

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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June 26, 2020

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
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 Secretary Chiavetta:

Enclosed please find the Answer of the Office of Consumer Advocate to the Motion of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company to Strike Portions of the Rebuttal Testimony of the Office of Consumer Advocate in the above-referenced proceedings.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully submitted,

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Enclosures:

cc: The Honorable Joel H. Cheskis (**email only**)
Certificate of Service

*290951

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 Answer to the Motion of Metropolitan Edison, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company to Strike Portions of the Rebuttal Testimony of the Office of Consumer Advocate, 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 26th day of June 2020.

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Dated: June 26, 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	:	

THE OFFICE OF CONSUMER ADVOCATE’S ANSWER TO THE MOTION OF
METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC
COMPANY, PENNSYLVANIA POWER COMPANY, AND WEST PENN POWER
COMPANY TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF
THE OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

Pursuant to Section 5.103(c) of the Pennsylvania Public Utility Commission’s (Commission) Regulations, the Office of Consumer Advocate (OCA) submits this Answer to the Motion of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, the FirstEnergy Companies) to Strike Portions of the Rebuttal Testimony of the Office of Consumer Advocate witness Barbara Alexander in the above-captioned proceeding (Motion to Strike). The FirstEnergy Companies’ Motion to Strike should be denied because it misconstrues and misrepresents the OCA’s Rebuttal Testimony, which neither raised new issues outside the scope of direct testimony in this matter nor raised new issues beyond the Commission’s jurisdiction. Rather, the OCA’s Rebuttal Testimony was in response to the Joint Complainants’ Direct Testimony seeking to require the FirstEnergy EDCs to bill customers for the suppliers’ non-basic and non-commodity charges on the

FirstEnergy bill. As explained herein, the FirstEnergy Companies' Motion to Strike should be denied.

II. BACKGROUND

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 Commission against the FirstEnergy Companies. The EGSs' complaint averred that the FirstEnergy Companies' conduct of on-bill billing for non-commodity products and services offered through the FirstEnergy Companies for their affiliates while refusing to provide on-bill billing for EGSs' non-commodity products and services 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 FirstEnergy Companies' 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 FirstEnergy Companies to provide a similar service to the EGSs operating on their systems for the EGSs' non-commodity products and services.

On February 7, 2020, the OCA filed a Notice of Intervention to protect the interests of consumers in the FirstEnergy Companies' service territories in this proceeding before the Commission. The EGSs submitted their direct testimony on March 24, 2020. In accord with the Scheduling Order¹, the OCA's witness Barbara Alexander filed written Rebuttal Testimony on May 13, 2020.

The FirstEnergy Companies filed this Motion to Strike on June 9, 2020.

¹ See, Scheduling Order at 3.

III. LEGAL STANDARD

A. Rebuttal Evidence.

The Pennsylvania Public Utility Code at 66 Pa. C.S. § 332(c) entitles every party “to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”² Evidence will not be permitted to be introduced during the rebuttal stage if it: “(1) Is repetitive; (2) Should have been included in the party's case-in-chief; (3) Substantially varies from the party's case-in-chief.”³ The purpose of 52 Pa. Code Section 5.243(e) is “to avoid trial by ambush and the prevention of surprise can only be achieved if the parties are confined to the scope of their direct case.”⁴

B. Jurisdiction.

Billing falls under the Commission’s jurisdiction as constituting “service” defined under Section 102 of the Pennsylvania Public Utility Code (Public Utility Code), 66 Pa.C.S. Section 102, and is therefore subject to Commission jurisdiction.⁵

IV. ANSWER

FirstEnergy’s Motion to Strike should be denied because it misconstrues and misrepresents the OCA’s Rebuttal Testimony, which neither raised new issues outside the scope of direct

² 66 Pa. C.S. § 332(c).

³ 52 Pa. Code § 5.243(e).

⁴ See Pa. Pub. Util. Comm’n v. UGI Utilities, Inc., Docket No. R-00932862, et al., 1994 Pa. PUC LEXIS 137, *133 (Opinion and Order entered July 27, 1994) (UGI could not introduce two adjustments in its Rebuttal Testimony that were previously overlooked and not included as part of the UGI’s case-in-chief in direct testimony); see also, Pa. Pub. Util. Comm’n v. Total Environmental Solutions, Inc. – Treasure Lake Water Division, Docket No. R-00072493, 2008 Pa. PUC LEXIS 42, *114 (May 23, 2008) (TESI could not introduce salary and wage adjustments at rebuttal stage after failing to include them as case-in-chief in direct testimony).

⁵ See Pa. Pub. Util. Comm’n v. Columbia Gas of Pennsylvania, Inc., Docket No. R- 2018-2647577, et al., 2018 Pa. PUC LEXIS 431, *72 (Opinion and Order entered December 6, 2018) (Columbia).

testimony in this matter nor raised new issues beyond the Commission’s jurisdiction. The OCA’s Rebuttal Testimony is proper, considering the facts of this case, and does not constitute “trial by ambush”. Rather, the OCA’s Rebuttal Testimony was in response to the Joint Complainants’ Direct Testimony seeking to require the FirstEnergy EDCs to bill customers for the suppliers’ non-basic and non-commodity charges on the FirstEnergy bill. The OCA’s Rebuttal Testimony described the functions and features of the FirstEnergy Companies’ on-bill billing practices of its non-commodity products and services in order to evaluate the EGSs’ claims and the appropriateness of the EGSs’ proposed remedy. Furthermore, the OCA’s Rebuttal Testimony was given in response to the Direct Testimony of the Joint Complainants who relied in part on their evaluation of the FirstEnergy EDCs’ billing practices for non-basic services provided by an affiliate of the EDCs on the residential bills.⁶

The FirstEnergy Companies make the above-mentioned claims about specific pages and lines⁷ of the OCA’s Rebuttal Testimony, but fail to demonstrate in the Motion to Strike how each specifically indicated portion of the OCA’s testimony raises “new issues” or is otherwise “outside of the Commission’s jurisdiction”. Conversely, all of the portions of the OCA’s Rebuttal Testimony relevant to the Motion to Strike are in response to the Joint Complainant’s Direct Testimony and discuss topics subject to the Commission’s jurisdiction. For instance, on Page 3, lines 18-20 and Page 4, lines 1-8, OCA Witness Barbara Alexander responds to the EGSs’ claim⁸ by indicating that there is a competitive advantage for FirstEnergy to have their non-commodity

⁶ See Joint Complainant’s Direct Testimony at 8-12.

⁷ FirstEnergy Companies requested that Administrative Law Judge Joel H. Cheskis strike the portions of the OCA’s Rebuttal Testimony appearing on page 3, lines 18-20, page 4, lines 1-8, page 5, lines 2-6 and 20-23, page 6, page 7, page 8, lines 1-17, page 12, lines 20-22, page 13, lines 5-18, page 14, lines 20-23, page 15, lines 1-4 and 12-13, page 16, lines 9-14, and page 17, lines 6-8 and 16-21. Motion to Strike at 6.

⁸ See, Joint Complainant’s Direct Testimony at 6, lines 13-17.

charges on the regulated utility bill and a disadvantage to customers who may be misled into paying the total amount owed (basic service and non-basic service amounts) to avoid collection actions. This evidence was presented in direct response to the Joint Complainant's testimony that customers do not like to receive two separate bills for commodity and non-commodity services.⁹ Since OCA Witness Barbara Alexander responded to the above claim made by Joint Complainant's Direct Testimony, it is not a "new issue". Additionally, as billing practices are subject to Commission jurisdiction, the OCA's discussion of FirstEnergy's billing of its non-commodity products and services with its basic service charges is not "outside the scope of the Commission's jurisdiction." Not only was the OCA's evidence properly included in the OCA's Rebuttal Testimony, it is crucial information for the Commission to evaluate in its determination of this matter.

In addition, FirstEnergy Companies' argument that the OCA chose not to file direct testimony along with the Joint Complainants in this matter should be rejected as this Complaint proceeding was initiated by the suppliers who raised the issue of how the FirstEnergy EDCs bill non-basic services to their residential customers on behalf of their affiliates. It was proper for the Joint Complainants to file direct testimony and it was proper for the OCA to respond to that direct testimony in its Rebuttal Testimony. In particular, the OCA has a right to present its views on the FirstEnergy billing practice and why the remedy sought by the EGSs to use these billing practices should not be granted. The OCA's Rebuttal Testimony was not in violation of 52 Pa. Code Section 5.243(e), but rather responded to the analysis and proposals set out in the EGSs' Direct Testimony. The OCA's Rebuttal Testimony describes the FirstEnergy Companies' on-bill billing practices

⁹ Id.

from the perspective of the OCA's statutory role to ensure protections for customers and proposed a prudent and reasonable resolution to this Complaint.

A. FirstEnergy Companies' Assertion that the OCA's Rebuttal Testimony Introduced "Novel" Issues Should Be Rejected.

As mentioned above, the OCA's Rebuttal Testimony was filed in response to the Joint Complainant's testimony, which discussed the FirstEnergy Companies' practice of on-bill billing for its own non-commodity products and services and their recommended solution that the EGSs be permitted to use this billing practice. The FirstEnergy Companies' Motion to Strike alleges that the OCA's Rebuttal Testimony "raised a number of new issues entirely outside the scope of direct testimony and beyond the Commission's jurisdiction."¹⁰ Specifically, FirstEnergy alleges that the OCA's Rebuttal Testimony "challenges the reasonableness of the Companies' product and service offerings, the Companies' product and service web pages, customer service practices, and revenues, the Companies' bill presentment for product and service charges, and...further advocates against the Companies' continued billing of products and services."¹¹ First, the above statement is a mischaracterization of the above-mentioned portions of the OCA's Rebuttal Testimony. The OCA was not "challenging" the FirstEnergy Companies' product and services offerings, product and service web pages, customer service practices, revenues, and bill presentment for product and service charges. Rather, the OCA's Rebuttal Testimony addresses the features and functions of the FirstEnergy Companies' on-bill billing practice for the FirstEnergy Companies' own non-commodity products and services and whether these practices, if extended to the EGSs, provides an appropriate remedy that properly protects consumers.

¹⁰ See, FirstEnergy's Motion to Strike at 2.

¹¹ Id. at 3.

The OCA's rebuttal discussion of the FirstEnergy Companies' product and service offerings, product and service web pages, customer service practices, revenues, and bill presentment for product and service charges, and their impact on consumers are not new issues addressed at the rebuttal phase of testimony. In their Motion to Strike, the FirstEnergy Companies' claim that the topics listed in the preceding sentence are either "novel" issues or outside the scope of direct testimony and beyond the Commission's jurisdiction, yet they are discussed in Joint Complainant's direct testimony in this matter.¹² For instance, the Joint Complainants' Direct Testimony describes the non-commodity products and services the FirstEnergy Companies sell on the Utilities website on page 8 and describes how the FirstEnergy Companies do not separately bill for the non-commodity products and services on page 9.¹³

The OCA's discussion of the non-commodity products and services the FirstEnergy Companies sell is not outside the scope of the Commission's jurisdiction. The FirstEnergy Companies' on-bill billing of non-commodity products and services constitute "service" under Section 102 of the Public Utility Code, 66 Pa.C.S. Section 102, and is subject to the Commission's jurisdiction to determine whether the practice violates Section 1502 of the Public Utility Code, 66 Pa.C.S. Section 1502, prohibiting discrimination in the provision of service.¹⁴ The FirstEnergy Companies are using Commission regulated utility bills to charge ratepayers for their non-commodity products and services and discussion of charges for billing of such products and services is not outside the scope of the Commission's jurisdiction in this Complaint alleging discrimination under Section 1502 of the Public Utility Code.

¹² See Joint Complainant's Direct Testimony at 8-12.

¹³ Id.

¹⁴ See Columbia at *71.

Lastly, the Joint Complainants recommend, in their Direct Testimony, that the Commission find FirstEnergy Companies' current on-bill billing practices for its own non-commodity products and refusal to provide that service for the Joint Complainant's to be discriminatory and, as a remedy, require the FirstEnergy Companies to provide the same on-bill billing services for the Joint Complainant's non-commodity products and services.¹⁵ The OCA's Rebuttal Testimony evaluates the potential anti-competitive effects of the practice and the consumer protection issues related to this proposed solution and recommends an alternative solution. The OCA's recommendation was appropriately made in its Rebuttal Testimony. The OCA's recommended resolution in response to the Joint Complainant's requested remedy in this matter was entirely appropriate to include in its Rebuttal Testimony and it is not a "novel" issue introduced at the rebuttal stage of testimony.

B. FirstEnergy Has Failed to Demonstrate that the OCA's Rebuttal Testimony is in Violation of the Commission's Regulations at 52 Pa. Code Section 5.243(e).

The Commission's regulations at 52 Pa. Code Section 5.243(e) provide: "[A] party will not be permitted to introduce evidence during a rebuttal phase which: (1) is repetitive; (2) should have been included in the party's case-in-chief; [or] (3) substantially varies from the party's case-in-chief." The OCA does not have a "case-in-chief" in this matter and was not required to file direct testimony. The OCA intervened in this case to ensure that the outcome of this Complaint does not harm consumers within the FirstEnergy Companies' service territories. The OCA's Rebuttal Testimony was filed in response to the Joint Complainant's Direct Testimony and addresses the claims made within it and the remedy requested.

¹⁵ Id.

This is not a situation involving “trial by ambush.” In prior cases addressing a motion to strike testimony based on Section 5.243(e), the Commission has recognized that the information being introduced in the rebuttal phase could have been introduced in the direct testimony phase.¹⁶ FirstEnergy’s claim that the OCA should have filed direct testimony in a case where it is not the Complainant and does not have the burden of proof has no merit and should be rejected.

C. Striking Portions of the OCA’s Rebuttal Testimony as Requested by FirstEnergy Would Deny the OCA Due Process Under 66 Pa. C.S. Section 332(c).

The OCA is entitled under 66 Pa. C.S. Section 332(c) to submit rebuttal evidence to the Joint Complainant’s direct testimony “as may be required for a full and true disclosure of the facts.” The portions of the OCA’s testimony that FirstEnergy has requested to be struck are vital to the outcome of this matter. The OCA submits that striking its Rebuttal Testimony in response to Joint Complainant’s claims and requested remedy in direct testimony would be in violation of the OCA’s due process rights under 66 Pa. C.S. Section 332(c) of the Public Utility Code.

The FirstEnergy Companies argue that they are disadvantaged by the shorter period of response time associated with the OCA filing rebuttal testimony rather than if the OCA filed direct testimony in this matter. While the OCA was under no requirement to file direct testimony in this matter, the FirstEnergy Companies failed to mention any alternative to striking portions of the OCA’s Rebuttal Testimony in order to obtain more time to respond in surrebuttal. One alternative would have been to extend the procedural schedule to give FirstEnergy more time to respond in surrebuttal. This alternative would have prevented any infringement on the OCA’s due process rights and also would avoid depriving the Commission of the full and complete record as to the important issues raised in the OCA’s Rebuttal Testimony. The OCA submits that, in the interest

¹⁶ See Pa. Pub. Util. Comm’n v. UGI Utilities, Inc., at *133; see also, Pa. Pub. Util. Comm’n v. Total Environmental Solutions, Inc. – Treasure Lake Water Division, at *114.

of judicial economy, all of the statements made in the OCA's rebuttal testimony must be retained in the record so that the important issues raised can come to light.

V. CONCLUSION

The OCA requests that the Presiding Officer deny the Companies' Motion to Strike as the Company misrepresented the portions of OCA's Rebuttal Testimony relevant to the Motion to Strike. The OCA is entitled to submit Rebuttal Testimony in response to claims and requests made in Joint Complainant's direct testimony under 66 Pa. C.S. Section 332(c) of the Public Utility Code and striking the portions of OCA's rebuttal as requested by FirstEnergy Companies, would be a violation of due process and prevent the OCA from carrying out its statutory duties "to represent the interest of consumers as a party, or otherwise participate for the purpose of representing an interest of consumers, before the commission in any matter properly before the commission..."¹⁷

Respectfully Submitted,

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¹⁷ See [71 P.S. § 309-4](#).