

COMMONWEALTH OF PENNSYLVANIA



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June 1, 2015

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

RE: Commonwealth of Pennsylvania, by Attorney General
KATHLEEN G. KANE, Through the Bureau of Consumer
Protection,

And

TANYA J. McCLOSKEY, Acting Consumer Advocate,
Complainants

v.

IDT Energy, Inc.

Respondent

Docket No. C-2014-2427657

Secretary Chiavetta:

Enclosed please find the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion to Compel of IDT Energy, Inc., in the above-referenced proceeding.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Kristine E. Robinson".

Kristine E. Robinson
Assistant Consumer Advocate
PA Attorney I.D. #316479

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Certificate of Service

*185194

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	
	:	Docket No. C-2014-2427657
v.	:	
	:	
IDT ENERGY, INC.	:	
Respondent	:	

ANSWER OF THE COMMONWEALTH OF PENNSYLVANIA
AND THE OFFICE OF CONSUMER ADVOCATE
TO THE MOTION TO COMPEL OF IDT ENERGY, INC.

Pursuant to 52 Pa. Code §§ 5.342(g)(1) and 5.349(d), the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (OAG or BCP) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively Joint Complainants) provide the following Answer to the Motion to Compel of IDT Energy, Inc. (IDT or the Company) filed on May 27, 2015. For the reasons set forth below, the Company’s Motion should be denied.

I. INTRODUCTION

On June 20, 2014, the OAG and the OCA filed a Joint Complaint at the Pennsylvania Public Utility Commission (Commission) against IDT, pursuant to the Public Utility Code, 66

Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (CPL), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes seven separate counts, as follows: I) misleading and deceptive promises of savings; II) misleading and deceptive welcome letter and advertisements; III) slamming; IV) lack of good faith handling of complaints; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; and VII) failure to comply with the TRA. With respect to relief, the Joint Complainants request that the Commission find that IDT violated the Public Utility Code, the CPL, the TRA, and the Commission's regulations and orders; provide restitution to IDT's customers; impose a civil penalty; order IDT to make various modifications to its practices and procedures; and revoke or suspend IDT's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate (OSBA) intervened in the proceeding.

On July 10, 2014, IDT filed Preliminary Objections to the Joint Complaint. In its Preliminary Objections, IDT asserted, *inter alia*, that Count VI of the Joint Complaint should be dismissed pursuant to Pa. Code § 5.101(a)(4) (Legal Insufficiency) and stricken pursuant to 52 Pa. Code § 5.101(a)(2) (Inclusion of Impertinent Material). In support of this Preliminary Objection, the Company alleged that the Commission does not have the authority to regulate electricity generation prices offered by EGSs. On July 21, 2014, the Joint Complainants filed an Answer to Preliminary Objections. By Order dated August 20, 2014, the ALJs granted in part and denied in part IDT's Preliminary Objections and found, *inter alia*, that the Commission lacks jurisdiction to adjudicate Count VI of the Joint Complaint. On September 8, 2014, Joint Complainants filed a Petition for Interlocutory Review and Answer to Material Questions with the

Commission. Joint Complainants sought for the Commission to answer, *inter alia*, the following question: Does the Commission have the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. On September 18, 2014, the Joint Complainants filed a Brief in Support of their Material Questions, and IDT filed a Brief in Opposition. On December 18, 2014, the Commission issued an Order in which it determined that the Commission has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing.¹

On May 7, 2015, IDT served its sixth set of Interrogatories and Requests for Production of Documents (RPDs) (IDT's Set VI) on the Joint Complainants. IDT's Set VI consists of thirty-three interrogatories/RPDs. Joint Complainants communicated their objections to questions 3 and 4 to IDT on May 14, 2015 and directed IDT to the ALJs' prior Orders regarding other EGSs' actions or omissions being not relevant or likely to lead to admissible evidence. IDT was not willing to withdraw IDT's Set VI-3 and VI-4. Therefore, on May 18, 2015, Joint Complainants submitted written objections to IDT's Set VI-3 and VI-4 pursuant to 52 Pa. Code §§ 5.342(c) and

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

In the Blue Pilot and Respond Power Petitions, Joint Complainants also asked whether the Commission has the authority and jurisdiction to determine whether the prices charged to customers by an EGS conform to the EGS disclosure statement regarding pricing. The Commission has also issued an Order in the Blue Pilot proceeding, in which it answered this question in the affirmative. Although the Commission's Order in the Respond Power proceeding is pending, the Commission has indicated that it intends for the Orders in the four proceedings to be consistent with each other. See Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr. (November 13, 2014).

5.349(d). On May 27, 2015, IDT filed a Motion to Compel pursuant to 52 Pa. Code § 5.342(g), requesting the ALJs to dismiss Joint Complainants Objections to IDT's Set VI-3 and VI-4 and compel Joint Complainants to provide responses to those questions. Joint Complainants submit this Answer to IDT's Motion to Compel.

II. LEGAL STANDARD

The Commission's 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.*

Further, Section 5.361 of the Pennsylvania Code 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).

III. ANSWER

IDT's Interrogatory Set VI-3 provides:

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's Interrogatory Set VI-4 provides:

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

- d. charging the complaining customer a rate in excess of \$.20/kWh
- e. charging the complaining customer a rate in excess of \$.25/kWh
- f. charging the complaining customer a rate in excess of \$.30/kWh.

Joint Complainants assert that IDT's Set VI-3 and VI-4 seek information that is not permitted because (1) the information will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint; (2) the information is beyond the scope of permissible discovery because the Company seeks attorney work product; and (3) the information that may be responsive is protected by the investigative privilege. As such, the Company's Motion should be denied.

A. The Requests Will Not Lead To Relevant or Admissible Evidence

IDT's Set VI-3 and VI-4 seek information that is not permitted because they will not lead to relevant information or admissible evidence regarding the allegations against IDT in the Joint Complaint.

IDT contends that the information sought in IDT's Set 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.'" See Motion ¶ 16. The Company asserts that "[t]he information sought by IDT Interrogatories VI-3 and VI-4 is calculated to the (sic) lead to the

discovery of admissible evidence regarding what prices the market would dictate, and is necessary to allow IDT to develop Rebuttal to Dr. Estomin's Testimony." See Motion ¶ 17. The Company further asserts that "IDT's Interrogatories seek information about the extent to which electric generation supply rates exceeded of (sic) \$.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.'" See Motion ¶ 21. IDT asserts that "[i]f rates equal to or exceeding IDT's were present in the market during that time, it calls into question Dr. Estomin's allegations that IDT's rates 'were in excess of what the market would dictate.'" See Motion ¶ 22.

Joint Complainants submit that IDT's reliance on the one sentence from Dr. Estomin's Testimony is taken out of context. Dr. Estomin's Direct Testimony addresses the power supply prices charged by IDT as those prices relate to the Company's Disclosure Statement. See OCA/OAG Statement No. 2 at 3. IDT's Disclosure Statement states as follows regarding variable pricing:

Basic Services Prices – Respondent offers a variable price for all electric generation sold under this Agreement. **The price for electric generation sold is established on an approximately monthly basis based upon electric generation market pricing as furnished by PJM clearing house, transportation or transmission, and other market and business price related factors.** This price may be higher or lower than the EDC's price in any particular month. There is no ceiling price. Electric generation supply charges include estimated total state taxes. Respondent will comply with all required laws regarding sales tax and will include or exclude the appropriate sales taxes in each jurisdiction served, if any, as required by the Pennsylvania Department of Revenue for all Electric generation supply charges. Customers can call Respondent's Customer Service Dept. at 877-887-6866 for current variable pricing rates.

See Joint Complaint at ¶ 53 and Exhibit B; See also OAG/OCA Statement No. 2 at 7. (Emphasis added). In its Disclosure Statement, IDT states that it will establish prices based upon, *inter alia*,

“electric generation market pricing as furnished by PJM clearing house” and “other market and business price related factors.” As such, Dr. Estomin analyzed the factors identified in IDT’s Disclosure Statement, which include the market as furnished by PJM clearing house, not other EGSs, and compared IDT’s rates to IDT’s costs to determine whether IDT charged prices that conformed to its Disclosure Statement. See OAG/OCA Statement No. 2 at 6. Dr. Estomin did not analyze or opine about any other EGSs in his Direct Testimony.

The Company’s discovery requests seek additional details regarding the contacts received by the OCA and the OAG about variable rates of other EGSs. Pricing practices of other EGSs and the number of complaints or contacts received by the Joint Complainants is in no way pertinent to this case and does not provide a defense for IDT’s alleged violations of Pennsylvania law, the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission’s regulations, 52 Pa. Code Ch. 54, 56 and 111, and Commission policies and Orders. The Commission’s regulations state that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing or billing acts by its employees, agents and representatives. See e.g. 52 Pa. Code § 54.43(f). (Emphasis added). The allegations of violations in the Joint Complaint are specific to IDT’s billing and marketing practices in Pennsylvania. Consistently, Dr. Estomin’s analysis in his Direct Testimony is limited to an evaluation of whether IDT charged prices that conformed to IDT’s Disclosure Statement.

Neither the Commission’s regulations nor Pennsylvania law provides a safe harbor or any other type of defense based on competitor practices. Further, obtaining the prices charged by other EGSs in early 2014 will not lead to admissible evidence in defense of the allegations that IDT’s prices charged in early 2014 did not conform to IDT’s Disclosure Statement. As such, information about the prices charged by other EGSs and the number of complaints or contacts

received by the Joint Complainants will not lead to relevant information or admissible evidence regarding the specific allegations of violations in the Joint Complaint against IDT. IDT seeks to obtain information that is outside the scope of discovery. See 52 Pa. Code § 5.321(c). 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 other EGSs were charging variable prices at, near, or in excess of levels charged by IDT, is in no way germane to the issues posed in this case.

Additionally, IDT contends that even though a prior Motion to Compel filed by IDT in connection with Interrogatories that sought information regarding other EGSs was denied by the ALJs, IDT’s Set VI-3 and VI-4 are “different in both scope and purpose.” See Motion ¶¶ 18-19. Joint Complainants submit that IDT’s purported purpose for seeking this information, (*i.e.*, information is related to Company’s defense) is identical to the reasoning previously proffered by IDT² and also proffered by Respond Power, LLC³ and HIKO Energy, LLC⁴ in similar

² IDT included in its previous Motion to Compel in this proceeding the following:

The information requested by IDT ... is clearly related to the subject matter involved in the proceeding, and specifically related to IDT’s defense of the Joint Complaint. This information is necessary to allow IDT to develop its defense of the Complaint, and is sought for the purpose of discovering potentially admissible evidence regarding the suppliers operating in Pennsylvania who may have utilized marketing materials and disclosure statements similar to IDT.

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, Motion to Compel of IDT Energy, Inc. at 4, ¶ 14 (August 25, 2014). (Emphasis added).

³ Similarly, in Respond Power, LLC’s Motion to Compel, the Company states:

[I]nformation received by the Joint Complainants from consumers of the variable prices being charged by other EGSs in early 2014 is directly related to Respond Power’s defense against allegations about its prices being non-conforming to its Disclosure Statement. To the extent that consumers were alleging that other EGSs were charging variable prices at, near or in excess of levels charged by Respond, that information would tend to support Respond’s position that its prices generally reflected the costs to serve residential customers at that time and otherwise conformed to its Disclosure Statement by reflecting PJM market conditions and EGS profit margins.

Motions. The ALJs did not agree with the respondents that information related to other EGSs was relevant information or would lead to admissible evidence in any of these cases.

As for the scope of the requested information, the ALJs have already denied a virtually identical Motion to Compel in a similar 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. Respond Power, LLC, Docket No. C-2014-2427659, Order Denying Motion to Compel Responses to Respond Power Interrogatories Set II-4, 5 (May 28, 2015) (Respond Power Order). In that case, Respond Power, LLC (Respond Power) sought an Order compelling the OCA to answer, *inter alia*, the following interrogatories:

Please identify the number of electric generation suppliers who were the subject of the approximately 2,434 consumer contacts identified in Paragraph 16 of the Joint Complaint and were alleged to have charged consumers: (a) more than \$.2499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (b) more than \$.3499 per kwh at any point during the period from January 1, 2014 through April 30, 2014; (c) more than \$.3999 per kwh at any point during the period from January 1, 2014 through April 30, 2014; and (d) more than \$.4499 per kwh at any point during the period from January 1, 2014 through April 30, 2014.

See Respond Power Order at 3-4. Respond Power served a virtually identical interrogatory on the OAG regarding complaints it received about other EGSs, and also sought in its Motion an

See Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey, Acting Consumer Advocate v. Respond Power, LLC, Docket No. C-2014-2427659, Motion of Respond Power LLC to Compel Joint Complainant Responses to Interrogatories- Set II-4, 5 and 6 at 4, ¶¶ 12-13 (May 14, 2015).

⁴ In HIKO Energy, LLC's Motion to Compel, the Company states:

In response to Joint Complainants' effort to have penalties imposed on HIKO if they are able to prove misconduct on the part of HIKO's marketers, HIKO is entitled to show in mitigation of any such penalties that it acted properly in selecting marketers that were experienced in the industry and that were relied on by other EGS companies to market and sell variable rate products.

See 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, Motion of HIKO Energy, LLC to Compel Joint Complainants' Response to Interrogatory 26(a) at 2 (August 18, 2014). (Emphasis added).

Order compelling the OAG to answer, *inter alia*, that interrogatory. Id. at 4. In the Respond Power Order, the ALJs held:

“Market conditions” is a factor identified in Respond’s Disclosure Statement as a basis for setting Respond’s variable rates. However, the number of EGSs who were the subject of the consumer contacts identified in the Complaint, as well as the number of customers making allegations at specific rates charged by other EGSs, is not relevant to, or likely to lead to admissible evidence, regarding whether Respond’s prices charged conformed to its Disclosure Statement. Nor are the specific levels at which those consumers were charged by other EGSs relevant to whether the prices Respond charged conform to its Disclosure Statement. The specific information sought in these interrogatories does not comprise “market conditions.” Rather, the specific information sought in these interrogatories *arises as a result of* the “market conditions.” That is, market conditions include issues such as supply restraint, increased demand, weather conditions, among other things. Those conditions impact the market for electric generation supply. The number of customers who filed complaints against other EGSs and the level of the rates they were charged is *the result of* those market conditions – when the supply goes down and the demand goes up (market conditions), rates change (result) – not the market conditions themselves.

“Market fluctuations and conditions,” as stated in Respond’s Disclosure Statement, is a basis upon which Respond’s variable rates are set and, therefore, information regarding market fluctuations and conditions is likely to lead to the discovery of admissible evidence and discoverable. Yet, the information sought in Respond’s interrogatories Set II-4, 5 and 6 is *the result of* the market conditions, not the market conditions themselves. As such, information about the prices charged by other EGSs and the number of complaints or contacts received by the Joint Complainants at various levels will not lead to the relevant information or admissible evidence regarding the violations specifically alleged against Respond.

Id. at 5-6. (Emphasis in original).

Additionally, the ALJs have denied other similar discovery requests regarding the practices of other EGSs in similar proceedings and have held:

[T]he 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 to be addressed in this proceeding. The requested information is not likely to lead to the discovery of admissible evidence regarding the allegations against HIKO in the Joint Complaint. The allegations of violations in the Joint Complaint are specific to HIKO’s billing and marketing practices in Pennsylvania. As such, information about the third-party sales or marketing companies of other EGSs

will not lead to relevant information or admissible evidence regarding the specific allegations of violations in the Joint Complaint against HIKO.

See 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 Denying HIKO Energy LLC's Motion to Compel (September 2, 2014) (HIKO Order) at 4. (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.

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 Denying IDT Energy, Inc. Motion to Compel at 5 (September 8, 2014).

As such, Joint Complainants submit that the disclosure of the number of EGSs other than IDT who were identified as charging prices in excess of various specified rates per kWh will not lead to relevant information or admissible evidence regarding the allegations in the Joint Complaint against IDT. The Company seeks to obtain information that is outside the scope of discovery and the Company's Motion to Compel IDT's Set VI-3 and VI-4 should be denied. See 52 Pa. Code § 5.321(c).⁵

⁵ In its Motion to Compel, IDT also asserts that "[t]he Joint Complainants have the information requested by IDT in their possession ..." and "[a]t a minimum, IDT should be permitted to evaluate this information ... to determine if the information corroborates or contradicts Dr. Estomin's conclusions. Preventing IDT from obtaining this information would seriously impair IDT's ability to prepare Rebuttal Testimony, whereas allowing IDT to obtain this information will not prejudice the Joint Complainants in any way, as the Joint Complainants have not indicated that such information would be unduly burdensome to compile." Motion at ¶¶ 23-25. First, Joint Complainants note that, as explained above, Dr. Estomin's Testimony is limited to an evaluation of whether IDT charged prices that conformed to IDT's Disclosure Statement. See OCA/OAG Statement No. 2 at 3. Joint Complainants submit that IDT should have in its possession information relevant to this claim, as IDT should know

B. The Requests Seek Attorney Work Product

Additionally, the Joint Complainants object to IDT's Set VI-3 and VI-4 because the information that IDT seeks is protected from disclosure by the attorney work product privilege.⁶ IDT asserts that the introductory sentence to Pa. R.C.P. 4003.3 is critical to the determination of whether information constitutes "attorney work product." See Motion at ¶ 28. 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:

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. 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.

Joint Complainants submit that Rule 4003.3 is clear that discovery shall not include disclosure of, *inter alia*, a party's attorney memoranda, notes or summaries, or legal research. See Pa. R.C.P. 4003.3. Here, IDT is requesting 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

how it established its prices. Second, Joint Complainants note that it is not appropriate to grant a Motion to Compel on the grounds that the information would not be unduly burdensome to compile if the information is not relevant or reasonably calculated to lead to relevant information. See 52 Pa. Code § 5.321(c).

⁶ In the IDT Order and Respond Power Order, the ALJs determined that it was not necessary to consider the issues regarding whether the interrogatories are beyond the scope of permissible discovery because they seek attorney work product or the information requested is protect by the "investigative privilege" because it was sufficient to deny the motion to compel since the questions will not lead to relevant information or admissible evidence. See IDT Order at 7; see also Respond Power Order at 6-7. Nonetheless, the Joint Complainants raise these arguments in this Answer.

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).

In IDT's Set VI-3 and VI-4, IDT 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 work product that the Joint Complainants used, *inter alia*, to determine whether or not to initiate legal proceedings against EGSs. As such, IDT's Set VI-3 and VI-4 constitute attorney work product.

IDT also asserts that 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 the OAG, and the discovery requests do not seek any notes, summaries, mental impressions, conclusions, or other protected materials that would prevent disclosure under Pa. R.C.P. 4003.3. See Motion at ¶ 32. 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. 4th 216, 219 (Com. Pl. 1991). Thus, Joint Complainants submit that to the extent the information requested in IDT's Set VI-3 and VI-4 was compiled by staffs of the OAG and OCA, it was done so at the direction of attorneys. Accordingly, such information is part of the hiring attorneys' work product, just as if the work had been done by the attorneys themselves. As such, the ALJs should deny IDT's Motion to Compel.

C. IDT's Set VI-3 and VI-4 Seek Information Protected By Investigative Privilege

Finally, for similar reasons as set forth in Section III.B, above, the Joint Complainants request that the ALJs deny IDT's Set VI-3 and VI-4 because the information sought is protected from disclosure by the investigative privilege. The Pennsylvania Supreme Court has recognized an investigative privilege to protect information from being discovered during ongoing government investigations. See e.g., 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) (The 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).

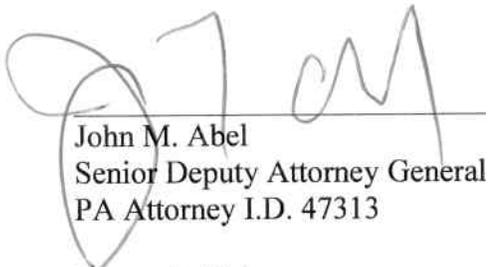
The disclosure of the information requested in IDT's Set VI-3 and VI-3 is contrary to public policy and implicates the investigative privilege. IDT's Set VI-3 and VI-4 are not seeking solely factual data related to the Company's case. IDT's Requests seek a protected evaluative summary of information related to the overall strategic and tactical approach in the preparation of filing suit against IDT and possibly other defendants. The Joint Complainants' evaluation in bringing not only this case, but others, will be chilled by disclosing the information IDT seeks in these Requests. Designating the information as "confidential" or "highly confidential," as IDT suggests in paragraph 41 of its Motion, would not remedy the fact that providing information related to other EGSs not the subjects of the allegations in the Joint Complaint to IDT would be inappropriate and would be contrary to the public interest.

Thus, the requested information is protected under the investigative privilege and therefore, is not discoverable.

III. CONCLUSION

WHEREFORE, the Joint Complainants respectfully request the ALJs to deny IDT's Motion to Compel because IDT's Set VI-3 and VI-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.

Respectfully submitted,



John M. Abel
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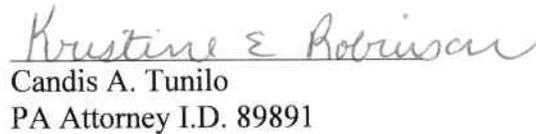
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CERTIFICATE OF SERVICE

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection,	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	Docket No. C-2014-2427657
	:	
v.	:	
	:	
IDT ENERGY, INC.,	:	
Respondent	:	

I hereby certify that I have this day served a true copy of the foregoing document, the Answer of the Commonwealth of Pennsylvania and the Office of Consumer Advocate to the Motion to Compel of IDT Energy, Inc., in the manner and upon the persons listed below:

Dated this 1st day of June 2015.

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*Receiving Proprietary Information