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August 5, 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 Motion of Anthony Ferrare to Compel Responses to Informal Discovery 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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A PROFESSIONAL CORPORATION

**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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**ANSWER OF IDT ENERGY, INC. TO ANTHONY FERRARE’S MOTION TO  
COMPEL RESPONSES TO INFORMAL DISCOVERY REQUESTS**

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Now Comes Respondent IDT Energy, Inc. (“IDT”) and files this Answer to the Motion of Anthony Ferrare to Compel Responses to Informal Discovery Requests (“Motion”). As set forth more fully below, Mr. Ferrare’s Motion should be dismissed as being unripe, procedurally deficient, unwarranted, and moot.

As IDT stated in its Answer to Mr. Ferrare’s Petition to Intervene, Mr. Ferrare’s intervention was quite obviously filed by his attorneys to support their interest in Mr. Ferrare’s class action case rather than to protect any direct interest of Mr. Ferrare’s. See IDT Answer to Petition to Intervene, at page 9. When Mr. Ferrare’s Intervention in this proceeding was granted, the presiding Administrative Law Judges (“ALJs”) made it clear that Mr. Ferrare was not permitted to represent the interests of other customers in this proceeding, and that to the extent that Mr. Ferrare seeks to pursue additional issues on behalf of others he believes are similarly situated, that matter is beyond the scope of this proceeding and will be left for the District Court to address. *See* May 1, 2015 *Order Granting Petition to Intervene*.

IDT's concerns with Mr. Ferrare's Intervention are now being borne out, and it is clear that Mr. Ferrare's attorneys are abusing their client's Intervener status in order to gather discovery material previously provided by IDT in this proceeding, but not entered into the record, in order to acquire information that goes far beyond Mr. Ferrare's limited interest in the proceeding. Since Mr. Ferrare's intervention was granted on May 1, 2015, his counsel did not serve IDT or any other parties with any discovery requests. Then, months after being granted Intervener status, and weeks after learning that IDT and the Joint Complainants had reached a settlement in principle, and just days before the actual Joint Settlement Petition was filed, Mr. Ferrare's counsel suddenly requested voluminous amounts of (mostly confidential) discovery material provided by IDT to the Joint Complainants long before Mr. Ferrare's Intervention was granted and that does not relate in any way to his specific account. The purported grounds for requesting the information – to allow Mr. Ferrare to evaluate the settlement - is a mere pretense, because Mr. Ferrare's counsel has already been provided with more than enough information from IDT and the Joint Complainants to evaluate the Settlement. The additional information requested by Mr. Ferrare is not in the record in this proceeding, it is not referenced in the Settlement Petition or accompanying filings, it does not relate in any way to the Testimony that Mr. Ferrare served in this proceeding, and it is completely unnecessary for Mr. Ferrare to have in order to determine his position on the pending Settlement Petition. For these reasons, as stated more fully below, Mr. Ferrare's Motion should be denied.

## **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 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 December 18, 2014, the Commission issued an Opinion and Order on the two Petitions for Interlocutory Review of Material Questions (“Material Question Order”).

On January 9, 2015, the ALJs issued a Further Prehearing Conference Order, scheduling a Further Prehearing Conference for January 27, 2015. At the Further Prehearing Conference,

the remaining litigation schedule was established, including dates for service of expert and other witness testimonies and hearings for cross examination.<sup>1</sup>

Hearings for the Cross-Examination of customer witnesses took place during the week of February 17-20, 2014, at which time the testimonies of 125 witnesses were moved into the record.

On April 8, 2015, nearly ten months after the proceeding was initiated, Mr. Ferrare filed his Petition to Intervene. On April 28, 2015, Joint Complainants and IDT filed Answers to Mr. Ferrare's Petition to Intervene requesting that the ALJs deny the Petition because Mr. Ferrare did not meet the Commission's requirements for intervention. By Order issued on May 1, 2015, Mr. Ferrare's Intervention was granted. On May 27, 2015, Mr. Ferrare served his Confidential Testimony.

Prior to the date for service of IDT's rebuttal testimony in this matter, Joint Complainants and IDT reached a settlement in principle, and during a conference call on July 2, 2015, Joint Complainants and IDT advised the ALJs of the settlement. In light of the settlement in principle between Joint Complainants and IDT, the ALJs convened a telephonic status conference and suspended the litigation schedule *vis a vis* IDT's rebuttal testimony.

At that time, Mr. Ferrare's counsel indicated that he could not determine whether to join or oppose the settlement until he had received additional information from IDT. On July 7, 2015, IDT provided Mr. Ferrare's Counsel with confidential discovery responses related to IDT's customer base, costs of procuring electricity, retail prices, and methodology for setting retail prices. Co-counsel for Mr. Ferrare confirmed their acknowledgment that the information was confidential in nature and should be treated as such under the terms of the Protective Order.

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<sup>1</sup> By letter dated April 16, 2015, counsel for IDT requested modification of the procedural schedule in order to allow additional time for preparation of rebuttal and surrebuttal testimonies. The ALJs granted the requested modification in Procedural Order #5 dated April 17, 2015.

Counsel for Mr. Ferrare also confirmed that 1) Mr. Ferrare himself will not be reviewing the provided information and 2) the information would be used solely by Mr. Ferrare's counsel for the purpose of evaluating whether their client will take a position on the proposed Settlement between IDT and the Joint Complainants.

A second conference call with the ALJs and parties, with the exception of OSBA, was convened on July 13, 2015. Counsel for Mr. Ferrare stated that he was still unable to take a position on whether Mr. Ferrare would join or oppose the settlement, as the information provided by IDT was still being reviewed. Additionally, counsel for Mr. Ferrare indicated that additional information was needed from Joint Complainants' witness Steven L. Estomin before Mr. Ferrare could determine if he would join or oppose the settlement. Upon further discussion and clarification after the conference call, OCA provided additional information to counsel for Mr. Ferrare.

During the conference call on July 13, 2015, the ALJs directed the parties to submit the Joint Petition and accompanying filings by August 4, 2015. By email on July 29, 2015, Mr. Ferrare's counsel notified Joint Complainants and IDT that Mr. Ferrare would oppose the Settlement. See Joint Petition, at page 10, footnote 4. Mr. Ferrare then filed his Motion to Compel on July 31, 2015.

In accordance with the ALJ's directive, on August 4, 2015 the Joint Complainants and IDT filed the Joint Petition for Approval of Settlement and Statements in Support of Settlement, along with a Stipulation of Facts and Conclusions of Law and a Motion for Admission of Consumer Testimony.

## II. ARGUMENT

### A. Mr. Ferrare has not served any discovery requests for which responses can be compelled

As a late-intervener, Mr. Ferrare is required to take the case as it stands at the time that he intervenes. See *May 1, 2015 Order Granting Intervention*, citing, *Pennsylvania Public Utility Comm'n, Bureau of Investigation and Enforcement v. West Penn Power Co.*, Docket No. C-2012-2307244, Opinion and Order (entered Aug. 29, 2013) and *Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission*, Docket No. L-00020156, Order (entered Jan. 4, 2006). The Commission's regulations direct participants to endeavor to initiate discovery as early in the proceedings as reasonably possible. See 52 Pa. Code 5.331(b). In this case, Mr. Ferrare's intervention was granted on May 1, 2015, by which time discovery in the proceeding had been largely completed. Mr. Ferrare and his counsel had every opportunity to serve discovery requests on any party after the intervention was granted, but they chose not to do so. The procedure agreed to by the parties provided Mr. Ferrare with ample time to serve and receive discovery prior to the submission of his Testimony, but Mr. Ferrare and his counsel apparently saw no need to serve discovery on any party in order to prepare his Testimony, which was served on May 27, 2015.

Now, two months after his Testimony was served, and after the Joint Complainants and IDT informed the ALJs that the proceeding had been settled, Mr. Ferrare has made informal discovery requests of IDT that relate in no way to his account or the subject matter of his testimony, and he has filed a Motion to compel IDT to provide responses to those requests. At the outset, Mr. Ferrare's Motion should be denied as being both impermissible under the Commission's regulations and untimely. Pursuant to 52 Pa. Code 5.342, Motions to Compel are to be filed within 10 days of receiving an Objection to Interrogatories or Requests for Production

of Documents. In this case, Mr. Ferrare did not serve any discovery requests, much less receive an objection to a discovery request, and thus there is nothing to compel.

**B. Mr. Ferrare's request is not reasonably calculated to lead to the discovery of admissible evidence at this stage in the proceeding.**

Even if the fact that Mr. Ferrare never served IDT with a discovery request is overlooked, and Mr. Ferrare's counsel's request is treated as a formal discovery request that was objected to, there still is no legitimate basis for requiring IDT to provide Mr. Ferrare with the requested information under the present circumstances. Under the Commission's regulations, discovery is permissible only if it is reasonably calculated to lead to the discovery of admissible evidence. See 52 Pa. Code 5.321(c). The discovery material requested by Mr. Ferrare is not related in any way to his limited interest in the proceeding, and could not be admitted into the record in this case.

First, none of the information requested by Mr. Ferrare relates to his account or the subject matter of his testimony. Mr. Ferrare's Motion avers that it is being filed "on behalf of himself and others similarly situated", but it has been made clear that that Mr. Ferrare is not permitted to represent the interests of other customers in this proceeding. *See* May 1, 2015 *Order Granting Petition to Intervene*. As such, Mr. Ferrare's interest in this proceeding is limited to his own dealings with IDT. Accordingly, the Testimony served by Mr. Ferrare related solely to his enrollment with IDT, rates charged to him by IDT, and his interactions with IDT following the Polar Vortex. Mr. Ferrare's Motion fails to articulate how the information he is requesting is relevant to these issues. The fact is that none of the discovery material requested by Mr. Ferrare relates in any way to the issues addressed in his testimony or his interest in this case. All of the discovery material requested was provided by IDT well prior to Mr. Ferrare's intervention, and none of it relates to IDT's dealings with Mr. Ferrare.

Second, now that this proceeding has been settled, there is no basis to require IDT to provide the requested discovery material, even if such discovery material was previously provided by IDT to the other active parties in the case. This proceeding is no longer in a litigation posture because a Joint Petition for Settlement has been filed which would fully and finally resolve the case, and the focus of the proceeding now turns to determining whether the Settlement should be approved as being in the public interest, based on the information in the record. The material sought by Mr. Ferrare is not in the record in the case, as the record consists of the 208 customer testimonies referenced in the Settlement Petition, along with the Stipulation of Facts submitted with the Settlement Petition. Because the case is no longer in a litigation posture, there is no process to allow the information requested by Mr. Ferrare to be admitted into the record without continuing the litigation. Permitting Mr. Ferrare to obtain this non-record material at this stage of the proceeding would run contrary to the Commission's well-established policy of encouraging settlements. See 52 Pa. Code § 5.231. As previously served discovery that is not in the record, the information sought by Mr. Ferrare is not relevant to the disposition of the Settlement Petition, and therefore there is no basis to require IDT to provide it to him, especially in light of the obvious reasons for which the information is being sought, i.e., to further the interests of Mr. Ferrare's attorneys in their class action suit against IDT.

The Commission has previously rejected an intervener's attempt to seek discovery in conjunction with the evaluation of a filed Settlement. In *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. UGI Utilities, Inc.*, Docket No. C-2012-2308997 (Order entered February 19, 2013), the Commission rejected an Intervener's request to seek additional discovery that was made while a Settlement Petition was pending. In that case (like in this case) the Intervener in question had a pending civil action against the Respondent. In denying the Intervener's request for discovery, the Commission reiterated the

principle that discovery is to be initiated as early in the proceedings as reasonably possible, and that under the circumstances it would not be appropriate to allow further discovery after the Settlement was filed.

The Settlement filed by the Joint Complainants and IDT in this case is lengthy and is supported by considerable amounts of record evidence. Mr. Ferrare has been provided with significant amounts of information to supplement the evidence that is actually in the record, and he can utilize the procedures available to him under the Commission's regulations to object to the Settlement or argue for its disapproval. Counsel for Mr. Ferrare know this fully well, as they made a filing in opposition to the Joint Settlement filed by the OCA/OAG and Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric in Docket No. C-2014-2427656 (Initial Decision issued June 8, 2015) ("*PaG&E*"). The fact that Mr. Ferrare's counsel is seeking discovery material that is not relevant to the disposition of the settlement, that is unrelated to his account, and that was provided by IDT well in advance of his intervention undermines the argument that information is necessary to evaluate the settlement.

**C. Mr. Ferrare is seeking the discovery material in bad faith, and has not articulated a valid need to obtain the discovery material**

The Commission regulation at 52 Pa. Code § 5.361(a)(1) prohibits discovery that is sought in bad faith. Mr. Ferrare has not articulated any basis for seeking the multitude of discovery responses listed in his Motion, other than that he requires them to "fairly assess any potential proposed resolutions of this matter that may arise in the future". Mr. Ferrare's Motion acknowledges that IDT has provided him with some discovery responses, and the Settlement Petition filed on August 4, 2015 noted that the Joint Complainants had already provided him

with material from Joint Complainants' witness Dr. Estomin.<sup>2</sup> Specifically, IDT has already provided Mr. Ferrare's counsel with confidential discovery material related to IDT's entire customer base in Pennsylvania, IDT's costs of procuring electricity during the Polar Vortex, IDT retail prices during the Polar Vortex, and methodology for setting retail prices. This information, coupled with 1) the information provided by the Joint Complainants, 2) the information that is in the record in the proceeding and 3) the information in the Joint Settlement Petition itself, provides Mr. Ferrare with more than enough information to evaluate the Settlement terms. Mr. Ferrare's Motion fails to explain why the information already provided to him is not sufficient to determine whether his specific concerns are adequately addressed by the Settlement, which alone justifies denial of the Motion.

Again, Mr. Ferrare is not representing the interests of other customers in this proceeding – he is only representing his own interests. The additional information requested by Mr. Ferrare is not relevant and it goes far beyond the concerns discussed in his Testimony, which were limited to his specific enrollment with IDT and the prices charged to him (and him alone) by IDT. Interestingly, Mr. Ferrare has never requested any information about his own enrollment or service from IDT, which illustrates that his Motion is truly aimed at seeking information about other customers. The information requested by Mr. Ferrare's counsel is also not relevant to the disposition of the Settlement because it is not in the record, and as such, the information requested serves no valid purpose at this stage in the proceeding, and it is obviously being sought for use in conjunction with their pending class action lawsuit against IDT.

Principles of basic fairness and justice also support the denial of the Motion to Compel. Presiding officers are given the discretion to apply the Commission's discovery regulations to serve the interests of justice. See 52 Pa. Code. § 5.321(b). To the extent that Mr. Ferrare's

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<sup>2</sup> See Joint Settlement Petition, at paragraph 35

counsel would seek to inject information from the confidential discovery responses into the record for purposes of objecting to the settlement, such action would be completely inappropriate and IDT would strongly object to such an attempt. After vigorously litigating this proceeding, IDT has reached a comprehensive settlement with the Joint Complainants to terminate the proceeding. That settlement was distilled to a lengthy, carefully worded, and thorough Joint Settlement Petition. The settling parties expended considerable time and effort to finalize the terms of the settlement and to stipulate to facts and evidence that they deemed necessary to seek approval for the Settlement. It also must be reiterated that IDT attempted to cooperate with Mr. Ferrare and provide him with considerable data and prior discovery responses, in good faith, in order to allow him to evaluate the settlement. Directing IDT to provide Mr. Ferrare's counsel with the voluminous and mostly confidential discovery material that the settling parties did not include in the settlement opens the door to continued litigation and controversy, and diverts resources away from the disposition of the Settlement. Allowing Mr. Ferrare's counsel to obtain IDT's prior discovery responses under these circumstances would also establish a precedent that would potentially expand the grounds for seeking intervention in Commission actions in the future. Based on such precedent, future litigants who have civil actions open against Commission-regulated entities would be encouraged to intervene in Commission actions solely for the purpose of gathering information from such regulated entities, even if the litigants have no genuine interest in participating in the Commission proceeding.

The most appropriate response to Mr. Ferrare's Motion is to deny it as being moot, in light of the filing of the Settlement Petition to terminate this litigation. The information contained in the confidential discovery responses is not in the record and therefore cannot be used at this stage in the proceeding. Should the Settlement be rejected by the Commission, and/or the proceeding is returned to a litigation track, Mr. Ferrare will have the opportunity to

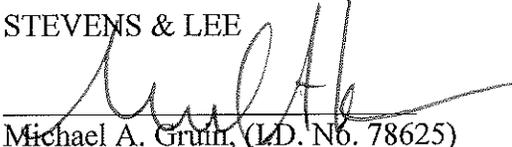
serve new discovery requests upon IDT, which can be handled in accordance with the Commission's discovery regulations.

### III. CONCLUSION

For the reasons set forth above, IDT respectfully requests that the Motion to Compel be denied, without prejudice to refile it should the Settlement in this case be rejected by the Commission.

Respectfully submitted,

STEVENS & LEE



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DATE: August 5, 2015

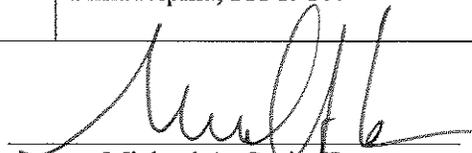
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the enclosed Answer to 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**

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August 5, 2015

  
Michael A. Grun, Esq.