

REDACTED VERSION

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.

**INTERVENER FERRARE’S AMENDED *AMICUS CURIAE* BRIEF IN OPPOSITION
TO THE JOINT PETITION FOR APPROVAL OF SETTLEMENT AND REQUEST
TO REMOVE “CONFIDENTIAL” DESIGNATION FROM
INFORMATION REFERENCED HEREIN**

AND NOW COMES Intervener Anthony Ferrare, on behalf of himself and all others similarly situated by and through his counsel, Jonathan Shub, Esquire and Kohn Swift & Graf, P.C., Scott George, Esquire and Seeger Weiss, LLP and Troy M. Frederick, Esquire and Marcus & Mack, P.C., and files the following *Intervener Ferrare’s Amended Amicus Curiae Brief In Opposition To The Joint Petition For Approval Of Settlement And Request To Remove “Confidential” Designation From Information Referenced Herein* and in support thereof respectfully avers as follows:

REDACTED VERSION

I. BACKGROUND

For the sake of brevity, Intervener Ferrare will not set forth the procedural background of this litigation.¹

II. ISSUES

- I. SHOULD THE *JOINT PETITION FOR APPROVAL OF SETTLEMENT* BE REJECTED AS THE SAME IS NOT IN THE PUBLIC INTEREST?**

Suggested Answer: Yes.

- II. SHOULD THE *JOINT PETITION FOR APPROVAL OF SETTLEMENT* BE REJECTED BECAUSE THE PUC LACKS THE AUTHORITY TO ORDER AND/OR PERMIT ELECTRIC GENERATION SUPPLIERS, SUCH AS THE COMPANY, TO REFUND MONEYS RELATING TO RATE DISPUTES AS SUCH ACTIONS ARE CLEARLY BEYOND THE SCOPE OF THE PUC'S AUTHORITY?**

Suggested Answer: Yes.

- III. SHOULD THE *JOINT PETITION FOR APPROVAL OF SETTLEMENT* BE REJECTED BECAUSE THE PUC LACKS AUTHORITY TO ORDER AND/OR PERMIT THE PARTIES TO REQUIRE THE COMPANY'S CUSTOMERS TO SIGN GENERAL RELEASES OF CLAIMS AGAINST THE COMPANY IN ORDER TO RECEIVE MONEY FROM THE PROPOSED SETTLEMENT FUND AS THE PUC CLEARLY DOES NOT HAVE JURISDICTION OR AUTHORITY OVER PRIVATE BREACH OF CONTRACT CLAIMS RELATED TO RATE DISPUTES?**

Suggested Answer: Yes.

- IV. SHOULD THE *JOINT PETITION FOR APPROVAL OF SETTLEMENT* BE REJECTED BECAUSE, DUE TO DEREGULATION, THE PUC AND THE OFFICE OF CONSUMER ADVOCATE LACK THE JURISDICTION OVER AND AUTHORITY TO REPRESENT, RESPECTIVELY, CONSUMERS WHO HAVE NOT FILED COMPLAINTS WITH THE PUC AGAINST EGSs WHICH ARE CORPORATIONS AND NOT PUBLIC UTILITIES?**

Suggested Answer: Yes.

¹ See the May 1, 2015 Order granting Intervener Ferrare's *Petition to Intervene* for the procedural background of this litigation.

REDACTED VERSION

- V. **SHOULD THE *JOINT PETITION FOR APPROVAL OF SETTLEMENT* BE REJECTED AS, ACCORDING TO PETITIONER FERRARE'S EXPERTS AS WELL AS OCA'S EXPERTS, THE MONETARY DAMAGES RESULTING FROM THE COMPANY'S EXCESSIVE, UNJUSTIFIABLE RATES WERE *BEGIN CONFIDENTIAL* [REDACTED] *END CONFIDENTIAL* HIGHER THAN THE \$6,577,000 THE COMPANY HAS AGREED TO SETTLE FOR?**

Suggested Answer: Yes.

- VI. **SHOULD THE PUC REMOVE THE "CONFIDENTIAL" AND/OR HIGHLY "CONFIDENTIAL" DESIGNATION(S) FROM THE INFORMATION CONTAINED IN SECTIONS I AND V HEREIN AS THE SAME SHOULD BE ACCESSIBLE TO THE PUBLIC AND IS NEITHER "CONFIDENTIAL" NOR HIGHLY "CONFIDENTIAL"?**

Suggested Answer: Yes.

III. LEGAL STANDARD

§ 69.1201. Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations -- statement of policy

- (a) The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa.C.S. (relating to Public Utility Code) and this title. These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.
- (b) Many of the same factors and standards may be considered in the evaluation of both litigated and settled cases. When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest. The parties to a settlement should include in the settlement agreement a statement in support of settlement explaining how and why the settlement is in the public interest. The statement may be filed jointly by the parties or separately by each individual party.
- (c) The factors and standards that will be considered by the Commission include the following:
 - (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the

REDACTED VERSION

conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

52 Pa. Code § 69.1201.

REDACTED VERSION

“It is clear that the Commission may not exceed the scope of its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.*, 43 A.2d 348 (Pa. Super 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the Commission's exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth 1992). Moreover, as a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, et seq., and its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977).” *Energy Services Providers, Inc. Answer In Opposition To Intervention And Reply Comments* at 6. The PUC does not have jurisdiction over private breach of contract claims. *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104).

IV. ARGUMENT

I. THE JOINT PETITION FOR APPROVAL OF SETTLEMENT SHOULD BE REJECTED AS THE SAME IS NOT IN THE PUBLIC INTEREST.

The *Joint Petition For Approval Of Settlement* should be rejected as the same is not in the public interest. To determine whether a proposed settlement is in the public interest, the Commission must evaluate the proposed settlement subjecting it to the following factors and standards:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

REDACTED VERSION

- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

52 Pa. Code § 69.1201.

- 1. Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.**

REDACTED VERSION

Intervener Ferrare along with the Joint Complainants and the Company are all in agreement that the Company's conduct was of a serious nature. *Joint Petition Appendix A* at 12 and *Appendix B* at 10.

- 2. Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.**

Intervener Ferrare along with the Joint Complainants and the Company are all in agreement that the resulting consequences of the alleged conduct at issue were of a serious nature. *Joint Petition Appendix A* at and *Appendix B* at 10-11.

- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.**

As this action is apparently set for settlement, the third factor would not apply at this point. As such, the same will not be discussed.

- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.**

While it appears from the *Joint Petition* that the Company has made efforts to modify its internal practices and procedures to address the conduct at issue and prevent similar conduct in the future, Petitioner asserts that the Company should be prohibited from offering variable rate electricity plans in Pennsylvania indefinitely. This prohibition, if implemented by the Commission, would further serve as a means by which Pennsylvania citizens would be shielded from predatory practices by the Company.

REDACTED VERSION

The Joint Complainants state that the proposed “modifications will help to prevent the conduct alleged in the Joint Complaint from occurring in the future.” (Emphasis added). *Joint Petition Appendix A at 15*. However, Petitioner asserts that it would be more than appropriate, based on the Company’s alleged conduct and the magnitude of the resultant consequences to Pennsylvania customers, for the Commission to ensure that the Company’s conduct alleged in the *Joint Complaint* does not occur in the future.

(5) The number of customers affected and the duration of the violation.

The Fifth Factor supports Petitioner’s position that the *Joint Petition* should be rejected. The Joint Complainants state, [h]ence, Joint Complainants submit that the majority, if not all, of IDT’s customers on variable rate plans in early 2014 were affected by IDT’s alleged actions. Joint Complainants submit that the number of customers who were impacted by the Company’s conduct as alleged in the Joint Complaint is significant.” *Joint Petition Appendix A at 16*. The Company states: [u]nder the terms of the Settlement, all IDT customers who were on variable rate plans in January, February, or March 2014 will be eligible for refunds from the Refund Pool, and those who choose not to participate in the Refund Pool distributions will have alternative methods to seek rate adjustments and/or refunds.” *Joint Petition Appendix B at 13*.

While both Parties acknowledge that the number of affected customers is significant, neither disclose the actual number of affected customers to the Commission or the public. However, both the Joint Complainants and the Company know how many of the Company’s customers were affected. “As of January 2013, IDT had BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL customers in Pennsylvania. During the summer of 2013, this number remained slightly less, but then dropped to approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL customers by December 2013. After the

REDACTED VERSION

impact of the very high prices charged beginning in January 2014, IDT's customer base dropped to approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL by April 2014 and was at a level of approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL by June 2014. In December 2013, IDT was serving approximately BEGIN CONFIDENTIAL

[REDACTED]
[REDACTED] END CONFIDENTIAL During the January through August 2013 IDT enrolled over BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL customers per month.” *Direct Testimony of Joint Complainants’ Expert Barbara R. Alexander, Consumer Affairs Consultant at 11-12.*

The number of the Company’s affected customers ranges between BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL in December of 2013 to BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL by April of 2014. As such, the proposed settlement of \$6,577,000.00 equates to compensation per person of roughly BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL. Joint Complainants’ expert Ashley E. Everette, Regulatory Analyst for the Pennsylvania Office of Consumer Advocate, testified that “[f]rom December 2013 to March 2014, IDT charged residential customers a total of approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL more than the PTC [Price to Compare], or approximately 5 times the amount that was refunded.” *Everette Direct Testimony at 5.*

It is unconscionable that the Company and the Joint Complainants are permitted to hide the underlying details of this Proposed Settlement from Public scrutiny behind the veil of “confidentiality”. The information discussed by Intervener Ferrare in this section in no way should be “confidential” as this information does not expose the Company’s trade secrets or

REDACTED VERSION

anything else that would cause the Company to lose its competitive edge, besides the facts themselves. If the Joint Complainants are permitted to advertise and tout this Proposed Settlement as a victory for Pennsylvania Consumers, the number of affected consumers and the amount of the financial harm caused by the Company should be disclosed to the public as well.² Intervener Ferrare submits that if the Public was aware that the Joint Complainants reached a settlement where the recorded over-charges were BEGIN CONFIDENTIAL ██████████ END CONFIDENTIAL for a mere \$6,577,000.00, the Public would be justifiably outraged.

As such, given the significant number of customers who were impacted, the staggering amount of the overcharges and the miniscule refund pool, the Proposed Settlement is nothing more than a windfall for the Company enabling it to buy off its obviously larger liability, by forcing customers to sign releases, for literally pennies on the dollar. For the above stated reasons, this settlement is not in the Public interest.

- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.**

It is Petitioner's position that the compliance history of the Company does form a barrier to approval of the *Joint Petition*. The Joint Complainants failed to mention the Company's past alleged violations: "Joint Complainants submit that the Company's compliance history poses no barrier to approval of the proposed Settlement." *Joint Petition Appendix A* at 16. The Company utilizes the approach that since they settled their prior alleged violations, that it does not have a history of prior violations. *Joint Petition Appendix A* at 13. Utilizing the Company's rationale in this section, the instant proposed settlement cannot be used against it in the future as it is also a

² See: https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=2012 and <https://www.facebook.com/PaAttorneyGen/posts/10153011559121981>

REDACTED VERSION

settlement with no findings of violations. The Company's earlier settlement Order was entered on October 17, 2013 and included overlapping alleged violations regarding deceptive sales and marketing practices. *Pennsylvania public utility commission Public Meeting held October 17, 2013*, at 5. This is the second settlement that the Company has agreed to in less than 2 years. As such, Petitioner asserts that the sixth factor mitigates against approval of the *Joint Petition*.

- (7) **Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.**

Petitioner is unaware of whether or not the Company has cooperated with the Commission's investigation.

- (8) **The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.**

It is Petitioner's position that the proposed amount of the civil penalty in the *Joint Petition*, \$25,000, excluding the \$100,000 contribution to the EDC hardship fund and \$75,000 to assist in administering the Settlement Fund neither of which are designated as civil penalties, is inadequate to deter the Company from engaging in similar conduct in the future. As was discussed in factor 6 above, the Company is already a repeat offender. As such, not only should the monetary penalty be substantially increased, but the Company should be prohibited from selling variable rate electric service in Pennsylvania indefinitely.

The \$25,000 proposed civil penalty equates to roughly BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL per harmed individual. If the \$100,000 contribution to the EDC hardship fund and \$75,000 to assist in administering the Settlement Fund are considered in addition to the \$25,000 civil penalty, the amount per harmed individual would still only range

REDACTED VERSION

from BEGIN CONFIDENTIAL ██████████ END CONFIDENTIAL. As such, Petitioner asserts that the eighth factor mitigates against the approval of the *Joint Petition*.

(9) Past Commission decisions in similar situations.

Aside from the pending Proposed Settlement in the matter of the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, Through the Bureau of Consumer Protection, And Tanya J. McCloskey, Acting Consumer Advocate, Complainants v. Energy Services Providers, Inc. d/b/a Pennsylvania Gas & Electric, The Company at Docket No. C-2014-2427656, which is being challenged by Intervener Thomas Sobiech, Intervener Ferrare is unaware of other past Commission Decisions directly relative to the instant action.

(10) Other relevant factors.

Petitioner will address other relevant factors in the sections that follow.

For the reasons set forth above and below, Petitioner respectfully requests that the Commission reject the *Joint Petition* as the same is not in the Public interest.

II. THE JOINT PETITION FOR APPROVAL OF SETTLEMENT SHOULD BE REJECTED BECAUSE THE PUC LACKS THE AUTHORITY TO ORDER AND/OR PERMIT ELECTRIC GENERATION SUPPLIERS, SUCH AS THE COMPANY, TO REFUND MONEYS RELATING TO RATE DISPUTES AS SUCH ACTIONS ARE CLEARLY BEYOND THE SCOPE OF THE PUC'S AUTHORITY.

The PUC lacks the authority to order and/or permit electric generation suppliers, such as the company, to refund moneys relating to rate disputes as such actions are clearly beyond the scope of the PUC's authority. "To begin, it is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.*, 43 A.2d 348 (Pa. Super 1945) (*Pittsburgh*). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (*Roberts*). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*,

REDACTED VERSION

619 A.2d 390 (Pa. Cmwlth 1992) (*Hughes*). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. (Emphasis added) *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*).” *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104).

The PUC lacks the authority under 66 Pa. C.S. § 1312, entitled *Refunds*, to force the Company to issue a refund. *Commonwealth of Pa, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Opinion and Order entered Dec. 18, 2014) (IDT Order). In *Delmarva Power & Light Co. v. Commonwealth*, the Pennsylvania Supreme Court determined that the Pennsylvania Public Utility Commission's Fiscal Office could not assess EGSs for the administrative expenses of the PUC, OCA, or OSBA as EGSs were not public utilities. *Delmarva Power & Light Co. v. Commonwealth*, 582 Pa. 338, 353, 870 A.2d 901, 910 (2005). In making this decision, the Supreme Court stated:

Nevertheless, the General Assembly made an exception to this rule by permitting EGSs to be deemed public utilities for "the limited purposes" described in sections 2809 and 2810. See 66 Pa. C.S. § 102 []. Notably, in making this limited exception, the General Assembly did not also state that EGSs could be deemed public utilities for purposes of section 510. ***Given this omission, we must presume that the General Assembly did not intend for EGSs to be considered public utilities for purposes of section 510 assessments.*** See 1 Pa. C.S. § 1924 ("Exceptions expressed in a statute shall be construed to exclude all others."); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 788 A.2d 955, 962 (Pa. 2001) ("An exception expressly provided in a statute is a strong indication that the legislature did not intend to exclude unexpressed items."). *Id.* at 902.

REDACTED VERSION

As was the case in *Delmarva*, “[t]he Code’s definition of ‘public utility’ states plainly and clearly that ‘the term does not include . . . (vi) [EGSs], except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue neutral reconciliation).” *66 Pa. C.S. § 102* []. Based on this unambiguous language, it is clear that the General Assembly did not intend for EGSs to be characterized as public utilities for most purposes.” *Id.* at 901.

Because the General Assembly specifically did not state that an EGS was a public utility for the purposes of refunds under *66 Pa. C.S. § 1312*, the PUC lacks the jurisdiction and authority to order and/or permit an EGS to issue refunds related to billing disputes. *Id.* The PUC cannot create authority where none was given. Because the PUC was not granted the authority to issue refunds in this scenario under *66 Pa. C.S. § 1312*, entitled *Refunds*, it is clearly impermissible for the PUC to attempt to exercise jurisdiction over the rate dispute aspects of this litigation.

For the reasons set forth above, Intervener Ferrare respectfully requests that the *Joint Petition for Approval of Settlement* be denied.

III. THE PUC LACKS AUTHORITY TO ORDER AND/OR PERMIT THE PARTIES TO REQUIRE THE COMPANY’S CUSTOMERS TO SIGN GENERAL RELEASES OF CLAIMS AGAINST THE COMPANY IN ORDER TO RECEIVE MONEY FROM THE PROPOSED SETTLEMENT FUND AS THE PUC CLEARLY DOES NOT HAVE JURISDICTION OR AUTHORITY OVER PRIVATE BREACH OF CONTRACT CLAIMS RELATED TO RATE DISPUTES.

The *Joint Petition for Approval of Settlement* should be rejected as it requires the Company’s customers to sign general releases to receive refunds from the Settlement Fund as it is beyond the jurisdiction and practice of the PUC to adjudicate and/or interfere with private causes of action such as breach of contract.

REDACTED VERSION

The Proposed Settlement requires the Company's customers to sign general releases, disposing of their private causes of action against the Company, if they wish to receive any amount of a refund, from the Settlement Fund. *Joint Petition* at 13 ¶ 41. Further, the Company, as far as Petitioner Ferrare is aware, did not require its customers to execute general releases when it decided to refund/provide rebates for the first \$4,177,000.00 to its customers.

Paragraph 41 of the *Joint Petition* states in part: "Release -- No customer shall be paid any funds from the Refund Pool without executing a 'Release of Claims' pursuant to which the customer agrees, in exchange for payment of the funds, to release, acquit, and forever discharge the Company and all of its current and former officers, shareholders, and employees from any and all claims related to the conduct alleged in the Joint Complaint over which the Commission has jurisdiction, including but not limited to, claims regarding the Company's prices not conforming to its Disclosure Statement or marketing statements." *Joint Petition* at 13.

It is undisputed that the PUC does not have jurisdiction over private breach of contract claims, yet the Proposed Settlement requires the Company's customers to sign a general release purportedly waiving such claims. *Joint Petition* at 13 ¶ 41 and *Commonwealth of Pennsylvania, et al v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104). "The Commission does not have subject matter jurisdiction to interpret the terms and conditions of a contract between an EGS and a customer to determine whether a breach of the contract has occurred. See, e.g. *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. Ct. 1978). The Commission has traditionally held that it does not have traditional ratemaking authority over competitive suppliers and has not asserted authority to regulate competitive supply rates." *Justin L. Herp v. Respond Power LLC*, 2014 Pa. PUC LEXIS 697, 18; December 17, 2014; C-2014-2413756.

REDACTED VERSION

In *Virgilli*, the Commonwealth Court explained as follows:

Although the public utility law grants to the Commission general supervisory and regulatory power over public utilities, 66 Pa. C.S. § 501, the Code does not confer an exclusive jurisdiction to decide all matters involving regulated public utilities. ***On the contrary, except as otherwise expressly provided in the Code, the Commission's powers and duties do not "abridge or alter the existing rights of action or remedies in equity or under common or statutory law of this Commonwealth."*** 66 Pa. C.S. § 103(c). In addition, our courts have construed the Public Utility Code as creating many areas of concurrent jurisdiction between the PUC and the Commonwealth's courts. See, e.g., *Rogoff v. Buncher*, 395 Pa. 477, 151 A.2d 83 (1959); *Leveto v. National Fuel Gas Distribution*, 243 Pa. Superior Ct. 510, 366 A.2d 270 (1976). (Emphasis added),

Virgilli v. Sw. Pa. Water Auth., 427 A.2d 1251, 1253 (1981). Given that in *Virgilli* the issue involved a public utility, which EGS' undisputedly are not, the authority granted to the PUC is even more restrained in this matter. In *Virgilli* the Court went on to state:

"[f]urthermore, the Code does not grant the PUC general supervisory power over contracts involving public utilities. See Leveto, supra; Myers v. Pennsylvania Public Utility Commission, 164 Pa. Superior Ct. 431, 65 A.2d 256 (1949). While Southwestern's claim may ultimately affect Mather's rates, such a result does not divest a common pleas court of its jurisdiction to resolve a private contract dispute." Id. at 1254. "An authority formed under the Municipal Authorities Act has no inherent powers and may do only those things that the legislature has expressly or by necessary implication placed within its power to do. [] Likewise, an administrative agency, such as the PUC, 'cannot, by mere usage, invest itself with authority or powers not fairly or properly within the legislative grant; it is the law which is to govern rather than departmental opinions in regard to it.'" (Internal citations omitted).

Susquehanna Area Reg'l Airport Auth. v. Pa. PUC, 911 A.2d 612, 617 n.8 (Pa. Cmwlth. 2006).

The PUC is not a court of law. The PUC does not have the discretion of a court of law. The PUC certainly lacks regulatory authority over an EGS' rates and it likewise lacks the authority to force consumers to waive private causes of action against the Company.

REDACTED VERSION

For the reasons set forth above, Intervener Ferrare respectfully requests that the *Joint Petition for Approval of Settlement* be denied.

IV. THE JOINT PETITION FOR APPROVAL OF SETTLEMENT SHOULD BE REJECTED BECAUSE THE PUC AND THE OFFICE OF CONSUMER ADVOCATE LACK THE JURISDICTION OVER AND AUTHORITY TO REPRESENT, RESPECTIVELY, CONSUMERS WHO HAVE NOT FILED COMPLAINTS WITH THE PUC AGAINST EGSs WHICH ARE CORPORATIONS AND NOT PUBLIC UTILITIES?

The Proposed Settlement should be denied as the PUC and the Office of Consumer Advocate (OCA) do not have the jurisdiction over or authority to represent, respectively, consumers who have not filed complaints with the PUC against EGSs which are corporations and not public utilities.

Paragraph 2 of the *Joint Complaint* states: “Tanya J. McCloskey is the Acting Consumer Advocate. The Office of Consumer Advocate is the agency authorized by law to represent the interests of utility *consumers* before the Commission as provided in 71 P.S. § 309-1, et seq.” (Emphasis added). However, in this instance, the Company’s customers are not considered utility “consumers” under 71 P.S. § 309-1.

71 P.S. § 309-1, Definitions, states:

As used in this article:

“COMMISSION” means the Pennsylvania Public Utility Commission.

“CONSUMER” means any person (i) who makes a direct use or is the ultimate recipient of a product or a service supplied by any *person or public utility* subject to the authority of the commission or (ii) who may be a direct user or ultimate recipient of a product or service supplied by any *person or public utility* subject to the authority of the commission and may be affected in any way by any action within the authority of the commission. The term “consumer” includes any “person,” “corporation” or “municipal corporation” as defined in section 2 of the act of May 28, 1937 (P.L. 1053, No. 286), known as the “Public Utility Law.”

REDACTED VERSION

“PUBLIC UTILITY” means public utility as defined in section 2(17), act of May 28, 1937 (P.L. 1053, No. 286), known as the “Public Utility Law.” (Emphasis added).

66 Pa.C.S. § 102 defines “Person” as: “Individuals, partnerships, or associations **other than corporations**, and includes their lessees, assignees, trustees, receivers, executors, administrators, or other successors in interest.” (Emphasis added).

It is clear from looking at the authority granted to the OCA under *71 P.S. § 309-1* that it lacks the authority to represent the Company’s customers as said customers are not considered “consumers” because the Company is neither a “person” nor a “public utility” but rather is a corporation. *66 Pa.C.S. § 102; 71 P.S. § 309-1* and *Joint Complaint* at 3 ¶ 6.

In further support, *§ 309-4.1*, entitled, *Assessment upon public utilities, disposition, appropriation and disbursement of such assessments* was found not to apply to Electric Generation Suppliers, such as the Company, as the same are not public utilities. The Supreme Court of Pennsylvania held:

At issue in this appeal is whether the Pennsylvania Public Utility Commission's Fiscal Office (the "Fiscal Office") may assess electric generation suppliers ("EGSs") for the administrative expenses of the ***Public Utility Commission (the "Commission"), the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA")***. We hold that the Fiscal Office may not assess EGSs for such expenses. (Emphasis added).

Delmarva Power & Light Co. v. Commonwealth, 870 A.2d 901, 902 (2005).

In *Delmarva*, the EGSs argued that “the Fiscal Office could not assess them for the OCA's and the OSBA's administrative expenses because section 904-A.1 of the Administrative Code and section 399.46 of the Small Business Advocate Act only permit the Fiscal Office to assess ‘public utilities.’” *Id.* at 903. The Supreme Court held:

REDACTED VERSION

Nevertheless, the General Assembly made an exception to this rule by permitting EGSs to be deemed public utilities for "the limited purposes" described in sections 2809 and 2810. See 66 Pa. C.S. § 102 [] Notably, in making this limited exception, the General Assembly did not also state that EGSs could be deemed public utilities for purposes of section 510. Given this omission, we must presume that the General Assembly did not intend for EGSs to be considered public utilities for purposes of section 510 assessments. [] See 1 Pa. C.S. § 1924 ("Exceptions expressed in a statute shall be construed to exclude all others."); *Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 567 Pa. 514, 788 A.2d 955, 962 (Pa. 2001) ("An exception expressly provided in a statute is a strong indication that the legislature did not intend to exclude unexpressed items.")” *Id.* at 910.

Delmarva applies to the issue at hand. The Office of Consumer Advocate under 71 P.S. § 309-1 lacks the authority to represent the Company’s customers as said customers are not considered “consumers” because the Company is neither a “person” nor a “public utility” but rather is a corporation. *66 Pa.C.S. § 102; 71 P.S. § 309-1 and Joint Complaint at 3 ¶ 6.*

As was discussed above, the PUC does not have jurisdiction over private causes of action or over refunds related to rate disputes, and as such, neither does OCA. *71 P.S. § 309-4* states in part, “[i]n addition to any other authority conferred upon him by this act, the Consumer Advocate is authorized, and it shall be his duty, in carrying out his responsibilities under this act, to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission *in any matter properly before the commission...*” For the sake of economy, and to address whether the issues of refunds and general releases are matters properly before the Commission, Intervener Ferrare incorporates the foregoing arguments from II & III above as if set forth herein in their entirety.

For the reasons set forth above, the PUC does not have jurisdiction or authority over the private causes of action of parties, especially those who have not filed complaints with the PUC,

REDACTED VERSION

and the OCA lacks standing and/or the authority to represent the Company's customers in this proceeding. As such, the Proposed Settlement should be rejected.

- V. **THE JOINT PETITION FOR APPROVAL OF SETTLEMENT SHOULD BE REJECTED AS, ACCORDING TO PETITIONER FERRARE'S EXPERTS AS WELL AS OCA'S EXPERTS, THE MONETARY DAMAGES RESULTING FROM THE COMPANY'S EXCESSIVE, UNJUSTIFIABLE RATES WERE BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL HIGHER THAN THE \$6,577,000 THE COMPANY HAS AGREED TO SETTLE FOR.**

During his involvement in the instant action, Intervener Ferrare has participated in informal discovery with Joint Complainants and the Company. On July 31, 2015, Intervener Ferrare filed a Motion to Compel the Company to provide certain information it produced to Joint Complainants to enable Intervener Ferrare's expert, Andrew N. Kleit, Ph.D., to formulate an opinion regarding the Proposed Settlement. Intervener Ferrare's Motion to Compel was granted on August 7, 2015. Intervener Ferrare received the requested information via hard copy from the Company on or around Wednesday August 19, 2015. As such, Intervener Ferrare's expert has not had ample time to prepare a thorough formal finding in this matter. That being said, Dr. Kleit largely agrees with the opinions offered by OCA's experts as was discussed in Section I above.³

As of January 2013, IDT had BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL customers in Pennsylvania. During the summer of 2013, this number remained slightly less, but then dropped to approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL customers by December 2013. After the impact of the very high prices charged beginning in January 2014, IDT's customer base dropped to approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL by April 2014 and was at a level of approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL by June 2014. In December 2013, IDT was

³ Intervener Ferrare states "largely" because the information provided by the Company appears to be incomplete in relation to all the areas and customers to which it provided service during the relevant time period. As such, Dr. Kleit's opinion in this regard is based partially on extrapolated information.

REDACTED VERSION

serving approximately BEGIN CONFIDENTIAL [REDACTED]

[REDACTED] END CONFIDENTIAL During the January through August 2013 IDT enrolled over BEGIN CONFIDENTIAL [REDACTED] [REDACTED] END CONFIDENTIAL customers per month.” *Direct Testimony of Joint Complainants’ Expert Barbara R. Alexander, Consumer Affairs Consultant at 11-12.*

The number of affected customers ranges between BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL in December of 2013 to BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL by April of 2014. As such, the proposed settlement of \$6,577,000.00 equates to compensation per person of roughly BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL per affected customer. Joint Complainants’ expert Ashley E. Everette, Regulatory Analyst for the Pennsylvania Office of Consumer Advocate, testified that “[f]rom December 2013 to March 2014, IDT charged residential customers a total of approximately BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL more than the PTC, or approximately 5 times the amount that was refunded.” *Everette Direct Testimony at 5.*

As the proposed settlement fund is clearly inadequate to address but a fraction of the financial harm caused by the Company, Intervener Ferrare respectfully requests that the Proposed Settlement be rejected. In addition, Intervener Ferrare requests the permission of the Commission to reveal the “confidential” information discussed in the instant document to the Public.

VI. THE PUC SHOULD REMOVE THE “CONFIDENTIAL” AND/OR HIGHLY “CONFIDENTIAL” DESIGNATION(S) FROM THE INFORMATION CONTAINED IN SECTIONS I AND V HEREIN AS THE SAME SHOULD BE ACCESSIBLE TO THE PUBLIC AND IS NEITHER “CONFIDENTIAL” NOR HIGHLY “CONFIDENTIAL”.

Pursuant to the PUC’s September 3, 2014, *Protective Order*, “[i]f a party challenges the designation of a document or information as proprietary, the party providing the information retains the burden of demonstrating that the designation is appropriate.” As such, Intervener

REDACTED VERSION

Ferrare is challenging confidential designation of the information cited herein and the findings of OCA's experts utilized herein in sections I and V above.

The above information does not meet the definition of "Confidential" set forth in the *Protective Order* as the materials, even if customarily treated by the Company as sensitive or proprietary and not available to the public, would not, if disclosed freely, subject the Company or others to risk of competitive disadvantage or other business injury.

The above information does not meet the definition of "Highly Confidential" as set forth below:

"Highly Confidential" those materials that are of such a commercially sensitive or of such a private, personal nature that the producing party is able to justify a heightened level of confidential protection with respect to those materials. For example but without limitation, "Highly Confidential" information may include Proprietary Information that constitutes or describes: inter alia, the producing party's marketing plans, costing data, pricing strategies and formulas, competitive strategies, market share projections, marketing materials that have not yet been used, agent deployment, employee –identifying information, customer-identifying information, or customer prospects for services that are subject to competition.

For the above stated reasons, Intervener Ferrare respectfully requests that the PUC remove the confidential and/or highly confidential designation(s) from the information discussed in sections I and V above.

VII. CONCLUSION

For the above stated reasons Intervener Ferrare respectfully requests that the *Joint Petition for Approval of Settlement* be rejected. Further, Intervener Ferrare respectfully requests the permission of the Commission to reveal the "confidential" information discussed herein to the Public.

REDACTED VERSION

Respectfully Submitted By Attorneys for Intervener Ferrare:

Kohn Swift & Graf, P.C.

/s/ Jonathan Shub, Esquire

Jonathan Shub, Esquire
Identification No: 53965
One South Broad Street
Suite 2100
Philadelphia, PA 19107
Phone: (215) 564-2300
Fax: (215) 851-8029

And

Marcus & Mack, P.C.

/s/ Troy M. Frederick, Esquire

Troy M. Frederick, Esquire
Identification No: 207461
57 South Sixth Street
Indiana, PA 15701
Phone: (724) 349-5602
Fax: (724) 349-8362

September 1, 2015

REDACTED VERSION

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.

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the *Intervener Ferrare's Amended Amicus Curiae Brief In Opposition To The Joint Petition For Approval Of Settlement* by e-filing, e-mail, and/or first-class mail (unless otherwise noted) upon the persons addressed below:

Administrative Law Judge Elizabeth H. Barnes
Administrative Law Judge Joel H. Cheskis
PO Box 3265
Harrisburg, PA 17105-3265
Phone: 717.787.1399
Fax: 717.787.0481
ebarnes@pa.gov
jcheskis@pa.gov
(Via E-mail and First-class mail)

Kourtney L. Myers, Esquire
Stephanie M. Wimer, Esquire
Michael L. Swindler, Esquire
Wayne T. Scott, Esquire
Bureau of Investigation & Enforcement
Commonwealth of Keystone Building
400 North Street
Harrisburg, PA 17120
komyers@pa.gov

Michael A. Gruin, Esquire
Stevens & Lee
17 N. 2nd Street, 16 Fl.
Harrisburg, PA 17101
mag@stevenslee.com
(E-Mail and First-class mail)

REDACTED VERSION

stwimer@pa.gov
mswindler@pa.gov
wascott@pa.gov
(E-mail and First-class mail)

Sharon Webb, Esquire
Office of Small Business Advocate
Commerce Building, Suite 202
300 North Second Street
Harrisburg, PA 17101
swebb@pa.gov
(E-mail and First-class mail)

Candis A. Tunilo, Esquire
Kristine E. Robinson, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, PA 17101-1923
ctunilo@paoca.org
krobinson@paoca.org
(E-mail and First class mail)

/s/ Troy M. Frederick, Esquire
Troy M. Frederick, Esquire
Counsel for Anthony Ferrare

September 1, 2015