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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,	:	C-2014-2427657
v.	:	
IDT Energy, Inc.	:	

EXCEPTIONS OF INTERVENER FERRARE TO THE NOVEMBER 19, 2015 INITIAL DECISION

AND NOW COMES Intervener Anthony Ferrare, by and through his counsel, Jonathan Shub, Esquire and Kohn Swift & Graf, P.C., and Troy M. Frederick, Esquire and Marcus & Mack, P.C., and files the following *Exceptions Of Intervener Ferrare To The November 19, 2015 Initial Decision* and in support thereof respectfully avers as follows:

EXCEPTIONS

EXCEPTION NO. 1:

THE ADMINISTRATIVE LAW JUDGES ERRED IN PERMITTING THE PARTIES TO INCLUDE THE PROVISION IN THE SETTLEMENT AGREEMENT REQUIRING 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

EXCEPTION NO. 2:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC HAS AUTHORITY TO ORDER AND/OR PERMIT ELECTRIC GENERATION SUPPLIERS, SUCH AS THE COMPANY, TO REFUND MONEYS RELATING

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TO RATE DISPUTES AS SUCH ACTIONS ARE CLEARLY BEYOND THE SCOPE OF THE PUC'S AUTHORITY

EXCEPTION NO. 3:

THE ADMINISTRATIVE LAW JUDGES ERRED IN APPROVING THE SETTLEMENT AS THE SETTLEMENT FUND IS GROSSLY INSUFFICIENT COMPARED TO THE AMOUNT OF ACTUAL DAMAGES CAUSED BY THE COMPANY AND THE NUMBER OF PENNSYLVANIA CONSUMERS THE COMPANY HARMED

EXCEPTION NO. 4:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC AND THE OFFICE OF CONSUMER ADVOCATE HAVE THE JURISDICTION OVER AND AUTHORITY TO REPRESENT, RESPECTIVELY, CONSUMERS WHO HAVE NOT FILED COMPLAINTS WITH THE PUC AGAINST EGSs WHICH ARE CORPORATIONS AND NOT PUBLIC UTILITIES

ARGUMENT

EXCEPTION NO. 1:

THE ADMINISTRATIVE LAW JUDGES ERRED IN PERMITTING THE PARTIES TO INCLUDE THE PROVISION IN THE SETTLEMENT AGREEMENT REQUIRING 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.

The Administrative Law Judges (ALJs) erred in permitting the parties to include the provision in the Settlement agreement requiring 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. The *November 19, 2015, Initial Decision* requires the Company's affected customers to sign general releases, disposing of their private causes of action against the Company, if they wish to receive any amount of a refund, from the settlement fund of $2,400,000. (*Initial Decision* at 15 ¶

38 and 16 at ¶ 41). Further, the Company, as far as Petitioner Ferrare is aware, did not require its customers to execute general releases when it decided to refund/provide rebates for the first $4,177,000 to its customers.

It is undisputed that the PUC does not have jurisdiction over private breach of contract claims, yet the ALJs have approved a settlement that requires affected customers to sign a general release purportedly waiving such claims. *Commonwealth of Pennsylvania, et al v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104).

The ALJs stated in their *Initial Decision*, "[a]lthough the Commission does not normally require as part of receiving a refund that a general release be signed, we do not seek to delve too deeply into mechanics or functioning of the refund pool, especially in light of the overall benefits provided in the remainder of the settlement." *Initial Decision* at 42. The ALJs aptly stated, in their *Initial Decision* approving the proposed settlement in the nearly identical matter of the *Commonwealth of Pennsylvania, et al v. Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric,* Pennsylvania Public Utility Commission, Docket No. C-2014-2427656 (June 30, 2015), that "[n]ormally, the Commission does not require customers to waive any other rights the party may have to pursue criminal charges or civil causes of actions they might have against a utility as a contingency to receiving a refund." *Initial Decision, Commonwealth of Pennsylvania, et al v. Energy Service Providers, Inc. d/b/a Pennsylvania Gas & Electric,* Pennsylvania Public Utility Commission, Docket No. C-2014-2427656 (June 30, 2015) at 42. It is Intervener Ferrare's position that the PUC should not now require the Company's customers to waive private causes of action to be reimbursed for the Company's misconduct and that requiring customers to do so exceeds the jurisdiction of the PUC.

The ALJs acknowledged that they are unsure of the legal consequences of requiring customers to sign a general release to partake in a refund: "[w]hether this release clause would be enforceable in another jurisdiction if a customer both accepted the refund, and then also pursued a separate cause of action despite having signed the release, is an issue for another jurisdiction." *Id.* Finally, the ALJs stated:

> It is apparent that the Settlement benefits consumers, although maybe financially not to the extent Mr. Sobiech contends they ought to benefit, *it protects PaG&E from some potential future legal claims against the Company* and is apparently a manageable enough refund amount such that the Company can continue to conduct business in Pennsylvania. *The Settlement may also reduce the size of class action law suits as customers sign the release and collect a refund from the refund pool.*
>
> *We have no interest in exceeding our authority by attempting to limit any cause of action that may be brought in another jurisdiction, and do not believe that we are doing so by approving the Settlement in its entirety without modification.* If a consumer elects to pursue the remedy created in this Settlement or somewhere else, he or she is free to do so. Such a result is within the Commission's authority to approve as part of a larger settlement. (Emphasis added) *Id.* at 42.

While the ALJs have not included the language cited above in the instant *Initial Decision*, which they utilized in their *Initial Decision* approving the PAG&E settlement, it is nonetheless applicable to this matter as the terms of both settlements are nearly identical. The eluded to tradeoff discussed above by the ALJs is critical to determining the extent of the PUC's jurisdiction in this matter. The ALJs state, "we do not seek to delve too deeply into mechanics or functioning of the refund pool, *especially in light of the overall benefits provided in the remainder of the settlement*." *(Emphasis added) Initial Decision* at 42. The *overall benefits provided in the remainder of the settlement* refers to the agreed to changes in the way the Company does business in Pennsylvania, which Petitioner Ferrare has not filed exceptions to.

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The ALJs have ignored the fact that the PUC does not have jurisdiction over private causes of action against the Company, or that their approval of this Settlement may limit those causes of action, in order to preserve the agreed to changes in the Company's business practices in Pennsylvania over which the PUC does have jurisdiction. The ALJs, in the PAG&E matter, further state, "[w]e have no interest in exceeding our authority by attempting to limit any cause of action that may be brought in another jurisdiction, *and do not believe that we are doing so by approving the Settlement in its entirety without* modification." *PAG&E Initial Decision* at 42 and 56. Although they believe this is a reasonable tradeoff, it does not change the fact that the PUC lacks the authority to approve such a bargain. Jurisdiction does not operate on a sliding scale. The PUC either has jurisdiction over private causes of action or it does not.

The ALJs correctly acknowledge in the *PAG&E* matter that limiting a cause of action that can be brought in another jurisdiction would exceed the authority of the PUC. *Id.* As such, it is impossible to explain why they are doing just that by permitting the release provision of the settlement to proceed. The ALJs further state in the *PAG&E* matter, "[w]hether this release clause would be enforceable in another jurisdiction if a customer both accepted the refund, and then also pursued a separate cause of action despite having signed the release, is an issue for another jurisdiction." *Id.* at 42. The explanation that the ALJs are unsure of the legal ramifications of a general release is insufficient to permit the PUC to exceed its authority in such a manner especially when, as is the case here, there is a class action being litigated against the Company in the United States District Court for the Eastern District of Pennsylvania at docket number 14-4658. In fact in the *PAG&E Initial Decision*, the ALJs refer to class actions when discussing the general release requirement as follows: "*it protects PaG&E from some potential future legal claims against the Company...* " and "*The Settlement may also reduce the size of*

class action law suits as customers sign the release and collect a refund from the refund pool." *PAG&E Initial Decision* at 42. However, it is not the place of the PUC to attempt to interfere with or attempt to limit private causes of action to protect the Company over its customers.

For the reasons set forth above, Intervener Ferrare respectfully requests that the Commission reverse the approval of the proposed Settlement.

EXCEPTION NO. 2:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC HAS AUTHORITY TO ORDER AND/OR PERMIT ELECTRIC GENERATION SUPPLIERS, SUCH AS THE COMPANY, TO REFUND MONEYS RELATING TO RATE DISPUTES AS SUCH ACTIONS ARE CLEARLY BEYOND THE SCOPE OF THE PUC'S AUTHORITY.

The ALJs erred in finding that the PUC has authority to order and/or permit electric generation suppliers, such as the company, to refund moneys relating to rate disputes as such actions are clearly beyond the scope of the PUC's authority. "To begin, it is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.*, 43 A.2d 348 (Pa. Super 1945) (*Pittsburgh*). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967) (*Roberts*). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth 1992) (*Hughes*). *As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code*. 66 Pa.C.S. §§ 101, *et seq*. *Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom*. (Emphasis added) *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*)." *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*,

Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104).

In the *PAG&E Initial* Decision, The ALJs recognized that they lack the authority under *66 Pa. C.S. § 1312*, entitled *Refunds*, to force the Company to issue a refund. *PAG&E Initial Decision* at 40 citing *Commonwealth of Pa, et al. v. IDT Energy, Inc.*, Docket No. C-2014-2427657 (Opinion and Order entered Dec. 18, 2014) (IDT Order). In *Delmarva Power & Light Co. v. Commonwealth*, the Pennsylvania Supreme Court determined that the Pennsylvania Public Utility Commission's Fiscal Office could not assess EGSs for the administrative expenses of the PUC, OCA, or OSBA as EGSs were not public utilities. *Delmarva Power & Light Co. v. Commonwealth*, 582 Pa. 338, 353, 870 A.2d 901, 910 (2005). In making this decision, the Supreme Court stated:

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

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

public utilities for most purposes." *Id.* at 901. Because the General Assembly specifically did not state that an EGS was a public utility for the purposes of refunds under *66 Pa. C.S. § 1312*, the PUC lacks the jurisdiction and authority to order and/or permit an EGS to issue refunds related to rate disputes. *Id.* The PUC cannot create authority where none was given.

Despite lacking any authority under the section relating to refunds, the PUC contends that it has plenary authority to issue refunds for over-billing under *66 Pa.C.S. § 501*, entitled *General Power*s, which does not address refunds. *Id.* It appears as though the ALJs are attempting to obtain authority/jurisdiction over the current ***Rate Dispute*** matter because the PUC has authority/jurisdiction regarding ***Over-Billing*** issues. *Initial Decision* at 61. Over-billing and rate disputes are two different matters. The appropriate remedy may be to order a refund in both matters. However, the PUC does not have the authority to order a refund in rate dispute matters.

This agency over reach is impermissible in Pennsylvania. "*As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code*. 66 Pa.C.S. §§ 101, *et seq*. *Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom*." (Emphasis added) *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*). *Commonwealth of Pennsylvania, et al. v. IDT Energy, Inc.*, Pennsylvania Public Utility Commission, Docket No. C-2014-2427657, 2014 WL 4374209 (Aug. 20, 2104). Because the PUC was not granted the authority to issue refunds in this scenario under *66 Pa. C.S. § 1312*, entitled *Refunds*, it is clearly impermissible for the PUC to attempt to exercise jurisdiction over the rate dispute aspects of this litigation, especially since the PUC has opted not to make any inquiry into whether there was an actual over charge and, if so, what the extent of the overcharge was.

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

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

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

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

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

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

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For the reasons set forth above, Intervener Ferrare respectfully requests that the Commission reverse the approval of the proposed Settlement.

EXCEPTION NO. 3:

THE ADMINISTRATIVE LAW JUDGES ERRED IN APPROVING THE SETTLEMENT AS THE SETTLEMENT FUND IS GROSSLY INSUFFICIENT COMPARED TO THE AMOUNT OF ACTUAL DAMAGES CAUSED BY THE COMPANY AND THE NUMBER OF PENNSYLVANIA CONSUMERS THE COMPANY HARMED:

The ALJs erred in approving the Settlement as the Settlement Fund is grossly insufficient compared to the amount of actual damages caused by the Company and the number of Pennsylvania consumers the Company harmed. The Commonwealth of Pennsylvania House of Representatives Consumer Affairs Committee Chair, Robert Godshall, stated during an interview that it was the PUC who was responsible for ensuring that EGSs, including the Company, prove what they claimed they paid for electricity during the "polar vortex". *https://www.youtube.com/watch?v=r28TTVWbFEU* at 29:20 - 29:46. However, it is clear that PUC has opted not do so in this matter.

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

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While both Parties acknowledge that the number of affected customers is significant, neither disclose the actual number of affected customers to the Commission or the public. However, both the Joint Complainants and the Company know how many of the Company's customers were affected. "As of January 2013, IDT had **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** customers in Pennsylvania. During the summer of 2013, this number remained slightly less, but then dropped to approximately **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** customers by December 2013. After the impact of the very high prices charged beginning in January 2014, IDT's customer base dropped to approximately **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** by April 2014 and was at a level of approximately **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** by June 2014. In December 2013, IDT was serving approximately **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** During the January through August 2013 IDT enrolled over **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** customers per month." *Direct Testimony of Joint Complainants' Expert Barbara R. Alexander, Consumer Affairs Consultant* at 11-12.

The number of the Company's affected customers ranges between **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** in December of 2013 to **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** by April of 2014. As such, the proposed settlement of $6,577,000.00 equates to compensation per person of roughly **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL.** Joint Complainants' expert Ashley E. Everette, Regulatory Analyst for the Pennsylvania Office of Consumer Advocate,

testified that "[f]rom December 2013 to March 2014, IDT charged residential customers a total of approximately **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** more than the PTC [Price to Compare], or approximately 5 times the amount that was refunded." *Everette* Direct Testimony at 5.

It is unconscionable that the Company and the Joint Complainants are permitted to hide the underlying details of this Proposed Settlement from Public scrutiny behind the veil of "confidentiality". The information discussed by Intervener Ferrare in this section in no way should be "confidential" as this information does not expose the Company's trade secrets or anything else that would cause the Company to lose its competitive edge, besides the facts themselves. If the Joint Complainants are permitted to advertise and tout this Proposed Settlement as a victory for Pennsylvania Consumers, the number of affected consumers and the amount of the financial harm caused by the Company should be disclosed to the public as well.[1] Intervener Ferrare submits that if the Public was aware that the Joint Complainants reached a settlement where the recorded over-charges were **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** for a mere $6,577,000.00, the Public would be justifiably outraged. As such, given the significant number of customers who were impacted, the staggering amount of the overcharges and the miniscule refund pool, the Proposed Settlement is nothing more than a windfall for the Company enabling it to buy off its obviously larger liability, by forcing customers to sign releases, for literally pennies on the dollar.

[1] *See: https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=2012* and *https://www.facebook.com/PaAttorneyGen/posts/10153011559121981*

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For the reasons set forth above, Intervener Ferrare respectfully requests that the Commission reverse the approval of the proposed Settlement.

EXCEPTION NO. 4:

THE ADMINISTRATIVE LAW JUDGES ERRED IN FINDING THAT THE PUC AND THE OFFICE OF CONSUMER ADVOCATE HAVE THE JURISDICTION OVER AND AUTHORITY TO REPRESENT, RESPECTIVELY, CONSUMERS WHO HAVE NOT FILED COMPLAINTS WITH THE PUC AGAINST EGSs WHICH ARE CORPORATIONS AND NOT PUBLIC UTILITIES:

The ALJs erred in finding that the PUC and the Office of Consumer Advocate (OCA) have the jurisdiction over and authority to represent, respectively, consumers who have not filed complaints with the PUC against EGSs which are corporations and not public utilities. The ALJs address this issue in the *Initial Decision*:

> With regard to Mr. Ferrare's argument that the Commission and the OCA lack jurisdiction over and authority to represent consumers who have not filed complaints with the Commission against EGSs who are corporations and not public utilities, this argument will be rejected. In addition to rejecting Mr. Ferrare's argument that the Commission lacks authority to order and/or permit EGSs, such as IDT, to refund money relating to rate disputes because such actions are beyond the scope of the Commission's authority, *supra*, Mr. Ferrare's arguments regarding the OCA's authority will also be rejected. In particular, Mr. Ferrare's argument fails to recognize that EGSs, such as IDT, are considered public utilities for purposes of Section 2809 of the Public Utility Code. Both the Joint Complainants and IDT correctly note that Mr. Ferrare has misinterpreted *Delmarva, supra*, wherein the Pennsylvania Supreme Court held that EGSs are considered to be public utilities for purposes of quality of service, including standards and billing practices for residential utility service. Citing, *66 Pa.C.S. § 2809(e)* and *52 Pa.Code Ch. 56*. These are the precise issues that are the subject of this settlement. As such, the Commission and the OCA have jurisdiction and authority to represent consumers who have not filed complaints with the Commission against EGSs contrary to Mr. Ferrare's argument. *Initial Decision* at 62.

The ALJs state: "the Pennsylvania Supreme Court held that EGSs are considered to be public utilities for purposes of quality of service, including standards and billing practices for residential utility service. Citing, *66 Pa.C.S. § 2809(e) and 52 Pa.Code Ch. 56.* These are the precise issues that are the subject of this settlement." *Id.* Petitioner Ferrare respectfully disagrees. While the ALJs rely on the excerpt "for purposes of quality of service, including standards and billing practices for residential utility service" as a catchall provision to expand the jurisdiction/authority of the OCA to cover the Company's customers in this rate dispute litigation, the direct, unambiguous statutory language will not permit the same.

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

71 P.S. § 309-1, Definitions, states:

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

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

66 Pa.C.S. § 102 defines "Person" as: "Individuals, partnerships, or associations ***other than corporations***, and includes their lessees, assignees, trustees, receivers, executors, administrators, or other successors in interest." (Emphasis added). It is clear from looking at the authority granted to the OCA under *71 P.S. § 309-1* that it lacks the authority to represent the Company's customers as said customers are not considered "consumers" because the Company is neither a "person" nor a "public utility" but rather is a corporation. *66 Pa.C.S. § 102; 71 P.S. § 309-1* and *Joint Complaint* at 3 ¶ 6.

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

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

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

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

> Nevertheless, the General Assembly made an exception to this rule by permitting EGSs to be deemed public utilities for "the limited

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

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

As was discussed above, the PUC does not have jurisdiction over private causes of action or over refunds related to rate disputes, and as such, neither does OCA. *71 P.S. § 309-4* states in part, "[i]n addition to any other authority conferred upon him by this act, the Consumer Advocate is authorized, and it shall be his duty, in carrying out his responsibilities under this act, to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission ***in any matter properly before the commission***..." For the sake of economy, and to address whether the issues of refunds and general releases are matters properly before the Commission, Intervener Ferrare incorporates the foregoing arguments from Exceptions 1 & 2 above as if set forth herein in their entirety.

For the reasons set forth above, the PUC does not have jurisdiction or authority over the private causes of action of parties, especially those who have not filed complaints with the PUC, and the OCA lacks standing and/or the authority to represent the Company's customers in this proceeding. As such, the settlement should be rejected/stricken.

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CONCLUSION

For the reasons set forth above, Intervener Ferrare respectfully submits that the Initial Decision approving the Settlement should be overturned/stricken.

Date: December 3, 2015

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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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed Exceptions of Intervener Ferrare to the November 19, 2015, Initial Decision on the Commission's electronic filing system. Further, I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of §1.54 (relating to service by a party) by e-filing, e-mail, and/or first-class mail (unless otherwise noted):

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(E-filing and first class mail)

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