



Todd S. Stewart
Office: 717 236-1300 x242
Direct: 717 703-0806
tsstewart@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com
March 10, 2020

VIA ELECTRONIC FILING

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

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; **JOINT COMPLAINANTS' ANSWER TO MOTION OF OFFICE OF CONSUMER ADVOCATE TO DISMISS OBJECTIONS AND COMPEL RESPONSES TO INTERROGATORIES SETS II, III AND IV, NO. 8**

Dear Counsel:

Enclosed please find the Joint Complainants' Answer to Motion of Office of Consumer Advocate to Dismiss Objections and Compel Responses to Interrogatories Sets II, III and IV, No. 8 in the above-captioned docket. Copies of the Answer have been served in accordance with the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Todd S. Stewart", is written over a horizontal line.

Todd S. Stewart
Counsel for the Joint Complainants

TSS/jld
Enclosure

cc: Administrative Law Judge Joel H. Cheskis (via electronic and first-class mail)
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 ELECTRONIC AND FIRST-CLASS MAIL

Tori L. Giesler
Teresa K. Harrold
FirstEnergy Service Company
2800 Pottsville Pike
PO Box 16001

Reading, PA 19612-6001

tgiesler@firstenergycorp.com

tharrold@firstenergycorp.com

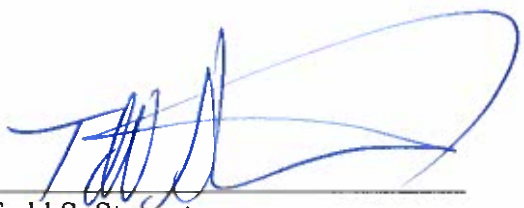
Counsel for Respondents Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and WestPenn Power Company

Joel H. Cheskis
Deputy Chief Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor West
Harrisburg, PA 17120
jcheskis@pa.gov

Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellott LLC
213 Market Street, 8th Floor
PO Box 1248
Harrisburg, PA 17101
dodell@eckertseamans.com
Counsel for Retail Energy Supply Association

Laura J. Antinucci
Darryl A. Lawrence
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923
LAntinucci@paoca.org
DLawrence@paoca.org

DATED: March 10, 2020



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 Nos. 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	:	

**JOINT COMPLAINANTS' ANSWER TO MOTION
OF OFFICE OF CONSUMER ADVOCATE
TO DISMISS OBJECTIONS AND COMPEL RESPONSES
TO INTERROGATORIES SETS II, III AND IV, NO. 8**

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, the "Joint Complainants"), and hereby submit their Answer to the Motion of the Office of Consumer Advocate to Dismiss the Objections of the Joint Complainants to OCA Interrogatories, Set II - No. 8, Set III - No. 8, and Set IV - No. 8, and to Compel them to provide answers to same. The objected-to questions are identical and were posed to each of the three parties that comprise the Joint Complainants. The Joint Complainants' Objection, which is the same for each question, is that the OCA has requested that the individual Joint Complainants provide regulatory decisions from other jurisdictions that authorize on-bill billing of non-commodity products and services. As the OCA must admit, there is no claim in this matter from any of the Joint Complainants that they possess or have reviewed the requested documents, nor have the Joint Complainants raised the availability of on-bill billing in any other jurisdictions as a basis for any determination in this matter. If they had, then

it would be incumbent upon the Joint Complainants to produce those determinations, but as of now, such a claim has not been made. The OCA cannot require that the Joint Complainants produce documents that they have not put at issue in the case, and such a request would force Joint Complainants to undertake an unduly burdensome and unreasonable investigation in violation of 52 Pa. Code § 5.361(a)(2) and (4). If the OCA wishes to put these determinations at issue, then it is the OCA that should locate them and provide them to the other parties. On that basis, the Joint Complainants Object.

I. PROCEDURAL HISTORY

1. On or about October 25, 2019, Joint Complainants filed the above-captioned complaints against Respondents to address the Respondents' unwarranted discrimination against the Joint Complainants in their provision of customer billing service. The Complaints allege that Respondents each bill for non-commodity products and services provided by Respondents, or an affiliate, on their utility bills to customers, and yet Respondents refuse to bill for the charges of the Joint Complainants for similar non-commodity products and services provided to the same universe of customers.

2. On November 14, 2019, Respondents filed a single Answer and New Matter to the Complaints in which they deny the majority of the material allegations of the Complaints. Respondents do admit, however, that they provide on-bill billing of non-commodity products for their own products while refusing to provide a similar billing service for Joint Complainants.

3. On December 4, 2019, Joint Complainants filed an Answer to Respondents' New Matter.

4. On December 9, 2019, Joint Complainants served their Interrogatories and Requests for Production of Documents, Set I. On December 19, 2019, Respondents served an Objection to Set I, No. 1.

5. 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.

6. Also, on December 23, 2019, Respondents served an Objection to Set I, Nos. 2, 5 & 6. On December 30, 2019, Joint Complainants filed a Motion to dismiss objections and compel responses to interrogatories.

7. On December 26, 2019, a Prehearing Order was issued that set forth various rules that will govern the hearing.

8. On January 6, 2020, the Respondents filed an answer to the Joint Complainant's motion. In their answer, Respondents 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 Respondents' out-of-state affiliates and holding company.

9. On January 15, 2020, Presiding Administrative Law Judge Joel Cheskis issued an Order granting the Joint Complainant's Motion to Compel.

10. On January 27, 2020, a Prehearing Conference was held, with the Honorable Deputy Chief Administrative Law Judge, Joel Cheskis presiding.

11. On February 7, 2020, the Office of Consumer Advocate ("OCA") filed and served its Notice of Intervention in this matter.

12. On February 12, 2020, the OCA propounded discovery, Sets II (IGS), III (Direct) and IV (Shipley) upon the Joint Complainants.

13. Each Set: II, III and IV, contains an identical Question No. 8:

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.

14. On February 24, 2020, the Joint Complainants interposed objections to the last sentence, which is a request for regulatory decisions in matters not cited-to nor relied upon by the Joint Complainants.

15. On March 6, 2020, the Office of Consumer Advocate filed a Motion to Compel which is the subject of this answer.

II. ARGUMENT

The OCA's Motion makes a number of claims that are without merit. The OCA begins with setting up a strawperson argument that the Joint Complainant's have not made: that regulatory decisions allowing on-bill billing in other states are relevant to the matter under consideration here. The OCA then contends that the Joint Complainants have failed to prove that such decisions are irrelevant. The OCA's view of what is at issue appears to differ from that of the Joint Complainants, who believe that the sole issue for determination is whether First Energy's refusal to provide the service to the Joint Complainants while providing the service to itself through an affiliate, constitutes discrimination under the Pennsylvania Public Utility Code. It cannot be forgotten that this is not a general rulemaking proceeding seeking to determine the efficacy of on-bill billing, rather, it is a complaint, where the Joint Complainants have the burden of proof regarding First Energy's discriminatory conduct. It was in the context of seeking evidence of that discrimination that the Joint Complainants inquired of First Energy's provision of on-bill billing in other states, because it should be clear that if First Energy provides the service in other states, that fact would

have bearing on whether its refusal to do so in Pennsylvania is justifiable on the grounds of inability as First Energy claims. The basic legality of First Energy's provision of on-bill billing (apart from the discrimination) has heretofore not been placed at issue in this matter. And if, as the OCA suggests, it intends to place the basic legality at issue, the OCA cannot bootstrap the Joint Complainant's legitimate inquiry, and through discovery seek to force the Joint Complainants to do its legal research to find out how other states address the issue of on-bill billing. That would constitute an unreasonable investigation under 52 Pa. Code § 5.361(a)(4).

The OCA also contends that the Joint Complainants have failed to prove that the requested "regulatory decisions" are not discoverable and in doing so claims that if there are regulatory decisions in other jurisdictions that authorize on-bill billing in that jurisdiction, that said regulatory decision would be a "business record" of each supplier participating in on-bill billing. This claim lacks any merit. The Pennsylvania Rules of Evidence, Pa. R.E., Rule 803(6), address business records in the context of an exception to the hearsay rule, and make it clear that "business records" are records of an "act, event or condition" kept in the "course of regularly conducted activity." Clearly, State Regulatory and Commission Orders are not "business records", and are more accurately characterized as "public records" under Pa. R.E. Rule 803(8). There simply is no basis for the OCA to make the specious claim that an EGS would maintain a record of every order of every regulatory body in whose jurisdiction it may serve and that may have some impact on its business. The OCA goes so far as to claim that it would not be "unreasonable to assume" that the Joint Complainants would retain these documents, which begs the question of what facts the OCA assumes to reach this conclusion. The OCA's argument goes so far as to claim that it would not know in which jurisdictions the Joint Complainants do provide on-bill billing, which is strange because that very question was actually the first part of Question 8, to which the Joint

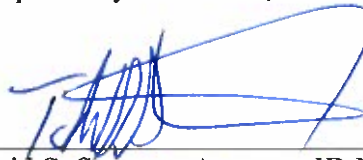
Complainant's did not object. The Joint Complainants have no burden of proving that regulatory decisions in other states are "not discoverable" as they never raised that argument, rather, they contend that the OCA has the same ability as the Joint Complainants to locate and review such orders as the Joint Complainants, and so that Joint Complainant's cannot be compelled to do the OCA's work for it, the OCA's uninformed assumption notwithstanding.

III. CONCLUSION

The scope of discovery in administrative proceedings is broad, 52 Pa. Code § 5.321(c), but contrary to what the OCA contends, it is not unlimited. In this instance, the OCA asks each Joint Complainant in what other jurisdictions they are provided with the on-bill billing option they seek in the instant matter. The Joint Complainants do not object to that request. However, the follow up question then asks each Joint Complainant to produce the "regulatory decisions" which authorized the provision of on bill-billing. Contrary to the OCA's strawperson argument, the Joint Complainant's are not at this point arguing the relevance of the requested information, even though it is quite obvious that regulatory decisions from other jurisdictions are likely to have little bearing on Pennsylvania law on subject of discrimination. The OCA apparently is seeking to take this complaint case down a worm hole of assessing what other states may or may not have done with regards to on-bill billing. By its request, the OCA does not seek discrete facts or documents, solely in the possession of the Joint Complainants, rather, it seeks public records, i.e., "regulatory decisions" from other jurisdictions when it is not clear that such decisions even exist. The OCA seeks to impose the duty to make that investigation (whether such decisions exist) on the Joint Complainants; to review public dockets, determine which, if any, decisions authorize on-bill billing, and to compile those decisions for the OCA. To be more direct, the OCA is in the same relative position as the Joint Complainants when it comes to obtaining the documents they

requested of the Joint Complainants, and the Joint Complainants should not be compelled to spend the time and effort locating the documents that they did not put at issue. To require otherwise would impose an unwarranted burden of doing the OCA's legal research on the Joint Complainants in violation of 52 Pa. Code § 5.361(a)(2) and (4). Accordingly, the OCA's Motion to Compel the Joint Complainants to answer Set II, No. 8, Set III, No. 8 and Set IV, No. 8 should be denied.

Respectfully submitted,



Todd S. Stewart, Attorney ID No. 75556
Hawke McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
Telephone: (717) 236-1300
Facsimile: (717) 236-4841
tsstewart@hmslegal.com

Dated: March 10, 2020

Counsel for the Joint Complainants