**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interstate Gas Supply, Inc., *et al*. :

:

v. : C-2019-3013805

: C-2019-3013806

Metropolitan Edison Company, : C-2019-3013807

Pennsylvania Electric Company, : C-2019-3013808

Pennsylvania Power Company and :

West Penn Power Company :

**ORDER**

**GRANTING MOTION TO COMPEL**

**FILED BY INTERSTATE GAS SUPPLY, INC. *et al.***

Introduction

On October 25, 2019, Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy (collectively referred to as “the EGSs”) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (collectively “the EDCs”). The Commission assigned the following four docket numbers, one for each respondent, to the complaint: C-2019-3013805, C-2019-3013806, C-2019-3013807 and C-2019-3013808.

In their complaint, the EGSs averred that the EDCs conduct of providing a billing service, known in the industry as “on-bill” billing, for non-commodity products and services that it provides for the benefit of its electric distribution customers, while refusing to provide on-bill billing for EGSs serving customers on its systems, violates Sections 1502 and 2804(6) of the Public Utility Code, as well as a Commission Opinion and Order in a recent similar case in the natural gas industry. The EGSs provided substantial argument and attachments to their complaint in support of their position and requested that the Commission find that the EDCs’ refusal to provide on-bill billing for EGSs operating in their system violates the Public Utility Code and, as a remedy, require the EDCs to provide a similar service to the EGSs operating on their systems.

On November 14, 2019, the EDCs filed an answer and new matter in response to the EGSs’ complaint. In their answer, the EDCs admitted or denied the various averments made by the EGSs in their complaint. In particular, the EDCs admitted that they offer non-commodity products and services to their customers but have not authorized the EGSs to bill for non-commodity products and services on the EDCs monthly electric service bills. In its new matter, which was accompanied by a notice to plead, the EDCs argued that the EGSs’ tariffs prohibit the relief requested in the formal complaint. The EDCs further argued that these tariffs were recently approved as part of their default service plan in 2018 which the EGSs’ were served a copy of. The EDCs also addressed other issues raised by the EGSs in their complaint and requested that the complaint be dismissed with prejudice.

On December 4, 2019, the EGSs filed an answer to the EDCs’ new matter. In its answer, the EGSs denied the EDCs’ claim to the extent they contend it is not appropriate or otherwise permissible to file a complaint regarding the legality of a service or tariff of a public utility. The EGSs also denied, among other things, the EDCs’ averment regarding their participation in the EDCs’ default service plans in 2018 and its impact on the complaint. The EGSs requested that their complaint be sustained and their relief requested granted.

On December 23, 2019, a prehearing conference notice was issued establishing a prehearing conference for this matter for Monday, February 3, 2020 at 10:00 a.m. in hearing room 5 of the Commonwealth Keystone Building in Harrisburg. On December 26, 2019, a prehearing order was issued that set forth various rules that will govern the hearing.

On December 30, 2019, the EGSs filed a motion to dismiss objections and compel responses to interrogatories and request for production of documents, set I numbers 1, 2, 5 and 6. In its motion, the EGSs first argued that the EDCs’ objections to interrogatories set I numbers 2, 5 and 6 are untimely and do not comply with the Commission’s regulations regarding objections. The EGSs next argued that the issue of which corporate entity actually provides the non-commodity products and services is at issue in this matter and the interrogatories are within the scope of the proceeding. The EGSs also argued that the interrogatories seek to explore the new matter raised by the EDCs, as well as other claims made by the EDCs. The EGSs argued that the information sought in the contested interrogatories is relevant to this proceeding and the objections must be dismissed.

On January 6, 2020, the EDCs filed an answer to the EGSs’ motion. In their answer, the EDCs argued that the interrogatories improperly seek information that is irrelevant, outside the scope of this proceeding and beyond the Commission’s jurisdiction because the interrogatories seek information related to the EDCs’ out-of-state affiliates and holding company. The EDCs argued that such information is outside the scope of the formal complaint and irrelevant. The EDCs also responded to the EGSs’ argument that the objections should be denied because they are untimely by arguing that the error or defect of procedure should be disregarded because no substantive rights of the parties have been affected.

The EGSs’ motion to compel is now ready for disposition. For the reasons discussed below, the EGSs’ motion will be granted.

Legal Standard

The Commission’s regulations allow parties the opportunity to conduct discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party. 52 Pa.Code § 5.321(c). It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. Id. Discovery is not permitted, however, if it is sought in bad faith; would cause unreasonable annoyance, embarrassment, oppression, burden or expense; relates to a matter which is privileged; or would require the making of an unreasonable investigation by the deponent, a party or witness. 52 Pa.Code § 5.361(a); *see also*, City of Pittsburgh v. Pa.P.U.C., 526 A.2d 1243 (Pa.Cmwlth 1987), *alloc. denied*, 538 A.2d 880 (Pa. 1988).

Information is relevant if it tends to establish a material fact, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. *See*, Petition of the Borough of Cornwall for a Declaratory Order that the Provision of Water Service to Isolated Customers Adjoining its Boundaries Does Not Constitute Provision of Public Utility Service Under § 102, Docket Number P-2015-2476211 (Order dated September 11, 2015) at 9-10, *citing*, Smith v. Morrison, 47 A.3d 1311 (Pa.Super 2012), *alloc. denied*, 57 A.3d 71 (Pa. 2012). Relevancy in discovery is broader than the standard used for admission of evidence at a hearing. Id. at 10, *citing*, Com. v. TAP Pharmaceutical Products, Inc., 904 A.2d 986 (Pa.Cmwlth 2006). The party objecting to discovery has the burden to establish that the requested information is not relevant or discoverable with any doubts regarding relevancy being resolved in favor of discovery. Id.

Interrogatories

Interrogatories set I numbers 1, 2, 5 and 6 provide as follows:

1. With regard to FirstEnergy's Answer and New Matter, ¶ 5, and its denial that "changes to the companies' billing systems to allow for non-commodity product and service charges by third parties would not be significant."

a. Provide all studies, investigations, cost assessments internal work products or similar analysis that were undertaken by FirstEnergy, its affiliates or any third party on behalf of same, to ascertain the scope of work or costs that would be required to modify the FirstEnergy billing system to accommodate billing for non-commodity products and services.

b. Has FirstEnergy provided on-bill billing for EGSs within the last 10 years in any jurisdiction (i.e., within or outside Pennsylvania) in which it operates? If the answer is yes, identify the EGS, the jurisdiction(s) and provide copies of any agreements or other documents related to the provision of such billing service.

c. Does FirstEnergy or any of its affiliates in any jurisdiction (i.e., within or outside the Commonwealth) provide or have provided on-bill billing for any non-EGSs in the last 10 years? If the answer is yes, please identify each and every non-EGS, the jurisdiction(s) and provide copies of any agreements or other documents related to the provision of such billing service.

1. With regard to FirstEnergy’s Answer and New Matter ¶ 19, and the contention that billing for FirstEnergy’s products and services is “perfectly reasonable”; provide a copy of any affiliated interest agreements between FirstEnergy and its Pennsylvania affiliates regarding said practice. Provide the following:
   1. The development costs of adapting FirstEnergy’s billing system to allow it to bill non-commodity products and services;
   2. If the option to provide non-commodity billing was not an “add-on” to the FE billing system, (i.e., was included in the initial specifications) provide any and all cost estimates or proposals that identify the development and implementation costs of including the non-commodity billing functionality; The annual operation and maintenance costs incurred by any FirstEnergy entity to operate the billing system for the previous 5 years, and any portion of its billing system that bills non-commodity products and services, broken down by month and by EDC; and
   3. Does FirstEnergy or any of its Pennsylvania affiliates intentionally terminate customers’ electricity service for failure to pay any non-commodity charges?

5. With regard to FirstEnergy’s Answer and New Matter ¶ 22, has FirstEnergy or any of its affiliates ever terminated electric service to a customer for failing to pay non-commodity charges on their utility bill? Describe each and every incident in the most recent 5 years including the date of any termination, the service territory and the duration of the termination.

6. Does FirstEnergy or any of its affiliates allow charges for non-commodity products and services to be paid using budget billing? If the answer is anything but “No”, explain how such charges are separated from regulated charges, and describe the mechanism for ensuring that customers are not terminated for failing to pay charges for non-commodity charges in that context?

Position of the parties

The EDCs provided the same objection to all four interrogatories:

The Companies object to this request to the extent that it seeks information regarding the Companies’ parent company, FirstEnergy Corp., and the Companies’ affiliate utilities located in other states, which are outside the scope of this proceeding and jurisdiction of the Pennsylvania Public Utility Commission. Moreover, none of these entities are parties within the context of the Answer and New Matter in this proceeding.

In their motion to compel, the EGSs argued that the complaint involves billing for products that the EDCs alleged they provide on their own, but which were alleged in the complaint to be provided by First Energy, the EDCs’ parent company, and, therefore, the issue of which corporate entity actually provides the non-commodity products and services is at issue in this matter. The EGSs also argued that because the complaint alleges that the EDCs refusal to provide on-bill billing for the EGSs constitutes discrimination that it is within the scope of the proceeding to determine whether First Energy or any affiliate of the EDCs provides a similar service. The EGSs argued that such evidence would support their claims that providing similar service to the EGSs would not impose significant costs on the EDCs. The EGSs also argued that the interrogatories seek to explore contentions placed at issue by the EDCs in their new matter and that the EDCs cannot make such an allegation and not responded to discovery on the objection.

In their answer to the motion to compel, the EDCs argued that information related to the EDCs’ affiliates in other states and to First Energy is irrelevant and outside the scope of the complaint proceeding because the entities are outside of the Commission’s jurisdiction and beyond the scope of the formal complaint. The EDCs further argued that these interrogatories are outside the scope of the formal complaint because the formal complaint pertains to the EDCs and information related to out-of-state affiliates and holding company is not relevant.

Furthermore, with regard to the argument that the EDCs’ objections should be dismissed because they are untimely, the EGSs noted that the EDCs originally only served objections to interrogatory set 1 number 1 on December 19, 2019. The EGSs added that the EDCs then served objections to interrogatories set 1 numbers 2, 5 and 6 on December 23, 2019 and claimed that those objections were inadvertently left off of the first submission. The EGSs argued that because the objections are untimely without good excuse and because the timing of the objections occurred during the holidays, they have been prejudiced and the objections should be dismissed out of hand.

In their answer to the motion to compel, the EDCs argued that the EGSs’ claims that the objections are untimely should be disregarded. The EDCs argued that there was an administrative error that resulted in no prejudice to the EGSs who timely received the substance of the objections and the administrative error should be disregarded. The EDCs noted that the Commission’s regulations allow any error or defect of procedure to be disregarded if the substantive rights of the parties are not affected.

Disposition

As a preliminary matter, I agree with the EDCs that the EGSs’ argument that the EDCs’ objections should be denied because they are untimely or insufficient is without merit and should be rejected. As the EDCs noted in their answer to the motion to compel, the Commission’s regulations provide that its rules

…shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

52 Pa.Code § 1.2(a). It is unclear what substantive rights of the EGSs would be affected by the delay caused by the EDCs’ administrative error. The EGSs subsequently filed a motion to compel that is being considered as part of this order. Furthermore, the prehearing conference for this matter is February 3, 2020 and no procedural schedule has yet been set for this case. Therefore, there is no prejudice to the EGSs that they suffer as a result of the delay of two-business days before the procedural error was corrected. The motion to compel is still being considered and a procedural schedule for this matter has not yet been established. To grant the EDCs’ objections because of this two-day delay would not secure the just, speedy and inexpensive determination of this proceeding. The EDCs objections will not be dismissed for that reason.

Regarding the substance of the EDCs’ objections, however, the EGSs’ motion to compel will be granted. The EDCs’ argument that their affiliates and parent company are outside the Commission’s jurisdiction is without merit and will be rejected. There is no requirement in the Commission’s scope of discovery that the Commission have jurisdiction over the subject matter of the interrogatory. As noted above, discovery is allowed regarding any matter that is not privileged and which is relevant so long as it is not sought in bad faith, unreasonably annoying, embarrassing, oppressive, burdensome or expensive, is privileged or would require the making of an unreasonable investigation. 52 Pa.Code § 5.361(a). Information is relevant if it tends to establish a material fact or make a fact at issue more or less probable. There is no requirement that the Commission have jurisdiction over the subject matter of the interrogatory. The information sought in interrogatories set I numbers 1, 2, 5 and 6 tends to establish a material fact or make a fact more less probable and is not precluded for the reasons identified in the Commission’s regulations.

It is reasonable, for example, that the EGSs inquire about the EDCs denial in its answer and new matter that the changes to their billing systems to allow what the EGSs seek in this complaint would not be significant. The EGSs are correct that whether those changes would be significant in other jurisdictions is relevant whether to the EDCs failure to provide them in Pennsylvania is discriminatory. If the EDCs can provide those services in other jurisdictions then the EDCs failure to provide those services in Pennsylvania without reason may be discriminatory and in violation of the Public Utility Code. Similarly, the EDCs’ practices in other jurisdictions regarding termination of service for failure to pay any non-commodity charges and whether the non-commodity products and services can be paid using budget billing is relevant to whether such products and services can be provided in Pennsylvania. Whether such answers are admissible into the record of this proceeding, however, can be determined when and if the EGSs seek to admit such evidence into the record. At present, however, such information is within the scope of discovery and the EDCs’ objections will be dismissed.

Furthermore, the EDCs’ argument that all relevant information was already provided by the EDCs in response to the EGSs’ discovery is not an objection to discovery but an answer. To the extent that the EDCs have already provided information and have no more information to provide, that is a sufficient answer to the interrogatories. The EDCs have otherwise provided no valid argument that warrants denying the EGSs’ motion and sustaining their objections.

Conclusion

In conclusion, the motion to compel filed by the EGSs seeking to compel answers to interrogatories set I numbers 1, 2, 5 and 6 will be granted. There is no effect to the EGSs’ substantive rights as a result of the two-day delay in the EDCs serving complete objections. However, the standard for discovery is broad, and broader than the standard used for the admission of evidence at a hearing. In this case, the information sought in these interrogatories tends to establish a material fact or make a fact more less probable and is not sought in bad faith or unreasonably annoying, embarrassing, oppressive, burdensome or expensive. Nor is the information privileged. Therefore, the EDCs’ objections will be denied and the EGSs’ motion to compel granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion to compel responses to interrogatories and requests for production of documents propounded by Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy on Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company – Set I, dated December 30, 2019, is granted.
2. That the complaint filed by Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy on October 25, 2019 against Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company shall proceed to a prehearing conference on February 3, 2020, as scheduled.

Date: January 15, 2020 /s/

Joel H. Cheskis

Deputy Chief Administrative Law Judge

**C-2019-3013805, C-2019-3013806, C-2019-3013807 AND C-2019-3013808 - INTERSTATE GAS SUPPLY INC., ET AL v. METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA POWER COMPANY AND WEST PENN POWER COMPANY**

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