BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection,

And

Docket No. C-2014-2427657

TANYA J. McCLOSKEY, Acting Consumer Advocate,
Complainants

v.

IDT Energy, Inc.,
Respondent.

INTERVENER FERRARE'S RESPONSE IN OPPOSITION TO IDT ENERGY, INC.'S MOTION TO STRIKE PORTIONS OF INTERVENER ANTHONY FERRARE'S AMICUS CURIAE BRIEF

AND NOW COMES Intervener Anthony Ferrare, on behalf of himself and all others similarly situated by and through his counsel, Jonathan Shub, Esquire and Kohn Swift & Graf, P.C., Scott George, Esquire and Seeger Weiss, LLP and Troy M. Frederick, Esquire and Marcus & Mack, P.C., and files the following *Intervener Ferrare's Response In Opposition To IDT Energy, Inc.'s Motion To Strike Portions Of Intervener Anthony Ferrare's Amicus Curiae Brief* and in support thereof respectfully avers as follows:

I. BACKGROUND:

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Paragraph 7 requires no response as the referenced document speaks for itself.

8. Paragraph 8 requires no response as the referenced documents speak for themselves.

9. Paragraph 9 requires no response as the referenced document speaks for itself.

10. Admitted in part and denied in part. It is admitted that prior to the date for service of IDT's rebuttal testimony in this matter, Joint Complainants and IDT reached a settlement in principle. It is further admitted that during a conference call on July 2, 2015, they advised the ALJs of the proposed settlement. It is denied that "extensive" discovery was conducted. Strict proof to the contrary is demanded.

11. Admitted.

12. Admitted. By way of further response it should be noted that Procedural Order #6 does not permit Defendant IDT Energy, Inc. to file the instant *Motion To Strike Portions Of Intervener Anthony Ferrare's Amicus Curiae Brief.* Procedural Order #6 permits Defendant IDT Energy, Inc. to "file Reply Comments in response within 10 days of Mr. Ferrare's comments or objections." Strict proof to the contrary is demanded.

13. Admitted.

II. INTERVENER'S RESPONSE TO DEFENDANT IDT ENERGY, INC.'s ARGUMENT:

14. Denied. It is specifically denied that 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. By way of further response, Intervener Ferrare submitted facts which Defendant IDT Energy, Inc. is attempting to have stricken with the instant Motion. Procedural Order# 6 permitted Intervener Ferrare to

submit Objections substantiated with facts, argument and relevant legal analysis, which is what Intervener Ferrare did. But for the limited time frame in which Intervener Ferrare's experts had to review the compelled discovery from Defendant IDT Energy, Inc., Intervener Ferrare would have submitted expert affidavits as well. Strict proof to the contrary is demanded.

15. Denied. It is specifically denied that "[i]nstead, 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. It is further denied that the statements referenced by Mr. Ferrare in his Brief are not in the record in this proceeding and thus cannot be considered in evaluating the Settlement." By way of further answer, Intervener Ferrare cited to the Joint Complainants' experts', namely the "Direct Testimony Of Steven L. Estomin" and the "Direct Testimony Of Barbara R. Alexander". Defendant IDT Energy, Inc.'s Motion attempts to call into question whether the facts that Intervener Ferrare cited to were taken from "testimony". The aforementioned titles of the cited documents puts Defendant IDT Energy, Inc.'s "testimony" accusations to rest.

Next, Defendant IDT Energy, Inc. attempts to argue that the Joint Complainants' Expert Testimony is not part of the record. Intervener Ferrare was provided with copies of the Joint Complainants' expert testimony as was Defendant IDT Energy, Inc. (*See Candis A. Tunilo's April 30, 2015 filing of the direct Testimony of Barbara R. Alexander, Steven L. Estomin, Ashley E. Everette* and *Heather M. Troutman attached hereto as Exhibit "A")*. Further, despite Defendant IDT Energy, Inc.'s arguemt to the contrary, the Joint Complainants' Experts, cited by Intervener Ferrare, clearly submit their qualifications in said testimony.

Finally Defendant IDT Energy, Inc. attempts to assert a self-manufactured prejudice argument. Defendant IDT Energy, Inc. argues that the expert testimony cited by Intervener Ferrare should be stricken because the conclusions were of individuals other than Intervener Ferrare who did not submit any qualifications or sworn testimony and who were not subject to cross-examination. However, this argument is baseless as Defendant IDT Energy Inc., could have cross-examined the Joint Complainants' experts and further could have submitted rebuttal testimony, but it chose not to. Instead, Defendant IDT Energy, Inc. decided that it would be better to enter into a settlement and halt the litigation of this matter than it would be to attempt to contradict the Joint Complainants' Experts' testimony. Defendant IDT Energy, Inc., cannot be its own victim. Strict proof to the contrary is demanded.

16. Denied. Paragraph 16 is denied in its entirety. By way of further answer Intervener Ferrare incorporates his response to Paragraph 15 above as though set forth herein at length. It is further denied that the "record" is limited to the Settlement Petition, Stipulation of Facts, Statements in Support, or Consumer Testimony as Defendant IDT Energy Inc. claims. Further, this testimony was discussed in the Joint Petition for Settlement. Paragraph 52 of the Joint Petition states:

> This Settlement was achieved by the Joint Petitioners after extensive investigation into IDT's marketing and billing practices, including formal and informal discovery and Joint Complainants' service on the ALJs and parties of the direct testimonies of 215 consumers, of which the direct testimonies and related exhibits of 125 consumer witnesses were moved into the record, 6 and the service of the direct testimonies of Joint Complainants' witnesses Ms. Alexander, Dr. Estomin and Ms. Everette and the direct testimony of OAG investigator Heather R. Troutman.

(*See also Joint Petition for Approval of Settlement* at: ¶¶ 31, 52; *Exhibit A* at ¶¶ 10, 24; and *Appendix A* at 3, and 4).

Further, Joint Complainants' Expert testimony was clearly a factor in the Settlement as it is listed in the *Stipulation Of Facts In Support Of Settlement And Conclusions Of Law* at page 6 paragraph 24, directly under the caption "STIPULATION OF FACTS BASED UPON NON-CONSUMER TESTIMONY". Paragraph 24 states: On April 30, 2015, in accordance with the procedural schedules in this proceeding, Joint Complainants served the direct testimonies of Barbara R. Alexander, Steven L. Estomin and Ashley E. Everette and the direct testimony of OAG investigator Heather R. Troutman (Non-Consumer Testimony) in support of the Joint Complaint." Further, paragraph 27 states: "[t]he parties stipulate that if a Settlement had not been reached, ***Joint Complainants would have relied on the Non-Consumer Testimonies and exhibits***, along with the consumer testimonies and exhibits, to prove the allegations in their Joint Complaint…". (Emphasis added). *Joint Petition for Settlement, Exhibit A* at 6.

As such, it is disingenuous for Defendant IDT Energy, Inc. to argue, in the instant impermissible motion, that the testimony relied on by Intervener Ferrare is "improper" and "extra-record". Simply because the information cited by Intervener Ferrare is damaging to Defendant IDT Energy, Inc. does not make it improper or extra-record. Strict proof to the contrary is demanded.

17. Paragraph 17 does not require a response as it simply states Defendant IDT Energy Inc.'s conclusion of law.

18. Denied. It is specifically denied that anything cited or relied upon by Intervener Ferrare in his Objections to the Proposed Settlement was inappropriate or not part of the record. Strict proof to the contrary is demanded.

19. Denied. It is specifically denied that the record in this case is limited to: I) 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. By way of further answer, Defendant IDT Energy Inc. lacks the authority to make the determination of what is or is not part of the record. As was discussed earlier, the Joint Complainants expert testimony was served on all parties and was relied upon, by at least the Joint Complainants, in entering into the Proposed Settlement. As such, the Joint Complainants' expert testimony is clearly part of the record and was permissibly relied upon by Intervener Ferrare in his Objections to the Proposed Settlement. Strict proof to the contrary is demanded.

20. Paragraph 20 requires no response as it contains Defendant IDT Energy, Inc.'s conclusions of law. However, Intervener Ferrare properly relied upon and cited to the Joint Complainants' Expert Testimony. It is bewildering to imagine how the very testimony referred to in the Joint Petition for Approval of Settlement, which was relied upon by Joint Complainants in reaching the settlement, could somehow be unavailable to Intervener Ferrare to rely upon in Objecting to said Proposed Settlement. Strict proof to the contrary is demanded.

21. Denied. It is specifically denied that the information relied upon by Intervener Ferrare was not in the record. Strict proof to the contrary is demanded.

22. Denied. It is specifically denied that Mr. Ferrare is attempting to introduce the afore-mentioned statements into evidence, via his Brief, as everything relied upon by Mr. Ferrare is part of the record. By way of further answer, Joint Complainant's expert testimony is referenced in the Joint Petition for Approval of Settlement and accompanying documents as was discussed above. Strict proof to the contrary is demanded.

23. Denied. It is specifically denied that the written statements referenced in Mr. Ferrare's Brief constitute inadmissible hearsay. It is further denied that the Joint Complainants' Expert Testimony constitutes hearsay under Pennsylvania Rule of Evidence 801. The subject statements are not being used at trial or in a hearing and, as such, Pennsylvania Rule of Evidence 801 does not apply.

The comment to *Pa.R.E. 101* states in part: "These rules are applicable in the courts of the Commonwealth of Pennsylvania's unified judicial system. ***In some respects***, these rules are applicable in administrative proceedings. See, e.g., *Gibson v. W.C.A.B.*, 580 Pa. 470, 861 A.2d 938 (2004) (evidentiary rules 602, 701 and 702 applicable in agency proceedings in general, including Workers' Compensation proceedings)." (Emphasis added). *Pa.R.E. 101.*

Pa.R.E. 102 sets forth the purpose of the Pennsylvania Rules of Evidence: "[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, ***to the end of ascertaining the truth and securing a just determination***." (Emphasis added). *Pa.R.E. 102.* It is Intervener Ferrare's position that to the end of ascertaining the truth and securing a just determination in this matter, the material cited by Intervener Ferrare cannot be ignored.

Pa.R.E.104., Preliminary Questions, states in part: "(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or ***evidence is admissible***. In so deciding, ***the court is not bound by evidence rules***, except those on privilege. (Emphasis added).

The comment to *PaR.E. 705* permits the PUC, even if the ALJs find that the Joint Complainants' Expert Testimony is inadmissible, to consider the underlying facts and data the experts based their opinions on. "When an expert testifies about the underlying facts and data

that support the expert's opinion and the evidence would be otherwise inadmissible, the trial judge upon request must, or on the judge's own initiative may, instruct the jury to consider the facts and data only to explain the basis for the expert's opinion, and not as substantive evidence." In that regard, and to the extent the Pennsylvania Rules of evidence apply in this situation, Intervener Ferrare requests that, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint Petition for Settlement, the ALJs consider the underlying facts and data relied on by the Joint Complainants' Experts in forming their opinions.

Further, the PUC is not bound by the technical rules of evidence. *2 Pa.C.S. § 505* states: "Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted." The subject testimony is more than reasonably probative to the issues at hand. Defendant IDT Energy, Inc. willingly entered into the subject proposed settlement prior to filing opposing expert testimony and, as such, is not prejudiced. Defendant IDT Energy, Inc., had every opportunity to dispute the Joint Complainants' Experts' testimony. Strict proof to the contrary is demanded.

24. Paragraph 24 states conclusions of law to which no response is necessary. To the extent that a response is necessary, Petitioner Ferrare incorporates his response to Paragraph 23 as though set forth at length herein.

25. Paragraph 25 states conclusions of law to which no response is necessary. To the extent that a response is necessary, Petitioner Ferrare incorporates his response to Paragraph 23 as though set forth at length herein. Further, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint

Petition for Settlement, the ALJs should still consider the underlying facts and data relied on by the Joint Complainants' Experts. *PaR.E. 705.*

26. Paragraph 26 states conclusions of law to which no response is necessary. To the extent that a response is necessary, Petitioner Ferrare incorporates his response to Paragraph 23 as though set forth at length herein. Further, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint Petition for Settlement, the ALJs should still consider the underlying facts and data relied on by the Joint Complainants' Experts. *PaR.E. 705.*

27. Paragraph 27 states conclusions of law to which no response is necessary. To the extent that a response is necessary, Petitioner Ferrare incorporates his response to Paragraph 23 as though set forth at length herein. Further, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint Petition for Settlement, the ALJs should still consider the underlying facts and data relied on by the Joint Complainants' Experts. *PaR.E. 705.*

28. Denied. It is specifically denied that the inclusion of these references in Mr. Ferrare's Brief is prejudicial to IDT. By way of further answer, *Pa.R.E. 102* states: "[t]hese rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, ***to the end of ascertaining the truth and securing a just determination***." (Emphasis added). *Pa.R.E. 102.* It is Intervener Ferrare's position that to the end of ascertaining the truth and securing a just determination in this matter, the material cited by Intervener Ferrare cannot be ignored.

To the extent that Defendant IDT Energy, Inc., attempts to argue that it would have contested the Joint Complainants' Experts' opinions, that in and of itself would not have

prevented said opinions from being utilized in this litigation. It must not be overlooked that Defendant IDT Energy, Inc., has been aware of the subject opinions since April 30, 2015 and chose to settle with the Joint Complainants as opposed to attempting to contradict the facts relied on by their experts. The data that Intervener Ferrare references in his Opposition relates to hard numbers provided by Defendant IDT Energy, Inc. to Joint Complainants and not to novel theories espoused by experts. Defendant IDT Energy, Inc. can object all day long and its objections will not change the numbers.

Further, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint Petition for Settlement, the ALJs should still consider the underlying facts and data relied on by the Joint Complainants' Experts. *PaR.E. 705.*

29. Denied. It is specifically denied that Defendant IDT Energy, Inc. was not afforded the opportunity to respond to the statements that were included in Mr. Ferrare's Brief, or cross-examine the individuals who are associated with those statements. It is denied that the subject statements are "extra-record". It is denied that inclusion of the subject statements allegedly violate basic principles of due process. By way of further response, if anyone is responsible for depriving Defendant IDT Energy, Inc. of its "due process" rights, it is Defendant IDT Energy, Inc. Defendant IDT Energy, Inc. voluntarily entered into the subject proposed settlement before responding to the Joint Complainants' Experts' opinions. Further, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint Petition for Settlement, the ALJs should still consider the underlying facts and data relied on by the Joint Complainants' Experts. *PaR.E. 705.* Strict proof to the contrary is demanded.

III. CONCLUSION:

30. Being that the subject testimony was referenced in the Joint Petition, the Joint Complainants relied on said testimony in agreeing to enter into the subject proposed settlement and Defendant IDT Energy, Inc., has been aware of the testimony since April 30, 2015 and willingly entered into the proposed settlement without attempting to contradict the testimony, the PUC should permit Intervener Ferrare's use of the same in his Objections to the Joint Petition for Approval of settlement to stand. Further, even if the ALJs decide the Joint Complainants' Expert Testimony was not permissibly utilized in Intervener Ferrare's Opposition to the Joint Petition for Settlement, the ALJs should still consider the underlying facts and data relied on by the Joint Complainants' Experts. *PaR.E. 705.*

Respectfully Submitted By Attorneys for Intervener Ferrare:

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September 15, 2015

EXHIBIT A

COMMONWEALTH OF PENNSYLVANIA

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April 30, 2015

Honorable Elizabeth Barnes
Honorable Joel Cheskis
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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

Dear Judges Barnes and Cheskis:

Enclosed please find copies of the Direct Testimony being submitted on behalf of the Office of Attorney General, Bureau of Consumer Protection and the Pennsylvania Office of Consumer Advocate in the above proceeding, as follows:

Direct Testimony of Barbara R. Alexander, OAG/OCA Statement No. 1;
Direct Testimony of Steven L. Estomin, OAG/OCA Statement No. 2;
Direct Testimony of Ashley E. Everette, OAG/OCA Statement No. 3; and
Direct Testimony of Heather M. Troutman, OAG/OCA Statement No. 4

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

Sincerely yours,

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

Enclosure
cc: Rosemary Chiavetta, Secretary (Certificate of Service)
Certificate of Service
206045

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the foregoing document, the Direct Testimony of Barbara R. Alexander, OAG/OCA St. No. 1; Steven L. Estomin, OAG/OCA St. No. 2; Ashley E. Everette, OAG/OCA St. No. 3; and Heather M. Troutman, OAG/OCA St. No. 4 on behalf of the Office of Attorney General, Bureau of Consumer Protection and the Pennsylvania Office of Consumer Advocate, in the manner and upon the persons listed below:

Dated this 30th day of April 2015.

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*Receiving Proprietary Information

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,
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v.

IDT Energy, Inc.,
Respondent.

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the *Intervener Ferrare's Response In Opposition To IDT Energy, Inc.'s Motion To Strike Portions Of Intervener Anthony Ferrare's Amicus Curiae Brief* by e-filing, e-mail, and/or first-class mail (unless otherwise noted) upon the persons addressed below:

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September 15, 2015