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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 Motion to Strike Portions of the *Amicus Curiae* Brief of Anthony Ferrare in the above-referenced matter. Copies of the Motion to Strike 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

Docket No. C-2014- 2427657

TANYA J. McCLOSKEY, Acting Consumer
Advocate

Complainants

v.

IDT ENERGY, INC.

Respondent

NOTICE TO PLEAD

To: Troy Frederick, Esq. and Jonathan Shub, Esq., Counsel for Anthony Ferrare

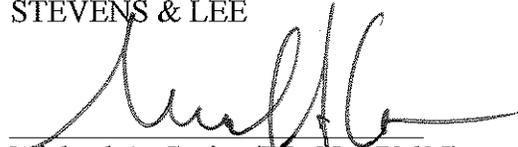
You are hereby notified to file a written response to the attached Motion to Strike of IDT Energy, Inc. within twenty (20) days from the date of service of this notice. If you do not file a written response denying the enclosed Motion to Strike within twenty (20) days of service, the presiding officers may rule in favor of IDT Energy, Inc. on the attached Motion without a hearing. All pleadings, such as Answers to Motions, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned counsel for IDT Energy, Inc. Failure to respond to this Motion could result in an Order striking portions of the *Amicus Curiae* Brief of Anthony Ferrare.

DATE: September 8, 2015

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COUNSEL FOR IDT ENERGY, INC.

4. On July 10, 2014, the Office of Small Business Advocate (“OSBA”) filed a Notice of Appearance, Notice of Intervention and Public Statement in this proceeding. On July 31, 2014, the Bureau of Investigation & Enforcement (“I&E”) filed a Notice of Intervention.

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

6. 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.

7. 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.”

8. 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.

9. 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.”

10. 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, they advised the ALJs of the settlement.

11. 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 an additional consumer witness testimonies and accompanying exhibits.

12. 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.

13. On August 26, 2015, Mr. Ferrare filed his *Amicus Curiae* Brief, in which Mr. Ferrare set forth his opposition to the Joint Petition.

II. ARGUMENT

14. Pursuant to Procedural Order # 6, Mr. Ferrare was provided with the opportunity to submit factual statements and affidavits to support his opposition to the Settlement, but he failed to take the opportunity to do so.

15. 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 any qualifications or 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.

16. 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.

17. It is axiomatic that Commission determinations must be supported by substantial evidence of record. *See, Re: United Telephone Company of Pennsylvania*, Docket No. P-00001850, 95 Pa.P.U.C. 271 (Order entered April 3, 2001) and 2 Pa. C.S. § 704.

18. In evaluating the Settlement, the Commission must only consider the evidence that is in the record in this case, and it is inappropriate for Briefs to reference information which is not in the record.

19. 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.

20. 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).

21. 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).

22. To the extent that Mr. Ferrare is attempting to introduce the afore-mentioned statements into evidence now, via his Brief, such attempts are clearly improper and must be rejected.

23. Unauthenticated written statements such as those referenced in Mr. Ferrare's Brief 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.

24. 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.*, 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. Cmwltth 1976).

25. Rule 901 of the Pennsylvania Rules of Evidence provides for the necessity of authentication of documentary evidence.

26. 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).

27. Without such authentication, the information proffered by Mr. Ferrare is inadmissible as hearsay.

28. 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.

29. 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"). As such, such references must be stricken from Mr. Ferrare's Brief.

III. CONCLUSION

30. For the reasons set forth above, IDT respectfully requests the following portions of the *Amicus Curiae* Brief of Anthony Ferrare 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."
- Page 10, line 4, the passage marked as Confidential.
- Page 11, last paragraph, through the first two lines at top of page 12.
- Pages 20, starting at the last sentence of the first full paragraph of Section V (including the footnote) through the end of the indented passages on Page 21.

Respectfully submitted,

STEVENSON & LEE


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DATE: September 8, 2015

