, consumer protection and telemarketing sales. 52 Pa.Code § 111.10(a) (emphasis added). None of the violations averred in the Complaint pertain to activities of other EGSs or IDT's activities in relation to other EGSs. Information about the operation of other suppliers will not prove or disprove whether IDT has violated Section 54.43 or 111.10 of the Commission's regulations, or any other Commission regulation. IDT interrogatories II-1 and II-4 are, therefore, irrelevant and beyond the scope of discovery ...

Materials and practices of other EGSs have no relevance to whether IDT's materials and practices violate the Public Utility Code. Even if it was determined that IDT's materials and practices are similar to those of other EGSs, that would not be a reasonable defense to the averments in the Complaint.

IDT Order at 5, 7 (Emphasis in original); See also I&E Order at 4-6 (“[T]he number of customer complaints filed against other EGSs in comparison to HIKO is irrelevant and not likely to lead to admissible evidence in the instant case.”). Thus, the Joint Complainants submit that the number of EGSs who were identified as charging prices in excess of various specified rates per kWh, as requested by the Company in Set VI-3 and 4, is not relevant to any of the allegations in the Joint Complaint or to any defense that IDT Energy could raise.

Similarly, in the HIKO Order, the ALJs addressed the issue of whether it was permissible for HIKO to seek information regarding the use of any of HIKO's third party marketers by any of the other four EGSs that Joint Complainants had filed Complaints against with the Commission. The ALJs, again, held that the requested information about other EGS third party sales or marketing services appears to be outside the scope of discovery and not relevant to the issues in that proceeding. See HIKO Order at 4. The ALJs also stated:

While discovery is broad in Pennsylvania, parties are not entitled to engage in “fishing expeditions.” Land v. State Farm Mut. Ins. Co., 410 Pa. Super. 579, 585, 600 A.2d 605, 608 (1991). Whether or not the third party sales marketing company used by HIKO was used by any other EGS appears to be irrelevant to the issues posed in this case.

Id.

Here, IDT Energy is seeking information regarding the practices of other EGSs. Specifically, in IDT Energy’s Set VI-3 and 4, IDT Energy is seeking the number of EGSs who were identified as charging prices in excess of various specified rates per kWh. As the ALJs have held, information regarding consumer contacts to the OCA and consumer complaints to the Attorney General about other EGSs is not relevant and will not lead to admissible evidence regarding the allegations against IDT Energy in the Joint Complaint. Accordingly, the Joint Complainants’ objections to IDT Energy’s Set VI-3 and 4 should be sustained.

**B. IDT Energy’s Set VI-3 and 4 are beyond the permissible scope of discovery, because they seek attorney work product.**

The information that IDT Energy seeks in Set VI-3 and 4 is attorney work product, which is beyond the permissible scope of discovery. Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party’s attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. IDT Energy is asking the Joint Complainants to disclose information that was collected by attorneys or agents and representative employees regarding the number of EGSs

who were identified as charging prices in excess of various specified rates per kWh. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the respondent access to such privileged information, would allow him to “. . . get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate ‘on wits borrowed from the adversary.’ Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983) (J. Brennan, concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429. See also Brant v. Turnamian, 9 Pa. D. & C. 4<sup>th</sup> 216, 219 (Com. Pl. 1991).

In IDT Energy's Set VI-3 and 4, IDT Energy is requesting the Joint Complainants to disclose the number of EGSs who were identified as charging prices in excess of various specified rates per kWh. This information, collected by the Joint Complainants, is legal research that the Joint Complainants used, *inter alia*, in determining whether or not to initiate legal proceedings against EGSs. As such, IDT Energy's Set VI-3 and 4 constitute attorney work product.

**C. IDT Energy's Set VI-3 and 4 seek information that is protected by the investigative privilege.**

Additionally, IDT Energy's Set VI-3 and 4 seek information that is not permitted because it is protected by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See In re Buchanan, 583 Pa. 620, 880 A.2d 568 (2005). See also Commonwealth V. Kauffman, 413 Pa. Super. 527, 605 A.2d 1243, 1247 (1992) (Court held that this privilege "requires the court to balance the government's interest in ensuring the secrecy of the documents whose discovery is sought against the need of the private litigant to obtain discovery of relevant materials in possession of the government"). The investigative privilege has been defined as "the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest." Frankenhauser v. Rizzo, 59 F.R.D. 339, 342 (E.D. Pa. 1993); See also U.S. v. Lang, 766 F.Supp. 389 (D.Md.1991) (Court found that one party is seeking notes integral to the continuing investigation of another party and of a possible civil enforcement action; moreover, such selective note-taking can provide clues as to the focus of the on-going investigation and thus are not discoverable).

IDT Energy's Set VI-3 and 4 are protected by the investigative privilege. The OCA statute states: "it shall be [the Consumer Advocate's] duty, in carrying out the responsibilities under this act, to ... initiat[e] proceedings if in his judgment such may be necessary ... ." 71 P.S. Sec. 309-4(a). Further, subpart (b) states that "[t]he Consumer Advocate may exercise discretion in determining the interests of consumers which will be advocated in any particular proceeding and in determining whether or not ... to initiate any particular proceeding and, in so determining, shall consider the public interest, the resources available and the substantiality of the effect of the proceedings on the interest of consumers."

The number of EGSs who were identified as charging prices in excess of various specified rates per kWh is protected information gathered solely for the purpose of allowing the Acting Consumer Advocate to exercise her statutory authority to determine whether or not to initiate proceedings in the interest of consumers. Disclosure of such information would be contrary to the public interest, because it would prevent the free flow of information to the OCA, inhibiting the OCA's ability to gain the necessary information that is required in order to determine whether to initiate proceedings in the interest of the public.

Additionally, the Attorney General is vested with the authority to bring an action "in the name of the Commonwealth" when she deems it to be "in the public interest" against "any person" engaging in any method, act or practice declared unlawful by the Consumer Protection Law. 73 P.S. § 201-4. Further, the Bureau of Consumer Protection has the duty to investigate fraud, misrepresentation and deception in the sale of consumer goods and services. 71 P.S. § 307-2. The Attorney General's evaluation in bringing this case will be chilled by disclosing the information IDT seeks in this Interrogatory and would otherwise impair her role as the chief law enforcement officer as established by the Pennsylvania Constitution. Pa. Const. art. IV, § 4.1.

The number of EGSs who were identified as charging prices in excess of various specified rates per kWh is not solely factual data. IDT Energy is essentially seeking an evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the determination of whether to file suit against IDT Energy; thus, this information as it relates to other EGSs the Joint Complainants may be investigating is protected from discovery under the investigative privilege.

**III. CONCLUSION**

WHEREFORE, the Joint Complainants respectfully request that these Objections be sustained because IDT Energy's Set VI-3 and 4 seek information that is not relevant and will not lead to admissible evidence in this proceeding, constitute attorney work product, and is protected by the investigative privilege.



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

Margarita Tulman  
Deputy Attorney General  
PA Attorney I.D. 313514

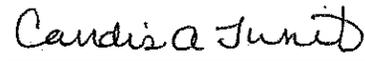
Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
T: (717) 787-9707  
F: (717) 787-1190  
jabel@attorneygeneral.gov  
mtulman@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General  
Bureau of Consumer Protection

Date: May 18, 2015

Respectfully submitted,



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Candis A. Tunilo  
PA Attorney I.D. 89891

Kristine E. Robinson  
PA Attorney I.D. 316479  
Assistant Consumer Advocates

Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
T: (717) 783-5048  
F: (717) 783-7152  
ctunilo@paoca.org  
krobinson@paoca.org

Counsel for:

Tanya J. McCloskey  
Acting Consumer Advocate

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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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

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Joint Objections of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to IDT Energy, Inc. Interrogatories and Requests for Production Set VI, Nos. 3 and 4, in the manner and upon the persons listed below:

Dated this 18<sup>th</sup> day of May 2015.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Kourtney L. Myers, Esq.  
Michael Swindler, Esq.  
Stephanie M. Wimer, Esq.  
Wayne T. Scott, Esq.  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120  
komyers@pa.gov  
mswindler@pa.gov  
stwimer@pa.gov  
wascott@pa.gov  
**(E-Mail & Inter-Office Mail)**

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Michael A. Gruin, Esq.  
Stevens & Lee  
17 N. 2<sup>nd</sup> Street, 16<sup>th</sup> Fl.  
Harrisburg, PA 17101  
[mag@stevenslee.com](mailto:mag@stevenslee.com)  
**(E-Mail & First-Class Mail)**

Sharon Webb, Esq.  
Office of Small Business Advocate  
Commerce Building, Suite 1102  
300 North Second Street  
Harrisburg, PA 17101  
[swebb@pa.gov](mailto:swebb@pa.gov)  
**(E-Mail & First-Class Mail)**

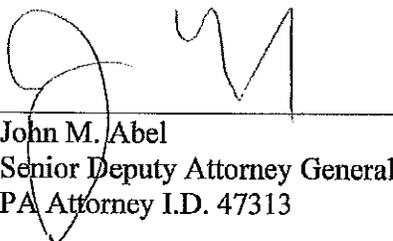
Scott George, Esq.  
Seeger Weiss, LLP  
1515 Market St., Suite 1380  
Philadelphia, PA 19102  
[sgeorge@seegerweiss.com](mailto:sgeorge@seegerweiss.com)  
**(E-Mail & First-Class Mail)**

Troy Frederick, Esq.  
Marcus & Mack, P.C.  
57 South Sixth Street  
Indiana, PA 15701  
[tfrederick@marcusandmack.com](mailto:tfrederick@marcusandmack.com)  
**(E-Mail & First-Class Mail)**

Johnathan Shub, Esq.  
Kohn, Swift & Graf, P.C.  
One South Broad Street  
Suite 2100  
Philadelphia, PA 19107  
[jshub@kohmswift.com](mailto:jshub@kohmswift.com)  
**(E-Mail & First-Class Mail)**

SERVICE BY FIRST CLASS MAIL, POSTAGE PAID

Wayne Stoughton  
IDT Energy Inc.  
20 West Third St., Suite 10  
Jamestown, NY 14702-0400  
**(First-Class Mail Only)**



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

Margarita Tulman  
Deputy Attorney General  
PA Attorney I.D. 313514

Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
T: (717) 787-9707  
F: (717) 787-1190  
jabel@attorneygeneral.gov  
mtulman@attorneygeneral.gov

Counsel for:  
Kathleen G. Kane, Attorney General  
Bureau of Consumer Protection

# **EXHIBIT C**

Responses of Commonwealth of Pennsylvania and Office of Consumer Advocate to  
Interrogatories and Requests for Production of Documents of IDT Energy, Inc.

Set II

C-2014-2427657

2. Referencing paragraph 16 of the Complaint, please clarify the statement that “the OCA had collected information from approximately 2,434 of its customer contacts”. Please identify the types of information that were generally “collected” from these customers, and explain the types of information that were reduced to written summaries or notes. \*\*\*IDT and OCA agreed to limit the scope of this request to contacts regarding IDT.\*\*\*

ANSWER: The information generally collected from consumers and reduced to written summaries or notes includes: date of contact; OCA employee that received the contact; consumer’s name, address and telephone number; consumer’s EDC; consumer’s EGS; consumer’s rate with his EGS; and consumer’s total bill.

**CERTIFICATE OF SERVICE**

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

**VIA ELECTRONIC MAIL AND FIRST CLASS US MAIL**

Candis A. Tunilo, Esq. Kristine Robinson, Esq. Office of Consumer Advocate 555 Walnut Street Forum Place, 5 <sup>th</sup> Floor Harrisburg, PA17101	Sharon Webb, Esq. Office of Small Business Advocate 300 North 2nd Street - #1102 Harrisburg, PA 17101
John M. Abel, Esq. Senior Deputy Attorney General Margarita Tulman, Esq. Deputy Attorney General Bureau of Consumer Protection Office of Attorney General 15 <sup>th</sup> Floor Strawberry Square Harrisburg, PA 17120	Wayne Scott, Esq. Michael Swindler, Esq. Stephanie Wimer, Esq. Bureau of Investigation & Enforcement Pennsylvania Public Utility Commission Commonwealth Keystone Building 400 North Street Harrisburg, PA 17120
Troy Frederick, Esq. Marcus & Mack, P.C. 57 South Sixth Street Indiana, PA 15701	Johnathan Shub, Esq. Kohn, Swift & Graf, P.C. One South Broad Street Suite 2100 Philadelphia, PA 19107

May 27, 2015



Michael A. Guin, Esq.

**CERTIFICATE OF SERVICE**

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

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John M. Abel, Esq. Senior Deputy Attorney General Margarita Tulman, Esq. Deputy Attorney General Bureau of Consumer Protection Office of Attorney General 15 <sup>th</sup> Floor Strawberry Square Harrisburg, PA 17120	Wayne Scott, Esq. Michael Swindler, Esq. Stephanie Wimer, Esq. Bureau of Investigation & Enforcement Pennsylvania Public Utility Commission Commonwealth Keystone Building 400 North Street Harrisburg, PA 17120
Troy Frederick, Esq. Marcus & Mack, P.C. 57 South Sixth Street Indiana, PA 15701	Johnathan Shub, Esq. Kohn, Swift & Graf, P.C. One South Broad Street Suite 2100 Philadelphia, PA 19107

May 27, 2015



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Michael A. Gruin, Esq.