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December 4, 2019

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105-3265

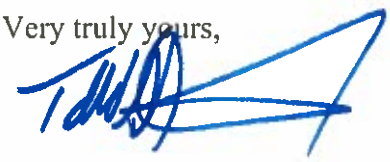
RE: Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy v. Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and WestPenn Power Company; Docket Nos. C-2019-3013805, C-2019-3013806, C-2019-3013807, and C-2019-3013808; **ANSWER OF INTERSTATE GAS SUPPLY, INC., DIRECT ENERGY AND SHIPLEY CHOICE TO NEW MATTER OF METROPOLITAN EDISON COMPANY, ET AL.**

Dear Secretary Chiavetta:

Please find enclosed for filing with the Commission the Answer of Interstate Gas Supply, Inc. d/b/a IGS Energy ("IGS"), Direct Energy Services LLC ("Direct Energy"), and Shipley Choice, LLC d/b/a Shipley Energy ("Shipley") (collectively, the "EGS Parties") to New Matter of Metropolitan Edison Company, et al. in the above matter. 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, please do not hesitate to contact me.

Very truly yours,



Todd S. Stewart
Counsel to EGS Parties

TSS/jld
Enclosures
cc: 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).

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

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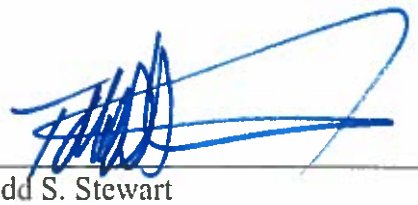
DATED: December 4, 2019



Todd S. Stewart

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC, and Shipley Choice, LLC d/b/a Shipley Energy Complainants	:	Docket No. C-2019-3013805
	:	C-2019-3013806
v.	:	C-2019-3013807
	:	C-2019-3013808
Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and WestPenn Power Company Respondents	:	

ANSWER OF INTERSTATE GAS SUPPLY, DIRECT ENERGY AND SHIPLEY CHOICE TO NEW MATTER OF METROPOLITAN EDISON COMPANY, ET AL

NOW COME, Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC, and Shipley Choice, LLC d/b/a Shipley Energy (collectively, "Complainants"), and hereby respond to the New Matter included in the Answers of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and WestPenn Power Company (collectively, "Respondents"), pursuant to 52 Pa. Code § 5.63.

On October 25, 2019, Complainants in the above-captioned matters filed formal complaints with the Pennsylvania Public Utility Commission ("Commission") against each of the four FirstEnergy electric distribution company ("EDC") operating units in Pennsylvania. The Complaints are identical and allege that each of the four FirstEnergy EDCs include charges for non-commodity products and services provided by FirstEnergy on the EDC utility bill, while at

the same time refusing to bill for similar products and services provided by electric generation suppliers serving customers on its system. The Complaints allege that such a refusal constitutes unwarranted discrimination in service in violation of 66 Pa. C.S. § 1502 and 66 Pa. C.S. § 2804(6), as applied in the holding of the Commission's recent decision in *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, et seq., (Opinion and Order entered December 6, 2018) "*Columbia*").

On November 14, 2019, Respondents served Complainants with an answer to the Complaints in which FirstEnergy admits that it provides the on-bill billing service for its own use while refusing to provide the same service for EGSs; but in which FirstEnergy denies that such a position is discriminatory or in any way violates the Public Utility Code, 66 Pa. C.S. § 101, *et seq.* Included in Respondents' Answer, in paragraphs 9-24, was New Matter. The purpose of this pleading is to Respond to the New Matter raised by Respondents.

ANSWER TO NEW MATTER[1]

9. Paragraph 9 is an incorporation clause that references Respondents' answer and incorporates it by reference. To the extent permitted by the Commission's Regulations that prohibit answers to Answers, Complainants deny any allegation of fact or law that is not consistent with their Complaints or this answer to New Matter.

10. Denied, in part. Respondents' claims in ¶ 10 are denied to the extent that they contend that it is not appropriate or otherwise permissible to file a complaint regarding the legality of a service, or tariff, of a public utility. Respondents allege that the Supplier Coordination tariffs

[1] For the convenience of the reader, this Answer will number its responses to the corresponding paragraph numbers of Respondents' New Matter.

of each Respondent, prohibit EGSs from billing non-commodity products and services through the respective Respondent's purchase of receivables ("POR") program and that the POR program is mandatory for consolidated billing for certain rate classes. Because Complainant's are not seeking to have charges for non-commodity products and services included in the POR program, that is not an issue in dispute. However, the fact that Respondents bill for their non-commodity products and services, outside of the POR process, and refuse to do the same for EGSs, is the crux of the discrimination at issue in this matter and Complainants deny that such practice is permitted under the law, regardless of what Respondents' tariffs might state.

11. Denied. It is Denied that any of the Complainants signed the Settlement in the most recent default service proceeding for the Respondents.[2] While RESA may have agreed, it's intervention and longstanding precedent make clear that RESA maintains an identity separate from that of its members for purposes of participation in Commission matters and those members cannot be imputed to have participated in any such proceeding unless they participate on their own accord. Accordingly, as discussed below, to the extent that ¶ 11 intends to imply some sort of estoppel argument regarding billing for non-commodity products and services, such an argument is wholly lacking in merit.

12. Denied. As discussed below, to the extent that ¶ 12 intends to imply some sort of estoppel argument regarding billing for non-commodity products and services, such an argument is wholly lacking in merit. The fact that RESA may have signed a settlement, that by its own terms makes it clear that "the partial settlement terms are agreed to without any admission against or prejudice to and position which Joint Petitioners might adopt during subsequent litigation of this

[2] *Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 though May 31, 2023*, Docket Nos. P-2017-2637855, et al., (Order entered September 4, 2018) ("DSP V").

case or any other case."[3] It is also clear that one of the Complainants here is not a member of RESA and did not participate in the DSP V case in any capacity.

13. Section 316 of the Public Utility Code, 66 Pa. C.S. § 316, speaks for itself.

14. Section 316 of the Public Utility Code, 66 Pa. C.S. § 316, speaks for itself and any characterization of § 316 is denied.

15. Denied. The purpose and intent of Section 316 is to ensure that once the Commission reaches a determination, the "facts found" are conclusive on all parties "affected thereby". By its own terms, Section 316 makes findings conclusive, not orders. In this instance, Respondents fail to recite a single finding of fact that would be conclusive. Nor is the present action a collateral attack on a Commission Order in any prior case. Rather, the complaint seeks prospective relief, in the form of a finding that a practice (on bill billing for itself and not for EGSs), which may be in some respect enshrined in a tariff, that was not specifically litigated in any prior case, is discriminatory and illegal in light of a recent holding in an unrelated matter. To the extent that Respondents are attempting to create a collateral estoppel argument, such a reference is likewise misplaced. Under Pennsylvania law, in order for a Complaint to be dismissed with respect to Collateral Estoppel, each of the following four factors must be met: 1) the issue decided in the prior adjudication was identical with the one presented in the later action, 2) there was a final judgment on the merits, 3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and 4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action. *GPU Indus. Intervenors v. Pennsylvania Pub. Util. Comm'n*, 156 Pa. Cmwlth. 626, 628 A.2d 1187 (1993); *See also Safeguard Mut. Ins. Co. v. Williams*, 463 Pa. 567, 574–75, 345 A.2d 664, 668 (1975); *Rue v.*

[3] *DSP V*, Joint Petition for Partial Settlement, para. 14.

K-Mart Corp., 552 Pa. 13, 713 A.2d 82 (1998); *Stilp v. Com. of PA, et al.*, 910 A.2d 775, 784 (Pa. Com. Ct. 2006). Additionally, our Commonwealth Court has held that: "[T]he objecting party must show that '*the fact or facts at issue in both instances were identical;* [and] that these facts were essential to the first judgment *and were actually litigated in the first cause.*" *Schubach v. Silver,* 461 Pa. 366, 377, 336 A.2d 328, 334 (1975). Further, our Commonwealth Court has held that "the party against whom a plea of collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in question in a prior action. *In re Ellis' Estate,* 460 Pa. 281, 287, 333 A.2d 728, 731 (1975); *see also GPU Indus. Intervenors v. Pennsylvania Pub. Util. Comm'n*, 156 Pa. Cmwlth. 626, 628 A.2d 1187 (1993).

16. Denied. In this case, none of the four factors for collateral estoppel are met: 1) the issues are not identical, that is the issue of the discriminatory nature of First Energy providing on-bill billing for itself while refusing to provide the same service for EGSs was not raised or litigated to completion; 2) there was no final judgement on the merits in the DSP V case regarding whether the on bill billing is dissimilatory; 3) there are no parties in privity in this case that would be precluded from raising the issue here; and, 4) the issue was not litigated fully in the earlier case, which was settled. Simply put, there is no basis for the allegation that the Complainants be collaterally estopped from raising the issues raised in their Complaint.

17. Denied. It is clear that Section 316 renders as conclusive only "findings" by the Commission and yet Respondents cite to no finding that is purportedly conclusive. Rather, Respondents characterizes Section 316 in a such a way that if it were ever adopted, would prevent any litigation, ever in the future, of any broad subject matter ever litigated in a prior case, or which arguably could have been litigated in such a case. In this case, the issue of discrimination was not

litigated, and it is telling that Respondents cite not a single competent case to support their baseless position.

18. The legal conclusions in Paragraph 18 are denied. Contrary to the Respondents' assertions, the holding in the *Columbia* matter is directly on point. The service in question is the billing service. In this case, FirstEnergy provides non-commodity products to its customers and then bills for those products on the "utility" bill, while refusing this sort of access to the billing service to EGSs that provide the same or similar services. In *Columbia* the utility did indeed provide the on-bill billing service to third parties, but the Commission found that Columbia's conduct not only violated Section 1502 of the Code, which prohibits discrimination in service generally which would apply here as well, but also that it violated Section 2203(4) (which is virtually identical to 66 Pa. C.S.§ 2804(6)) and which requires an EDC to provide transmission and distribution service to all customers and suppliers on terms that are "comparable to the utility's own use of its system." That means Respondents must provide all customers with substantially the same services regardless of whether they take service from the utility or an EGS. In this case FirstEnergy admits that it is not doing so. First Energy admits it is providing an advantage to certain customers, vis a vis the utility bill that it refuses to provide to others and the purveyors of those services, and it is providing its own business an unwarranted advantage over similarly situated competitors. This is the same violation the Commission found in *Columbia.* Simply put, in the provision of distribution service, which includes the rendering of bills, Respondents are favoring, one entity, themselves, over EGSs.

19. It is denied that Respondents' provision of on-bill billing to itself is reasonable. It also is denied that there is no rule that prevents a utility from billing its own customers for non-commodity products while refusing to provide the same billing service for other similarly situated

parties – in this case, the EGSs. As discussed in ¶ 18 above, 66 Pa. C.S. § 2804(6), squarely addresses the issue.

20. Denied. Respondents' unsubstantiated and speculative claims as to the cost and/or complexity of expanding its non-commodity billing infrastructure to include charges for EGS customers are denied.

21. Denied. The Complaint does not request that charges for non-commodity products be subject to the POR program, as such products typically cannot be the basis of termination of service for non-payment, as can energy charges. Accordingly, the red herring claims regarding the operation of POR should be disregarded as being beyond the scope of the complaint.

22. Denied. The highly speculative claims that the Company "might" accidentally terminate service to a customer for non-payment of non-commodity charges would apply equally to the Respondents' charges for its own non-commodity services, are denied. This allegation begs the question of whether FirstEnergy presently is terminating service for customers who fail to pay its non-commodity charges?

23. Denied. Respondents currently bill for EGS commodity charges, and customers have proven quite adept at recognizing the difference between the EDC and an EGS. There is no evidence to suggest that a different result would arise with respect to non-commodity products.

24. Denied. It is denied that the Complaint is a collateral attack on any Commission Order. The Company's prohibition against any party other than itself using the utility bill to bill for non-commodity products and services is discriminatory and contrary to law. The Commission has made no prior findings on First Energy's discriminatory practices violate the Public Utility Code and the discriminatory conduct has not been litigated prior to this Complaint.

WHEREFORE, Complainants respectfully request that the Commission sustain their complaint, and determine that Respondents' actions are in violation of the Public Utility Code and Commission Orders, and require immediately that Respondents begin a process to allow for EGSs serving customers on its system be permitted to include charges for non-commodity products and services on the FirstEnergy distribution bill.

Respectfully submitted,

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DATED: December 4, 2019