

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place
Harrisburg, Pennsylvania 17101-1923
(717) 783-5048
800-684-6560

 @pa_oca
 /pennoca

FAX (717) 783-7152
consumer@paoca.org

April 14, 2020

Via Electronic Mail Only

The Honorable Joel H. Cheskis
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd 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 the Office of Consumer Advocate's Motion to Compel Answers to OCA Set VI Interrogatories, No. 1 and No. 6 in the above-referenced proceedings.

The Motion to Compel 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,

/s/ Laura J. Antinucci
Laura J. Antinucci
Assistant Consumer Advocate
PA Attorney I.D. # 327217
E-Mail: LAntinucci@paoca.org

Enclosures:

cc: Rosemary Chiavetta, PUC Secretary
Certificate of Service

*286468

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 Answers to OCA Set VI Interrogatories, No. 1 and No. 6, 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 14th day of April 2020.

SERVICE BY E-MAIL ONLY

Todd S. Stewart, Esquire
Bryce R. Beard, Esquire
Hawke McKeon and Sniscak LLP
100 North 10th Street
Harrisburg, PA 17101

Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellott LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

Teresa Harrold, Esquire
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001

/s/ Laura J. Antinucci
Laura J. Antinucci
Assistant Consumer Advocate
PA Attorney I.D. # 327217
E-Mail: LAntinucci@paoca.org

Darryl A. Lawrence
Senior Assistant Consumer Advocate
PA Attorney I.D. # 93682
E-Mail: DLawrence@paoca.org

Counsel for:
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
Dated: April 14, 2020
*286469

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	:	

MOTION OF THE OFFICE OF CONSUMER ADVOCATE TO
COMPEL INTERSTATE GAS SUPPLY, INC., et al. TO ANSWER QUESTIONS NO. 1 AND
NO. 6 OF OCA INTERROGATORY SET VI PURSUANT TO 52 PA. CODE SECTION
5.342(g)

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 VI, questions 1 and 6 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” or “the FirstEnergy 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 FirstEnergy EDCs’ conduct of on-bill billing for non-commodity products and services 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 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 VI to the EGSs on March 27, 2020. Relevant to this Motion, the OCA requested information from the EGSs relating to the currently effective billing contracts between the EGSs and each of the utilities—in Pennsylvania, Ohio, and Maryland—identified as allowing retail energy suppliers to bill and collect for non-commodity products described on page 6, lines 1-3 of the EGSs' Direct Testimony.¹ Additionally, the OCA requested copies of each EGS's written materials and sales representation scripts utilized for door-to-door marketing to residential customers for the non-commodity products and services that the EGSs' have requested to appear on the FirstEnergy EDC's regulated bills as a remedy in this proceeding. The interrogatories relevant to this Motion to Compel consist of the two questions set forth below:

1. Please provide the billing contracts currently in effect for each of the utilities identified as allowing retail energy suppliers to bill and collect for non-commodity services and products in Ohio, Pennsylvania, and Maryland. (page 6, lines 1-3)
6. Please provide a copy of each supplier's written materials and sales presentation scripts for non-commodity services utilized in door-to-door marketing to residential customers while soliciting orders for commodity services (page 5, lines 14-15).

On April 6, 2020, the EGSs filed a Written Objection to questions 1 and 6 of OCA Interrogatories Set VI. In the Written Objection, the EGSs objected to question 1 arguing that the billing contracts in other utility service territories and other jurisdictions are “not relevant to the actual issues in the instance matter”—particularly, the issue of discrimination. In reference to question 6, the EGSs asserted that the OCA's request for copies of the written materials and sales presentation scripts for non-commodity services utilized in door-to-door marketing to residential

¹ In Direct Testimony, the EGSs stated that they have billing arrangements with EDCs and NGDCs for non-commodity products and services in the following territories: Columbus Gas of Ohio, Vectren Energy Delivery of Ohio, Vectren Energy Delivery of Indiana, Peoples Natural Gas of Pennsylvania, and Baltimore Gas & Electric in Maryland. See Joint Complainants' Statement No. 1, pp. 5-6.

customers while soliciting orders for commodity services is outside the scope of discovery because such materials are non-jurisdictional and not relevant to the issue of discrimination. Specifically, the EGSs averred that the door-to-door marketing materials and scripts reveal nothing about discrimination and are not regulated by the Commission because their subject matter, non-commodity products and services, are not under the Commission's jurisdiction. Additionally, the EGSs claim that the OCA's request for the marketing materials and scripts related to their non-commodity products and services implies that the OCA is arguing that non-commodity services should not be placed on the utility bill—an argument, the EGSs claim, inappropriate for this proceeding.

Accordingly, the OCA files this Motion to Compel respectfully requesting that ALJ Cheskis compel the EGSs to answer questions 1 and 6 of OCA Interrogatories Set VI.

B. Summary.

The OCA submits that the OCA's requests in questions 1 and 6 are relevant in this proceeding for they tend to establish the material fact of whether or not the EGSs' requested remedy in this proceeding for mandatory on-bill billing of non-commodity services on an EDC's regulated utility bills is a reasonable one. The contracts requested in question 1 involving the EGSs' effective billing arrangements which allow on-bill billing in Pennsylvania and the other referenced states, along with the door-to-door marketing materials and sales representation scripts related to non-commodity products and services requested in question 6, are very relevant to establishing the reasonableness of the remedy requested by the EGSs' in this proceeding. Specifically, the contracts are relevant for the OCA to gain insight into the nature, terms, and conditions of the billing contracts that may be similarly drafted here in Pennsylvania if the EGSs' requested remedy is granted. Additionally, the non-regulated, non-commodity marketing materials and scripts are relevant to whether or not it is reasonable to include non-commodity products and services on a regulated EDC utility bill.

This Written Objection constitutes the EGSs' second attempt to make the meritless argument that all discovery in this matter must be relevant to the issue of discrimination only. In a prior Order Granting Motion to Compel² issued to the parties on March 19, 2020, ALJ Cheskis

² See Order Granting Motion to Compel Filed by the Office of Consumer Advocate, Docket Nos. C-2019-3013805, C-2019-3013806, C-2019-3013807, and C-2019-3013808 (Order issued March 19, 2020).

stated that information relevant to the remedy requested in this matter *is relevant and discoverable*. The EGSs have not demonstrated that the documents and information requested in OCA Set VI questions 1 and 6 are not relevant to the remedy requested in this matter.

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

II. LEGAL STANDARD

The burden is placed on the party objecting to discovery to establish that the information requested is not relevant or discoverable.³ 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.⁴ For information to be relevant it must either tend to establish a material fact, tend to make a fact at issue more or less probable, or support a reasonable inference or presumptions regarding a material fact.⁵

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

³ 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).

⁴ *Id.*

⁵ *Id.* At 9-10, *citing Smith v. Morrison*, 47 A.3d 1311 (PA. Super 2012), *alloc. Denied*, 57 A.3d 71 (Pa. 2012).

information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

III. MOTION TO COMPEL

A. The EGSs Have Not Met Their Burden of Demonstrating That Question 1 Is Not Relevant.

The EGSs have challenged question 1 on the grounds of relevance to the issue of discrimination without considering its relevance to the *remedy requested* in this matter—to require on-bill billing of all EGSs’ non-commodity products and services on a regulated utility bill. The contracts currently effective in Pennsylvania and the other specified jurisdictions allowing the EGSs to have their non-commodity products and services charges displayed on a regulated utility’s bill are relevant because they reveal the conditions under which such billing arrangements have been approved and, therefore, would allow the OCA to compare these billing arrangements with the billing arrangements currently in effect by FirstEnergy EDCs with their FirstEnergy affiliates in billing for non-commodity products and services. These billing arrangements currently in effect with the FirstEnergy EDCs have been the subject of discovery by the OCA and the EGSs in this proceeding.

Earlier in this proceeding, ALJ Cheskis found the OCA’s prior discovery request for “regulatory decisions” permitting the relevant EGSs to enjoy on-bill billing in other jurisdictions to be relevant and within the scope of discovery in this matter because they tend to establish a material fact in this case: whether the EDCs should be compelled to provide on-bill billing for the EGSs in Pennsylvania.⁶ The OCA submits that, in a similar vein, any currently effective contracts between the EGSs and distribution utilities in Pennsylvania and the other specified states are relevant as to the same material fact. Examining the conditions of the billing arrangements that currently allow the EGSs to enjoy on-bill billing is relevant as to whether the EDCs should be compelled to include the EGSs’ non-commodity products and services on their regulated bills here in Pennsylvania as a remedy in this matter.

⁶ See Order Granting Motion to Compel Filed by the Office of Consumer Advocate.

B. The EGSs Have Not Met Their Burden of Demonstrating That The Information Requested In Question 6 Is Not Relevant.

Once again, by challenging the discovery items requested in question 6 on the grounds of relevance to discrimination, the EGSs have failed to consider the relevance of the discovery items to the *requested remedy* in this matter. As mentioned above, the OCA’s request for copies of the written materials and sales scripts for the door-to-door marketing of the EGSs’ non-commodity products and services is relevant to the remedy requested in this matter which would require the EDCs in Pennsylvania to include the non-commodity items on their bills. In other words, this information on marketing practices would tend to establish the material fact of whether or not the EDCs should be required to include the EGSs’ non-commodity goods and services on their regulated utility bills, and, if so, under what conditions, as an outcome in this matter.

The EGSs aver that the Commission made clear in the 2018 Columbia base rate case⁷ that the “service” over which it has jurisdiction is the provision of the billing service and not the underlying non-commodity products and services. Accordingly, the EGSs argue that non-commodity services, along with the sales methods of non-commodity services, are neither jurisdictional nor relevant to the alleged discrimination in this case. However, the OCA disagrees. This formal complaint filed by the EGSs has opened the door to the consideration of how the FirstEnergy EDCs market, sell, and bill for non-commodity products and services provided by the FirstEnergy affiliates. The OCA has conducted discovery of how FirstEnergy EDCs market and sell their non-commodity services, including sales presentations and customer service representative scripts, as well as the terms of service for non-commodity services purchased by residential customers. The OCA’s participation in this proceeding seeks to raise not only the discriminatory allegations raised by the EGSs, but the role of the FirstEnergy EDCs in marketing, sales, and billing for non-commodity services in light of the EGSs’ allegations.

Here, the marketing materials and scripts utilized by the EGSs to sell non-commodity products and services are relevant as to whether or not the Commission should mandate that such non-commodity purchases are to be included on an EDC’s regulated bill—especially in the situations whereas non-commodity goods and services are sold alongside regulated commodity services. In Columbia, the Commission determined that the *billing of non-commodity products and*

⁷ See Pa PUC, et al., v. Columbia Gas of Pennsylvania, Docket No. R-2018-2647577, et seq., (Opinion and Order entered December 6, 2018).

services are under its jurisdiction and hence, the Commission had the power to determine whether Columbia's on-bill billing practices were discriminatory and *whether or not those non-commodity products and services should be included on an EDC's regulated utility bill.*⁸ In fact, in the Commission's determination that requiring Columbia to provide the EGSs on-bill billing was an unreasonable remedy under the circumstances in the matter, it agreed with the OCA's Reply Exception which highlighted issues with Columbia's on-bill billing practices and consumer protection concerns related to non-commodity on-bill billing.⁹ The EGSs are correct in that, *alone*, the manners in which the EGSs conduct sales of non-commodity goods and services are made are not within the Commission's jurisdiction. However, the EGSs elected to bring this issue to the Commission's attention with its Formal Complaint and, therefore, are hardly in a position to object to OCA's intent to explore the way in which the EGSs' market and sell these non-commodity charges which they aim to have included on the regulated utility bill. The OCA intends to review the EGSs' marketing materials and scripts for non-commodity products and services just as it intends to review the manner in which the FirstEnergy EDCs and their affiliates currently conduct these same activities for the non-commodity products and services that are displayed on the regulated utility bills. In sum, the OCA submits that the information on the EGSs' marketing practices for non-commodity goods and services are within the scope of discovery in the context of including the non-commodity goods and services on a regulated utility bill.

Further, the EGSs incorrectly assume that the OCA's request for copies of the door-to-door marketing materials and scripts implies that the OCA is challenging the legality of non-commodity products and services and the sales practices related to non-commodity products and services. This is not the case. However, as brought forward by the EGSs themselves, the issue now is whether these non-commodity products and services should be allowed to be billed on a regulated EDC bill. To put it plainly, the EGSs have a license to sell commodity products and services included on EDC's regulated bills; they do not have a license to sell non-commodity products and services. The resolution to the EGSs' request must necessarily consider the consumer protection implications of bundling non-commodity charges—for which the EGSs are not licensed by the Commission—with the commodity charges for which the EGSs are licensed by the Commission

⁸ Id. at 44 and 50.

⁹ Id. at 43 and 50.

under strict consumer protection provisions. The manner through which these non-commodity charges are sold is relevant to the determination of whether or not the charges should be placed on a regulated EDC bill and the conditions under which such charges should appear.

C. Conclusion.

The EGSs have not met their burden of demonstrating that questions 1 and 6 are irrelevant or contain non-discoverable information. The EGSs' failure to fully and completely respond to question 1 would prevent the OCA and its expert from using the information to understand the nature, terms and conditions of existing contracts allowing on-bill billing of non-commodity services in Pennsylvania and in other jurisdictions so that the OCA can conclude whether or not the remedy requested in this matter—which would likely lead to similar contract arrangements here in Pennsylvania—would be in the interest of Pennsylvania customers in the EDCs' service territories. Similarly, the OCA once again submits that the marketing materials and scripts utilized by the EGSs to sell non-commodity goods and services requested in question 6 are relevant in establishing the material fact of whether or not the Commission should mandate that the purchased non-commodity goods and services appear on a regulated EDC utility bill.

IV. Prayer for Relief

For the reasons discussed above, the OCA respectfully requests that ALJ Cheskis grant this Motion to Compel.

Respectfully submitted,

/s/ Laura J. Antinucci

Laura J. Antinucci

Assistant Consumer Advocate

PA Attorney I.D. # 327217

E-Mail: LAntinucci@paoca.org

Darryl A. Lawrence

Senior Assistant Consumer Advocate

PA Attorney I.D. # 93682

E-Mail: DLawrence@paoca.org

Counsel for:

Tanya J. McCloskey

Acting Consumer Advocate

Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
Phone: (717) 783-5048
Fax: (717) 783-7152
Dated: April 14, 2020
*286263