

COMMONWEALTH OF PENNSYLVANIA



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March 5, 2020

The Honorable Joel H. Cheskis  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

Re: Interstate Gas Supply, Inc., *et al.*  
v.  
Metropolitan Edison Company,  
Pennsylvania Electric Company,  
Pennsylvania Power Company and  
West Penn Power Company  
Docket Nos. C-2019-3013805  
C-2019-3013806  
C-2019-3013807  
C-2019-3013808

Dear Judge Cheskis:

Enclosed please find copies of the Office of Consumer Advocate's Motion to Compel Answers to OCA Set II, III, and IV Interrogatories, No. 8 in the above-referenced proceedings.

The original has been electronically filed with the Secretary's Office and copies have been served upon the parties as evidenced by the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Laura J. Antinucci".

Laura J. Antinucci  
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Enclosures:

cc: Rosemary Chiavetta, Secretary  
Certificate of Service

\*284773

CERTIFICATE OF SERVICE

Re: Interstate Gas Supply, Inc., *et al.* : Docket Nos. C-2019-3013805  
v. : C-2019-3013806  
Metropolitan Edison Company, : C-2019-3013807  
Pennsylvania Electric Company, : C-2019-3013808  
Pennsylvania Power Company and :  
West Penn Power Company :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Motion to Compel Answer to OCA Set II, III, and IV Interrogatories, No. 8, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 5<sup>th</sup> day of March 2020

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Dated: March 5, 2020  
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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	:	
	:	
v.	:	Docket Nos. C-2019-3013805
	:	C-2019-3013806
Metropolitan Edison Company, Pennsylvania	:	C-2019-3013807
Electric Company, Pennsylvania Power	:	C-2019-3013808
Company, and West Penn Power Company	:	

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MOTION OF THE OFFICE OF CONSUMER ADVOCATE TO  
COMPEL INTERSTATE GAS SUPPLY, INC., et al. TO ANSWER QUESTION NO. 8 OF  
OCA INTERROGATORY SETS II, III, AND IV PURSUANT TO 52 PA. CODE SECTION  
5.342(g)

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The Pennsylvania Office of Consumer Advocate (OCA) hereby respectfully requests that Administrative Law Judge Joel H. Cheskis (ALJ Cheskis) compel 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”) to respond to OCA Set II, question 8, OCA Set III, question 8, and OCA Set IV, question 8 (hereafter collectively referred to as “Question 8”) pursuant to 52 Pa. Code Section 5.342(g). The OCA states in support as follows:

**I. INTRODUCTION**

**A. Background**

On October 25, 2019 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”) to which the Commission subsequently assigned docket numbers C-2019-3013805, C-2019-3013806, C-2019-3013807 and C-2019-3013808. The EGSs’ complaint averred that the EDCs’ conduct of on-bill billing for non-commodity products and services for the benefits 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 prior Commission order. The EGSs requested that the Commission find that the EDCs' conduct of refusing to provide on-bill billing for EGSs operating on their system violates the Public Utility Code and to require, as a remedy, the EDCs to provide a similar service to the EGSs operating on their systems.

On February 7, 2020 the Office of Consumer Advocate (OCA) filed a Notice of Intervention to protect the interests of consumers in the EDCs' service territories in this proceeding before the Commission.

The OCA served Interrogatories Set II, Set III, and Set IV to the EGSs on February 12, 2020. Relevant to this Motion, the OCA requested information from the EGSs relating to (1) the possible existence of billing arrangements in other restructuring states that allow the EGS to bill non-commodity or non-basic charges for optional products and services on the EDC bill and (2) the documents from the appropriate regulatory agencies that authorize the EGSs to have such an arrangement. The interrogatories relevant to this Motion to Compel consist of one identical question set forth below:

8. Does the complainant have billing arrangements in other restructuring states that allow the EGS or NGS to bill non-commodity or non-basic charges for optional products and services on the EDC bill? If so, please provide the regulatory decision that allows such a policy.

On February 24, 2020, the EGSs filed a Written Objection<sup>1</sup> to Question 8 of OCA Interrogatories Set II, Set III and Set IV. In the Written Objection, the EGSs did not object to the first part of Question 8 which asked each EGS to state the other jurisdictions in which they currently possess the on-bill billing option that they seek as a remedy in the instant manner. Rather, the EGSs' objection is directed at the second part of Question 8 which requests the EGSs to provide the regulatory documents which allow for the EGSs to receive the on-bill billing option—if such an option exists. Specifically, the EGSs averred that (1) the OCA cannot require the EGSs to produce documents they did not put at issue in the case, (2) there is no basis to conclude the EGSs are in possession of the requested material, (3) there is no suggestion that any EGS would be in a superior position than the OCA to locate and obtain the presumably public documents from other

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<sup>1</sup> Prior to filing the Written Objection, Counsel for the EGSs provided an oral objection to Question 8 to the OCA and discussions ensued as to informally resolving this issue, but to no avail.

jurisdictions, (4) the OCA is not seeking “discrete facts,” but rather, regulatory decisions which may not exist, and (5) compelling the EGSs to spend time and effort locating the documents that they did not put at issue would impose an “unwarranted burden” in violation of 52 Pa. Code § 5.361 (a)(2) and (4).

Accordingly, the OCA files this Motion to Compel respectfully requesting that ALJ Cheskis compel the EGSs to answer Question 8 of OCA Interrogatories Set II, Set III, and Set IV.

## **B. Summary**

The OCA submits that the OCA’s request for the information on the EGSs’ regulatory decisions or documents in other jurisdictions is both relevant and discoverable for the following reasons: (1) the information is relevant to the EGSs’ claim for equal access to the on-bill billing option on the EDCs’ bills as a remedy in this matter because it would provide insight into the terms and conditions of such a regulatory decision which may or may not be mirrored here in Pennsylvania as an outcome of this case, and (2) if the regulatory decisions that would authorize the on-bill billing privileges of the EGSs in other jurisdictions exist, they would constitute business documents under which the EGSs exercise such billing option and therefore it would not be an unreasonable burden or investigation<sup>2</sup> for a sophisticated EGS to provide these business documents to the OCA. In addition, the OCA is not in an equal position to the EGSs when it comes to retrieving or researching these documents since the OCA has no knowledge of (1) what states the EGSs have on-bill billing privileges, (2) for which electric distribution company the on-bill billing arrangement is with, and (3) the precise document—either order, tariff, contract, etc.—by which the on-bill billing privileges are authorized. It is not an unreasonable assumption that the EGSs utilizing this billing service would have the documents from the appropriate regulatory authority permitting it. If the regulatory documents that permit on-bill billing to the EGSs in other jurisdictions do not exist, the EGSs may simply state so.

For the reasons above, and in more detail below, the OCA submits this Motion to Compel.

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<sup>2</sup> The OCA would point out that the EGSs’ written objection did not use the terms “unreasonable burden” or “unreasonable investigation” as stated in the regulations at 54 Pa. Code § 5.361(a)(2) and (4). Rather, the EGSs described the act of compelling the EGSs to spend the time and effort locating the documents as imposing an “unwarranted burden” of doing the OCA’s legal research in violation of those above-mentioned regulations.

## II. LEGAL STANDARD

The burden is placed on the party objecting to discovery to establish that the information requested is not relevant or discoverable.<sup>3</sup> Relevancy depends upon the nature and facts of the individual case, and any doubts are to be resolved in favor of relevancy and permitting discovery.<sup>4</sup>

Under the Commission's regulations, the scope of discovery is broad and allows for a party to obtain discovery relating to any non-privileged matter which is relevant to the subject matter involved in the pending action if it relates to the claim or defense of another party, specifically including the existence of any documents. 52 Pa. Code § 5.321(c). Further, it is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. *Id.* Section 5.321 outlines the scope of discovery as follows:

- (c) *Scope.* Subject to this subchapter, a party may obtain 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**, including the **existence**, description, nature, content, custody, condition and location of any books, **documents**, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c) (emphasis added).

A request for discovery, however, is not permitted if it: “(1) Is sought in bad faith; (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party; (3) Relates to matter which is privileged; or (4) Would require the making of an unreasonable investigation by the deponent, a party or witness.” 52 Pa. Code §5.361.

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<sup>3</sup> 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 66 Pa.C.S. § 102, Docket No. P-2015-2476211, (Order issued September 11, 2015) *citing* Koken v. One Beacon Insurance Company, 911 A.2d 1021, 1025 (Pa. Commw. Ct. 2006).

<sup>4</sup> *Id.*

In Pennsylvania, “[t]he prohibition on discovery is not whether answering the discovery would be burdensome but, rather, whether it would be **unduly burdensome**.”<sup>5</sup>

### **III. MOTION TO COMPEL**

#### **A. The EGSs Have Not Met Their Burden of Demonstrating That Question 8 Is Not Relevant.**

The EGSs have not directly challenged Questions 8 on the grounds of relevance, but statements within the Written Objection, that the EGSs have not put the requested documents at issue in this proceeding, could be inferred to suggest an argument that the documents are irrelevant or outside the scope of discovery. Regulatory decisions, however, are very relevant to the remedy requested in this proceeding which is to produce a regulatory decision requiring an EDC to provide on-bill billing. The OCA submits that, similar to the information requested by the EGSs of the EDCs in this matter on the existence of the EDCs’ provision of on-bill billing in other jurisdictions—along with copies of any agreements or other documents related to the provision of such billing service—which was determined to be relevant to the claim of discrimination in ALJ Cheskis’ recent Order Granting Motion to Compel<sup>6</sup>, the information requested by the OCA relating to the existence of and the regulatory documents related to the EGSs’ enjoyment of the provision of on-bill billing in other jurisdictions is likewise relevant to the requested remedy of requiring on-bill billing for all EGSs on the EDCs’ bills. In reference to the EGSs’ request for information on the EDCs’ practices in other jurisdictions regarding changes to their billing systems, ALJ Cheskis found the information to be relevant towards whether the failure of the EDC’s to provide the same services here is reasonable or discriminatory. Similarly, ALJ Cheskis found “the EDC’s practices in other jurisdictions regarding termination of service for failure to pay a 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 here in Pennsylvania.” The OCA submits that, in a similar vein, any existing regulatory decisions in other jurisdictions under which the appropriate regulatory authorities allow the remedy requested here for on-bill billing are relevant

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<sup>5</sup> See Comm., et al. v. Blue Pilot Energy, LLC., 2015 Pa. PUC LEXIS 403 at 9 (Blue Pilot Motion to Compel) (emphasis added).

<sup>6</sup> See Order Granting Motion to Compel Filed by Interstate Gas Supply, Inc. et al., Docket Nos. C-2019-3013805, C-2019-3013806, C-2019-3013807, and C-2019-3013808 (Order issued January 15, 2020).

as to whether such services can or should be provided here in Pennsylvania as a remedy in this matter.

**B. The EGSs Have Not Met Their Burden of Demonstrating That The Information Requested In Question 8 Is Not Discoverable.**

As mentioned above, the EGSs objected to the OCA's request for the regulatory documents authorizing on-bill billing options in other jurisdictions as in violation of Sections 5.361(a)(2) and (4) because the EGSs claim that they are not in a superior position than the OCA to locate the documents and they should not be required to locate them since they have not "put them at issue" as of yet in this proceeding. For a discovery request to be an "unreasonable burden," it must not simply be burdensome, but rather, it must be unduly burdensome.<sup>7</sup> The OCA submits that the EGSs are in a far superior position than the OCA to locate the regulatory decisions in the other jurisdictions where they operate their businesses and possibly have on-bill billing options. As stated above, the OCA does not have knowledge of: (1) what states the EGSs have on-bill billing privileges, (2) for which electric distribution company the on-bill billing arrangement is with, and (3) the precise document—either order, tariff, contract, etc.—by which their on-bill billing privileges are authorized. It is not unreasonable to assume that these regulatory decisions that authorize the EGSs to participate in this business practice would be in the EGSs' possessions and readily available for the EGSs to cite to when necessary. At minimum, the EGSs' knowledge of their own on-bill billing privileges in other jurisdictions places them in a superior position to locate the coinciding regulatory decisions if they exist. The fact that a party may be able to locate discoverable material on their own is not a bar to requesting such information through discovery. Through Question 8, the OCA has simply requested that the EGSs provide the regulatory decisions in their other jurisdictions—which they reasonably would have knowledge of and possess if they existed and authorized them to participate in on-bill billing. If the regulatory decisions do not exist, to the best of the EGS's knowledge, the EGS may state so.

There is no requirement under the regulations that a question in discovery must seek "discrete facts." The EGSs' argument that the OCA is requesting regulatory decisions and not "discrete facts" has no merit.

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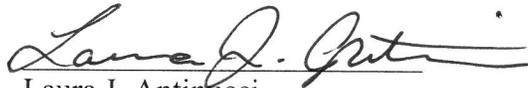
<sup>7</sup> See [Blue Pilot Motion to Compel](#).

Additionally, The OCA has not requested the EGSs to perform their legal research for them. Rather, the OCA has requested that the EGSs provide information on which jurisdictions they have on-bill billing privileges and, if so, to provide the regulatory order, tariff, or contract that allows the EGSs such an arrangement. The EGSs' argument that compelling them to provide the regulatory decisions would equate to forcing the EGSs to perform legal research on behalf of the OCA has no merit and should be rejected.

#### IV. CONCLUSION

The EGSs have not met their burden of demonstrating that Question 8 is irrelevant or contains non-discoverable information. The EGSs' failure to fully and completely respond to Question 8 would prevent the OCA and its expert from using the information to understand the nature, terms and conditions of existing regulatory decisions in other jurisdictions allowing on-bill billing so that the OCA can conclude whether or not such a regulatory decision—the remedy requested in this matter—would be in the interest of Pennsylvania customers in the EDCs' service territories. The OCA once again submits that it would not be unduly burdensome to request that the EDCs provide the regulatory decisions that allow them to have on-bill billing in other jurisdictions if such regulatory decisions exist. The relevant regulatory decisions would assumedly be “on-file” and readily accessible business documents—like any other regulatory document—that the EGSs would cite to as the authority permitting certain EGS action. For the reasons discussed above, the OCA respectfully requests that ALJ Cheskis grant this Motion to Compel.

Respectfully submitted,



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