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September 8, 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 IDT Energy, Inc.'s Brief in Reply to the *Amicus Curiae* Brief of Anthony Ferrare in the above-referenced matter. Copies of the Reply Brief have been served in accordance with the attached certificate of service. Please feel free to contact me if you have any questions or concerns.

Best Regards,

STEVENS & LEE



Michael A. Gruin

Encl.

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

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

COMMONWEALTH OF
PENNSYLVANIA, by Attorney General
KATHLEEN G. KANE, Through the Bureau
of Consumer Protection

And

TANYA J. McCLOSKEY, Acting Consumer
Advocate

Complainants

v.

IDT ENERGY, INC.

Respondent

Docket No. C-2014-2427657

**IDT ENERGY, INC.'S BRIEF IN REPLY TO *AMICUS CURIAE* BRIEF OF
INTERVENER ANTHONY FERRARE**

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**IDT ENERGY, INC.'S BRIEF IN REPLY TO *AMICUS CURIAE* BRIEF OF
INTERVENER ANTHONY FERRARE**

Pursuant to the August 5, 2015 Procedural Order # 6 issued in the above-captioned matter, Respondent, IDT Energy, Inc. (“IDT”) files this Reply to the Amicus Curiae Brief filed by Intervener Anthony Ferrare in Opposition to the Joint Petition for Approval of Settlement (“Settlement Petition”) in the above-captioned matter. For the reasons set forth below, the Pennsylvania Public Utility Commission (“Commission”) should 1) approve the Joint Petition without modification and 2) deny Mr. Ferrare’s request to remove the “Confidential” designation from the information discussed in Sections I and V of his *Amicus Curiae* Brief.

I. INTRODUCTION AND PROCEDURAL HISTORY

On June 20, 2014, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Consumer Advocate, (collectively, “Joint Complainants”) filed with the Commission a Formal Complaint against IDT (“Joint Complaint”). The Joint Complainants included seven separate counts in the Joint Complaint against IDT, and made several requests for relief, including providing restitution to customers, prohibiting deceptive practices in the future, and revocation of IDT’s Electric Generation Supplier (EGS) license, if warranted.

On July 10, 2014, IDT filed an Answer with New Matter to the Joint Complaint. In its New Matter, IDT averred various affirmative defenses, and averred that high rates experienced by Pennsylvania retail electricity customers during early 2014 were caused by dramatic, unprecedented, and sustained spikes in wholesale electricity prices in the energy markets administered by PJM Interconnection, LLC.

On July 10, 2014, the OSBA filed a Notice of Appearance, Notice of Intervention and Public Statement in this proceeding. On July 31, 2014, I&E filed a Notice of Intervention. On

September 3, 2014, IDT filed an unopposed Motion for Protective Order. The Motion was granted by Order dated September 3, 2014.

Hearings for the admission of consumer direct testimony into the record and cross examination were held February 17-20, 2015. The direct testimonies of 125 consumers were admitted into the record during the hearings along with various cross examination and redirect exhibits.

On April 8, 2015, Anthony Ferrare, a former customer of IDT and named plaintiff in a class action filed against IDT in the United States District Court for the Eastern District of Pennsylvania, filed a Petition to Intervene and Public Statement in this matter. Mr. Ferrare sought intervention “to protect his rights and all other customers that have contracted with IDT Energy, Inc.”

On April 28, 2015, Joint Complainants filed an Answer 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. Also on April 28, 2015, IDT filed an Answer to Mr. Ferrare’s Petition to Intervene requesting that the ALJs deny the Petition because: 1) Mr. Ferrare had not demonstrated good cause for the lateness of his Petition; 2) it is well settled that individuals are not permitted to represent the interests of other customers in Commission proceedings; and 3) Mr. Ferrare has not identified any interest of his that will be affected by Commission action in this case that is not adequately represented by existing participants.

By Order dated May 1, 2015, the ALJs granted Mr. Ferrare’s Petition to Intervene but also held that Mr. Ferrare is not permitted to represent the interests of “all others similarly situated”, 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.”

After extensive discovery, and 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. On August 4, 2015, the Joint Complainants and IDT filed the Joint Petition for Settlement, accompanied by a Joint Stipulation of Facts and Conclusions of Law and Statements in Support of the Settlement from the Joint Complainants, IDT, and OSBA. The Joint Complainants and IDT also filed a Motion for Admission of Testimony and Exhibits on August 4, 2015, seeking the admission into the record of additional consumer witness testimonies and accompanying exhibits.

By Procedural Order #6 issued on August 5, 2015, the presiding Administrative Law Judges granted Mr. Ferrare leave to file comments or objections to the Joint Petition on or before August 26, 2015, and permitted all parties to file Briefs or Reply Comments in response to comments or objections filed by Mr. Ferrare within ten (10) days of the date that Mr. Ferrare served his comments or objections.

On August 26, 2015, Mr. Ferrare filed his *Amicus Curiae* Brief, in which Mr. Ferrare set forth his opposition to the Joint Petition and requested the removal of the “Confidential Designation” from certain information referenced in the *Amicus Curiae* Brief.

II. SUMMARY OF REPLY ARGUMENT

Mr. Ferrare’s Brief fails to point to any evidence or legal authority to rebut the Joint Petitioners’ clear demonstration that the Settlement is in the public interest and that it should be approved by the Commission under its standards for evaluating Settlements. Mr. Ferrare’s Brief

is improper on multiple levels, and should be given little weight, if not stricken outright. First, Mr. Ferrare's Brief improperly attempts to refer to information and materials that are clearly not in the record in this case and which are not supported by an affidavit, as required by Procedural Order # 6. In evaluating the Settlement, the Commission must only consider the evidence that is in the record in this case. Mr. Ferrare was provided with the flexibility to submit factual statements and affidavits to support his opposition to the Settlement, but he failed to take the opportunity to do so. Accordingly, Mr. Ferrare's references to materials that are not in the record, and to the conclusions of individuals other than himself who did not submit any qualifications and/or sworn testimony, and/or who were not subject to cross-examination, should be stricken and not considered.¹

Second, Mr. Ferrare's Brief continues his attempts to advocate on behalf of other consumers in this proceeding, even though the Order granting his intervention made it clear that he had no standing to advocate on behalf of consumers other than himself. In opposing the Settlement, Mr. Ferrare's Brief fails to even nominally address how or why he personally would be negatively affected by the approval of the Settlement. The Brief contains no assertions of facts that are specific to Mr. Ferrare in any way, and it is clear that the brief was written from the perspective of Mr. Ferrare's class action attorneys rather than Mr. Ferrare himself.

Third, Mr. Ferrare's opposition to the Settlement is based in large part on the mistaken conclusion that IDT was found to have committed a wrongdoing. Obviously, this is not the case. The Joint Petition, the Joint Stipulation of Facts, and the parties' Statements in Support make it very clear that IDT did not admit to any wrongdoing by entering into the Settlement, and that the Settlement represents the compromise of a very complex set of circumstances.

¹ IDT is filing a Motion to Strike Portions of Mr. Ferrare's *Amicus Curiae* brief, contemporaneously with the filing of this Reply Brief.

Fourth, Mr. Ferrare's Brief contains numerous misstatements of law regarding the Commission's authority to approve settlement agreements and the OCA's ability to represent the interests of consumers in matters before the Commission.

Finally, Mr. Ferrare's request to remove the confidential designation from certain information referenced within his Brief must be rejected, because the information in question was correctly marked as Confidential under the terms of the Protective Order. The Protective Order allows the parties to designate as "Confidential" those materials which are customarily treated as sensitive or proprietary, and which are not available to public. All of the Confidential information referenced in Mr. Ferrare's Brief is information about IDT's customer base in Pennsylvania, which is expressly noted as being Confidential under 54 Pa. Code § 54.203(a)(4) and other Commission authority.

III. ARGUMENT

A. Mr. Ferrare's Brief Improperly Refers to Third-Party Statements And Other Information That Is Not In the Record and Not Supported by Affidavits

In evaluating the Settlement, the Commission must only consider the evidence that is in the record in this case. The record in this case is limited to 1) the Joint Stipulation of Facts in Support of the Settlement; 2) the materials from the February 17-20, 2015 evidentiary hearings, including the Consumer Direct Testimonies and exhibits that were moved into the record at that time; and 3) the additional Consumer Testimonies and accompanying Exhibits that the Joint Complainants and IDT moved to admit by Joint Motion on August 4, 2015. Mr. Ferrare was provided with the flexibility to submit factual statements and affidavits to support his opposition to the Settlement, but he failed to take the opportunity to do so. Instead, Mr. Ferrare's brief contains several references to "testimony" that is clearly not part of the record, and to the conclusions of individuals other than himself who did not submit sworn testimony and who were

not subject to cross-examination. These statements referenced by Mr. Ferrare in his Brief are clearly not in the record in this proceeding, and thus cannot be considered in evaluating the Settlement.

It is axiomatic that Commission determinations must be supported by substantial evidence of record, and it is inappropriate for Briefs to reference information which is not in the record. The Commission's regulations at 52 Pa. Code § 5.501(a)(2) require that briefs contain "[r]eference to the pages or record or exhibits where the evidence relied upon by the filing party appears" and the Commission has repeatedly struck portions of briefs that contain references to information that is not in the record. *See, e.g., Petition of PECO Energy Company for Approval of Its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of Its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order issued October 28, 2009) ("*PECO Act 129 Order*") ("The inclusion of extra-record evidence in a brief violates the principle of fundamental fairness and violates the due process rights of other parties who have no opportunity to cross examine a witness in a separate hearing"), and *Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, 2006 Pa.PUC LEXIS 22 (2006), *aff'd sub nom., Popowsky v. PA. Public Utility Commission*, 937 A.2d 1040 (2007). If information is not in the record, it cannot be considered by the Commission in evaluating a Settlement. *See, e.g., Pennsylvania Public Utility Commission, et al. v. Equitable Gas Company*, Docket Nos. R-2009-2088072, C-2009-2091475, C-2009-2098330 and C-2009-2100312 (Order entered December 21, 2009), and *In re Pennsylvania-American Water-Company*, 95 Pa. P.U.C. 86 (Order entered February 13, 2001) (wherein the Commission upheld the Initial Decision of ALJ Cocheres in which he struck extra-record references from a Protestant's brief).

To the extent that Mr. Ferrare is attempting to introduce these statements into evidence now, via his Brief, such attempts are clearly improper and must be rejected. Unauthenticated written statements such as those referenced by Mr. Ferrare constitute inadmissible hearsay. These references are written statements, other than those made by a declarant while testifying at trial, that ostensibly are being offered into evidence to prove the truth of the matters asserted therein. As such, they constitute hearsay under Pennsylvania Rule of Evidence 801.

Pennsylvania Rule of Evidence 802 generally prohibits the admission of hearsay into evidence. It has long been recognized in Pennsylvania that hearsay rules are not mere “technical rules of evidence” but instead are fundamental rules of law that should be followed by agencies when facts crucial to the issue are sought to be placed on the record. See, e.g., *Loudon v. Viridian Energy*, PA PUC Docket No. C-2011-2244309 (Initial Decision dated February 2, 2012, Final Order entered March 29, 2012), *Gibson v. W.C.A.B.*, 861 A.2d 938 (Pa. 2004); and *Anthony v. PECO Energy Co.*, PA PUC Docket No. C-2014-2408057 (Order entered July 30, 2014). A finding based solely on hearsay cannot support a legal conclusion by an administrative agency. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth 1976).

Rule 901 of the Pennsylvania Rules of Evidence provides for the necessity of authentication of documentary evidence. Under the Commission’s regulations, written testimony such as that referenced by Mr. Ferrare in his Brief is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner. 52 Pa. Code § 5.412. In Commission hearings, the author of the prepared testimony must authenticate the testimony as a witness with knowledge of the authenticity of the document pursuant to P.R.E. 901(b)(1). Without such authentication, the information proffered by

Mr. Ferrare is inadmissible as hearsay. Furthermore, the inclusion of these references in Mr. Ferrare's Brief is prejudicial to IDT. As noted in the Joint Stipulation of Facts submitted with the Settlement Petition, had this proceeding not settled, IDT would have challenged the accuracy of the statements, opinions and conclusions of Joint Complainants' witnesses through cross-examination, cross-examination exhibits, and rebuttal testimony. See Stipulation of Facts, at ¶ 27. Because IDT was not afforded the opportunity to respond to the statements that were improperly included in Mr. Ferrare's Brief, or cross-examine the individuals who are associated with those statements, the inclusion of this extra-record statements violate basic principles of due process. *See, PECO Act 129 Order, supra.* ("The inclusion of extra-record evidence in a brief violates the principle of fundamental fairness and violates the due process rights of other parties who have no opportunity to cross examine a witness in a separate hearing"),

Specifically, the following sections of Mr. Ferrare's Brief contain improper, extra-record references and should be stricken:

- *Page 8, beginning on the fourth line of the final paragraph, after the word "affected", through the first two paragraphs of page 9, up through and including the passage that ends with the words "at 5."* These sections of Mr. Ferrare's Brief attempt to reproduce selected sections of materials that were not submitted into the record in the case, and do not appear anywhere in the Settlement Petition, Stipulation of Facts, Statements in Support, or Consumer Testimony. These passages refer to statements or conclusions of individuals other than Mr. Ferrare, and those individuals did not present sworn testimony and were not subject to cross-examination. As such, these references constitute hearsay and should not be considered by the ALJs or the Commission in evaluating the Settlement.

- *Page 10, line 4, the passage marked as Confidential.* The information marked as confidential on line 4 of Page 10 is also taken from an unsworn statement from an individual other than Mr. Ferrare and is not in the record. The source of this information is the passage from page 9 of the Brief that was addressed above.
- *Page 11, last paragraph, through the first two lines at top of page 12.* This section includes mathematical calculations that use the extra-record, hearsay information from pages 8 and 9 as the denominator for the calculation and associated argument.
- *Pages 20, starting at the last sentence of the first full paragraph in Section V (including the footnote) through the end of the indented passages on Page 21.* This section of the Brief again attempts to reproduce selected sections of materials that were not submitted into the record in the case, and do not appear anywhere in the Settlement Petition, Stipulation of Facts, Statements in Support, or Consumer Testimony. These passages refer to statements or conclusions of individuals other than Mr. Ferrare, and those individuals did not submit testimony into the record and were not subject to cross-examination. As such, these references constitute hearsay and should not be considered by the ALJs or the Commission in evaluating the Settlement.

B. The Joint Petitioners Have Demonstrated That The Settlement Is In the Public Interest and Should Be Approved

It is the Commission’s policy to encourage settlements, and the Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 5.231 and 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. *Pa. Pub. Util. Comm’n, et al. v. City of Lancaster – Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Opinion and Order

entered July 14, 2011). The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. Pub. Util. Comm'n LBPS v. PPL Utilities Corporation*, M-2009-2058182 (Opinion and Order entered November 23, 2009); *Pa. Pub. Util. Comm'n v. Philadelphia Gas Works*, M-00031768 (Opinion and Order entered January 7, 2004); 52 Pa. Code § 69.1201; *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Opinion and Order entered April 1, 1996); *Pa. Pub. Util. Comm'n v. CS Water and Sewer Associates*, 74 Pa. PUC 767 (1991).

In this case, both the Joint Complainants and IDT provided extensive discussion to explain why approval of the complex and detailed Settlement is in the public interest. In doing so, the Joint Complainants and IDT thoroughly addressed each of the ten factors and standards for evaluating litigated and settled proceedings, as articulated in *Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company*, Docket No. C-0092409 (Final Order entered February 10, 2000) (“*Rosi*”) and codified in the Commission’s Policy Statement at 52 Pa. Code § 69.1201.

Those factors are:

(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.

(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.

The Statements in Support filed by the Joint Complainants and IDT carefully and thoroughly examined each of the *Rosi* factors, and clearly demonstrated that the Settlement was appropriate under those factors based on the information that is part of the record in the case. Conversely, Mr. Ferrare's Brief attempts to argue that several of the *Rosi* Factors do not justify a finding that the Settlement is in the public interest. In doing so, Mr. Ferrare's Brief relies almost exclusively on piecemeal data and false assumptions that are not part of the record in this proceeding and therefore cannot be considered in evaluating the settlement. As set forth below, Mr. Ferrare's criticisms of the Settlement should be rejected.

Rosi Factors 1-3: Mr. Ferrare agrees with the Joint Petitioners regarding the first three *Rosi* Factors.

Rosi Factor 4: With respect to the fourth *Rosi* factor, Mr. Ferrare's sole criticism of the extensive modifications to business practices reflected in the Settlement relates to the 21-month

prohibition on the offering of variable rate products by IDT. Mr. Ferrare argues that a 21-month prohibition is not sufficient, and that IDT should be prohibited from offering a variable rate product “indefinitely” in light of what he calls IDT’s “predatory” practices. IDT strongly rejects the assertion that its practices were “predatory”, and there is absolutely nothing in the record to suggest that IDT engaged in “predatory” behavior. The Settlement clearly acknowledges that the Settlement’s provisions should not be construed as an admission of any liability by IDT. Settlement Petition, at ¶ 37 and Stipulation of Facts, at p. 1.

Furthermore, Mr. Ferrare fails to recognize that the 21-month prohibition on the offering of variable rates was just one of several substantial modifications to business practices that are reflected in the Settlement. Pennsylvania law permits EGSs to offer variable rates for electric generation supply, and it has been acknowledged that a variable rate may offer substantial savings when wholesale market prices are low². The 21-month moratorium on the offering of variable rate products is meant to work in conjunction with modifications to IDT’s disclosure statement, sales agent training program, third-party verification procedures, complaint handling process, and sales compliance monitoring, as outlined in paragraphs 45-51 of the Settlement Petition. In light of these significant business modifications and the fact that variable rate products are legal and commonplace in the Pennsylvania electric choice marketplace today, a longer moratorium on the offering of variable products would be unduly excessive and punitive. By way of comparison, another EGS, (Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric (“PaG&E”)) recently reached a settlement with the OCA and OAG in a case involving nearly identical allegations, and that settlement included an 18-month prohibition on the offering

² Joint Motion of Vice Chairman John F. Coleman, Jr. and Commissioner James H. Cawley, *Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (February 20, 2014)

of variable rate products.³ The 21-month prohibition included in the present Settlement is comparable to the one agreed to by PaG&E, and both the IDT and PaG&E settlements include nearly identical modifications to business practices. As such, Mr. Ferrare's criticisms of the length of the variable rate prohibition are not warranted and should be rejected.

Rosi Factor 5: With regard to the fifth *Rosi* factor (the number of customers affected and the duration of the alleged violation), Mr. Ferrare argues that the amount of the Refund Pool is not sufficient in comparison to IDT's customer base during the January - March, 2014 time frame. In objecting to the size of the Refund Pool, Mr. Ferrare again improperly references certain materials that are not in the record in this case and should not be considered by the ALJs or the Commission. Mr. Ferrare also purports to calculate the amount of "over-charges" to customers and compares those "over-charges" to the size of the Refund Pool. As references to information that is not in the record in the case and not supported by any affidavits or factual statements, these references cannot be relied upon in evaluating the Settlement and should be stricken from Mr. Ferrare's Brief, for the reasons set forth in Section III.A, *supra*, and IDT's Motion to Strike. Mr. Ferrare's conclusion that "over-charges" occurred is merely an unsubstantiated opinion that is contradicted by the evidence of record. The Settlement Petition and Joint Stipulation of Facts both note that the Settlement's provisions should not be construed as an admission of any liability by IDT. Settlement Petition, at ¶ 37 and Stipulation of Facts, at p. 1. As noted in IDT's Statement in Support, IDT's Pennsylvania Disclosure Statement clearly and unequivocally stated that customers would be charged a market-based variable rate for electricity generation supply, that the rate may be higher or lower than the EDC's rate in any given month, and that the price has no ceiling. IDT Statement in Support, at p. 2. The retail

³ See *Commonwealth of Pennsylvania and Office of Consumer Advocate v. Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-242-7656 (Initial Decision issued June 8, 2015) ("PaG&E").

electric rates that occurred in Pennsylvania during the winter of 2014 were the direct result of unprecedented price spikes in the wholesale electricity markets. IDT Statement in Support, at p. 3.

In evaluating the Settlement, and specifically the Refund Pool, it is appropriate to rely only upon the information that is actually in the record in this case. The record in this case reflects that the Joint Complaint stemmed from 47 Formal Complaints filed against IDT at the Commission, 1917 customer complaints filed against IDT with the OAG, and 539 customer contacts to the OCA regarding IDT's variable rate increase during the "Polar Vortex" crisis of early 2014. See Complaint, at paragraphs 17-19. In total, the testimonies of 205 IDT customers were moved for admission into the record. The record also reflects that IDT provided significant amounts of information and data to the OCA and OAG, both formally during litigation and informally settlement discussions. *See*, IDT Statement in Support, at p. 16.

In addition to relying solely on information that is not part of the record, Mr. Ferrare's objection to the Refund amount fails to recognize that the Settlement is a compromise of a very complex and disputed claim, yet it ensures that every customer who was on a variable rate plan in January – March 2014 will be eligible for immediate refunds and will have an alternative method for seeking rate adjustments and refunds should they choose not to participate in the refund pool. By contrast, if the Settlement is rejected, it is unclear whether the Commission would or could order refunds to the number of customers who will receive refunds under this Settlement. Furthermore, even if the Commission were to order IDT to issue refunds to some pool of IDT's present or former customers, such payments may not have been issued for years if this case was fully litigated.

Under 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. Settlement Petition, at ¶ 38. Furthermore, under the terms of the Settlement, any customer who chooses not to participate in the Refund Pool distributions will have alternative methods to seek rate adjustments and/or refunds. Settlement Petition, at ¶ 40. As such, the Settlement's terms directly address all of the customers alleged to have been affected in the Joint Complaint, and many more beyond those referenced in the Joint Complaint. The Settlement provides multiple avenues for customers to seek rate adjustments and/or refunds, such that every customer who believes that were affected by the conduct alleged in the Joint Complaint will be able to seek recourse.

The fact that the Settlement does not recite the precise number of customers alleged to have been affected is not a basis for rejecting the Settlement. As indicated in the Settlement Petition, the Joint Complainants and IDT disagreed regarding the allegations in the Joint Complaint and IDT does not admit to any wrongdoing by participating in the Settlement. Yet, despite their disagreement on the allegations, the Joint Petitioners crafted a wide-ranging and thorough compromise of a very complex case that will afford rate relief to all IDT customers who were on variable rates during the January – March 2014 time frame. In addition to being very broad in scope, the Settlement's Refund Pool mechanism is very individualized in implementation. Under the Settlement, the OCA and OAG will determine the specific refund amount to be offered to each customer based on several factors. Settlement Petition, at ¶ 39. IDT provided significant amounts of information and data to the OCA and OAG, both formally during litigation and informally during settlement discussions, and under the Settlement IDT is obligated provide the OCA and OAG with all the customer information needed to calculate each customer's refund amount. Settlement Petition, at ¶ 39.

Mr. Ferrare's argument on the fifth factor essentially boils down to questioning the judgement of the OCA and OAG regarding the size and administration of the Refund Pool in the context of a compromise. Respectfully, as an Intervener whose involvement in this proceeding is strictly limited to representing his own interests, Mr. Ferrare is in no position to question the OCA and OAG's exercise of judgment in carrying out their statutory duties.

Mr. Ferrare's analysis of the fifth *Rosi* factor also includes an argument that certain information that had been marked as "Confidential" should be disclosed to the public. This argument will be addressed in detail in Section III.G, below.

Rosi Factor 6: With respect to the sixth *Rosi* factor (IDT's compliance history), Mr. Ferrare asserts that a prior settlement between IDT and the Bureau of Investigation & Enforcement warrants rejection of the Settlement in this case. Mr. Ferrare is wrong on this point. While IDT did previously agree to a civil penalty of \$39,000 to resolve an informal investigation by the Bureau of Investigation and Enforcement in 2013, related to twenty-one BCS informal complaints filed against IDT between 2010 and 2012, no finding of violation was made against IDT in that proceeding. See *Pa. PUC v. IDT Energy, Inc.*, Docket No. 2013-2314312 (Order entered October 17, 2013). That settlement with BI&E, like the current Settlement, involved a compromise of disputed claims, and contained no admission of wrongdoing by IDT. Furthermore, the settlement with BI&E expressly indicated that the settlement would not be admissible in any future proceedings as proof of unlawful and/or improper behavior, or as an admission of unlawful and/or improper behavior by IDT. *Id.* at p. 8. As such, Mr. Ferrare's assertions regarding IDT's compliance history provide no basis for rejecting the Settlement.

Rosi Factor 7: With respect to the seventh *Rosi* factor, Mr. Ferrare indicates that he is unaware of whether IDT cooperated with the Commission's investigation. Both the Joint Complainants and IDT, however, confirmed that IDT did in fact cooperate fully with the investigation of this matter. See Joint Complainants' Statement in Support, at p. 16 and IDT Statement in Support, at p. 14. Accordingly, analysis of the seventh *Rosi* factor weighs in favor of approval of the Settlement.

Rosi Factor 8: With respect to the eighth *Rosi* factor (whether the amount of the civil penalty is adequate to deter future violations), Mr. Ferrare again improperly references certain unattested calculations that have no basis in the record. For the reasons set forth above and in IDT's Motion to Strike, these references should not be considered in evaluating the Settlement. In addition, Mr. Ferrare characterizes IDT as a "repeat offender", but as stated above in relation to the sixth *Rosi* factor, no finding of violation was made against IDT in connection with its 2013 settlement with BIE, so it is inaccurate to refer to IDT as a "repeat offender".

As stated in IDT's Statement in Support, the total amount of payments to be made by IDT under the Settlement Agreement is clearly sufficient to deter future violations. Pursuant to the Settlement, the Company has agreed to pay an additional \$2,400,000 in refunds plus up to \$75,000 for the costs administering the Restitution Pool, a \$100,000 contribution to the EDC hardship funds, and a voluntary civil penalty of \$25,000. The amounts to be paid by IDT are substantially similar to the amounts to be paid by PaG&E in connection with the settlement of a Joint Complaint involving very similar allegations and customers who were impacted during the identical time frames. See *Commonwealth of Pennsylvania and Office of Consumer Advocate v. Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric*, Docket No. C-2014-242-7656 (Initial Decision issued June 8, 2015) ("*PaG&E*"). As such, IDT submits that the total

amount of refund payments, civil penalty, and hardship contributions to be made by IDT constitute a reasonable and appropriate amount to resolve this proceeding, and Mr. Ferrare's assertions related to the eighth *Rosi* factor should be rejected.

Rosi Factor 9: With respect to the ninth *Rosi* factor, Mr. Ferrare acknowledges that he is unaware of any other Commission decisions that are relevant to the current proceeding, other than the *PaG&E* decision. As set forth above, the Initial Decision in the *PaG&E* proceeding recommended approval of a settlement that was very similar in terms of financial payment and modifications to business practices, in a case that involved similar allegations during the same time frame. Accordingly, the Company submits that approval of the Settlement Agreement is reasonable and appropriate, and consistent with the Initial Decision issued in *PaG&E*.

Rosi Factor 10: Mr. Ferrare's assertions regarding the tenth *Rosi* factor (Other relevant factors) will be addressed individually in the sections below.

C. The Commission Clearly Has The Authority To Approve a Settlement Under Which A Regulated Entity Voluntarily Agrees To Issue Refunds To Customers

Mr. Ferrare argues that the Settlement should be rejected on the grounds that "the PUC lacks the authority to order and/or permit electric generation suppliers, such as the company, to refund moneys related to rate disputes as such actions are clearly beyond the scope of the PUC's authority". Ferrare Brief, at p. 12. In addition to being legally flawed, this argument by Mr. Ferrare is hypocritical and exposes the true intention behind Mr. Ferrare's objections to the Settlement – which is to scuttle the Settlement in order to selfishly preserve the financial value of his speculative class action lawsuit, to the detriment of customers who would otherwise receive refunds under the Settlement Agreement. While holding himself out as an advocate for the public interest, Mr. Ferrare is challenging the Commission's jurisdiction to approve a Settlement under which all of IDT's customers who were on variable rates in January – March 2014 would

be immediately eligible to participate in a Refund Pool of \$2,400,000. This cynical advocacy by Mr. Ferrare should negatively color the Commission's consideration of the entirety of his Brief in Opposition to the Settlement.

In any event, Mr. Ferrare's argument on this point is misguided, because it focuses on the Commission's authority to order an EGS to issue a refund to customers, whereas the relevant inquiry is whether the Commission has the ability to approve a Settlement under which an EGS voluntarily agrees to issues refunds to customers. The Commission has already confirmed in this proceeding that "nothing precludes an EGS from agreeing to issue refunds as part of a settlement of a Commission proceeding arising pursuant to the Code". See Order on Material Question, issued on December 18, 2014 in this proceeding, at p. 16, citing, *Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC*, Docket No. C-2012-2257858 (Opinion and Order entered December 19, 2013). This finding is the law of the case, and is binding on the parties, including Mr. Ferrare.⁴ As such, Mr. Ferrare's argument that the Commission lacks the authority to approve the Settlement must be rejected. Mr. Ferrare's analysis of this issue is additionally flawed because this proceeding is not a "rate dispute", nor does it involve a refund order pursuant to Section 1312 of the Public Utility Code. The evaluation of the Settlement is taking place pursuant to the Commission's authority to approve settlements of proceedings alleging violations of the Public Utility Code. The Commission, of course, has the jurisdiction to approve Settlements of proceedings involving allegations of violations of the Code, and routinely does so. Mr. Ferrare's argument on this point is meritless and must be rejected.

⁴ Section 316 of the Public Utility Code, 66 Pa. C.S. § 316, provides in pertinent part:

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and **shall remain conclusive upon all parties affected thereby**, unless set aside, annulled or modified on judicial review (emphasis added).

D. The Commission Has the Authority to Approve a Settlement Under Which Customers Must Sign General Releases in Order to Receive Refunds from the Refund Pool

Mr. Ferrare argues that the Settlement should be rejected because “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.” Ferrare Brief, at p. 14. Similar to his other jurisdictional argument, Mr. Ferrare’s argument on this point is misguided and erroneous.

Even if it was found that Commission does not have jurisdiction over private breach of contract claims, the Commission clearly does have the authority to approve settlements that include the issuance of voluntary refunds in exchange for the execution of a general release. For example, the Commission approved a settlement between the Commission and Verizon Pennsylvania, Inc. (“Verizon”), under which Verizon agreed to pay restitution to customers affected by Verizon’s failure to lift their “local service freeze”, provided that the customers agreed in writing to release and forever discharge Verizon from any and all claims related to the lifting of the local service freeze. *Pennsylvania Public Utility Commission v. Verizon Pennsylvania, Inc.*, Docket No. M-0021592 (Order issued January 25, 2002).

Mr. Ferrare incorrectly characterizes the approval of the Settlement as akin to “forcing consumers to waive private causes of action against the Company”. Ferrare Brief at p. 16. In making this argument, Mr. Ferrare intentionally mischaracterizes the Settlement’s actual provisions regarding the issuance of refunds to customers. Under the clear terms of the Settlement, customers are given options to seek rate adjustments or refunds. First, they can choose to receive a refund from the Refund Pool in exchange for the execution of a general release. If they decline to participate in the refund pool, customers still have the right to seek a refund directly from the Company and file a formal Complaint with the Commission if they are

not satisfied with the Company's response to their refund request. See Settlement Petition, at ¶ 40. Nothing in the Settlement "forces" customers to waive their private causes of action against IDT as Mr. Ferrare alleges.

While the Settlement's refund procedures may not comport with Mr. Ferrare and his class-action lawyers' particular wishes, Mr. Ferrare fails to provide any reasons why those refund procedures are not in the public interest. Furthermore, he ignores the many clear and well-articulated public interest benefits of the Settlement's refund provisions. For instance, he fails to recognize the public interest benefits of making refunds available to all customers of IDT who were on variable rates in January, February, and March, 2014, notwithstanding the fact that IDT admits to no wrongdoing and notwithstanding the unique, complex, and contested issues involved in this proceeding. He fails to recognize that the refund mechanism provides for calculation of appropriate refunds by the OCA and OAG based on each customer's unique circumstances. He fails to recognize the public interest benefits of providing customers with an alternative method for seeking refunds should they decline to participate in the refund pool. And he fails to recognize the public interest benefits of the Settlement's expeditious timeline for providing the refunds to customers within 180 days of the Commission's approval of the Settlement, which is much sooner than if refunds would be directed as a result of full litigation. In short, other than his misguided "lack of jurisdiction" argument that mischaracterizes the Settlement's actual terms, Mr. Ferrare has provided no legitimate reasons why the Settlement's refund provisions are not in the public interest. Accordingly, his objections to the Settlement's refund provisions should be rejected.

E. Mr. Ferrare's Arguments Regarding Customers Who Have Not Filed Complaints with The Commission Are Non-Sensical and Irrelevant

Mr. Ferrare argues that “the Proposed Settlement should be denied as the PUC and the Office of Consumer Advocate do not have 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.” Ferrare Brief, at p. 19. This argument is so disjointed as to be nearly incomprehensible, and should be summarily rejected.

First, this argument by Mr. Ferrare appears to be made on behalf of other customers of EGSs, rather than on behalf of Mr. Ferrare himself, and as such Mr. Ferrare has no standing to make this argument. When the ALJs granted Mr. Ferrare's late intervention in the proceeding, it was made clear that he would not be permitted to represent the interests of other customers. See May 1, 2015 Order granting Mr. Ferrare's intervention. With this argument regarding the Commission's jurisdiction over customers who have not filed complaints, and the ability of the OCA to represent customers who have not filed complaints, Mr. Ferrare is clearly attempting to advocate the interests of customers other than himself. As such, his argument on this point fails due to lack of standing and should be rejected.

Secondly, Mr. Ferrare's argument regarding the ability of the OCA to represent the interests of consumers in matters involving EGSs is legally incorrect. The key underpinning of this argument is that EGSs such as IDT are not “public utilities”. But under Section 102 of the Public Utility Code (66 Pa.C.S. §102), EGSs are considered public utilities for the limited purposes described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue neutral reconciliation) of the Code. Rather than supporting his argument on this point, the *Delmarva* case⁵ cited by Mr. Ferrare actually undermines his

⁵ *Delmarva Power & Light Co. v. Pa. Pub. Util. Comm'n*, 870 A.2d 901 (Pa. 2005) (“*Delmarva*”).

argument. *Delmarva* confirmed that the General Assembly deemed EGSs to be public utilities for the purposes described in sections 2809 and 2810 of the Public Utility Code, while holding that EGSs were not public utilities for purposes of section 510 of the Public Utility Code. Because of this key flaw, Mr. Ferrare's argument regarding the OCA's authority to represent consumers in matters involving EGSs must fail.

Mr. Ferrare's remaining argument in this section incorporates his previous argument that the Settlement Petition should be rejected because the Commission does not have jurisdiction or authority over the private causes of action of parties. As set forth above, Commission authority over private causes of action is not needed in order to approve the Settlement. Even if it was found that Commission does not have jurisdiction over private breach of contract claims, the Commission clearly does have the authority to approve settlements that include the issuance of voluntary refunds in exchange for the execution of a general release.

F. Mr. Ferrare's Argument Regarding the "Monetary Damages" Allegedly Resulting from IDT's Conduct Should Be Stricken and Ignored Because it Relies Solely on Information that is Not in The Record

Section V of Mr. Ferrare's Brief purports to set forth the unsworn opinion of an "expert", who in turn is adopting the conclusions of two other individuals, whose conclusions are not part of the record in this proceeding. This argument by Mr. Ferrare should be stricken in its entirety and ignored. First, the argument continues Mr. Ferrare's attempt to advocate on behalf of customers other than himself, even though it was made clear that he was precluded from doing so in the May 1, 2015 Order which granted his intervention. Furthermore, this section of Mr. Ferrare's Brief again improperly attempts to refer to information and conclusions that are clearly not in the record and not supported by an affidavit or supporting facts, as required by Procedural Order # 6. In evaluating the Settlement, the Commission must only consider the

evidence that is in the record in this case. The record in this case is limited to 1) the Joint Stipulation of Facts in Support of the Settlement; 2) the materials from the February 17-20, 2015 evidentiary hearings, including the Consumer Direct Testimonies and Exhibits that were moved into the record at that time; and 3) the additional Consumer Testimonies and accompanying Exhibits that the Joint Complainants and IDT moved to admit by Joint Motion on August 4, 2015. As discussed in Section III.A, *supra*, pages 20-21 of Mr. Ferrare's Brief attempts to reproduce selected sections of materials that were not submitted into the record in the case, and do not appear anywhere in the Settlement Petition, Stipulation of Facts, Statements in Support, or Consumer Testimony. These passages in Mr. Ferrare's Brief refer to statements or conclusions of individuals other than Mr. Ferrare, and those individuals did not present sworn testimony and were not subject to cross-examination. As such, these references constitute hearsay and should not be considered by the ALJs or the Commission in evaluating the Settlement.

G. Mr. Ferrare's Challenge to the Confidential Designations of the Information Included in His Brief Must Be Rejected

Mr. Ferrare's request to remove the confidential designation from the material referenced in Sections I and V of his brief must be rejected. All of the Confidential information referenced in these sections relates solely to data about 1) IDT's customer base in Pennsylvania and, to a lesser extent, 2) IDT's gross receipts in Pennsylvania. This information was previously marked as "Confidential" pursuant to the terms of the Protective Order entered on September 4, 2015 in this matter. Paragraph 3 of that Protective Order states that "the parties may designate as "Confidential" those materials **which customarily are treated by that party as sensitive or proprietary, which are not available to the public** or which, if disclosed freely, would subject that party or others to risk of competitive disadvantage or other business injury." (emphasis added).

The information regarding IDT's customer base in Pennsylvania is clearly customarily treated as proprietary and not available to the public. EGSs such as IDT are required to submit annual "Retail Choice Activity Reports" to the Commission regarding the size of their customer base in Pennsylvania, pursuant to 52 Pa. Code § 54.203 (a)(4). This regulation explicitly states that the information submitted by EGSs is to be marked as confidential. In the Rulemaking Order which promulgated the regulation which requires EGSs to submit these annual Reports, the Commission squarely addressed the issue of confidentiality. See *Re: Retail Electricity Choice Activity Reports*, Docket No. L-00070184 (Final Order on Reconsideration issued December 4, 2008). During the rulemaking process, the Independent Regulatory Review Commission ("IRRC") asked the Commission to establish protocols and procedures to protect the confidentiality of EGS information. Multiple other stakeholders, including the OSBA, commented that such reports should be kept confidential. In response, the Commission held that the sections of the EGS Annual Choice Activity Reports which contain numbers of accounts served and total sales shall be marked as Confidential. *Id.*, at p. 17. This demonstrates that information regarding numbers of customers served by IDT is "customarily treated as proprietary and sensitive" and is not available to the public. Accordingly, this information is correctly marked as "Confidential" under the Protective Order, and there is no basis for removing that Confidential designation.

Likewise, information about EGS gross receipts is required to be marked as confidential. EGSs are required to file annual reports with the Commission, to report their gross receipts from sales of electricity during the prior calendar year. A copy of the Commission-issued form that is used to submit those reports is publicly available on the Commission's website at http://www.puc.state.pa.us/filing_resources/electric_online_forms.aspx. That form explicitly

states that “ *Gross receipt information is proprietary and will not be released to the public. Commission Order entered 7/20/00 at P-00991752*”. The Order cited on the form was issued in response to a Petition filed by Exelon Energy; Reliant Energy Retail, Inc., and Statoil Energy Services, Inc. to request the issuance of a Protective Order to confirm the confidential treatment of EGS gross receipts information. The Commission approved the Petition by Order dated July 20, 2000 in Docket Nos. P-00991752; P-00991753 and P-00991755 and held that “the total amount of gross receipts that licensed electric generation suppliers are required to report pursuant to 52 Pa. Code § 54.39(b)(2) is considered proprietary and shall not be released to the public.” See, *Petition of Exelon Energy; Reliant Energy Retail, Inc., and Statoil Energy Services, Inc. for Protective Order*, Docket Nos. P-00991752; P-00991753 and P-00991755 (Order issued July 20, 2000), at p. 6. In making this ruling, the Commission noted that disclosing sales and revenue data would potentially cause unfair economic or competitive damage to the companies, because the combination of this data could allow competitors to calculate the EGS’s average price per kWh and as general rule, the Commission does not require EGSs to release pricing data. *Id.* at p. 5.

Mr. Ferrare appears to be arguing that only information that “would subject that party or others to risk of competitive disadvantage or other business injury” is entitled to the Confidential designation under the Protective Order. See Ferrare brief, at p. 22. This argument misreads the actual language of the Protective Order. Again, paragraph 3 of that Protective Order states that

“the parties may designate as “Confidential” those materials which customarily are treated by that party as sensitive or proprietary, which are not available to the public or which, if disclosed freely, would subject that party or others to risk of competitive disadvantage or other business injury.” (emphasis added).

Mr. Ferrare overlooks the word “or” in the above passage, and interprets the passage as if the “or” was an “and”. Contrary to Mr. Ferrare’s argument, the Protective Order does not

require proof that release of the information would subject a party to competitive disadvantage or business injury in order to obtain the Confidential designation. The Protective Order clearly states that materials which are customarily treated as sensitive or proprietary and which are not available to the public qualify for the Confidential designation. Under the Commission's rules, information about EGS customer bases and information about EGS gross receipts are customarily treated as sensitive and proprietary and are not available to the public. Accordingly, Mr. Ferrare's challenge to the Confidential designation of the information in question must be rejected.

IV. CONCLUSION

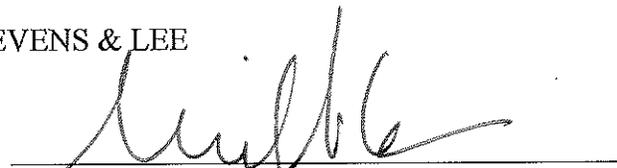
For all of the foregoing reasons, as well as the reasons set forth in the Settlement Petition and IDT's Statement in Support, IDT respectfully requests that the Commission issue an Order which:

- 1) Rejects Mr. Ferrare's Objections to the Settlement;
- 2) Approves the Joint Petition for Approval of Settlement submitted by the Joint Complainants and IDT on August 4, 2015;
- 3) Strikes the portions of Mr. Ferrare's Brief identified in Section III.A, *supra*; and
- 4) Rejects Mr. Ferrare's challenge to the Confidential designation of the materials referenced in Sections I and V of his Brief.

Respectfully submitted,

STEVENS & LEE

By: _____


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Date: September 8, 2015

