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April 20, 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 SET VI, NOS. 1 & 6**

Dear Secretary Chiavetta:

Enclosed for filing with the Commission is the Joint Complainants' Answer to Motion of Office of Consumer Advocate to Dismiss Objections and Compel Responses to Interrogatories Set VI, Nos. 1 & 6 in the above-captioned proceeding. Copies of this Answer have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Todd S. Stewart
Counsel for Joint Complainants

TSS/jld
Enclosure
cc: Administrative Law Judge Joel H. Cheskis (via electronic 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 MAIL ONLY

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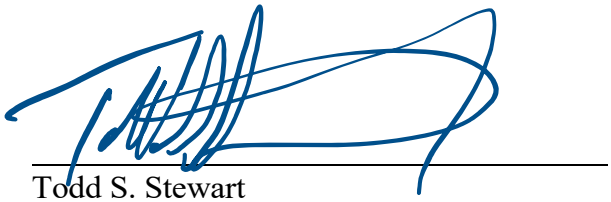


Todd S. Stewart

DATED: April 20, 2020

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 SET VI, NOS. 1 & 6

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 this Answer to the Motion of the Office of Consumer Advocate ("OCA") to Dismiss the Objections of the Joint Complainants to OCA Interrogatories, Set VI - Nos. 1 and 6 and to Compel them to provide answers to same. The two interrogatories at issue request information on the means by which the Joint Complainants market (scripts and sales materials for door to door marketing) and provide (contracts for on-bill billing with other utilities) the non-commodity products and services for which they have requested that the First Energy Pennsylvania Electric Distribution Company affiliates ("FE EDCs") provide them with on-bill billing services. The basis of the Joint Complainants' objections is that the interrogatories seek

information irrelevant to the issue in this complaint proceeding, that is whether the FE EDCs' refusal to provide on-bill billing for non-commodity products offered by the Joint Complainants while providing that same on bill billing for its affiliated companies is unreasonable discrimination which is prohibited by the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 1502 & 2804(6).[1] In its Motion, the OCA openly admits that its intention in this proceeding is to consider whether on-bill billing, by the Joint Complainants, or anyone, should be permitted in the first instance. Specifically, the OCA contends that requests No. 1 & 6 are intended to test whether the relief sought by the Joint Complainants in this proceeding is reasonable.

The Joint Complainants contend that such an inquiry is not relevant to this proceeding and indeed cannot be part of this proceeding. The reason is simple -- the Commission does not, and cannot, as a matter of law, regulate the provision of the non-commodity services in question, because the Commission already has regulations in place that allow for the billing of such products and services and because none of the services fall under the definition of public utility service. The OCA raised similar arguments in the *Columbia*[2] case which the Commission refused

[1] The OCA's Motion to Compel does not comply with the Commission's Regulations at 52 Pa. Code § 5.342(g) which requires that Motions to Compel include the Objections to which they are addressed. While the OCA picks and chooses parts of the Joint Complainants' objections to address, its failure to include them in their entirety not only fails to comply with the law but also prejudices the Joint Complainants by presenting counterarguments out of context. Moreover, this is not the OCA's first offense on this count in this proceeding, as it failed to include the Joint Complainant's Objections in its Motion to Compel answers to its Set II, III and IV interrogatories as well. This repeated, blatant and prejudicial violation of a very clear requirement of the Commission's regulations should not be left un-addressed. Ordinarily such a failure would be the subject of a Preliminary Objection, under 52 Pa. Code § 5.101(a)(4), citing that the pleading is legally insufficient, which it is. Given the current circumstances, however, the Joint Complainants determined that filing a separate set of POs would unnecessarily burden The Presiding Administrative Law Judge and other parties. Accordingly, the Joint Complainants ask that Your Honor provide whatever remedy is appropriate under the circumstances.

[2] *Pa. P.U.C., et al v. Columbia Gas Company of Pennsylvania*, Docket Nos. R-2018-2647577, *et seq*., (Opinion and Order entered December 6, 2018)("*Columbia*").

to accept. Notably, on this exact issue, the Commission dismissed the OCA's arguments *not once, but twice* when denying the OCA's Petition for Reconsideration in *Columbia:*

> **1. OCA fails to assert grounds for reconsideration**
>
> First, the OCA's Petition for Reconsideration reiterates the same arguments previously raised before us on Exceptions in the underlying Columbia rate proceeding. We note that the OCA took no position in the rate proceeding on whether Columbia's current practice discriminates in the provision of service by providing "on bill billing" of non-commodity goods and services offered by its two former affiliates and denying that same billing service to the NGS parties. Rather, the OCA expressed grave concerns for consumer protection issues raised by the practice of "on bill billing" and opposed extending the service to the NGS parties. The OCA argued that the extension of Columbia's "on bill billing" service to the NGS parties "exacerbates the concern…about Columbia's current practice . . . ." Petition at 4.
> …
> **We find that the OCA's Petition for Reconsideration reiterating OCA's position in the underlying proceeding raises no new matter for our consideration.**

Pa. P.U.C., et al v. Columbia Gas Company of Pennsylvania, Docket Nos. R-2018-2647577, *et seq*., Opinion and Order on Reconsideration at 8-9 (Order entered January 17, 2019) (emphasis added). The Commission denied the OCA's Petition for Reconsideration which again sought deeper inquiry into its concerns for consumer protection issues raised by the practices of on bill billing with the simple, yet firm pronouncement:

> With respect to the OCA's position that the billing practice in question raises consumer protection concerns, our *December 6 Order*'s requirement that Columbia provide billing services in a non-discriminatory manner does not obviate the need for those billing practices to comply with existing consumer protection regulations. *See, December 6 Order* at 51, *citing* 52 Pa. Code § 56.83(3) (providing that utility service may not be terminated for nonpayment of such non-basic charges). **If the billing practice in question results in actual violations of consumer protections, the matter may be appropriately raised and addressed at that time.**

Id. at 9. (emphasis added). The Joint Complainant's do not raise any issues on whether the "billing practices in question result in actual violations of consumer protections…" *Id.* Indeed, the OCA can point to no such allegations or issues in this case. With no such conduct was alleged against the FE EDC's, the Commission has already spoken that further inquiry **without actual violations of consumer protections**, is not warranted.

The OCA cannot have a *third* bite at the apple to challenge the permissibility of on-bill billing through this Complaint proceeding; to do so would run amuck the basic principles and rights of the Joint Complainants to challenge the FE EDC's discriminatory conduct. If the OCA's desire is to determine whether the Commission should allow for the billing of non-commodity products and services, its recourse is to petition the Commission for a rulemaking to consider OCA's desire to prevent on-bill billing and amend the current regulations which allow it under 52 Pa. Code §§ 52.13, 52.23 and 52.83. Otherwise, the OCA's efforts in this vein are simply a collateral attack on the Commission's recent determination in the *Columbia* case, where on similar facts the Commission found that the appropriate remedy for this same discriminatory practice, was to allow the utility the choice of either providing the service on a non-discriminatory basis, or not provide the service at all. This collateral attack on a prior Commission order is precluded under 66 PA. C.S. § 316 which provides:

> Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

66 Pa. C.S. § 316. "This section of the Public Utility Code precludes a collateral attack upon a Commission order that has not been reversed upon appeal." *In re Core Communications, Inc.*, Docket No. A-310922F0003 et al. 2007 WL 1771688 (Order entered May 31, 2017). Simply put, the OCA cannot commandeer this Complaint proceeding to challenge the validity of on-bill billing

practices permitted by the Commission in *Columbia.* The only additional "requirement" mentioned by the Commission in *Columbia* is whether NGS providing non-commodity billing had the mechanical ability to provide billing information to Columbia in the appropriate format.[3] Importantly, while the Commission does reference one of its regulations that applies to on-bill billing by noting that customers cannot be terminated for non-payment of non-basic charges – a provision that the Joint Complainants avidly support - that Order does not involve any examination of the means by which the NGSs in that case would provide the services as a precursor to providing the requested remedy which is identical to the remedy sought here.

Non-basic or non-commodity products and services are not "public utility services" (66 Pa. C.S. § 102) and are not subject to Commission oversight or regulation, a key point of the Commission's determination in *Columbia.* Simply put, the Commission's inquiry ends at the bill. Accordingly, because the Commission does not regulate non-commodity products and services,

[3] The concluding paragraph, at pages 50-51, of the *Columbia* Order states:

> We find that Columbia's billing practice, as presently implemented, is discriminatory, unreasonable and not justified in the given circumstances. Therefore, we conclude that Columbia's billing practice, as implemented, violates the prohibition on discrimination in provision of service under both Sections 1502 and 2204 of the Code. Notwithstanding this determination, we agree with the OCA's Reply Exception that it would not be a reasonable solution in these circumstances for the Commission to compel Columbia to provide the NGS Parties "on bill" billing service for non-commodity goods and services offered by the NGS Parties. Columbia must comply with Section 1502 of the Code and provide its "on bill" billing policy in a way that is nondiscriminatory. In other words, Columbia must either provide such a service to all entities that provide such non-basic services or must discontinue the "on bill" billing policy. Columbia may not continue to provide this ability to only the two entities referenced in this case. Should Columbia provide the service to all entities providing non-basic services, *we recognize the potential need for reasonable limitations, such as a requirement that the entities be able to provide information to Columbia in a manner that conforms to Columbia's billing practices, spacing and technologies*. As such, we shall require Columbia to report to this Commission's Bureau of Technical Utility Services, within 60 days of the entry day of this Opinion and Order, its methodology for coming into compliance with Section 1502 of the Code. *We reiterate the requirements of 52 Pa. Code § 56.83(3) which directs that a customer's service may not be terminated for nonpayment of such non-basic charges*. (emphasis added)

the inquiry into how those non-basic products and services are provided and items such as contracts with other utilities that govern how they are provided, are not relevant.

The first basis of the OCA's Motion is the claim that contracts that allow the Joint Complainants to provide non-commodity products and services in other utility service territories and jurisdictions are relevant to this proceeding because they address the remedy requested in this matter. See OCA Motion at 5. The OCA alleges, without citing any evidence, that these other arrangements would "reveal the conditions under which such billing arrangements have been approved. . ." *Id.* This is the first fallacy of the OCA's argument. There simply is no process in Pennsylvania by which these arrangements are approved by the Commission because they are not jurisdictional. The OCA cannot cite a single case that contends otherwise. The OCA's argument is circular and should be given no weight.

The OCA then suggests that because the Presiding ALJ concluded that administrative orders allowing on-bill billing in other states might have a bearing on whether Pennsylvania should allow on-bill billing, contracts with other utilities in other states and jurisdictions might have some bearing on the reasonableness of the remedy requested and should likewise be produced. Despite the fact that the Joint Complainants disagree with the ALJ's decision on the prior Objections, there is no parallel here. Assuming, *arguendo*, that administrative decisions that allow on-bill billing could assist the ALJ in reaching a determination here on whether there is discrimination in this case, the Joint Complainants' contracts with other utilities have no such value and simply are what they are – non-jurisdictional contracts. The OCA's request for contracts from other jurisdictions has no practical relevance to the FE EDC's discrimination at issue, let alone the fact that the Commission does not have the jurisdiction to review and approve the terms and conditions of the non-commodity services provided in Pennsylvania. 66 Pa. C.S. § 102. Rather, in the only case in

Pennsylvania on this subject, the Commission gave no consideration of any contracts, except the ones which formed the basis for the discrimination between the NGSs and the offending former affiliates. See *Columbia*, pp. 34-35. That is not the case here. Contracts of the Joint Complainants with other utilities in other jurisdictions are irrelevant and at most are mere evidence of a contract's existence. This line of discovery, even if permitted, will not lead to admissible evidence in this case. The terms have no bearing on whether the FE EDC's refusal is discriminatory, nor the remedy sought. It is true that contracts between First Energy and its affiliates are relevant as they are the vehicles of the discriminatory conduct just like in *Columbia*, but that is a completely different argument not made by the OCA.

With regard to the request for the Joint Complainants' marketing materials, the OCA claims that these are necessary to determine if the remedy is reasonable. What the OCA seeks is not supported by law – it desires a Commission review of the non-commodity products and services provided by the Joint Complainants before the Commission considers whether the clear discrimination on the part of the FE EDCs deserves a remedy. The OCA ignores the very fact that the Commission has no authority to engage in such a process. There is no case cited by the OCA, nor can the Joint Complainants locate a single case that stands for that proposition, while the seminal case, *Columbia*, points to a diametrically opposite result.

The OCA does not hide its zeal for turning this proceeding into one in which the non-commodity products and services the Joint Complainants wish to offer are put on trial. If that is indeed the OCA's goal, given the existence of regulations that clearly allow for the billing of non-commodity products and services, the OCA must first address the regulations through the appropriate process. Attempting to transform a complaint case about discrimination into an opportunity to address the OCA's concerns over on-bill billing for non-commodity products is

impermissible – the correct process the OCA should use for such a challenge are through a petition for rulemaking. To allow discovery at this time into non-commodity products and contracts offered by the Joint Complainants in other jurisdiction is not only burdensome but is in no-way calculated to lead to admissible evidence.

As the Commission Order in the *Columbia* case reflects, the OCA made the same arguments in that case it raises in its Motion to Compel:

> The OCA raised consumer protection concerns regarding Columbia's present practice of "on bill' billing for non-commodity services offered by a third party. OCA M.B. at 7-8. The OCA suggested that the practice required thorough review to ensure consumer protection concerns are adequately addressed. The OCA argued against the NGS Parties' proposal to be permitted to engage in the same billing practice, while not opposing Columbia's *status quo*. OCA M.B. at 8-9.
>
> The OCA also asserted that the record is deficient regarding the actual practice in place by Columbia and questioned how the non-commodity services are marketed to Columbia's customers. OCA St. No. 5-R at 7. Finally, the OCA questioned whether Columbia has authority to provide "on bill" billing since the practice is not reflected in Columbia's tariff or approved by a Commission order. OCA St. No. 5-R at 4.

Columbia, pp. 39-40.

Even more, the Commission's Order on the OCA's Petition for Reconsideration in *Columbia* shows the dismissal of the OCA's arguments:

> First, the OCA's Petition for Reconsideration reiterates the same arguments previously raised before us on Exceptions in the underlying Columbia rate proceeding. We note that the OCA took no position in the rate proceeding on whether Columbia's current practice discriminates in the provision of service by providing "on bill billing" of non-commodity goods and services offered by its two former affiliates and denying that same billing service to the NGS parties. Rather, the OCA expressed grave concerns for consumer protection issues raised by the practice of "on bill billing" and opposed extending the service to the NGS parties. The OCA argued

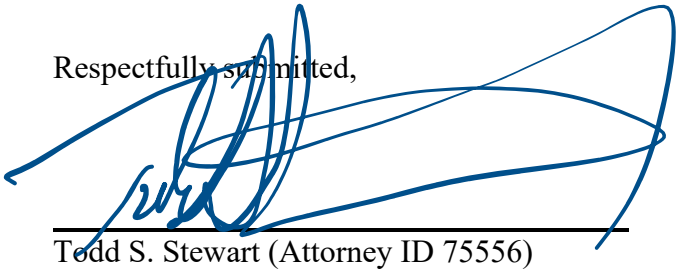
> that the extension of Columbia's "on bill billing" service to the NGS parties "exacerbates the concern…about Columbia's current practice . . . ." Petition at 4.
> …
> **We find that the OCA's Petition for Reconsideration reiterating OCA's position in the underlying proceeding raises no new matter for our consideration.**

Pa. P.U.C., et al v. Columbia Gas Company of Pennsylvania, Docket Nos. R-2018-2647577, *et seq*., Opinion and Order on Reconsideration at 8-9 (Order entered January 17, 2019) (emphasis added). In sum, the Commission not once, *but twice* denied the OCA's request to commandeer the *Columbia* proceeding to address the OCA's concerns over on-bill billing for non-commodity products. The OCA should not be allowed to expand this proceeding through irrelevant discovery into the Joint Complainants' non-commodity marketing and contracts in unrelated jurisdictions when the Commission has *twice* made clear that the on-bill billing products are not relevant unless "the billing practices results in **actual violations of consumer protections**" *Id.* at 9. (emphasis added). Not only that, but even if Your Honor would allow this discovery, it would not lead to admissible evidence in this matter, as any attempt by the OCA to address the permissibility of on-bill billing would be a collateral attack on the *Columbia* order which is not allowed. See 66 Pa. C.S. § 316.

The result in *Columbia* is the same as it should be here, the Commission did not go down that rabbit hole and instead limited its inquiry to the discrimination at hand. The OCA is attempting here to similarly and unnecessarily broaden the scope of inquiry to collaterally attack the issues it lost in *Columbia*. The OCA should not be given a *third* bite of the apple, especially through this Complaint proceeding where the issue lies on the FE EDC's discriminatory conduct alone. The Joint Complainants submit as a matter of law such inquiries are beyond the Commission's jurisdiction and would be contrary to its existing regulations.

WHEREFORE, the Joint Complainants respectfully request that Your Honor dismiss the OCA's Motion to Compel.

Respectfully submitted,



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DATED: April 20, 2020