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December 31, 2018

VIA ELECTRONIC FILING

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

RE: Pennsylvania Public Utility Commission v. Columbia Gas of Pennsylvania, Inc.; Docket No. R-2018-2647577; **ANSWER OF THE NATURAL GAS SUPPLIER PARTIES TO PETITION FOR RECONSIDERATION OF THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY EFFICIENCY IN PENNSYLVANIA (CAUSE-PA)**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Answer of the Natural Gas Supplier Parties to Petition for Reconsideration of The Coalition For Affordable Utility Services and Energy Efficiency in Pennsylvania in the above-captioned docket. Copies of the Answer have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact my office.

Very truly yours,

Todd S. Stewart
Counsel for
Shiple Choice, LLC, and Interstate Gas Supply,
Inc. d/b/a IGS Energy ("NGS Parties")

TSS/jld

Enclosure

cc: Administrative Law Judge Jeffrey A. Watson
Office of Special Assistants (via email only: ra-OSA@pa.gov)
Per Certificate of Service

CERTIFICATE OF SERVICE

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 52 Pa. Code § 1.54 (relating to service by a party).

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DATED: December 31, 2018



Todd S. Stewart

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,

v.

Columbia Gas of Pennsylvania, Inc.

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Docket Nos.: R-2018-2647577

**ANSWER OF
THE NATURAL GAS SUPPLIER PARTIES
TO PETITION FOR RECONSIDERATION
OF THE COALITION FOR AFFORDABLE UTILITY SERVICES
AND ENERGY EFFICIENCY IN PENNSYLVANIA (CAUSE-PA)**

NOW COMES Shipley Choice, LLC d/b/a Shipley Energy (“Shipley”), and Interstate Gas Supply, Inc. d/b/a IGS Energy (“IGS”) (collectively “NGS Parties”), and hereby answer the Petition for Reconsideration (“Petition”) filed by the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”) in the above-captioned proceeding pursuant to 52 Pa. Code §5.572, *et. seq.* The NGS Parties submit that CAUSE-PA has failed to raise any new or novel arguments and has failed in its effort to suggest that the Pennsylvania Public Utility Commission (“Commission”) overlooked or failed to consider any of its arguments and, accordingly, its Petition must be denied.¹ At the threshold however, and as discussed more completely below, CAUSE-PA’s inaction and failure to raise any of these issues below constitutes a waiver of its ability to raise them for the first time here, and its Petition must be rejected on that basis alone.

¹ Petitions for Reconsideration were filed by the Office of Small Business Advocate and Columbia. The NGS Parties hereby incorporates its Answers, in their entirety, to those Petitions into this Answer by reference thereto.

I. INTRODUCTION

The Commission entered its Opinion and Order (“Opinion and Order”) in this matter on December 6, 2018. Important to the issues raised by CAUSE-PA, the Commission held that Columbia Gas of Pennsylvania’s (“Columbia”) practice of “on bill” billing only for two former affiliates, to the exclusion of the NGS Parties and other providers of non-commodity products and services that are similar to those provided by the former affiliates, and who had requested such service, was discriminatory. Specifically, the Commission held:

We find that Columbia’s billing practice constitutes “service” as the term is defined under Section 102 of the Code, 66 Pa. C.S. § 102, and is subject to the Commission’s jurisdiction to determine whether the practice violates Sections 1502 and 2203(4), 66 Pa. C.S. §§ 1502 and 2203(4) prohibiting discrimination and anti-competitive practices in the provision of service. Further, we find that Columbia’s “on bill” billing practice is unreasonable and discriminatory in this instance.²

As a remedy for this discrimination, the Commission recognized that it could not compel Columbia to provide “on bill” billing for the NGS Parties or similarly situated entities, rather it only could require that if Columbia provides the service, that it must do so on a non-discriminatory basis. Importantly, the Commission recognized the need for “reasonable limitations” if Columbia chooses to continue providing “on bill” billing.

Columbia must comply with Section 1502 of the Code and provide its “on bill” billing policy in a way that is nondiscriminatory. In other words, Columbia must either provide such a service to all entities that provide such non-basic services or must discontinue the “on bill” billing policy. Columbia may not continue to provide this ability to only the two entities referenced in this case. Should Columbia provide the service to all entities providing non-basic services, we recognize the potential need for reasonable limitations...³

² Opinion and Order at 44.

³ Opinion and Order at 50.

In reaching these conclusions, the Commission made it clear that it had reviewed arguments raised by the party most aligned with CAUSE-PA, the OCA, even going to such lengths as to recite the OCA's arguments.

Nonetheless, CAUSE-PA's request for relief – that the Commission order Columbia to cease all “on-bill” billing because allowing it to provide the service would be a change in policy - is legally and factually wrong. The General Assembly authorized the billing service nearly 20 years ago, 66 Pa. C.S. § 2205(c)(3). The only arguable “change” in policy is the Commission correctly acknowledging that billing service implicates the applicable anti-discrimination provisions of the Public Utility Code, 66 Pa. C.S. §§ 1502 and 2203(4). Granting the relief suggested by CAUSE-PA would violate existing law, a law which already contains requirements that Natural Gas Distribution Companies (“NGDC”) bill for the regulated charges of natural gas suppliers (“NGS”). 66 Pa. C.S. § 2205(c)(4). Yet, CAUSE-PA fails to even acknowledge the existence of the statute, let alone offer any argument as to why it does not control the outcome. It is clear that the Commission's Order appropriately addresses the issues and needs no further clarification.

II. STANDARD OF REVIEW

The Commission's standard for granting a Petition for Reconsideration filed under 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572(a) is well-settled:

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553, 559, (1982). Under the standards set forth in *Duick*, a Petition for Reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Duick* at 559. It has also been held that, because a grant of relief on such petitions may result in the disturbance of final orders, it should be granted judiciously and only under

appropriate circumstances. *West Penn Power v. Pennsylvania Public Utility Commission*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

We note that any issue, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).⁴

Accordingly, to meet the standard, not only must a party raise a “new and novel” argument, it also must overcome the threshold notion that the Commission must not stand up and knock down every argument raised by every party below.

In this case, however, and as noted above, CAUSE-PA did not provide the Commission with any prior opportunity to know of its arguments, and so CAUSE-PA cannot now suggest that the Commission overlooked them.

III. ARGUMENT

A. CAUSE-PA’s Petition fails to Satisfy the Appropriate Standard for a Grant of Reconsideration.

CAUSE-PA has failed to meet the *Duick* standard. That is, it has failed to raise any argument that has not been raised before.⁵ CAUSE-PA has failed to explain why it has entirely failed to raise any arguments prior to the instant Petition. Rather, it takes the rather brazen

⁴ *Petition of Duquesne Light Company for Approval of its Energy Efficiency and Conservation Plan; Petition for Reconsideration of the Office of Small Business Advocate*; Docket No. M-2009-2093217 (Opinion and Order entered December 23, 2009 at 3).

⁵ Indeed, the Commission’s Opinion and Order does recite the entire litany of arguments raised by the OCA: 1) concerns regarding on-bill billing for non-commodity products offered by third parties (Opinion and Order at 39); 2) the need for a thorough review to ensure consumer protections are adequate (*Id.*); 3) that NGSs should not be permitted to procure “on-bill” billing from Columbia but providing the service to two former affiliates was acceptable (Opinion and Order at 40); 4) the deficiency of the record on how non-commodity services are marketed (*Id.*); 5) Columbia’s authority to provide “on-bill” billing because it has no tariff nor Commission order approving it (*Id.*); 6) the NGS Parties’ alleged failure to prove that requiring Columbia to provide “on-bill” billing to them is a reasonable solution (Opinion and Order at 43); 7) the consumer protection concerns, including customer confusion over inclusion of a line item for non-commodity products and including the charge in the total due (*Id.*) – among others. But as a consequence of CAUSE-PA’s failure to brief its issues at any phase, the same cannot be said of its arguments here.

approach to suggest that the Commission has overlooked arguments that were never made. It is not the job of the Commission to imagine what arguments parties would have made and to then address them in its Orders. As discussed below, the Petition should be denied outright because it waived its opportunity to raise any argument now by having failed to raise any arguments earlier in the proceeding and for failing to meet the appropriate standard for review of such a Petition.

B. CAUSE-PA Waived Its Opportunity to File for Reconsideration by not Raising the Issues Earlier in the Case.

CAUSE-PA filed neither a brief, a reply brief, exceptions nor replies, and accordingly has forfeited every opportunity to inform the Commission of its position and its Petition for Reconsideration should be denied on the basis of that waiver alone. It is disingenuous at best for CAUSE-PA to suggest that the Commission disregarded arguments that it did not raise. If CAUSE-PA thought its concerns were so critical, it should have filed replies to the NGS Parties' Exceptions to preserve them. It did not, which constitutes a waiver of its ability to do so, and its Petition should be disregarded as well.

The Commission has applied the principle of waiver when a party has failed to raise an argument earlier in a proceeding. *See Ruth Matieu-Alce v. Philadelphia Gas Works*, Docket No. F-2015-2473661 (Order entered April 7, 2016) at 10 (“in the interest of judicial economy, the Commission will not grant exceptions or reconsideration when the party failed to raise an argument earlier in the proceeding.”); *see also, Pa. PUC v. Uber Technologies, Inc. et al.*, Docket No. C-2014-2422723 (finding that Uber waived its constitutional arguments pertaining to alleged excessiveness of civil penalty when it could have raised its constitutional claims “in its briefs to the ALJs and within its Exceptions but declined to do so” and further opining that “Uber’s last minute attempt to add constitutional arguments to its previous legal theory of excessiveness strikes us as the type of piecemeal advocacy the waiver doctrine was intended to prevent.”).

The Pennsylvania Supreme Court explained the waiver doctrine in *DeMarco v. Jones & Laughlin Steel Corp.*, noting that issues not raised or presented at the trial stage will not be considered on appellate review. 513 Pa. 526, 530-31, 522 A.2d 26, 28 (citing *Dilliplaine v. Lehigh Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974) (*Dilliplaine*), and *Commonwealth v. Clair*, 458 Pa. 418, 326 A.2d 272 (1974) (*Clair*)).

Appellate court consideration of issues not raised in the trial court results in the trial becoming merely a dress rehearsal. This process removes the professional necessity for trial counsel to be prepared to litigate the case fully at trial and to create a record adequate for appellate review. The ill-prepared advocate's hope is that an appellate court will come to his aid after the fact and afford him relief despite his failure at trial to object to an alleged error. The diligent and prepared trial lawyer-and his client-are penalized when an entire case is retried because an appellate court reverses on the basis of an error opposing counsel failed to call to the trial court's attention.⁶

The Supreme Court further explained that the waiver doctrine applies to administrative proceedings. *DeMarco*, 513 Pa. at 531, 522 A.2d at 29 (citing *Wing v. Unemployment Compensation Board of Review*, 496 Pa. 113, 436 A.2d 179 (1981) (*Wing*)).

The *Dilliplaine* and *Clair* rationales are perfectly apposite in administrative law cases as well: the administrative law tribunal must be given the opportunity to correct its errors *as early as possible*; diligent preparation and effective advocacy before the tribunal must be encouraged by requiring the parties to develop complete records and advance all legal theories; and the finality of the lower tribunals' determinations must not be eroded by treating each determination as part of a sequence of piecemeal adjudications.⁷

Simply put, by failing at every prior stage of this proceeding to raise any of these legal issues, CAUSE-PA has waived its right to do so.

C. The Contention that “on-bill” billing is a “policy change” is an incorrect statement of the law.

⁶ *Dilliplaine*, 457 Pa. at 257, 322 A.2d at 116

⁷ *Wing*, 496 Pa. at 117, 436 A.2d at 180-81 (1981) (emphasis added).

At issue in this proceeding is the practice of “on-bill” billing. *The Natural Gas Choice and Competition Act*, 66 Pa. C.S. § 2205(c)(3), specifically authorizes NGDCs, such as Columbia to provide billing services for NGSs and other entities, and to recover the costs thereof from the party using the service. Accordingly, the argument that the Commission’s authorizing Columbia to provide “on-bill” billing to all providers of non-commodity services is contrary to current “policy” – completely misses the mark.⁸ Likewise, suggesting that the NGS Parties bear the burden of proving that the service is just or reasonable is also off-target, given the clear statutory authorization of the service. It is telling that not once in the eleven plus pages of its Petition does CAUSE-PA even note that there is a statute directly on point, nor does it ever attempt to explain why it thinks the statute does not control the outcome. The reason is clear – any recognition of the statute renders inert CAUSE-PA’s argument that the NGS Parties bear the burden of proving the efficacy of on-bill billing. The statute controls.

Even if the Commission were to engage in the rulemaking process, any resulting regulations could not deviate from the specific requirements of the statute, which authorizes the service. The Commission found that the service, as it is currently being provided by Columbia, is discriminatory and has ordered Columbia either to cease providing the service, or to provide it to all comers in a “non-discriminatory” manor, subject to “reasonable limitations”.⁹

Like the OCA, CAUSE-PA asks the Commission to reconsider its order that Columbia either not provide the billing service or provide it to all providers of non-commodity services subject to reasonable limitations, and instead, and contrary to the express authority of 66 Pa. C.S. § 2205(c)(3), prevent Columbia from providing the service at all. Simply stated, there is no

⁸ It is important to note that the Commission did not require Columbia to provide on-bill billing for anyone. Rather, it required that if Columbia is inclined to offer the service, it must do so without discriminating.

⁹ Opinion and Order at 50.

requirement in the statute that the Commission promulgate regulations on the provision of billing service, apart from the general requirements that already apply – non-discrimination for example. There is nothing on the record of this proceeding to suggest that the manner in which Columbia otherwise provides the service or would provide the service to the NGS Parties if it chooses that path, would violate the applicable regulations. If there were any actual evidence, not conjecture, of any deviation from the applicable requirements, such was not placed into the record and CAUSE-PA cannot now suggest that such exists. What it appears CAUSE-PA desires, is for the Commission to establish a rulemaking, where none is required, before allowing an NGDC to provide a service that is clearly authorized by statute. If there were an actual factual basis for a such rulemaking, the appropriate course would be to petition for one under 52 Pa. Code § 5.43 and state the “facts claimed to constitute the grounds requiring the regulation.” Vague and general concerns cannot stand in the way of the plain statutory language.

In its attempt to impugn the motives of the NGS Parties, CAUSE-PA resorts to outrageous contentions made by witnesses below that have no basis in fact: suggesting that suppliers intend to confuse and manipulate customers, conflate charges, and commit other outrageous and equally fictional acts. These arguments were already raised by other parties in this proceeding (namely the OCA and CPA), and the Commission correctly addressed these arguments as unreasonable and merely speculative. The fact remains that customers are intelligent enough to make their own decisions about the products and services they desire. Allowing customers to conveniently receive additional products and services with their natural gas service will only benefit customers - irrespective of CAUSE-PA’s unsupported contentions.

What the NGS Parties seek in this case is clear, they desire to be on the same footing as Columbia’s former affiliates and have Columbia bill for the same sorts of products and services.

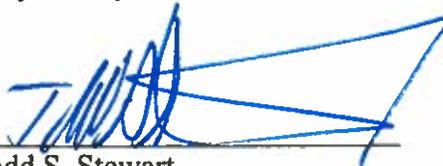
A fair review of the record makes that point clearly. With regard to CAUSE-PA's argument that the cost recovery mechanism is vague, it is belied by the fact that Columbia already provides the very same service for other entities, and the statute requires the charges, at a minimum, recover the incremental costs of the service, which is consistent with the NGS Parties' position. Further, given that Columbia already makes this service available to two entities (and presumably already charges them the cost of service) it should be straight forward to calculate any incremental costs of allowing additional suppliers to access the billing services.

IV. CONCLUSION

CAUSE-PA has stated no new or novel arguments that have not already been addressed and defeated in this proceeding. Moreover, it has waived its ability to raise any such argument at this stage of the proceeding by failing to have raised it earlier. There simply is no basis to modify the Opinion and Order, and CAUSE-PA's Petition must be denied.

WHEREFORE, the NGS Parties respectfully request that this Commission deny the OCA's Petition for Reconsideration.

Respectfully submitted,



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