**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 PROTECTIVE ORDER**

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 their 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 their 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 and assigning me as the presiding officer. 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. On January 6, 2020, the EDCs filed an answer to the EGSs’ motion. The EGSs’ motion was granted via order dated January 15, 2020.

On January 24, 2020, the Retail Energy Supply Association (RESA) filed a petition to intervene into the proceeding.

The prehearing conference convened on February 3, 2020 as scheduled. A scheduling order dated February 5, 2020 was issued memorializing the various matters discussed during the prehearing conference.

The Office of Consumer Advocate (OCA) filed a notice of intervention on February 7, 2020.

On February 25, 2020, the EDCs filed a petition for protective order to govern the treatment of material alleged to be proprietary in this proceeding. In its petition, the EDCs averred that, since the prehearing conference, it has become apparent that the EDCs may be required to file with the Commission or furnish to the parties non-public proprietary information that has been requested during the course of the proceeding and may be used for cross-examination purposes. The EDCs added that unrestricted disclosure of such information would not be in the public interest. This includes sales and financial information related to the companies’ product and service offerings which may not be accessible to competitive product and service providers. The EDCs added that litigation of this matter will be facilitated by the adoption of the protective order governing the treatment of material alleged to be proprietary. The EDCs also averred that no party has any objection to the petition. The purpose of this order is to formally enter the proposed protective order.

The Commission’s Rules of Practice and Procedure permit the Commission to issue protective orders limiting the availability of certain proprietary or confidential information. 52 Pa. Code §§ 5.362 and 5.365. The party seeking the protective order has the burden to establish that the potential harm to the party of providing the information would be substantial and the harm to the party if the information is disclosed without restriction outweighs the public’s interest in free and open access to the administrative hearing process. Petition for Protective order of GTE North Inc., 1996 Pa PUC LEXIS 95, Docket No. G-00940402, Order (entered August 8, 1996); ITT Communications Services’ Petition for a Protective Order, 1991 Pa PUC LEXIS 193, Docket No. R-912017, Order (entered November 5, 1991). If that burden is satisfied, the least restrictive means of limitation which will provide the necessary protection from disclosure will be applied. 52 Pa. Code § 5.365(a).

In considering whether to issue a protective order, the Commission, pursuant to Section 5.365(a), should consider the following factors:

(1)  The extent to which the disclosure would cause unfair economic or competitive damage.

(2)  The extent to which the information is known by others and used in similar activities.

(3)  The worth or value of the information to the party and to the party’s competitors.

(4)  The degree of difficulty and cost of developing the information.

(5)  Other statutes or regulations dealing specifically with disclosure of the information.

52 Pa. Code § 5.365(a). The Commission’s regulations further provide detail regarding restrictions placed on the proprietary material, access to proprietary material by representatives of parties, special restrictions and the return of proprietary information at the conclusion of the proceeding. 52 Pa. Code §§ 5.365(c)-(g).

Section 5.365, however, must be balanced against Commission regulations that also provide that the Commission’s records, including the record of this proceeding, may be accessed by the public pursuant to 52 Pa. Code §§ 1.71-1.77. In particular, Section 1.71 of the Commission’s regulations provides: “The Commission’s record maintenance system is intended to provide for the greatest degree of public access to Commission documents that is consistent with the exercise of the functions of the Commission under the act and other applicable laws.” 52 Pa. Code § 1.71. In addition, the interests of keeping material proprietary or confidential must be viewed in light of the Pennsylvania Right to Know Law. 65 P.S. § 67.102.

In light of this legal background, the proposed protective order will be granted. The EDCs have averred that information has been requested in this matter that maybe non-public proprietary information and documents that contain proprietary information within the Commission’s regulations. The EDCs noted that such information, which includes sales and financial information related to the EDCs’ product and service offerings, should be treated as proprietary because unrestricted disclosure of such information would not be in the public interest. Such information could include, for example, details about non-commodity products and services that the EDCs provide for the benefit of its electric distribution customers. The EDCs are correct that litigation of this matter will be facilitated by the adoption of a protective order so that the parties can freely exchange information without fear that non-public proprietary material may be made available to the public. Adopting the proposed protective order will ensure such protection. Furthermore, no party has opposed the proposed petition for protective order.

As a result, the proposed protective order will be adopted for this proceeding. The parties are advised, however, to minimize the amount of information alleged to be proprietary that is admitted into the record to increase the likelihood that the ultimate decision of the Commission in this matter provides the greatest degree of public access, consistent with the Commission’s regulations.

ORDER

THEREFORE,

IT IS ORDERED THAT:

1. This Protective Order is granted with respect to all materials identified in Ordering Paragraph Nos. 2 and 3, below, which are filed with the Commission, produced in discovery or otherwise presented during this proceeding. All persons now, and hereafter, granted access to the information identified in Ordering Paragraph Nos. 2 and 3 shall use and disclose such information only in accordance with this Order.

2. The information subject to this Order includes all correspondence, documents, data, studies, methodologies, and all other materials or information that any party or an affiliate of any party (“the producing party”) furnishes in this proceeding pursuant to filing, discovery or evidentiary procedures, or otherwise may provide as a courtesy to other active parties in this proceeding, which are claimed to be of a security-sensitive, proprietary or other confidential nature and which are designated “CONFIDENTIAL INFORMATION” or “HIGHLY CONFIDENTIAL INFORMATION.” Such materials are referred to in this Order as “Proprietary Information.”

3. For purposes of this Protective Order there are two categories of Proprietary Information: “CONFIDENTIAL INFORMATION” and “HIGHLY CONFIDENTIAL INFORMATION.” A producing party may designate as “CONFIDENTIAL INFORMATION” materials concerning electric service facilities, inspection or maintenance practices or policies that may be security-sensitive, proprietary or otherwise confidential, and any other information that is either specified as confidential by its terms or pertains to business practices, operations or financial matters that are commercially sensitive or that is ordinarily considered and treated as confidential by the producing party. A producing party may designate as “HIGHLY CONFIDENTIAL INFORMATION” those materials that the producing party deems to be of such a commercially sensitive nature, relative to the business interests of itself or other parties to this proceeding, or of such a private or personal nature, that the producing party determined that a heightened level of confidential protection with respect to those materials is appropriate. The parties shall endeavor to limit the information designated as “HIGHLY CONFIDENTIAL INFORMATION.”

4. Confidential Information shall be disclosed solely to the Commission, its Staff, counsel to the parties in this proceeding, parties’ employees, officers and members (as applicable) who are directly responsible for reviewing, preparing or presenting evidence, cross-examination or argument in this proceeding and outside expert consultants retained by the parties’ counsel for this proceeding. Confidential Information shall be specifically marked “CONFIDENTIAL INFORMATION.”

5. Highly Confidential Information shall be provided solely to other parties’ counsel. Such highly sensitive information may be copied only for the limited purpose of review by a party’s expert or consultant in this case. Such specific prohibition from copying such Highly Confidential Information shall be clearly designated on the face of the information. In such cases, the producing party shall permit other parties’ counsel to take custody of such Highly Confidential Information, provided that it shall not be copied, except as provided for in this Ordering Paragraph, and shall be returned or destroyed as provided for in Ordering Paragraph No. 11, below. The producing party may designate certain Highly Confidential Information that, absent the express agreement of the producing party, may not be viewed by the employees of an inspecting party who are involved in competitive activities or by employees of an outside expert or consultant that provide services to any person or entity involved in such competitive activities. Further, in accordance with the provisions of Sections 5.362 and 5.431(e) of the Commission’s Rules of Practice and Procedure (52 Pa. Code §§ 5.362, 5.431(e)) and Sections 2209(f)(3) and 2811(c)(3) of the Public Utility Code (66 Pa.C.S. §§ 2209(f)(3), 2811(c)(3)), any party may, by objection or motion, seek further protection with respect to Highly Confidential Information, including, but not limited to, total prohibition of disclosure or limitation of disclosure only to particular parties. Highly Confidential Information shall be specifically marked “HIGHLY CONFIDENTIAL INFORMATION – DO NOT COPY OR DISTRIBUTE EXCEPT IN ACCORDANCE WITH PROTECTIVE ORDER.”

6. Proprietary Information shall be made available to the Commission and its Staff for use in this and any related proceeding and for all internal Commission analyses, studies or investigations related to the same. For purposes of filing, to the extent that Proprietary Information is placed in the Commission’s report folders, testimony folders or other document folders, such information shall be separately bound, conspicuously marked, and accompanied by a copy of this Order. The Proprietary Information shall be considered and treated as “confidential proprietary information” as defined in the Pennsylvania Right-to-Know Law, 65 P.S. § 67.101, *et seq*. Public inspection of the Proprietary Information shall be permitted only in accordance with this Protective Order.

7. Proprietary Information shall be made available only as permitted by this Order and only for purposes of reviewing, preparing or presenting evidence, cross-examination or argument in this proceeding. No counsel, expert, employee, officer or member (as applicable) will be afforded access to Proprietary Information until a signed acknowledgement of this Protective Order in the form attached to this Order, from each such individual, has been returned to the producing party. Upon return of a signed acknowledgment, parties will receive access to Proprietary Information consistent with this Order. No other persons may have access to the Proprietary Information, except as specifically authorized by further order of the Commission or the Administrative Law Judge; provided, however, that counsel for the Office of Consumer Advocate (“OCA”) may share Proprietary Information with the Consumer Advocate without obtaining a Non-Disclosure Certificate from them, provided the Consumer Advocate otherwise abides by the terms of the Protective Order. No person may be entitled to receive, or if afforded access to any Proprietary Information shall possess, use or disclose Proprietary Information for the purpose of business or competition or any purpose other than the preparation for, and conduct of, this proceeding or any administrative or judicial review thereof.

8. The producing parties shall designate data or documents as constituting or containing Confidential Information or Highly Confidential Information by affixing an appropriate stamp or typewritten designation on all such data or documents. Where only part of a compilation or multi-page document constitutes or contains Confidential Information or Highly Confidential Information, the producing party shall designate only the specific data or pages of documents which constitute or contain Confidential Information or Highly Confidential Information. Upon request from another party, the producing party shall produce a redacted (public) version of any such partially confidential compilation or multi-page document within a reasonable period of time.

9. Any public reference to Proprietary Information by the Commission or by counsel or persons afforded access thereto shall be to the title or exhibit reference in sufficient detail to permit persons with access to the Proprietary Information to understand the reference fully and not more. Proprietary Information shall remain a part of the record, to the extent admitted, for all purposes of administrative or judicial review. Part of any record of this proceeding containing Proprietary Information, including but not limited to all exhibits, writings, direct testimony, cross-examination, argument, and responses to discovery, and including reference thereto as mentioned in the above Ordering Paragraphs, shall be sealed for all purposes, including administrative and judicial review, unless such Proprietary Information is released from the restrictions of this Order, either through the agreement of the parties or pursuant to a further order of the Administrative Law Judge or the Commission.

10. The parties affected by the terms of this Order shall retain the right to question or challenge the confidential nature of the Proprietary Information; to question or challenge the admissibility of Proprietary Information; to refuse or object to the production of Proprietary Information on any proper ground, including but not limited to irrelevance, immateriality, or undue burden; and to seek additional measures of protection of Proprietary Information beyond those provided in this Order. If a challenge is made to the designation of a document or information as Proprietary Information, the party claiming that the information is proprietary or otherwise confidential retains the burden of demonstrating that the designation is necessary and appropriate.

11. Upon completion of this proceeding, including any administrative or judicial review, all copies of all documents and other materials, including notes, whether written or oral, which contain any Proprietary Information, shall be immediately returned to the party furnishing such Proprietary Information or destroyed. This provision, however, shall not apply to the Commission, its Staff, the OCA, or any other party receiving the consent of the producing party; except, however, that Highly Confidential Information provided to any party pursuant to Ordering Paragraph No. 5, above, shall be returned to the producing party or destroyed in all cases. In the event that a party elects to destroy all copies of documents and other materials containing Proprietary Information instead of returning the copies to the producing party, that party shall certify in writing to the producing party that all copies of the documents and other materials containing Proprietary Information have been destroyed.

Dated: February 27, 2020 \_\_\_\_\_\_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Joel H. Cheskis

Deputy Chief Administrative Law Judge

**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| **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 WEST PENN POWER COMPANY** | **:**  **:**  **:**  **:**  **:**  **:**  **:**  **:**  **:**  **:**  **:**  **:**  **:** | **Docket No. C-2019-3013805**  **C-2019-3013806**  **C-2019-3013807**  **C-2019-3013808** |

TO WHOM IT MAY CONCERN:

The undersigned is the expert, counsel, employee, member or officer of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the retaining party).

The undersigned has read and understands the Protective Order issued in the above-captioned proceeding deals with the treatment of Proprietary Information. The undersigned agrees to be bound by, and comply with, the terms and conditions of said Order. The undersigned agrees that any Proprietary Information shall be used or disclosed only for purposes of preparation for, and conduct of the above-captioned proceeding, and any administrative or judicial review thereof, and shall not be disclosed or used for purposes of business or competition.

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Signature

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Print Name

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Address

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Employer

**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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