**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 SECOND MOTION TO COMPEL**

**FILED BY THE OFFICE OF CONSUMER ADVOCATE**

Introduction

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 its 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 its 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. 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 was held on February 3, 2020 as scheduled. On February 5, 2020, a scheduling order was issued that memorialized the various matters agreed to during the prehearing conference.

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

On March 5, 2020, the OCA filed a motion to compel answers to interrogatory 8 in each of their set II, III and IV interrogatories served on the EGSs. On March 10, 2020, the EGSs filed their answer to the OCA’s motion. That motion was granted via order dated March 19, 2020.

On April 14, 2020, the OCA filed a second motion to compel. This motion pertained to interrogatories set VI numbers 1 and 6. In its motion, the OCA argued, as discussed further below, that the EGSs should be compelled to provide answers to these interrogatories, which pertain to the currently effective billing contracts between the EGSs and utilities in Pennsylvania, Ohio and Maryland, as well as the written materials and sales scripts used for door-to-door marketing for residential customers, because, among other things, they tend to establish a material fact of whether the EGSs’ requested remedy in this proceeding for mandatory on-bill billing of non-commodity services on an EDC’s regulated utility bill is a reasonable one. The OCA argued that the EGS’s have not met their burden to prove that these interrogatories are not relevant or contain non-discoverable information.

On April 20, 2020, the EGS’s filed an answer to the OCA’s motion. In their answer, the EGSs argued that the interrogatories seek information irrelevant to the issue in this proceeding – whether the EDC’s refusal to provide on-bill billing for non-commodity products offered by the EGSs is unreasonable discrimination prohibited by the Public Utility Code. The EGSs argued that the interrogatories are irrelevant because the Commission does not have jurisdiction as a matter of law to regulate the provision of the non-commodity services in questions. The EGSs added that the Commission has addressed this issue in a recent proceeding and the OCA cannot raise the issue again in this proceeding. The EGSs concluded by requesting that the OCA’s motion be dismissed.

The OCA’s second motion to compel is now ready for disposition. For the reasons discussed below, the OCA’s motion will be granted and the EGSs will be directed to provide answers to OCA interrogatories VI-1 and VI-6.

Legal Standard

As noted in the various previous orders addressing discovery disputes in this case, the Commission’s regulations allow parties the opportunity to conduct 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. 52 Pa.Code § 5.321(c). It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. Id. Discovery is not permitted, however, if it is sought in bad faith; would cause unreasonable annoyance, embarrassment, oppression, burden or expense; relates to a matter which is privileged; or would require the making of an unreasonable investigation by the deponent, a party or witness. 52 Pa.Code § 5.361(a); *see also*, City of Pittsburgh v. Pa.P.U.C., 526 A.2d 1243 (Pa.Cmwlth 1987), *alloc. denied*, 538 A.2d 880 (Pa. 1988).

Information is relevant if it tends to establish a material fact, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. *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 § 102, Docket Number P-2015-2476211 (Order dated September 11, 2015) at 9-10, *citing*, Smith v. Morrison, 47 A.3d 1311 (Pa.Super 2012), *alloc. denied*, 57 A.3d 71 (Pa. 2012). Relevancy in discovery is broader than the standard used for admission of evidence at a hearing. Id. at 10, *citing*, Com. v. TAP Pharmaceutical Products, Inc., 904 A.2d 986 (Pa.Cmwlth 2006). The party objecting to discovery has the burden to establish that the requested information is not relevant or discoverable with any doubts regarding relevancy being resolved in favor of discovery. Id.

Interrogatories

As stated in the OCA’s motion, interrogatories set VI numbers 1 and 6 state as follows:

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).
2. Please provide a copy of each suppliers’ written materials and sales presentation scripts for non-commodity services utilities in door-to-door marketing to residential customers while soliciting orders for commodity services (pages 5, lines 14-15).

Position of the parties

With regard to interrogatory VI-1, the OCA argued that the contracts currently effect in Pennsylvania and the other 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 the EDCs. The OCA noted that these billing arrangements currently in effect have been the subject of discovery by the OCA and the EGSs in this proceeding.

With regard to interrogatory VI-6, the OCA argued that the EGSs’ objection to this question fails to consider the relevance of discovery on the requested remedy in this matter. The OCA added that 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 bills and, if so, under what conditions. The OCA then addresses the EGSs’ averment that the Commission addressed this issue in a 2018 base rate case involving the Columbia Gas Company of Pennsylvania (Columbia) and that the non-commodity services are not jurisdictional or relevant to the alleged discrimination in this case. The OCA disagreed by stating that the EGSs’ complaint has opened the door to consideration of this issue. The OCA added that the marketing materials and scripts utilized by the EGSs are relevant as to whether the EGSs’ relief requested in this case should be granted. The OCA concluded, among other things, that the manner through which the non-commodity charges are sold is relevant to whether the charges should be placed on a regulated EDC bill and the conditions under which those charges should appear.

The EGSs provide one response to both the OCA’s arguments regarding interrogatory VI-1 and VI-6. The EGSs argued that the Commission does not, and cannot, as a matter of law, regulate the provision of the non-commodity services in questions 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 EGSs noted that the OCA twice raised similar arguments in the Columbia base rate case and both the Commission refused to accept the OCA’s argument. The EGSs highlighted the Commission’s determination that if the billing practice in question results in actual violations of consumer protections the matter may be appropriately raised and addressed at that time, and added that no such allegations occur in this case and there are no actual violations. The EGSs argued that the OCA is now attempting to have a third bite of the apple on this issue and such attempt must be denied, noting that the OCA’s proper recourse is to petition the Commission for a rulemaking. The EGSs then argue that the non-commodity products are not public utility services as defined by the Public Utility Code. The EGSs added that the OCA is 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. The EGSs concluded that, as in the Columbia case, the Commission should not go down that “rabbit hole” and instead limit its inquiry to the discrimination at hand.

Disposition

To begin, as with the OCA’s first motion to compel filed in this proceeding on March 5, 2020, the EGSs’ objection has not been provided as part of the motion. As the EGSs noted in their answer, Section 5.342(g) of the Commission’s regulations specifically provides, among other things that “the motion to compel must include the interrogatory objected to ***and the objection***.” 52 Pa.Code § 5.342(g)(emphasis added). Without the objection to the interrogatory, it is impossible to know exactly what needs to be addressed in an order resolving a motion to compel. As noted above, there are many reasons why an interrogatory may be objectionable, including if the interrogatory is sought in bad faith; would cause unreasonable annoyance, embarrassment, oppression, burden or expense; relates to a matter which is privileged; or would require the making of an unreasonable investigation by the deponent, a party or witness. 52 Pa.Code § 5.361(a). It is unclear whether the EGSs objected to these interrogatories on those bases because the OCA did not attach the objections to its motion as it is required to do.

Nonetheless, Section 1.2 of the Commission’s regulations allows for the liberal construction of the Commission’s regulations to ensure the just, speedy and inexpensive determination of every action and that a presiding officer may disregard an error or defect of procedure which does not affect the substantive rights of the parties. 52 Pa.Code § 1.2(a). In this case, without the objection provided again, the order will be limited to addressing whether the interrogatories are relevant. The OCA’s procedural error in failing to include the objections with the motion to compel will be disregarded since the EGSs substantive rights have not been affected. To the extent that the EGSs believed that the OCA’s motion omitted a particular ground for why the interrogatories are objectionable, i.e., that the interrogatories were privileged, unreasonably burdensome, etc., they could have raised such arguments in their answer to the OCA’s motion. They did not. The OCA is strongly advised to ensure that all future pleadings comply with the Commission regulations.

With regard to the merits of the motion to compel, I agree with the OCA that the EGSs have “opened the door” to the consideration of these interrogatories. Although the OCA argued that the “this formal complaint filed by the EGSs has opened the door to the consideration of how the First Energy EDCs market, sell and bill for non-commodity products and services provided by the First Energy affiliates,” it is the testimony of EGS witness Cusati, pre-served on the parties on March 24, 2020, that has opened the door to the OCA’s interrogatories.

For example, Mr. Cusati testified that “the EGSs have billing arrangements with Electric Distribution Companies and Natural Gas Distribution Companies (local utilities) for non-commodity products and services in the following territories: Columbia Gas of Ohio, Vectren Energy Delivery of Ohio, Vectren Energy Delivery of Indiana, Peoples Natural Gas of Pennsylvania and Baltimore Gas & Electric in Maryland.” As a result, the OCA is entitled to explore that statement further through discovery by asking for the billing contracts in effect for each of those utilities identified as allowing retail energy suppliers to bill and collect for non-commodity services and products in Ohio, Pennsylvania and Maryland.

Similarly, Mr. Cusati testified in response to the question “How do the EGSs take orders from the consumer on these non-commodity products and services” that “in addition, EGSs market and sell these services as part of their door-to-door campaigns when soliciting orders for the commodity products available in that service territory.” Again, the OCA is entitled to explore that statement through discovery by asking for 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.

As noted above, relevancy in discovery is broader than the standard used for admission of evidence at a hearing. It is unclear whether the answers to interrogatories VI-1 and VI-6 will be admitted into the record of this proceeding if such admission is sought. At present, however, the EGSs have made the interrogatories relevant by raising the subject matter of the interrogatories in their preserved testimony. And, since no other argument has been made for why the interrogatories may be improper – such as bad faith, unreasonably burdensome, etc. – the EGSs’ objections must be denied and the OCA’s motion to compel must be granted.

In addition, the other arguments that the EGSs raised in their answer to the OCA’s motion to compel will also be rejected. Most notably, the EGSs argued that the Commission has already addressed the issues raised in interrogatories VI-1 and VI-6 in the Columbia base rate proceeding and that addressing those issues that the Commission has already rejected in a separate proceeding would be a collateral attack of that prior order in violation of Section 316 of the Public Utility Code. This argument, however, is undermined by the fact that the EGS witness opened the door to these interrogatories by raising the issues in his preserved testimony. The OCA is allowed to question those statements made by the EGS witness through discovery which is precisely what interrogatories VI-1 and VI-6 do.

Conclusion

In conclusion, the motion to compel filed by the OCA seeking to compel answers to interrogatories VI-1 and VI-6 will be granted. The standard for discovery is broad, and broader than the standard used for the admission of evidence at a hearing. In this case, the information sought in these interrogatories explores statements made by the EGSs’ witness in preserved testimony which the OCA is entitled to question through discovery. Furthermore, the interrogatories are not precluded on other grounds such as privilege or being unreasonably burdensome. Therefore, the EGSs’ objections will be denied and the OCA’s second motion to compel granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion to compel answers to Office of Consumer Advocate interrogatories VI-1 and VI-6 dated April 14, 2020 is granted.

Date: April 22, 2020 \_\_\_\_\_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Joel H. Cheskis

Deputy Chief Administrative Law Judge

**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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