

COMMONWEALTH OF PENNSYLVANIA



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September 8, 2015

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

RE: Commonwealth of Pennsylvania, by Attorney General
KATHLEEN G. KANE, Through the Bureau of Consumer
Protection,
And
TANYA J. McCLOSKEY, Acting Consumer Advocate,
Complainants

v.

IDT Energy, Inc.

Respondent

Docket No. C-2014-2427657

Secretary Chiavetta:

Enclosed please find the Joint Reply Brief of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate, in the above-referenced proceeding.

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

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. #89891

Enclosures

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

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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	:	Docket No. C-2014-2427657
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
	:	
Complainants	:	
	:	
v.	:	
	:	
IDT ENERGY, INC.,	:	
	:	
Respondent	:	

JOINT REPLY BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA BUREAU OF
CONSUMER PROTECTION AND THE OFFICE OF CONSUMER ADVOCATE TO
INTERVENOR FERRARE'S *AMICUS CURIAE* BRIEF

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Pursuant to the August 5, 2015 Order of Administrative Law Judges (ALJs) Elizabeth Barnes and Joel H. Cheskis in this proceeding, the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection (OAG) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively Joint Complainants) submit the following Joint Reply Brief in response to Intervenor Ferrare's *Amicus Curiae* Brief.

I. INTRODUCTION

On June 20, 2014, the OAG and the OCA filed a Joint Complaint at the Pennsylvania Public Utility Commission (Commission) against IDT Energy, Inc. (IDT or Company), pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (CPL), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint includes seven separate counts, as follows: I) misleading and deceptive promises of savings; II) misleading and deceptive welcome letter and advertisements; III) slamming; IV) lack of good faith handling of complaints; V) failing to provide accurate pricing information; VI) prices nonconforming to disclosure statement; and VII) failure to comply with the TRA. With respect to relief, the Joint Complainants requested that the Commission find that IDT violated the Public Utility Code, the CPL, the TRA, and the Commission's regulations and orders; provide restitution to IDT's customers; impose a civil penalty; order IDT to make various modifications to its practices and procedures; and revoke or suspend IDT's Electric Generation Supplier (EGS) license, if warranted. The Bureau of Investigation and Enforcement (I&E) and the Office of Small Business Advocate (OSBA) intervened in this proceeding. Additionally, Anthony Ferrare filed a Petition to Intervene, which was granted by Order dated May 27, 2015.

Pursuant to the litigation schedule adopted at the August 25, 2014 Initial Prehearing Conference in this matter, Joint Complainants timely served the ALJs and the parties on October 31, 2014 with consumer direct testimony, consisting of testimony in question-and-answer form and exhibits of 215 consumer witnesses and encompassing 4 volumes, totaling 1068 pages. The testimony relates to each consumer's firsthand experience with IDT's marketing, billing and customer service practices. A Further Prehearing Conference to determine the remainder of the litigation schedule for the submission of the testimony of expert and other non-consumer witnesses was held on January 9, 2015. Hearings for the cross-examination of the consumer witnesses were held on February 17 through 20, 2015, at which time 125 consumer testimonies were admitted into the record. On May 27, 2015, Intervenor Ferrare served his Direct Testimony.

On April 30, 2015, in accordance with the procedural schedule for serving expert witness testimony, Joint Complainants served the direct testimonies of Ms. Barbara R. Alexander,¹ Dr. Steven L. Estomin,² Ms. Ashley E. Everette,³ and Ms. Heather M. Troutman.⁴ Through these expert and non-consumer testimonies, Joint Complainants were prepared to show, *inter alia*:

¹ Ms. Alexander is a Consumer Affairs Consultant. She is a graduate of the University of Michigan and the University of Maine School of Law. She has appeared before over 20 U.S. and Canadian regulatory and legislative bodies, provided expert testimony in regulatory proceedings to adopt and enforce consumer protection policies for retail energy markets, and published papers and reports on consumer protection policies and programs that should govern regulated utility and competitive energy supply services for residential customers. She has appeared before the Commission on behalf of the OCA in numerous proceedings since 1998 relating to the implementation of retail electric and natural gas competition, consumer protection regulations applicable to retail electric suppliers, default service policies, retail market enhancement programs, and in utility rate cases relating to customer service and reliability of service performance.

² Dr. Estomin is a Senior Economist and Principal with Exeter Associates, Inc. Dr. Estomin holds B.A., M.A., and Ph.D. degrees in economics from the University of Maryland. He has been employed in the area of energy, utility, and telecommunications consulting for the past 34 years, working on a wide range of issues. Most of his work has focused on electric utility integrated planning, load forecasting, environmental issues, power supply procurement and market-related issues, and renewable energy issues. Dr. Estomin has provided expert witness testimony in more than 35 regulated proceedings in various jurisdictions. His testimony has addressed a variety of subjects including resource planning, load forecasting, competitive restructuring, rate design, weather normalization, statistical analysis, default service supply procurement, and other issues.

- IDT's marketing practices, its oversight and training of marketing agents, and Terms of Service and pricing practices were unfair, deceptive and inadequate and did not comply with the Public Utility Code or the Commission's regulations that govern the retail energy market (Alexander Direct Testimony);
- IDT's responses to its customers' complaints and contacts regarding IDT's high variable prices charged in early 2014 were insufficient and discriminatory with respect to rebates and credits issued to affected customers (Alexander Direct Testimony);
- IDT's rates for its residential and small commercial variable rate customers in Pennsylvania could not be meaningfully tied to PJM market costs during January through March, 2014, as is stated in IDT's Terms of Service (Estomin Direct Testimony);
- An analysis of the billing summaries of the consumer witnesses whose testimonies were served by Joint Complainants shows that these customers of IDT consistently paid more than the Price to Compare (PTC). While a very small portion of customers saved approximately 5% by switching to IDT, the vast majority of customers paid 15% to 34% more than the PTC as a result of switching to IDT (Everette Direct Testimony);
- The OAG received and reviewed 1,913 consumer complaints against IDT from February 24, 2014 through June 4, 2014 (Troutman Direct Testimony);
- The consumer complaints were received from different geographic regions in Pennsylvania (Troutman Direct Testimony); and
- The consumers identified similar areas of concern regarding IDT's marketing and billing activities in their complaints filed with OAG (Troutman Direct Testimony).

The Company was prepared to defend this matter. Pursuant to the Commission's policy of encouraging settlements that are reasonable and in the public interest, Joint Petitioners engaged in settlement discussions. Joint Petitioners⁵ reached a settlement prior to IDT serving rebuttal testimony. The Joint Petition for Approval of Settlement, filed on July 31, 2015,

³ Ms. Everette is employed as a Regulatory Analyst by the Pennsylvania Office of Consumer Advocate. She has a Master's degree in Business Administration and a Bachelor's degree in Economics from the University of Illinois. At the OCA, Ms. Everette's responsibilities include, *inter alia*, reviewing utility company filings with the Pennsylvania Public Utility Commission and analyzing the financial, economic, rate of return, and policy issues that are relevant to the filings.

⁴ Ms. Troutman is a Consumer Protection Agent in the Pennsylvania Office of Attorney General's Bureau of Consumer Protection. Her job duties include mediating thousands of consumer complaints, conducting investigations under the supervision of an attorney, and assisting in litigation as necessary.

⁵ Joint Petitioners include Joint Complainants, IDT and OSBA. I&E did not join but did not oppose the Joint Petition.

addresses the numerous complex issues raised in this case and applies to residential and small business customers. Simultaneously with the Joint Petition, Joint Complainants and IDT also moved for the admission of 80 additional consumer direct testimonies and exhibits into the record.

On April 8, 2015, Anthony Ferrare, formerly an IDT customer, filed a Petition to Intervene, which ALJs Cheskis and Barnes granted on May 1, 2015. The Order specifically states, however, that “Mr. Ferrare’s involvement cannot be on behalf of ‘all others similarly situated,’ as is possible in proceedings brought before a Court of Common Pleas.” Order of May 1, 2015 at 5. The ALJs further explained as follows:

Section 701 of the Public Utility Code provides that any person may complain in writing to the Commission regarding the acts or omissions of a public utility. 66 Pa.C.S. §701. Nothing in Section 701 or any other section of the Public Utility Code, however, allows for the filing of class action complaints. In the absence of statutory authority, the Commission cannot entertain class action complaints. Furthermore, Commission regulations allow individuals to represent themselves, but they cannot be represented by people who are not attorneys. 52 Pa. Code §§ 1.21(a) and 1.22(a); *see also* William MacLuckie v. Palmco Energy PA LLC, Docket No. C-20134-2402558, Opinion and Order (entered December 4, 2014). **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.**

Order of May 1, 2015, at 5-6 (emphasis added).

On August 5, 2015, the ALJs ordered that Intervenor Ferrare submit any comments on the Joint Petition by August 26, 2015 and that any reply to those comments be submitted within ten days thereafter. In accord with the ALJs’ Order, Joint Complainants submit this reply to Intervenor Ferrare’s comments in a document entitled “Brief *Amicus Curiae*.”

II. DISCUSSION

A. Introduction.

In his Brief, Intervenor Ferrare references the Commission's Statement of Policy, codified at 52 Pa. Code § 69.1201(a)-(c)(Rosi factors), and argues that several of the factors support his contention that the Joint Petition is not in the public interest and should be rejected. Ferrare Brief at 2-15. Intervenor Ferrare's assertions, among them that the monetary relief provisions are insufficient, do not take into account the comprehensive nature of the overall settlement provisions nor do his legal arguments reflect the current state of Pennsylvania law. His arguments regarding jurisdiction show a fundamental misunderstanding of public utility law and of Joint Complainants' roles in fulfillment of their statutory obligations. Furthermore, Intervenor Ferrare's assertions regarding the release language in the Joint Petition are broader in scope than his permitted intervention -- which allows him to represent his interests alone and not those of the group of customers.

The Joint Petition, as with all settlements, is the result of compromise after extensive discovery, both formal and informal, and the exchange of information during settlement negotiations. Joint Complainants, who are authorized by statutes to represent the interests of the public and consumers,⁶ have discussed at length in their Joint Statement in Support of the Joint Petition the reasons why the Joint Petition is in the public interest. See Joint Petition at App. A. Additionally, the Office of Small Business Advocate, which is charged by statute with representing the interests of small businesses before the Commission,⁷ submitted a Statement in

⁶ 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.* Additionally, the Attorney General may bring an action in the name of the Commonwealth to restrain by temporary or permanent injunction, any act or practice declared unlawful by the Consumer Protection Law, when she determines that the proceeding would be in the public interest, as authorized by 73 P.S. § 201-4.

⁷ See 73 P.S. §§ 399.41 – 399.50.

Support of the Joint Petition asserting that it is in the public interest. See Joint Petition at App. C. Joint Complainants submit that the settlement of the Joint Complaint adequately protects the interests of consumers through: (1) modifications to IDT business practices, including offering only fixed rate products for a specified period and elimination of cancellation or termination fees for variable rate products; (2) comprehensive injunctive relief that, *inter alia*, requires IDT, its agents, employees and representatives to refrain from misrepresenting its products as “risk-free” or “guaranteed” and the utility Price to Compare (PTC) as a “variable rate”; (3) a prompt resolution of this matter; and (4) significant relief to eligible customers in the form of refunds.

In the recent Initial Decision in a similar matter, Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane and Tanya J. McCloskey, Acting Consumer Advocate v. Energy Service Providers, Inc. d/b/a Pennsylvania Gas and Electric, Docket No. C-2014-2427656, Initial Decision (June 30, 2015) (PaG&E Initial Decision), ALJs Barnes and Cheskis considered and rejected many similar arguments made by Intervenor Thomas Sobiech. The ALJs found none of the Intervenor’s objections sufficient to reject or modify any of the provisions within the proposed settlement in that case. As such, for all of the reasons expressed in the PaG&E Initial Decision and those more fully explained below, Joint Complainants submit that Intervenor Ferrare’s assertions in opposition of the Joint Petition should be rejected, and the Joint Petition should be approved without modification.

B. Intervenor Ferrare’s Assertions that the Joint Petition Is Not in the Public Interest Should Be Rejected.

Before discussing Intervenor Ferrare’s specific assertions, Joint Complainants submit that the settlement provisions in the Joint Petition must be read as a whole in determining whether the Joint Petition is in the public interest. The Refund Pool provisions, which Intervenor Ferrare singles out in his Brief as insufficient relief in light of the number of affected customers, are but

one component of a settlement that addresses a Joint Complaint containing multiple, interrelated counts. The Joint Petition as a whole is extensive and designed to fully address all of the allegations in the Joint Complaint to the benefit of IDT's past, present and future customers. Additionally, as a settlement, the Joint Petition is the result of compromise by the Joint Petitioners and intended to resolve the allegations in the Joint Complaint in order to avoid the inherent uncertainty of litigation and preserve the resources of the Joint Petitioners and the Commission. Thus, Intervenor Ferrare's critique directed to the Refund Pool provision alone should be rejected in light of the comprehensive nature of the settlement in its entirety.

With regard to the specific assertions in his Brief, Intervenor Ferrare discusses each of the Rosi factors⁸ and how they support his contention that the Joint Petition is not in the public interest and should be rejected. The Rosi factors and standards that will be considered by the Commission in determining whether to approve a settlement 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 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.

⁸ Intervenor Ferrare does not discuss the third Rosi Factor because it is a factor to be considered only in litigated proceedings. Ferrare Brief at 7.

(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.

See 52 Pa. Code § 69.1201(b). The ALJs determined in the PaG&E Initial Decision, by applying the Rosi factors to the terms of the proposed settlement in that matter and considering the positions of all of the parties, including Intervenor Sobiech, that the Settlement was in the public interest. The proposed settlement herein, which is substantially similar in its range of remedial provisions for IDT customers, is also in the public interest and should be approved without modification.

1. Analysis of the first, second and fourth Rosi factors support a finding that the Joint Petition is in the public interest.

Intervenor Ferrare states that with regard to the first and second Rosi factors, he, the Joint Petitioners and the Company agree that the conduct at issue and the resulting consequences were serious. Ferrare Brief at 6-7, citing Joint Petition Appendix A at 12-13 and Appendix B at 10-11. Intervenor Ferrare, however, does take issue with the Joint Complainants' and the Company's

assertions that the Joint Petition for Settlement taken as a whole are sufficiently responsive to the serious nature of the conduct and consequences and should be approved. Id., at 7.

With respect to the fourth Rosi factor, Mr. Ferrare acknowledges 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.” Ferrare Brief at 7. Mr. Ferrare apparently dislikes, however, the settlement provision that limits the period during which IDT refrains from selling variable rate products in Pennsylvania to twenty-one months. Joint Petition at 14, ¶ 44. He argues that the Commission should prohibit IDT from offering variable rate products in the Commonwealth “indefinitely” and that such a modification would “ensure that the Company’s conduct alleged in the Joint Complaint does not occur in the future.” Ferrare Brief at 7-8, 11.

Joint Complainants submit that Intervenor Ferrare’s assertions do not support a finding that the Joint Petition is not in the public interest. Currently, the law in the Commonwealth permits the offering of variable rate electric supply plans. See 66 Pa. C.S. Ch. 28; 52 Pa. Code Ch. 54 and 111. The Joint Petition not only requires that IDT not offer variable rate plans for twenty-one months, but also contains specific requirements regarding, *inter alia*, disclosures, third party verifications, training, compliance monitoring and reporting should IDT offer variable rate plans after the stay-out period. See Joint Petition at 14-23, ¶¶ 44-47.

It bears repeating that the proposed settlement is comprehensive and should be considered as a whole, not piecemeal, as Mr. Ferrare suggests. The fact that Mr. Ferrare disagrees with the specifics of the agreed-upon injunctive relief is not a valid basis for rejecting the entire proposed settlement, particularly when he is not bound by its terms and is free to seek any relief he deems appropriate in the context of his own civil class action suit or his own formal complaint filed with the Commission.

Just as the ALJs rejected Mr. Sobiech's contention in PaG&E that the injunctive relief against offering variable rate plans should be indefinite rather than for a limited time, Mr. Ferrare's identical contention should be rejected in this proceeding. As the ALJs therein stated:

Although Mr. Sobiech believes that PaG&E should be prohibited from offering variable rate plans indefinitely, we believe that an indefinite suspension is excessive. When viewed in conjunction with the entire Settlement, including the numerous other injunctive provisions, prohibiting PaG&E from offering a variable rate plan for 18 months is reasonable. In part, this time period allows for the implementation of the modifications to the business practices so that a variable rate plan may be a viable competitive option for some customers in the future. Mr. Sobiech's argument to the contrary will be rejected.

See PaG&E Initial Decision at 51-52.

Similarly, Joint Complainants submit that these injunctive provisions in the Joint Petition, taken together, adequately and appropriately address the allegations in the Joint Complaint, and as such, contrary to Mr. Ferrare's contentions herein, the Joint Petition is in the public interest.

2. Intervenor Ferrare's contentions under the fifth Rosi factor, number of customers affected and duration, should be rejected.

Under the fifth factor, Mr. Ferrare's arguments can be summarized as follows:

- The number of customers affected is significant;
- The number of customers affected divided by settlement amount of \$6,577,000 results in too small an amount per person;
- It is "unconscionable" for the Joint Complainants and Company to "hide the underlying details of the settlement "behind the veil of confidentiality."

Ferrare Brief at 8-10. Intervenor Ferrare's third point concerning confidentiality reflects a fundamental misunderstanding of the nature and purpose of Commission rules and regulations allowing for nondisclosure of certain facts. As it is not material to the fifth Rosi factor, the issues surrounding confidential information will be addressed, *infra*, in Section C.4.

With regard to the assertion that the Refund Pool of \$6,577,000 is not adequate to fully reimburse customers for their losses, it bears repeating that Mr. Ferrare has been permitted to intervene in this case to pursue his own interests alone, not those of the entire group of affected customers. Order of May, 1, 2015, at 2. Therefore, Mr. Ferrare may argue that the Refund Pool will not afford *him* sufficient relief, but pursuant to the ALJs' Order granting the intervention, his arguments purporting to be on behalf of the entire group of affected customers must be disregarded.

To the extent this argument may be considered at all in the context of Mr. Ferrare's intervention, Joint Complainants submit that refunds will be calculated for all eligible customers⁹ based on their usage, price charged and refunds already received directly from IDT. The opportunity to provide refunds to IDT's eligible customers would not be a certainty if the Joint Petitioners were to fully litigate the Joint Complaint. In addition, customers will receive refunds much sooner than if refunds were directed as a result of full litigation of the Joint Complaint. Further, "[t]he refund determinations will be designed so as to fully utilize the Refund Pool after accounting for administration fees not otherwise paid by IDT pursuant to this settlement." *Id.*

The Joint Petition also provides an alternate refund process for customers not eligible for a refund from the Refund Pool or who reject an offer from the Refund Pool. Joint Petition at 13, ¶40. Such alternate refund methods may be, for example, pursued by customers with slamming allegations spanning time periods other than January through March 2014, and the Company is obligated in the Joint Petition to use its best efforts to investigate and negotiate individual resolutions with those customers. Any customer who pursues the alternate refund process and is not satisfied with the Company's offer and any customer who chooses not to pursue the alternate

⁹ The Joint Petition provides that the Joint Complainants "shall determine the refund amount to offer eligible IDT customers based on the individual's usage, price charged and refund amounts already received directly from IDT." Joint Petition at 11, ¶38.a. See also Joint Petition at App. A at 9-10.

refund process may pursue a Formal Complaint with the Commission or file an action at law or in equity in court, as Mr. Ferrare has done.

Finally, Mr. Ferrare's comparison of the amount of the Refund Pool to the number of customers is too simplistic. The amount stated in the Joint Petition is not fully representative of the relief that may be granted pursuant to the settlement provisions because it cannot include amounts that may be granted to those IDT customers who may seek their own relief, Mr. Ferrare included. In addition, the total sum of \$6,577,000 does not include the dollar value of other promotional items such as "one-month free, two-months free and discount card promotions" to any customer, whether or not eligible for a refund. Joint Petition at 11, ¶38, a.-b. Further, the sum of \$6,577,000 fails to take into account IDT's contributions to the distribution companies' hardship funds totaling \$75,000. See Joint Petition at ¶ 43.

Joint Complainants submit that, based on the foregoing, the Joint Petition, taken as a whole, resolves the allegations in the Joint Complaint, benefits IDT's past, present and future customers and preserves the ability of those who may choose not to accept offers under the Refund Pool or who may not be offered a refund from the Refund Pool in the settlement to pursue other legal options. As such, Intervenor Ferrare's assertions that the settlement is not in the public interest because the Refund Pool is not sufficient should be rejected.

3. Analysis of the sixth Rosi factor, compliance history, supports a finding that the Joint Petition is in the public interest.

In his Brief, Intervenor Ferrare asserts that the Company's compliance history should weigh against approval of the Joint Petition. Ferrare Brief at 10, 11. Specifically, Intervenor Ferrare asserts that the Commission's approval of a settlement between IDT and I&E, which resolved allegations of deceptive sales and marketing practices, at Docket No. M-2013-2314312,

should be a barrier to approval of the Joint Petition because the Joint Complaint also contains allegations of deceptive sales and marketing practices, and IDT is therefore a repeat offender. Id.

As Joint Complainants stated in their Statement in Support, the Company's compliance history should not be considered a barrier to the approval of the Joint Petition. See Joint Petition at App. A at 16. Joint Complainants submit that the settlement at Docket M-2013-2314312 was, like the Joint Petition, a compromise. The settlement did not contain an admission of wrongdoing by IDT. Additionally, the settlement specifically stated that it is not admissible in any future proceeding as evidence of wrongdoing. See Pa. P.U.C., Bureau of Investigation and Enforcement v. IDT Energy, Inc., Docket No. M-2013-2314312, Order at 14, ¶33 (Aug. 15, 2013).

Moreover, the ALJs considered a similar contention by Mr. Sobiech in the PaG&E proceeding and rejected it for substantially the same reasons that Mr. Ferrare's contention should be rejected here. See PaG&E Initial Decision at 53-54. The ALJs determined that the 2013 Order approving the settlement between I&E and PaG&E had not been sufficient to ensure compliance, but the significant monetary and injunctive provisions of the settlement under consideration therein would have a greater impact upon ensuring the company's compliance. Id.

For the same reasons here, the ALJs should reject Intervenor Ferrare's assertions that the Joint Petition should not be approved because of IDT's "compliance history."

4. Analysis of the eighth Rosi factor, the amount of the civil penalty needed to deter future violations, supports a finding that the Joint Petition is in the public interest.¹⁰

In his Brief, Intervenor Ferrare asserts that the \$25,000 civil penalty in the Joint Petition is not adequate to deter IDT from engaging in similar conduct in the future, and therefore, the

¹⁰ Mr. Ferrare does not address the seventh Rosi factor, which is "whether the regulated entity cooperated with the Commission's investigation." Ferrare Brief at 11. The Joint Complainants stated in their Statement in Support, however, that IDT's cooperation in the investigation, in formal and informal discovery and throughout settlement negotiations weighed in favor of approving the Settlement. Joint Petition, App. A at 16.

civil penalty should be substantially increased. He further asserts that the Company should be prohibited from selling variable rate electric supply plans in Pennsylvania indefinitely. Ferrare Brief at 13. This specific contention has already been addressed at Section B.1., *supra*, and will not be repeated herein. Intervenor Ferrare again refers to the settlement between I&E and IDT at Docket No. M-2013-2314312, as evidence of “compliance history that justifies a more substantial civil penalty in this matter”; similarly, Joint Complainants will not repeat their response to this contention as it was discussed in Section B.5., *supra*.

In a similar case, the ALJs in PaG&E appropriately did not consider the amount of the civil penalty in isolation, as Mr. Sobiech argued should be the case. PaG&E Initial Decision at 54-55. The ALJs considered the totality of the monetary provisions, including the amount of the Refund Pool, the cost of administration, and the contributions to the EDCs’ Hardship Fund. *Id.* As was true in PaG&E, Joint Complainants submit that, in the present matter, the \$25,000 civil penalty provision in the Joint Petition, the \$100,000 contribution to the EDCs’ hardship funds, the \$6,577,000 in refunds or credits to customers, together with the injunctive relief in the form of modifications to IDT’s business practices are, taken together, sufficient to deter similar future conduct. As such, the Commission should reject Intervenor Ferrare’s assertions that the monetary provisions are insufficient to deter future violations.

With regard to his discussion of the tenth Rosi factor, Intervenor Ferrare asserts that the “other relevant factors” that support rejection of the Joint Petition are grounded in law. These five additional factors will be discussed *seriatim*, in the following section.

C. The Proposed Settlement is Well-Supported in Law in Every Respect.

1. The Commission has the jurisdiction to order or permit EGSs to refund moneys relating to rate disputes.¹¹

Mr. Ferrare argues that the Commission lacks authority to order or permit EGSs to refund moneys relating to rate disputes, because such disputes are “clearly beyond the scope of the PUC’s authority.” Ferrare Brief at 12-14. The scope of the Commission’s authority has already been addressed in the instant case when the Commission responded to a Petition for Interlocutory Review questioning, among other things, whether it has authority under Section 1312 of the Code to order EGSs to issue refunds. In that Order, the Commission relied upon its plenary powers under Section 501 of the Public Utility Code, 66 Pa. C.S. § 501, as a basis for directing an EGS to issue a credit or refund. Commonwealth of Pa., et al. v. IDT Energy, Inc., Docket No. C-2014-2427657, Order at 17-18 (Dec. 18, 2014) (IDT Order). The Commission observed that its Section 501 “powers have been interpreted broadly to include both the express powers conferred by the Code and those implied powers necessarily implicit in the Code” and stated further, as follows:

Directing a billing adjustment for an EGS over bill of supply charges is within the Commission’s Section 501 powers to carry out the consumer protections in the Electric Competition Act that are applicable to competitive electricity generation supply service. These consumer protections include the Section 2809(b) requirement that EGSs comply with the Commission’s regulations, including the Chapter 54 billing and disclosure regulations... [O]rdering EGS billing adjustments for an over bill of supply charges is fully consistent with the policy objectives of the Electric Competition Act as well. Under Section 2802(9) of the Code, 66 Pa.C.S. § 2802(9), electric service, including electric supply, is to be available to customers on reasonable terms and conditions. The ability to order an EGS to provide a refund to a customer that has been over charged in violation of its Disclosure Statement that has been required pursuant to the Code and/or the Commission’s Regulations furthers this policy objective by ensuring that

¹¹ At Section IV. of his Brief, Intervenor Ferrare argues both that the PUC has no jurisdiction over EGS bill disputes/general release provisions and that OCA has no authority to represent EGS consumers. Ferrare Brief at 17-19. Joint Complainants address these issues separately, with the PUC jurisdictional issues in Sections C.1. and C.2, and the issue of the OCA’s authority to represent EGS consumers in Section C.3.

customers receive accurate bills and hence, receive service under reasonable terms and conditions.

Id. at 17-18 (emphasis added); see also Pa. P.U.C. Bureau of Investigation and Enforcement v. Energy Services Providers, Inc. d/b/a/ Pennsylvania Gas and Electric and U.S. Gas and Electric d/b/a/ Pennsylvania Gas and Electric, Docket No. M-2013-2325122, Order (Oct. 2, 2014)(Commission ordered the EGSs to issue refunds directly to customers for the period of time the ten customers who had been slammed were served). For these reasons, the ALJs rejected Mr. Sobiech's contention as to the Commission's jurisdictional limits in the PaG&E Initial Decision, at 40-41.

Similarly, here, the ALJs should reject Mr. Ferrare's contention that the proposed settlement should be rejected because the Commission does not have jurisdiction to order EGSs to issue refunds and should recommend approval of the settlement without modification, because it is lawful and in the public interest.

2. The provision requiring customers who accept a refund offer to sign a general release is not a basis for rejection or modification of the proposed settlement.

Intervenor Ferrare argues that the PUC lacks authority to order or permit a requirement that customers sign a general release of claims in order to receive money from the proposed Refund Pool. Ferrare Brief at 14-16. The Joint Petition specifically provides that customers accepting any funds from the Refund Pool execute a release that discharges IDT "from any and all claims arising from or related to the conduct alleged in the Joint Complaint." See Joint Petition at 13, ¶41. Intervenor Ferrare asserts that the release is outside the scope of the Commission's jurisdiction to approve because it would effectively include private causes of action, including actions for breach of contract. Ferrare Brief at 14-16.

First, Joint Complainants submit that to the extent Intervenor Ferrare's assertions regarding the release in the Joint Petition appear to be made on behalf of all IDT customers, they must be rejected pursuant to the ALJs' Order granting the Ferrare Petition to Intervene, wherein the ALJs held that Mr. Ferrare was permitted to intervene only on his own behalf. Second, it appears based solely on the Joint Petition, Stipulation of Facts and Statements in Support, all public documents, that Intervenor Ferrare would have all of the information necessary to determine whether to accept a refund from the Refund Pool, if offered; therefore, as to Mr. Ferrare, he is required to do nothing at all pursuant to the settlement, if approved, and is free to pursue his own action prospectively. The ALJs should disregard the arguments that purport to be on behalf of the entire class of IDT customers.

Third, contrary to Mr. Ferrare's contention, the Commission has long acknowledged its jurisdiction to approve a settlement that contains a general release. See e.g. Pa. PUC v. Bell Telephone Co. of Pa, Docket No. R-811819, Order (Nov. 14, 1988); Pa. PUC v. Verizon Pennsylvania, Inc., Docket No. M-00021592, Order (Jan. 25, 2002). Therefore, not only has the Commission acted to approve such provisions in the past, the ALJs in a similar case have concluded that such a provision is appropriate and within the Commission's jurisdictional powers to approve. The ALJs addressed the same contention by Intervenor Sobiech in the PaG&E case, stating as follows:

Normally, the Commission does not require customers to waive any other rights the party may have to pursue criminal charges or civil causes of action they might have against a utility as a contingency to receiving a refund. However, nothing precludes a party from agreeing to perform under a settlement that which the party may not necessarily be legally obliged to do under law.

PAG&E Initial Decision at 42 (internal citation omitted). For the same reasons, the ALJs should give no weight to Mr. Ferrare's contention that the general release requirement for those who opt to accept a refund offer should result in rejection of the proposed settlement.

3. The OCA does not lack authority to represent consumers of EGSs.

Intervenor Ferrare argues that the OCA does not have authority to represent consumers who have not filed complaints with the Commission against EGSs, which are corporations and not public utilities pursuant to the Code. Ferrare Brief at 17-19. This contention is incorrect.

The OCA has consistently represented the collective interests of past, present and future IDT customers in a manner that is entirely consistent with its statutory responsibility pursuant to 71 P.S. § 309-1, *et seq.* Mr. Ferrare suggests that the definitions in the OCA's enabling statute, when read with the definitions of the Public Utility Code, render the OCA's actions in advocating for the IDT customers somehow *ultra vires*. Mr. Ferrare begins by correctly reciting the definitions within the OCA's enabling statute, as follows:

"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."

71 P.S. § 309-1 (emphasis added). Mr. Ferrare concludes that EGSs are neither "persons" nor "public utilities," and therefore, the OCA lacks the authority to represent the Company's customers. Ferrare Brief at 18-19. Mr. Ferrare, however, fails to recognize that the Public Utility Code specifically recognizes EGSs as public utilities for purposes of, *inter alia*, Section

2809 of the Public Utility Code, 66 Pa. C.S. § 2809. See 66 Pa. C.S. § 102. Specifically, Section 102 defines “Public Utility” and provides, in pertinent part, as follows:

(2) The term does not include: . . .

(vi) Electric generation supplier companies, **except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue-neutral reconciliation).**

See 66 Pa. C.S. § 102 (emphasis added).

Section 2809 of the Public Utility Code establishes the requirements for EGSs, including, *inter alia*, licensing requirements. Specifically, Section 2809 (a) and (b) provide as follows:

§ 2809. Requirements for electric generation suppliers.

(a) **License requirement.**--No person or corporation, . . . shall engage in the business of an electric generation supplier in this Commonwealth unless the person or corporation holds a license issued by the commission. . . .

(b) **License application and issuance.**--An application for an electric generation supplier license must be made to the commission in writing, be verified by oath or affirmation and be in such form and contain such information as the commission may by its regulations require. **A license shall be issued to any qualified applicant, authorizing the whole or any part of the service covered by the application, if it is found that the applicant is fit, willing and able to perform properly the service proposed and to conform to the provisions of this title and the lawful orders and regulations of the commission under this title, including the commission's regulations regarding standards and billing practices,** and that the proposed service, to the extent authorized by the license, will be consistent with the public interest and the policy declared in this chapter; otherwise, such application shall be denied.

66 Pa. C.S. §§ 2809(a) and (b) (emphasis added). EGSs are recognized as “public utilities” for the purposes of Section 2809, which specifically requires EGSs to, *inter alia*, obtain a license from the Commission, perform properly the service proposed in their license application, and conform to the provisions of the Commission’s regulations and orders, including the Commission’s regulations regarding standards and billing practices. The Commission has extensively developed regulations that govern EGSs. In the Joint Complaint, the OAG and the

OCA specifically allege violations of the Commission's regulations governing EGSs, 52 Pa. Code Ch. 54, 56 and 111. See gen'ly Joint Complaint at Counts I-VII. Furthermore, Section 2809(e) of the Public Utility Code provides:

(e) Form of regulation of electric generation suppliers. — The commission may forbear from applying requirements of this part which it determines are unnecessary due to competition among electric generation suppliers. In regulating the service of electric generation suppliers, the commission shall impose requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins of electric supply are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained.

66 Pa. C.S. § 2809(e). The Joint Complaint is directly related to maintaining the quality of electric service and assuring that the Code, the Commission's regulations and orders are not violated. Thus, the OCA has the authority to represent the interests of consumers before the Commission in this proceeding.

In support of his position that EGSs are not public utilities, Mr. Ferrare relies on Delmarva Power & Light Co. v. Commonwealth, 870 A.2d 901, 902 (2005). Ferrare Brief at 18-19. The issue in Delmarva, however, is not the issue in this case. In fact, the Pennsylvania Supreme Court's Opinion in Delmarva directly supports the conclusion that the OCA is authorized to represent EGS consumers. Delmarva addressed the issue of whether the Commission's Fiscal Office could assess EGSs for the administrative expenses of the Commission, the OCA, and the OSBA. See Delmarva at 902. In Delmarva, the Fiscal Office argued that the forbearance language in the first sentence of Section 2809 of the Public Utility Code gave it the discretion to apply any provision of the Public Utility Code. Delmarva at 904. The Pennsylvania Supreme Court held:

In determining what sections of the Code the Fiscal Office has the legal authority to apply to EGSs, **we agree with the Commonwealth Court below that we**

must look at the second sentence of section 2809(e) as that sentence plays off of the previous sentence by outlining those sections of the Code that may legally apply to EGSs as public utilities. According to that second sentence, the Fiscal Office may only impose on EGSs "those requirements necessary to ensure that the present quality of service provided by electric utilities does not deteriorate, including assuring that adequate reserve margins are maintained and assuring that 52 Pa. Code Ch. 56 (relating to standards and billing practices for residential utility service) are maintained." 66 Pa. C.S. § 2809(e). Significantly, the Fiscal Office does not argue that it may assess EGSs pursuant to this sentence and as a result, it also does not claim or otherwise attempt to show that section 510 assessments are necessary to ensure the present quality of electric utility service. Given the absence of such a showing, we cannot find that section 510 assessments, which simply fund the administrative practices of the Commission, are necessary to maintain current standards of electric service. Furthermore, we note that these assessments have nothing to do with maintaining reserve margins or adequate billing practices. Therefore, contrary to the finding of the Commonwealth Court, we hold that the Fiscal Office does not have the legal authority to assess EGSs as public utilities for the Commission's administrative costs pursuant to section 510 of the Code.

Delmarva at 911 (emphasis added). As stated above, the Joint Complaint is directly related to maintaining the quality of electric service and assuring that the Commission's regulations and orders in this regard are not violated. Joint Complainants would also note that Mr. Ferrare's interpretation would create a result that is not in the public interest. Under Mr. Ferrare's interpretation, if a consumer chooses an EGS, the OCA would not have the authority to represent that consumer's interest in any proceedings relating to, *inter alia*, quality of service and standards and billing practices under any circumstance.

Thus, contrary to Mr. Ferrare's contentions, the OCA has the authority to represent IDT consumers before the Commission in this proceeding.

4. The confidential designations are in accord with the ALJs' Protective Order.

Mr. Ferrare's asserts within his Brief that he is challenging the confidential and proprietary nature, *inter alia*, of IDT customer number information. Ferrare Brief at 21-22. The

Joint Complainants are signatory parties to the Protective Agreement approved by the September 3, 2014 Protective Order in this proceeding. As such, the OCA and OAG are duty-bound to mark as confidential any information that has been provided pursuant to the Protective Order and is used in submissions to the Commission or other documents served on the parties and ALJs. The Joint Complainants will continue to do so, unless and until the Company agrees to remove those designations or the ALJs or the Commission order otherwise.

III. CONCLUSION

For all of the foregoing reasons, Joint Complainants submit that Intervenor Ferrare's assertions that the Joint Petition is not in the public interest lack merit and reflect fundamental misunderstandings of the applicable law. Joint Complainants respectfully request that the Public Utility Commission approve the Joint Petition for Approval of Settlement without modification.

Respectfully submitted,



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: :
And :
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Complainants :
: Docket No. C-2014-2427657
v. :
: :
IDT ENERGY, INC., :
Respondent :

I hereby certify that I have this day served a true copy of the foregoing document, the Joint Reply Brief of the Commonwealth of Pennsylvania Bureau of Consumer Protection and the Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 8th day of September, 2015.

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