

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

FAX (717) 783-7152
consumer@paoca.org

December 18, 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 Reply Exceptions of Joint Complainants, in the above-referenced proceeding.

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

Respectfully Submitted,

Kristine E. Marsilio

Kristine E. Marsilio
Assistant Consumer Advocate
PA Attorney I.D. #316479

Enclosures

cc: Honorable Elizabeth Barnes, ALJ
Honorable Joel Cheskis, ALJ
Ra-OSA@pa.gov
Certificate of Service

*185194

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	:	
	:	

REPLY EXCEPTIONS OF JOINT COMPLAINANTS

John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

Margarita Tulman
Deputy Attorney General
PA Attorney I.D. 313514

Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 787-1190
jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

Counsel for:

Bruce R. Beemer, First Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection

Date: December 18, 2015

Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Marsilio
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
kmarsilio@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate
Office of Consumer Advocate

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I. INTRODUCTION

On June 20, 2014, the Joint Complainants filed a Joint Complaint with the Commission, 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.* (Consumer Protection Law), and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* (TRA). The Joint Complaint included 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 Commission's Bureau of Investigation and Enforcement (I&E) intervened in the proceeding on July 31, 2014, and the Office of Small Business Advocate (OSBA) intervened on July 10, 2014. Thereafter, on April 8, 2015, Anthony Ferrare on behalf of himself and all others similarly situated, filed a Petition to Intervene (Ferrare Petition). On April 28, 2015, Joint Complainants filed an Answer to the Ferrare Petition requesting that Administrative Law Judges Elizabeth Barnes and Joel H. Cheskis (ALJs) deny the Ferrare Petition. The Company also filed an Answer in opposition to the granting of the Ferrare Petition.

On May 1, 2015, the ALJs issued an Order granting the Ferrare Petition. Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Order Granting Petition to Intervene (May 1, 2015) (Order Granting Intervention). In their Order Granting Intervention, the ALJs concluded that Anthony Ferrare, a former IDT customer, has a “substantial, immediate and direct” interest in this proceeding sufficient to warrant granting his intervention. Order Granting Intervention at 5. The ALJs also held that Mr. Ferrare, as an intervenor, is not permitted to represent the interests of other consumers in this proceeding and is only permitted to intervene on his own behalf. Id. at 5-6.

On August 4, 2015, the Joint Complainants, IDT, and OSBA (collectively Joint Petitioners) filed a Joint Petition for Approval of Settlement (Joint Petition or Settlement) seeking to resolve the matters alleged in the Joint Complaint.¹ On November 19, 2015, the ALJs issued an Initial Decision, in which they recommended approval of the Joint Petition in its entirety without modification. Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Initial Decision (Nov. 19, 2015) (Initial Decision). Mr. Ferrare filed Exceptions to the Initial Decision on December 3, 2015. For the reasons set forth below, Joint Complainants request that the Commission reject Mr. Ferrare’s Exceptions and adopt the ALJs’ Initial Decision.

¹ I&E did not join in the Settlement but did not oppose the Settlement. Joint Complainants also note that they filed a Revised Page 10 to the Settlement on August 7, 2015, in which they clarified Mr. Ferrare’s position on the Settlement as follows: “By email on July 29, 2015, Mr. Ferrare’s counsel notified Joint Complainants as follows: ‘Until we can review relevant materials that we have been unable to obtain from IDT, we will be forced to oppose the proposed settlement.’” Settlement at Revised Page 10, FN 4.

II. REPLY EXCEPTIONS

JOINT COMPLAINANTS' REPLY TO EXCEPTION 1: The ALJs did not err in recommending approval of the Joint Petition, as a Commission order accepting the recommendation would not affect Ferrare's private causes of action.

In his Exceptions, Mr. Ferrare first asserts that the ALJs erred in permitting the parties to include in the Settlement a provision requiring the Company's customers to sign general releases to receive refunds from the Settlement Fund (Refund Pool), as it is beyond the jurisdiction and practice of the Commission to adjudicate and/or interfere with private causes of action, such as breach of contract. Ferrare Exc. at 2. Joint Complainants submit that the ALJs did not err in approving the Joint Petition, as the Commission has not adjudicated or interfered with Mr. Ferrare's private causes of action.

Under the terms of the Settlement, a customer must execute a "Release of Claims" in order to receive funds from the Refund Pool, in which the customer will release IDT and all of its current and former officers, shareholders, and employees from any and all claims related to the conduct alleged in the Joint Complaint over which the Commission has jurisdiction. Settlement at ¶ 41. As further stated in the Settlement, the refund eligibility shall be determined "based on the individual customer's usage, price charged, and refund amounts already received directly from IDT." Settlement at ¶ 38(a).

Joint Complainants first note that to the extent Intervenor Ferrare's Exception regarding the release language in the Joint Petition purports to be made on behalf of all IDT customers, it 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 on his own behalf only. Thus, Mr.

Ferrare 's Exception should be limited to determining whether the Commission has adjudicated or interfered with Mr. Ferrare's private causes of action.²

Furthermore, in their Initial Decision, the ALJs rejected Mr. Ferrare's argument as to the release language in the Settlement, as follows:

Commission precedent supports the authority of the Commission to approve a settlement wherein a customer is required to sign a general release before accepting the refund. *See e.g., Pennsylvania Public Utility Commission v. Verizon Pennsylvania, Inc.*, Docket No. M-00021592 (Order entered Jan. 25, 2002).

We also reject Mr. Ferrare's arguments because 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. *See e.g., Pa.P.U.C., Law Bureau Prosecutory Staff v. PPL Electric Utilities Corporation*, Docket No. M-2009-205812 (Opinion and Order entered September 10, 2009) (PPL Order) (approving a settlement prohibiting Friday electric service terminations). It is apparent that the settlement benefits consumers while providing the Company with an agreed upon outcome to this case regarding the status of their EGS license, financial risk, corrective action, and other modifications to business practices.

We also reject Mr. Ferrare's arguments because, as we noted in PaG&E, the decision to sign the release and receive the refund is at the discretion of the customer. Some customers might want the more expedient resolution of accepting a refund from the refund pool and others may wish to seek a resolution in another manner. [...] This is a unique complaint and involves a large lump sum refund pool for the benefit of those customers affected by IDT's alleged actions. We are not forcing consumers to take the refund amount provided in this settlement and forgo any other claim. Consumers have the ability to choose and we believe that is in the public interest.

In conclusion, we find the refund pool is in the public interest because those consumers who paid more than they believed that they would be required to pay for electric generation service based on their interactions with IDT will be remunerated for the additional amount they paid above their EDC's price to compare and many will receive the savings they expected.

Initial Decision at 41-42.

² Nevertheless, Joint Complainants submit that a Commission order accepting the ALJs' recommendation would not interfere in any way with any individual customer's private causes of action for the same reasons that it would not interfere with those of Mr. Ferrare, as discussed herein.

As the ALJs noted, even if eligible for a refund, Intervenor Ferrare would still not be bound by the Refund Pool and Release provisions of the Settlement should the Commission approve the Settlement. The Settlement permits each individual customer who is offered a refund to choose whether to accept the refund in exchange for releasing his or her claims against IDT. See Settlement at ¶¶ 40-41. That release is limited to claims related to the conduct alleged in the Joint Complaint over which the Commission has jurisdiction. See Id. If a customer refuses the refund or is not offered a refund pursuant to the Settlement, the customer does not provide any release of claims to IDT. See Settlement at ¶¶ 42-43. Joint Complainants submit that Intervenor Ferrare will not be required to release his claims against IDT if the Commission approves the Settlement, because if eligible and offered a refund pursuant to the Settlement, Intervenor Ferrare can choose to forego the refund and pursue his claims against the Company through the Additional Refund Method outlined in Paragraph 40 of the Settlement, through the Class Action or by filing a Formal Complaint at the Commission. In contrast to Mr. Ferrare's Exceptions, the Commission is not requiring customers to release their claims against the Company; it is the customers themselves that may choose to do so if they deem it to be in their best interests.³ Thus, the Commission has not, in any way, adjudicated or interfered with Mr. Ferrare's private causes of action.

In support of his position that the Commission does not have the jurisdiction to approve the release language in the Settlement, Intervenor Ferrare asserts that the Company did not require its customers to execute general releases when it provided refunds to its customers prior to the Settlement and that the Commission does not normally require consumers to waive their

³ Joint Complainants also note that, when customers are offered refunds pursuant to the Settlement, Joint Complainants intend to provide the customers with information that is necessary for them to make informed decisions regarding whether to accept the refund in exchange for a release of their claims or pursue other methods to obtain a refund.

rights as a contingency for receiving a refund. Ferrare Exc. at 3. These arguments lack merit. Whether the Company previously required customers to sign a general release upon receiving a refund is not relevant to this Settlement. Additionally, while some settlements that the Commission has approved do not contain general releases, that fact does not support a finding that the Commission lacks jurisdiction to do so. The Commission, in fact, has the 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).

Mr. Ferrare also argues that the Commission does not have the authority to limit a cause of action that can be brought in another jurisdiction, and the ALJs are unaware of the legal consequences in other jurisdictions of requiring customers to sign a general release in this proceeding. Ferrare Exc. at 4-5. Therefore, Mr. Ferrare concludes that the ALJs lack the authority to approve this Settlement. Id. As stated above, Joint Complainants submit that the Commission has the jurisdiction to approve a settlement that contains a general release. Furthermore, it bears repeating that the Commission is not requiring customers to release their claims against the Company; it is the customers themselves that may choose to do so if they deem it to be in their best interests to accept a refund from the Refund Pool.

In his Exceptions, Intervenor Ferrare also states that the ALJs made a “tradeoff” and implies that the ALJs accepted the release language as a tradeoff for the benefits provided in the injunctive relief provisions of the Settlement. Ferrare Exc. at 4. Joint Complainants acknowledge that 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. While the ALJs may have acknowledged this compromise in their

Initial Decision, they did not exceed their jurisdiction in doing so. As discussed above, the Commission is not adjudicating or interfering with private causes of action under the terms of the Settlement, but rather is giving consumers the option to determine whether it is in their best interests to accept an immediate refund or to pursue a separate claim before the Commission or in another forum.

For the reasons set forth above, Joint Complainants request that the Commission reject Mr. Ferrare's Exception No. 1 and approve the ALJs' Initial Decision.

JOINT COMPLAINANTS' REPLY TO EXCEPTION 2: Nothing precludes an EGS from agreeing to provide refunds as part of any settlement, and, nevertheless, the Commission specifically has the authority to issue refunds for the violations alleged in the Joint Complaint.

In his Exceptions, Mr. Ferrare next asserts that the ALJs erred in finding that the Commission has the authority to order and/or permit EGSs to refund money relating to "rate disputes." Ferrare Exc. at 6. Joint Complainants submit that nothing precludes an EGS from agreeing to issue refunds as part of any settlement, and, nevertheless, the Commission specifically has the authority to issue refunds for the violations alleged in the Joint Complaint.

In this proceeding, the Commission has already held that nothing precludes an EGS from agreeing to issue refunds as part of a settlement of a Commission proceeding arising pursuant to the Code. Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. IDT Energy, Inc., Docket No. C-2014-2427657, Opinion and Order at 16 (December 18, 2014) (December 18 Order). In fact, the Commission has approved the issuance of refunds that an EGS agreed to as part of a settlement to resolve a complaint. See e.g. Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v.

HIKO Energy, LLC, Docket No. C-2014-2427652, Order (December 3, 2015); see also December 18 Order at 16; see also Pa. PUC Bureau of Investigation and Enforcement v. Public Power, LLC, Docket No. C-2012-2257858, Opinion and Order (December 19, 2013); see also Pa. PUC 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, Opinion and Order (October 2, 2014) (October, 2014 Order). Thus, Joint Complainants submit that the ALJs did not err in approving the Settlement in which IDT agreed to provide refunds to customers.

Mr. Ferrare, however, fails to distinguish this settled proceeding from one which has been litigated, and he asserts that the Commission does not have the authority to issue refunds in “rate disputes.” See Ferrare Exc. at 6. In support of his position, Mr. Ferrare cites Delmarva Power & Light Co. v. Pa. PUC, 870 A.2d 901 (Pa. 2005) (Delmarva). See Ferrare Exc. at 7.

First, Joint Complainants note that Mr. Ferrare mischaracterizes the allegations in the Joint Complaint by summarizing the alleged violations as “rate disputes” and by relying on the holding in Delmarva, which addresses the issue of whether the Commission’s Fiscal Office could assess EGSs for the administrative expenses of the Commission, the OCA, and the Office of Small Business Advocate (OSBA). See Delmarva at 902. In their Joint Complaint, Joint Complainants have alleged, *inter alia*, that IDT engaged in misleading and deceptive practices in violation of the Commission’s Chapter 54 regulations, switched customer accounts without their consent, and charged prices that did not conform to its disclosure statement. See gen’ly Joint Complaint at Counts I-VII. Joint Complainants submit that it is neither proper to characterize

these allegations as “rate disputes” nor to compare the issues in this case to the issue in Delmarva.⁴

Mr. Ferrare further asserts that the Commission lacks authority under 66 Pa. C. S. § 501 (General Powers) to issue refunds in this proceeding. See Ferrare Exc. At 8-9. The Commission has already determined that it has the authority under 66 Pa. C. S. § 501 to issue refunds in this proceeding in its December 18 Order. December 18 Order at 16-18; see also Commonwealth of Pennsylvania, by Attorney General KATHLEEN G. KANE, Through the Bureau of Consumer Protection, And TANYA J. McCLOSKEY, Acting Consumer Advocate v. Blue Pilot Energy, LLC, Docket No. C-2014-2427655, Motion of Vice Chairman John F. Coleman, Jr. (November 13, 2014). Specifically, the Commission held:

Notwithstanding our Section 1312 analysis pursuant to the Code, we hold that the Commission has plenary authority under Section 501, 66 Pa. C.S. § 501, to direct an EGS to issue a credit or refund for an over bill. Under Section 501 and related case law, the Commission has broad authority to enforce the provisions of the Code, including the Electricity Generation Customer Choice and Competition Act (Electric Competition Act), 66 Pa. C.S. §§ 2801-2812, and is vested with broad powers to protect the rights of the public. These powers have been interpreted broadly to include both the express powers conferred by the Code and those implied powers necessarily implicit in the Code. *See Fairview Water Co. v. Pa. PUC*, 509 Pa. 384, 502 A.2d 162 (1985).

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. Having the authority to order EGS credits and/or refunds carries out these statutorily-prescribed consumer protections by ensuring that electric generation supply bills are adjusted accordingly when an EGS, for example, fails to bill a customer in accordance with its disclosure statement, in violation of the Commission’s Chapter 54 Regulations and, in turn, Code Section 2809(b). Thus, having the authority to order EGS billing adjustments, including refunds, under the appropriate circumstances, helps ensure that EGSs comply with the Commission’s

⁴ Joint Complainants provide a more detailed analysis of why Delmarva is not applicable in this case in Joint Complainants’ Reply to Exception 4, below.

Regulations and bill customers in accordance with their disclosure statement - a fundamental consumer protection under the Electric Competition Act. *See* 66 Pa. C.S. § 2802(14) (“ . . . Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other requirements concerning service as the commission deems necessary for the protection of the public.”).

Based on the foregoing, ordering 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 customers receive accurate bills and hence, receive service under reasonable terms and conditions.

December 18 Order at 17-18. (Internal footnotes omitted.) Moreover, in the December 18 Order, the Commission determined that while it does not have the authority under Section 1312 of the Public Utility Code to order EGSs to issue refunds to customers, the Commission can direct EGSs to issue refunds for “slamming” or direct refunds when a customer has, otherwise, been switched to an EGS without the customer’s consent pursuant to 52 Pa. Code § 57.177(b). *Id.* at 16-17.

As Joint Complainants alleged, *inter alia*, that IDT engaged in misleading and deceptive practices in violation of the Commission’s Chapter 54 regulations, switched customer accounts without their consent, and charged prices that did not conform to its disclosure statement, refunds are appropriate in this settled proceeding, and the Commission is within its authority to approve this Settlement.

Therefore, the Commission should reject Mr. Ferrare’s Exception No. 2 and approve the ALJs’ Initial Decision.

JOINT COMPLAINANTS' REPLY TO EXCEPTION 3: The Settlement is comprehensive, appropriate, reasonable under the circumstances and in the public interest.

Intervenor Ferrare argues that the ALJs erred in recommending approval of the Settlement, because the Refund Pool is “grossly insufficient” compared to the amount of actual damages caused by the Company and the number of Pennsylvania consumers harmed. Ferrare Exc. at 10. Specifically, Mr. Ferrare asserts that, given the Company’s overcharges above the Price to Compare from December 2013 through March 2014, the refund amount is insufficient. Id. at 11-12. Mr. Ferrare also argues that the number of affected consumers and the amount of financial harm caused by the Company should be disclosed to the public. Ferrare Exc. at 12.

First, Mr. Ferrare’s argument to the refund amount clearly exceeds Mr. Ferrare’s permitted scope of intervention in this case. Joint Complainants again note that Mr. Ferrare was permitted to intervene on his own behalf only. Thus, Mr. Ferrare’s Exception should be limited to determining whether the refund amount offered to Mr. Ferrare under the Settlement is sufficient compared to the harm that IDT caused Mr. Ferrare. The refund eligibility shall be determined “based on the individual customer’s usage, price charged, and refund amounts already received directly from IDT.” Settlement at ¶ 38(a). At this point, it has not been determined what amount of refund Mr. Ferrare will be offered under the Settlement, if any. Joint Complainants also note that, as pointed out in their Reply to Exception 1 above, if Mr. Ferrare is not offered a refund under the Settlement or is unsatisfied with the amount offered, Mr. Ferrare can choose to forego the refund and pursue his claims against the Company through the Additional Refund Method outlined in Paragraph 40 of the Settlement or through the Class Action or by filing a Formal Complaint at the Commission.

Furthermore, Joint Complainants submit that the Settlement adequately considers the extent of harm suffered by individual customers. Under the terms of the Settlement, refunds

shall be provided to IDT customers who were on variable rate plans and billed for usage in January, February or March 2014. See Settlement at ¶ 38(a). Furthermore, the Settlement provides that Joint Complainants shall determine the refund amount to offer eligible customers based on the individual customer's usage, price charged, and refund amounts already received directly from IDT. Id. As such, the Settlement adequately considers the extent of harm suffered by individual customers.

Joint Complainants also submit that the Joint Petition results from compromises of the factual allegations in the Joint Complaint, which the Joint Complainants intended to prove and which the Company has disputed. The Settlement was reached after extensive discovery, both formal and informal, and information exchanged during settlement negotiations. Joint Petitioners utilized the information exchanged and the information obtained from IDT's customers to tailor the provisions in the Joint Petition to fully resolve all of the allegations in the Joint Complaint. Again, as a settlement, the Joint Petition is the result of compromise by the Joint Petitioners and intended to resolve all of 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. Joint Complainants submit that the Settlement must be considered in its entirety. Joint Complainants further submit that the Settlement is comprehensive, appropriate and reasonable under the circumstances and is in the public interest, as it protects the interests of consumers through: (1) continued government monitoring of the Company; (2) comprehensive injunctive relief that requires IDT to implement various modifications to its business practices; (3) a swift resolution of this matter; and (4) significant relief to eligible customers in the form of refunds.

Therefore, the Commission should reject Mr. Ferrare's Exception No. 3 and approve the ALJs' Initial Decision.

JOINT COMPLAINANTS' REPLY TO EXCEPTION 4: The OCA has the authority to represent consumers of EGSs in proceedings related to Commission regulations governing the retail market and quality of service issues.

Finally, Intervenor Ferrare asserts that the ALJs erred in finding that the OCA has the authority to represent consumers who have not filed complaints with the Commission against EGSs. Ferrare Exc. at 13. Within this argument, Mr. Ferrare incorporates his arguments from his Exceptions Nos. 1 and 2, and, again, asserts that the Commission lacks jurisdiction here. Ferrare Exc. at 13, 15-16. Joint Complainants submit that Mr. Ferrare's assertions are not supported by law and, if interpreted as suggested by Mr. Ferrare, such interpretations would create a result that is not in the public interest.

The OCA has the authority to represent consumers of EGSs in this proceeding. The Office of Consumer Advocate is the agency authorized "to represent the interest of consumers before the Pennsylvania Public Utility Commission." 71 P.S. § 309-1. Intervenor Ferrare correctly states that "Consumer" is defined as follows under 71 P.S. § 309-1:

"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. In his Exceptions, 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 Exc. at 15. As the ALJs recognized in their Initial Decision, however, 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 Initial Decision at 62; see also 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, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators and other entities, 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. Consistent with 15 Pa.C.S. Ch. 74 (relating to generation choice for customers of electric cooperatives), electric cooperative corporations must possess a certificate for service to supply generation services beyond their territorial limits.

(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 their 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. Thus, the OCA has the authority to represent the interest of consumers before the Commission in this proceeding.

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 Commission's regulations and orders in this regard are not violated. See gen'ly Joint Complaint at Counts I-VII. Thus, the OCA has the authority to represent the interest of consumers before the Commission in this proceeding.

In support of his position that EGSs are not public utilities, Mr. Ferrare again relies on Delmarva. Ferrare Exc. at 15-16. As the ALJs recognized in their Initial Decision, Mr. Ferrare has misinterpreted Delmarva, wherein the Pennsylvania Supreme Court held that EGSs are considered public utilities for purposes of quality of service, including standards and billing

practices for residential utility service. Initial Decision at 65. The Pennsylvania Supreme Court's Opinion in Delmarva directly supports the conclusion that the OCA is authorized to represent EGS consumers. As stated above, 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. Thus, Joint Complainants submit that the OCA has the authority to represent consumers before the Commission in this proceeding.

Joint Complainants 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.

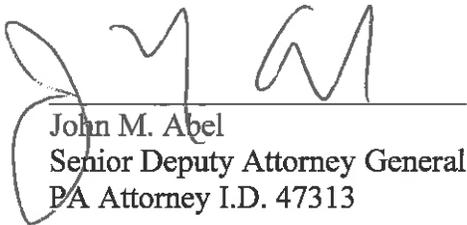
Petitioner Ferrare also argues that the OCA does not have the authority to represent consumers in this matter because the OCA's authority is limited to matters that are properly before the Commission. Ferrare Exc. at 16. Mr. Ferrare refers to his Exceptions 1 and 2 to support his argument that these matters are not properly before the Commission. *Id.* For the reasons discussed in Joint Complainants' Replies to Exceptions 1 and 2, these matters are properly before the Commission and therefore, the OCA has the authority to represent consumers in this proceeding.

Accordingly, Joint Complaints submit that the OCA has the authority to represent consumers against EGSs in proceedings related to Commission regulations governing the retail market and quality of service issues, and the Commission has jurisdiction over these issues. Therefore, the Commission should reject Mr. Ferrare's Exception No. 4.

III. CONCLUSION

For all of the foregoing reasons, Joint Complainants submit that the Commission should reject Mr. Ferrare's Exceptions and approve the ALJs' Initial Decision recommending approval the Settlement.

Respectfully submitted,



John M. Abel
Senior Deputy Attorney General
PA Attorney I.D. 47313

Margarita Tulman
Deputy Attorney General
PA Attorney I.D. 313514

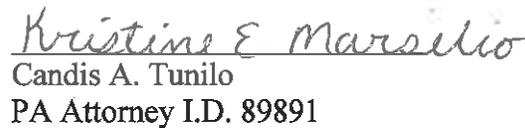
Bureau of Consumer Protection
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
T: (717) 787-9707
F: (717) 787-1190
jabel@attorneygeneral.gov
mtulman@attorneygeneral.gov

Counsel for:

Bruce R. Beemer, First Deputy Attorney General
Office of Attorney General
Bureau of Consumer Protection

Date: December 18, 2015

214630



Kristine E. Marsilio
Candis A. Tunilo
PA Attorney I.D. 89891

Kristine E. Marsilio
PA Attorney I.D. 316479
Assistant Consumer Advocates

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
T: (717) 783-5048
F: (717) 783-7152
ctunilo@paoca.org
kmarsilio@paoca.org

Counsel for:

Tanya J. McCloskey
Acting Consumer Advocate
Office of Consumer Advocate

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	:	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,

Reply Exceptions of Joint Complainants, in the manner and upon the persons listed below:

Dated this 18th day of December 2015.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Kourtney L. Myers, Esq.
Stephanie M. Wimer, Esq.
Michael L. Swindler, Esq.
Bureau of Investigation & Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

Michael A. Gruin, Esq.
Stevens & Lee
17 N. 2nd Street, 16th Fl.
Harrisburg, PA 17101

Sharon Webb, Esq.
Office of Small Business Advocate
Commerce Building, Suite 202
300 North Second Street
Harrisburg, PA 17101

Troy M. Frederick, Esq.
Marcus & Mack, P.C.
57 South Sixth Street
Indiana, PA 15701
Tfrederick@MarcusandMack.com

SERVICE BY E-MAIL ONLY

Scott George, Esq.
Jonathan Shub, Esq.
Seeger Weiss LLP
1515 Market Street, Suite 1380
Philadelphia, PA 19102
jshub@seegerweiss.com
sgeorge@seegerweiss.com

Kristine E. Marsilio

Candis A. Tunilo
Assistant Consumer Advocate
PA Attorney I.D. # 89891
E-Mail: CTunilo@paoca.org
Kristine E. Marsilio
Assistant Consumer Advocate
PA Attorney I.D. # 316479
E-Mail: KRobinson@paoca.org

Counsel for
Office of Consumer Advocate
555 Walnut Street, 5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
185176