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August 18, 2020

**VIA ELECTRONIC FILING**

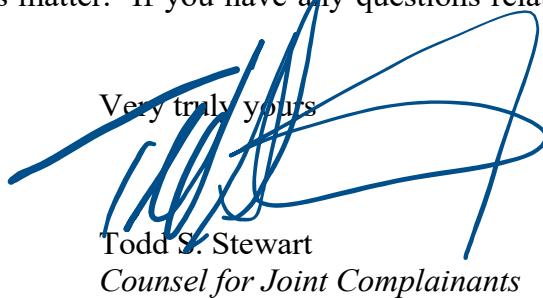
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Filing Room  
Harrisburg, PA 17120

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; **MAIN BRIEF**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Main Brief of the Joint Complainants in the above-captioned proceeding. Copies of this Brief have been served in accordance with the attached Certificate of Service.

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



A handwritten signature in blue ink. The signature is somewhat abstract and cursive, but the name "Todd S. Stewart" is recognizable within it. Above the signature, the phrase "Very truly yours" is written in a smaller, printed-style font. Below the signature, the name "Todd S. Stewart" is written again, followed by the title "Counsel for Joint Complainants" in a cursive script.

TSS/jld

Enclosures

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)

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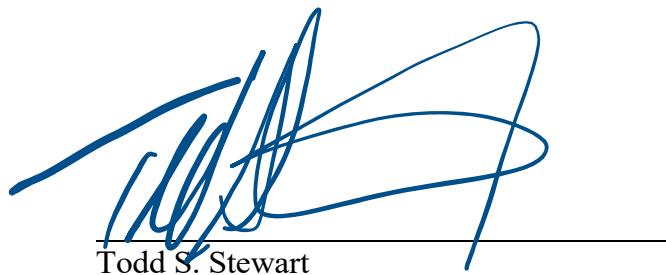
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Todd S. Stewart

DATED: August 18, 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	:	

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**MAIN BRIEF  
OF JOINT COMPLAINANTS  
INTERSTATE GAS SUPPLY, INC., D/B/A IGS ENERGY,  
DIRECT ENERGY SERVICES LLC AND  
SHIPLEY CHOICE, LLC D/B/A SHIPLEY ENERGY**

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DATED: August 18, 2020

## **TABLE OF CONTENTS**

I.	STATEMENT OF THE CASE.....	1
II.	STATEMENT OF THE QUESTIONS INVOLVED .....	3
III.	SUMMARY OF THE ARGUMENT .....	4
IV.	ARGUMENT.....	7
	A.    Burden of Proof.....	7
	B.    The FE EDC’s Provision of On-Bill billing For Their Own Non-Commodity, Non-Basic Products and Services, While Refusing to Provide the Same Service to EGSSs on its System is Discrimination Under 66 Pa.C.S. § 1502 and 66 Pa.C.S. 2804(6). .....	7
	C.    The FE EDC’s Discrimination is Neither Warranted Nor Reasonable.....	9
	D.    The Commission’s Regulations and Precedent Authorize On-Bill Billing for Non-Basic Non-Commodity Products and Services, and the OCA’s Consumer Protection Claims Cannot Supersede Those Regulations.....	11
V.	CONCLUSION.....	12
APPENDIX A	Proposed Findings of Fact	
APPENDIX B	Proposed Conclusions of Law	
APPENDIX C	Proposed Ordering Paragraphs	

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Aronson v. Pa. PUC,</i> 740 A.2d 1208 (Pa. Cmwlth. 1999) .....	8
<i>IGS, et al v. Metropolitan Edison, et al,</i> Docket No. C-2019-3013805, et seq.....	5
<i>Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.,</i> Docket No. R-2018-2647577, Opinion and Order (Order entered December 6, 2018) .....	1
<i>Samuel J Lansberry, Inc. v. Pa PUC,</i> 578 A.2d 600 (Pa. Cmwlth. 1990) .....	7
<i>Se-Ling Hosiery, Inc. v. Margulies,</i> 364 Pa. 45, 70 A.3d 854 (1950).....	7

### **Statutes**

66 Pa.C.S. § 1502.....	4, 7, 12
66 Pa.C.S. § 101, <i>et. seq.</i> .....	7
66 Pa.C.S. § 102.....	4, 8, 13
66 Pa.C.S. § 2203(4).....	8
66 Pa.C.S. § 2804(6).....	passim
66 Pa.C.S. §§ 1502 and 2203(4) .....	4
66 Pa.C.S. §§ 701, 1309.....	5, 11

### **Regulations**

52 Pa. Code §§ 56.13, 56.23 and 56.83(3).....	4, 11
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## I. STATEMENT OF THE CASE

In May 2019, representatives of Interstate Gas Supply, Inc. d/b/a IGS Energy (“IGS”) approached First Energy and requested that First Energy provide the same on-bill billing service to them that First Energy provides to its affiliate, First Energy Services, the same entity that provides logistics and support for the First Energy EDCs.<sup>1</sup>

IGS’ request was based in large part on the then recent decision of the Pennsylvania Public Utility Commission (“Commission”) in the *Columbia*<sup>2</sup> case, wherein the Commission found that a utility’s provision of on-bill billing services for non-commodity products and services to two former affiliates while refusing to provide it for NGSSs serving customers on its system was unwarranted discrimination. The Commission ordered a simple remedy to the discrimination in *Columbia*: that Columbia either provide the same on-bill billing service to competitive NGSSs as it does for its two former affiliates or not provide the service at all.<sup>3</sup> Columbia chose the latter.

After many reminders and half a year of waiting, First Energy’s promised response never came. With this silence, it was clear that First Energy had no intention of offering on-bill billing to EGSSs in a nondiscriminatory manner; the only assumption to be made was that First Energy had refused the request. (JC St. No. 1, 10:7-12). At that point, IGS and other like-minded electric generation suppliers that serve customers in the First Energy service territories had few options if they ever wanted to be on a level playing field with First Energy’s non-basic, non-commodity

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<sup>1</sup> See, JC Cross Exhibit No. 6.

<sup>2</sup> *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, Opinion and Order (Order entered December 6, 2018) (“*Columbia*”).

<sup>3</sup> *Columbia* at 50. (“*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.”)

products and services – they would need to file a formal complaint regardless of the issue already addressed in *Columbia*.

Identical formal complaints were filed by IGS, Shipley Choice LLC d/b/a Shipley Energy and Direct Energy Services, LLC, (collectively the “EGS Parties”) on October 25, 2019 against the Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (“FE EDCs”). A prehearing conference was held on February 3, 2020 at which time the Complaints were consolidated and a procedural schedule was established. On February 7, 2020, the Pennsylvania Office of Consumer Advocate (“OCA”) intervened. There was extensive discovery and direct, rebuttal and surrebuttal testimony. Due largely to the impacts of the present COVID-19 pandemic, the parties agreed to forego a hearing and simply move the testimony and exhibits into the record without cross examination.

## **II. STATEMENT OF THE QUESTIONS INVOLVED**

1. Is the FE EDC's provision of on-bill, non-basic billing for its affiliate and joint enterprise use while refusing to provide the same service for the Joint Complainants, unwarranted discrimination prohibited by 66 Pa.C.S. § 1502?

**Suggested Answer: Yes**

2. Is the FE EDC's use of its regulated utility bill to benefit its affiliate and joint enterprise, while refusing to provide the service for EGSSs serving customers on its system, a failure to provide distribution service electric generation suppliers on "rates, terms of access and conditions that are comparable to the utility's own use of its system" in violation of 66 Pa.C.S. § 2804(6)?

**Suggested Answer: Yes.**

3. Is there any reasonable or warranted excuse for the FE EDC's discrimination?

**Suggested Answer: No.**

### **III. SUMMARY OF THE ARGUMENT**

FirstEnergy's Pennsylvania electric distribution companies ("EDC") Metropolitan Edison Company, Pennsylvania Power Company, Pennsylvania Electric Company, and West Penn Power Company (collectively "FE EDCs") are all participants in an enterprise to provide non-basic services to their regulated utility customers. (Exhibits AC-1, AC-2; JC Cross Exhibit No. 6). These include anything from smart thermostats and LED lightbulbs to warranty services for plumbing, HVAC and electrical systems. The services are provided by an affiliate, First Energy Services Company, and are billed on the FE EDCs' regulated utility bills. (JC St. No. 1, 8:13-17). There is nothing inherently wrong with such a construct, as the Commission's regulations allow for such non-basic services to be provided, and to be billed on the utility bill.<sup>4</sup>

However, the exclusive arrangement between the FE EDCs and First Energy Services Company runs afoul of the law because the service of providing the utility bill to customers, i.e., utility billing, is a utility service.<sup>5</sup> That means it is subject to the requirements of 66 Pa.C.S. § 1502 and 66 Pa.C.S. § 2804(6), which prohibit discrimination in the provision of utility service generally; and specifically apply to the provision of utility service by EDCs to electric generation suppliers ("EGS") such as the Joint Complainants. At least one of the Joint Complainants requested that the FE EDCs provide on-bill billing for non-basic, non-commodity products and services that it provides to its customers, and the FE EDCs refused. (JC St. No. 1, 10:7-12). Throughout the course of this proceeding it became clear that FE EDCs have no intention to

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<sup>4</sup> See 52 Pa. Code §§ 56.13, 56.23 and 56.83(3).

<sup>5</sup> *Columbia* at 44. ("We find that Columbia's billing practice constitutes "service" as the term is defined under Section 102 of the Code, 66 Pa.C.S. § 102, and is subject to the Commission's jurisdiction to determine whether the practice violates Sections 1502 and 2203(4), 66 Pa.C.S. §§ 1502 and 2203(4) prohibiting discrimination and anti-competitive practices in the provision of service.")

provide the same on-bill billing service it provides its affiliate First Energy Services Company to any EGS absent a Commission Order. This anti-competitive and discriminatory restriction to a level playing field is not a new occurrence before this Commission. The Commission recently held, in a case with strikingly similar facts to those in this case, that providing such billing service to one's self or one's affiliate (or in that case, former affiliate) while refusing to provide it for competitive suppliers serving customers on your system, is clear discrimination.<sup>6</sup>

The FE EDCs likely will contend that this obvious discrimination does not really exist or even that it is "reasonable" because their tariffs require it, or because it would cost \$2-3 million to implement changes to their systems to effectuate a non-discriminatory service.<sup>7</sup> None of these arguments are availing. It is clear, that enshrining a discriminatory practice in a tariff does not shield it from the law<sup>8</sup>. Likewise, the FE EDC's unsupported and vague claims of what it might cost to implement non-commodity billing for suppliers must be viewed through the lens of its current practices, future obligations, and its failure to address the Joint Complainant's acknowledgement that a reasonable, cost-based fee to recover such costs is appropriate. It also is true, however, that using a vaguely estimated cost as a basis to claim that discrimination is reasonable has been refuted. Finally, the FE EDC's claims that there may be negative customer service consequences if it were to provide the billing service are refuted by the fact they address similar issues today, apparently successfully. This type of discrimination, that puts the Joint

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<sup>6</sup> *Columbia* at 50. ("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.")

<sup>7</sup> *IGS, et al v. Metropolitan Edison, et al*, Docket No. C-2019-3013805, et seq., "First Energy Answer to Complaint", (filed November 15, 2019).

<sup>8</sup> See 66 Pa.C.S. §§ 701, 1309.

Complainants at an unwarranted and unfair disadvantage must be addressed and cannot be brushed aside because it is merely inconvenient for the FE EDCs or diminishes their monopoly power.

In *Columbia*, the Commission concluded that it did not have the statutory authority to require Columbia to provide a billing service.<sup>9</sup> Rather, the choice of whether to provide the billing services for non-basic, non-commodity products and services for all EGSs on a non-discriminatory basis or the cease providing the service for any entity, including its former affiliates, was left to Columbia.<sup>10</sup> In this case the choice should be the same, either the FE EDCs provide the billing service for all or for none.

The OCA, for its part, agrees with the EGS Parties that First Energy's practice regarding on-bill billing is discriminatory, but, contrary to the Commission's own regulations that specifically allow on-bill billing, would have the Commission order the FE EDCs to cease what is otherwise a legal activity – but for the discrimination that is the subject of this complaint.<sup>11</sup> The OCA does raise legitimate consumer protection issues with regard to the FE EDC's billing practices, but nothing that would, standing alone, warrant anything more than a process to address and repair the cracks. Likewise, the OCA also takes up the cause of parties that are not even part of this proceeding and who arguably are not within the realm of the OCA's constituency, namely businesses that may compete with the EGS Parties, and who may provide the types of services for which the EGS Parties seek to have the FE EDCs bill. Those parties share none of the vital characteristics that would put them into a class that should be subject to the anti-discrimination provisions of 66 Pa.C.S. § 2804(6) – that is, they are not licensed EGSs with a pre-existing billing arrangement with the FE EDCs. The Commission will note that in its *Columbia* decision, it gave

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<sup>9</sup> *Columbia* at 50.

<sup>10</sup> *Id.*

<sup>11</sup> OCA St. No. 1-R, Rebuttal Testimony of Barbara Alexander, *passim*.

little attention to the OCA’s consumer protection claims, choosing only to point out that utilities must ensure that customers are not terminated for failing to pay non-basic, non-commodity charges.<sup>12</sup> In short, the OCA’s consumer protection and discrimination arguments lack any merit.

#### **IV. ARGUMENT**

##### **A. Burden of Proof**

The EGS Parties, as the proponents of a rule or order in this Commission proceeding, bear the burden of proof. 66 Pa.C.S. § 332. Accordingly, the EGS Parties have the burden of proving by a preponderance of the evidence, which is evidence that is more convincing than the evidence presented by the other parties, that the FE EDCs have violated the Public Utility Code, 66 Pa.C.S. § 101, *et. seq.*. See *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J Lansberry, Inc. v. Pa PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990).

##### **B. The FE EDC’s Provision of On-Bill billing For Their Own Non-Commodity, Non-Basic Products and Services, While Refusing to Provide the Same Service to EGSs on its System is Discrimination Under 66 Pa.C.S. § 1502 and 66 Pa.C.S. 2804(6).**

From a factual perspective, this matter is not complex. The FE EDCs have an affiliate, First Energy Services Company, that runs the FE EDCs’ non-commodity operations, including fulfillment. This same company also provides unified billing services for all the FE EDCs using, in substantial part, the same billing platform for non-commodity products and services sales and fulfillment, as it does for utility billing, but ultimately providing the utility bill on behalf of its utility affiliates.<sup>13</sup> This intertwined relationship makes it difficult to parse which entity does what, but at the end of the day, the issue is this: First Energy Services Company is an affiliate of the FE

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<sup>12</sup> See *Columbia* at 51.

<sup>13</sup> See EGS Parties Cross Exhibit 1, 5 – 7.

EDCs and provides the non-basic sales and fulfillment muscle to the operation. These products and services are billed exclusively on the FE EDC's utility bills.<sup>14</sup>

The EGS Parties also provide non-commodity, non-basic products and services to their customers and they desire to provide the same convenience as part of the value proposition to their customers - that the customer is billed for these products on their utility bill. (JC St. No. 1, 7:11-8:11). The FE EDCs have refused to provide this opportunity even while they bill for virtually identical products and services that they and their affiliate provide, through that same utility bill. This is the essence of discrimination, providing a regulated utility service – non-basic billing – for itself and its affiliates while refusing to provide it for EGSSs, who are the FE EDC's customers for billing service for commodity products, and who also are its competitors for non-commodity products.

The Commission has determined that billing for non-commodity products and services:

[C]onstitutes a public utility service as the term “service” is defined by Section 102 of the Code, 66 Pa.C.S. 102, which provides:

‘Service.’ Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities . . . 66 Pa.C.S. § 102.<sup>15</sup>

The Commission also recognizes that the Commonwealth Court has held that non-commodity “billing service” falls under the definition of Service as found in Section 102 and is subject to Commission jurisdiction.<sup>16</sup> Likewise, the Commission has also concluded that the analogous section of the *Natural Gas Choice and Competition Act*, 66 Pa.C.S. § 2203(4)<sup>17</sup>, “broadly prohibits

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<sup>14</sup> *Id.*

<sup>15</sup> *Columbia* at 45.

<sup>16</sup> *Id.*, citing *Aronson v. Pa. PUC*, 740 A.2d 1208 (*Pa. Cmwlth.* 1999).

<sup>17</sup> Analogous to 66 Pa.C.S. § 2804(6).

discrimination in the provision of service.”<sup>18</sup> The Commission determined that Columbia’s billing practice was discriminatory. It should reach the same conclusion here. The facts here are virtually identical to *Columbia*, with one immaterial difference, which does not impact the analysis, that in *Columbia* the entities receiving the service were former affiliates and in the case at the bar, the party receiving the preferential discriminatory treatment is a current affiliate, and/or the utility itself.

Lest the FE EDCs argue that there is a difference because the service is arguably, at least partially being provided for or by the FE EDCs, not the affiliated service company, 66 Pa.C.S. § 2804(6) addresses that consequence by requiring the EDCs provide service to EGSSs, affiliated or non-affiliated on “rates, terms of access and conditions that are comparable to the utility’s own use of its system.” Clearly billing for one’s own non-basic, non-commodity products and refusing to do the same for EGSSs who serve customers on their system, is not comparable, nor is it legal.

Simply put, the discrimination is clear. The FE EDCs provide billing service for non-basic, non-commodity products and services for one entity, their own, and refuse to provide it for EGSSs.

### **C. The FE EDC’s Discrimination is Neither Warranted Nor Reasonable.**

It is true that some level of discrimination is permitted if it is based on facts that warrant the discrimination.<sup>19</sup> None of the reasons that the FE EDCs have or are likely to raise warrant the discrimination exposed here. The primary approach that the FE EDCs will likely take is to argue that it is too complicated and/or too expensive to bill for the non-commodity products and services of competing EGSSs. This is refuted by the evidence in the case. (JC. St. No. 1-SR, *passim*) First, FE already has done a high-level review of what would be required to alter its systems to

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<sup>18</sup> *Columbia* at 47.

<sup>19</sup> *Columbia* at 48.

accomplish what the EGS parties have requested. (JC Cross Exhibits 1-7). Depending on the day, the FE EDCs claimed it would cost either \$2 million or \$3 million to implement the alleged system changes. (FE St. No. 2, 5:19-6:2) In either event, this is not an insurmountable amount of capital expense to recover in a per bill fee as the EGS Parties have suggested as an appropriate recovery mechanism. Mr. Cusati also testified that in his view the cost and complexity should be far less than the FE EDCs have projected because the billing is already provided for an affiliate that actually provides the service and because customers cannot be terminated for non-payment of the non-basic charges, that FE EDCs already must have the logic and back-end processing in place to recognize the difference.<sup>20</sup> In addition, there is record evidence of an order in Ohio issued during this case, wherein electric utilities that provide on-bill billing for their own products and services must provide that same service for suppliers on their systems.<sup>21</sup> Since all FE EDCs use the same billing system, it would appear that such capabilities are now already required in a different state where First Energy operates, so some cost savings is likely. Nonetheless, the cost of the systems changes is not an issue that should rise to the level of making the equal playing field unreasonable. Rather, once the FE EDCs are required to remedy the discrimination, they can file tariffs with the rates and the cost basis can be debated at that time and a reasonable rate can be approved by the Commission as the EGS Parties suggested to recover the FE EDCs costs of implementation.

The FE EDCs have repeatedly argued in this proceeding that what they do is reasonable because the practice is in some respects enshrined in its various tariffs. (FE St. No. 1, 4:9-15). This argument is wholly lacking in merit. The Public Utility Code is clear that while tariffs that are approved are considered just and reasonable, that status is not permanent and is subject to being

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<sup>20</sup> See Joint Complainants' Statement No. 1-SR, Pages 26-27.

<sup>21</sup> See Exhibit AC-3 (pp. 48-52); Joint Complainants' Statement No. 1, pages 10-11; Joint Complainants' Statement No. 1-SR, page 25.

changed. See 66 Pa.C.S. §§ 701 and 1309. This proceeding is clearly intended to alter FE EDC's discriminatory practices whether some portions are contained in tariffs or merely in policy. In other words, FE EDC's tariff argument changes nothing. The evidence in this case shows without wavering that the FE EDCs discriminate – it is clear that they do so out of a desire to keep competitors from having the same advantages that they do in providing convenience to customers, by reserving the exclusive capabilities that go with billing for non-basic services on the utility bill for its own use. Like in *Columbia*, the fact that the FE EDCs refuse without good reason to provide equal, non-discriminatory service is a good indicator that the FE EDCs attach value to their exclusivity. In short, there is no evidence that the discrimination in this case is warranted or that it is reasonable.

**D. The Commission's Regulations and Precedent Authorize On-Bill Billing for Non-Basic Non-Commodity Products and Services, and the OCA's Consumer Protection Claims Cannot Supersede Those Regulations.**

The Commission has had regulations addressing billing for non-basic services since at least 1978.<sup>22</sup> Nonetheless, the OCA's witness proposes that the appropriate solution for the FE EDC's discrimination, is to prevent the FE EDCs from providing non-basic products and services. (OCA St. No. 1, 5:1-17) The Commission readily dismissed a nearly identical argument raised by the OCA in the *Columbia* case, and instead made it clear that its primary concern was that customers' utility service not permitted to be terminated for failure to pay non-basic charges.<sup>23</sup> The simple truth is that if there are concerns with how the FE EDCs are presenting non-basic charges on their utility bills, that can be addressed, but it is not a viable reason to vitiate what has been permitted by regulation for at least forty years. The remedy for the FE EDC's discrimination is to end the

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<sup>22</sup> 52 Pa. Code §§ 56.13, 56.23, 56.83(3).

<sup>23</sup> *Columbia* at 50.

discrimination, not to simply to cast stones at the FE EDC's practices, however accurate those criticisms might be.

Likewise, the OCA raises the rights of businesses, that did not join the litigation and indeed have no regulated status before the Commission except perhaps as customers, who the OCA alleges might be negatively impacted by allowing EGSSs the ability to provide on-bill billing. (OCA St. No. 1-R, 3:12-4:12). This is a red herring argument. First, those businesses are not present, and without any evidence in the record, nothing about potential harm to them can be assumed. More importantly, there is evidence that these businesses are in a very different position vis a vis the FE EDCs than EGSSs and there is no legitimate reason that they should be permitted the same status as EGSSs.<sup>24</sup> First and foremost being that EGSSs are regulated by the PUC, even if the non-commodity services themselves are not. In short, there is no valid reason why the Commission should consider the OCA argument regarding potential harm to these entities.

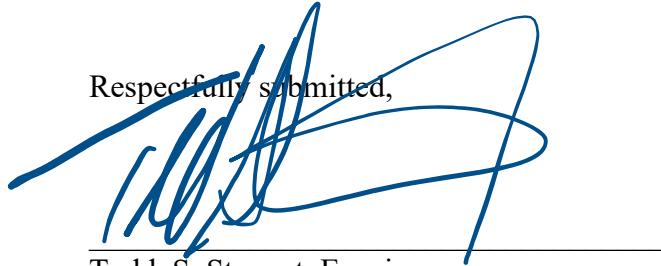
## V. CONCLUSION

WHEREFORE, the EGS Parties respectfully requests that Your Honor conclude that First Energy EDCs' current practice of allowing on-bill billing to its affiliate First Energy Service Company for non-basic commodity charges and services while refusing to offer those same services to Complainants and other competitive EGSSs serving on FE EDCs system is discriminatory under 66 Pa.C.S. § 1502 and 66 Pa.C.S. § 2804(6). The discrimination is neither warranted nor reasonable under the circumstances. As the Commission held in *Columbia*, the FE EDCs' must comply with 66 Pa.C.S. § 1502 and provide its "on bill" billing policy in a way that is nondiscriminatory. To rule otherwise would allow for First Energy to continue its monopolistic and anti-competitive hold over the non-commodity market through its billing practices, a "service"

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<sup>24</sup> See Joint Complainants Statement No. 1-SR, Pages 8-9.

subject to the Commission's jurisdiction under 66 Pa.C.S. § 102. The Commission should, as it did in *Columbia*, explicitly reject the discriminatory nature of the FE EDCs on-bill billing practices as these self-serving and anti-competitive enshrinements hurt the competitive market of non-commodity products and services and ultimately customers.

A handwritten signature in blue ink, appearing to read "Todd S. Stewart, Esq.", is overlaid on a blue line drawing of a stylized letter "T". The drawing consists of several intersecting and overlapping blue lines forming a decorative, abstract shape.

Respectfully submitted,

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**APPENDIX A**

**PROPOSED FINDINGS OF FACT**

1. Competition encourages the development of innovative products and services that add value to customers beyond electricity. The market is continually evolving to offer even more sophisticated products including commodity bundled with energy efficiency products, home protection, warranty products, and others. The Joint Complainants offer these products in various markets included those service territories of the FE EDCs. (Joint Complainants' St. No. 1, 3:3-12).
2. As electricity markets have evolved, customers are beginning to see electricity as more than a commodity, but rather as a package of products and services that includes electricity. (JC St. No. 1, 3:16-20).
3. The Joint Complainants engage customers in a variety of ways to market these non-commodity products and services, including websites, direct mail, and in some cases via door-to-door marketing. (JC St. No. 1, 5:7-17).
4. The Joint Complainants have arrangements with a number of Electric Distribution Companies and Natural Gas Distribution Companies in Pennsylvania and other states, where those utilities will bill for Joint Complainant's non-commodity products. These include Columbia Gas of Ohio, Vectren Energy Delivery of Ohio, Vectren Energy Delivery of Indiana, Peoples Natural Gas Company of Pennsylvania, and Baltimore Gas & Electric in Maryland. Each of these utilities has the ability and does bill for non-commodity products and services in addition to commodity products. (JC St. No. 1, 6:1-6).
5. Consumers do not like receiving additional bills for non-commodity products and services they purchase from their EGS. The vast majority of customers, when given the choice

prefer to receive a single bill that includes all these related charges or a separate bill, will choose the single bill. Customers are more likely to take advantage of non-commodity products and services if they have the convenience of having them billed via the utility bill. (JC St. No. 1, 6:22-7:11).

6. In the FE EDC service territories, the Joint Complainants do provide commodity services for which the FE EDCs will bill customers. In fact, each of the Joint Complainants has an ongoing billing relationship with the FE EDCs that includes participation in the FE EDC's purchase of receivables ("POR") program. (JC St. No. 1, 8:3-11).
7. The FE EDCs sell multiple products to their EDC customers, including electrical services, tree services, surge assistance, landscape lighting, post lamps, security lighting, home security systems, insulation services, home repair plans and more. (JC St. No. 1, 8:15-17). The products and services offered by the FE EDCs are in most cases nearly identical to those offered by the Joint Complainants. (*Id.*, 8:19-9:1).
8. The charges for the FE EDC products are billed on the FE EDC's utility bill. Indeed, the only payment method that is offered is for the products to be billed on the utility bill. (JC St. No. 1, 9:3-12).
9. The FE EDCs' affiliate, First Energy Service Company, provides the billing services under contract to all FE EDC affiliates. This billing platform was initially paid-for by the distribution customers of the various affiliated EDCs. (Exhibit AC-1) First Energy Services Company also provides the website ordering platform and fulfillment operations for the various FE EDC affiliates. (Exhibit AC-2).
10. The FE EDCs initially claimed that it would cost \$2 million to upgrade its IT capabilities to allow for billing of supplier non-commodity products. (JC St. No. 1, 10:16-18.) Later

in the case, it revised its estimate to \$3 million without explanation. (FE St. No.2, 4:19-5:2). The Company later confirmed that the estimate included all the costs of providing for on-bill billing. (JC Cross Exhibit 4).

11. The Public Utilities Commission of Ohio (“PUCO”) has issued an order that will require all electric distribution companies that provide billing service for non-commodity products and services for themselves, to provide the same on-bill billing service for competitive suppliers in their service territory. (Exhibit AC-3). Therefore, to the extent that First Energy desires to continue to offer non-commodity products and services in Ohio in the same manner it does now, it will be required to adapt its billing infrastructure to allow for non-commodity billings by non-affiliated suppliers. (JC St. No. 1, 11:1-10).
12. The Joint Complainant’s request expressly states that they would not want their non-commodity charges to be subject to POR, (JC St. No. 1, 13:4-5), or that customers could be terminated for non-payment of these charges. In fact, the Joint Complainants made clear that balances for non-commodity products and services that are overdue by 30-60 would be removed from the utility bill and returned to the EGS via an existing EDI transaction type. (JC St. No. 1, 12:13-22).
13. The Joint Complainants have made it clear from the start that they do not expect that the FE EDCs would provide an on-bill billing service at no cost. Rather, the EGS parties posited that a reasonable, cost-based, fee would be expected. (JC St. No. 1, 13:9-14).
14. Barbara Alexander, who presented testimony on behalf of the OCA in this case, agrees with the Joint Complainants that First Energy’s current practice of providing on-bill billing for its own non-commodity products while refusing to do the same for EGSSs is discrimination in violation of the Commission’s holding in the Columbia case. (OCA St.

1-R, Page 3:12-16), Mr. Cusati is concerned, however, with Ms. Alexander’s unsupported allegations of potential harm to non-EGSs if the relief requested by the Joint Complainants were granted:

I disagree with Ms. Alexander’s discussion regarding harm to other parties, not EGSs, that provide similar products in the market. She ignores the clear distinctions that EGSs are licensed by the Commission, provide commodity services in the territories, have pre-existing billing relationships with First Energy and currently trade electronic transactions with the First Energy utility companies. These distinctions are significant and provide ample reason to not include “everyone” with the ability to use “on-bill” billing. (JC St. No. 1-SR, 2:14-20).

15. Contrary to Ms. Alexander’s characterization, the Commission’s December 6, 2018 Order would have allowed Columbia to continue to provide on-bill billing for its two former affiliates, but if it did so, it was also required to provide the same service to NGSSs. Columbia *chose* to not provide the service at all, which was its second option. (JC St. No. 1-SR, 3:7-16).
16. Ms. Alexander’s testimony ignores the existence of Commission regulation that make it clear that billing for non-commodity products and services, on the utility bill, is permitted. (JC St. No. 1-SR, 4:11-5:5).
17. It is not radical to seek to bundle electricity sales with natural gas sales on a single bill to a customer. The promise of competition is the ability to innovate and provide products that customers want. (JC St. No. 1-SR, 5:9-16).
18. While the Commission’s Regulations do require a verification for certain modes of commodity sales (52 Pa. Code § 111.7), non-commodity sales have no such requirements. That does not mean that suppliers do not ensure that customers know what products they are purchasing, or that such choices are not memorialized, as Ms. Alexander seems to suggest. Indeed, the opposite is the case – suppliers do verify sales in a variety of ways

and if the commodity and non-commodity products are “bundled” could verify the sale of the “bundle” at the same time. (JC St. No. 1-SR, 5:18-6:7).

19. The OCA’s witness provides no criteria for what she believes to be products that are “related to” electric service, and yet she ignores the Commission’s regulations which do not place any limit on the types of products and services that can be billed on the utility bill. (JC St. No. 1-SR, 6:9-20).
20. Contrary to the view expressed by the OCA witness, the intention of suppliers is not to take advantage of customers, and the majority of suppliers do not lack integrity. Rather, suppliers wish to provide customers with products and services that customers actually want and will purchase and use. (JC St. No. 1-SR, 7:17-23).
21. Mr. Cusati responded to Ms. Alexander’s argument that other non-EGS providers of products and services would be disadvantaged if the FE EDCs were to bill for EGS products and services by pointing out that those entities are not suppliers that are licensed by the Commission. Mr. Cusati also noted that:

[T]hey don’t provide commodity service on the First Energy system, they don’t bill those customers on First Energy’s utility bill, they don’t trade electronic transactions with the First Energy utility companies as the EGS Parties do, and they don’t compete with First Energy for customers like EGSs do. In short, the position of an independent HVAC firm, for example, is vastly different, *vis a vis* First Energy, than an EGS. Many of those entities are local and may have years of presence in the areas in which they operate, unlike the EGSs. I am not aware of any of these entities having come to the Commission seeking to bill on the utility bill.

(JC St. No. 1-SR, 8:11-21)

22. Mr. Cusati testified that Ms. Alexander’s recommendation to prevent the FE EDCs from providing on-bill billing for non-basic, non-commodity products as a cure for their use of monopoly power, would be to “throw out the baby with the bath water”, i.e., to throw away the good with the bad. To the contrary, Mr. Cusati recommends that the FE EDCs instead

be required to either provide the service for all qualified EGSS or not be permitted to provide it at all. Ms. Alexander has presented no empirical evidence to support her case, and nothing to contradict Mr. Cusati's experience dealing directly with customers. (JC St. No. 1-SR, 9:6-20).

23. The EGS Parties' witness, Mr. Cusati, rejects Ms. Alexander's meager attempt to define the types of products that would be eligible to be sold on a regulated utility bill, choosing instead to allow customer demand to drive what products and services are offered. (JC St. No. 1-SR, 10:3-23).
24. There is no evidence on the record that there is any need to limit to number of products and services that could be offered on a utility bill, but if there were a practical basis for such a limitation, one could be proposed, so long as it applied to the FE EDCs and First Energy Services in the same manner. (JC St. No. 1-SR, 11:3-15).
25. The Joint Complainants have differing views on how to implement on-bill billing, but that difference reflects the competitive nature of the marketplace not a refutation of the discriminatory nature of the FE EDC's practices. (JC St. No. 1-SR, 11:21-12:5).
26. Mr. Cusati agrees with Ms. Alexander that to the extent the FE EDC's current methodology for billing non-commodity products and services is confusing to customers, that such practices should be remedied and that the goal of transparency is indeed valid. However, Mr. Cusati does not believe that these are fatal, and that they are implementation issues and don't bear on the ultimate and obvious conclusion that the current practice is discriminatory and illegal. (JC St. No. 1-SR, 12:7-17).
27. The EGS Parties' witness rejects Ms. Alexander's "cynical" view that suppliers simply want to take advantage of customers:

The so-called “consumer protection” issues she discusses in her testimony fall into two categories, either they are “speculative” issues that should have no bearing on the outcome of this proceeding, such as the argument that because other businesses provide similar services the solution proposed by the EGS Parties is not fair to them and should be discarded. Those parties are notably distinguishable from EGSSs as I discussed and the solution to First Energy’s discrimination does not necessarily involve them. The other so called “issues” are minor implementation issues that can be addressed, but which present no good reason to ignore the discrimination and the appropriate remedy which is to allow suppliers the same access to on-bill billing as First Energy’s affiliate enjoys. (JC St. No. 1-SR, 15:6-16).

28. The fact that the FE EDCs do not allow any EGS to avail itself of on bill billing while reserving that privilege for itself does not mean that there is no discrimination. Mr. Cusati believes this is obfuscation at best. (JC St. No. 1-SR, 16:4-8).
29. First Energy admits, in Mr. Cusati’s view, that it has been abusing its monopoly power since the beginning of the competitive market by allowing its affiliate to provide on-bill billing while refusing to provide the same service for EGSSs. (JC St. No. 1-SR, 16:12-18).
30. Mr. Cusati believes that Ms. Bortz, testifying for the FE EDCs, is purposefully addressing the wrong issue, saying that First Energy’s discrimination does not harm the competitive market as between suppliers because no supplier is permitted to do it. This ignores that all suppliers compete for customers with default service, provided by the utility. (JC St. No. 1-SR, 17:12-23).
31. Ms. Bortz posits the argument that the FE EDC’s discrimination does not prevent the EGS Parties from offering the same products and services. Mr. Cusati responds that that test for whether conduct is discriminatory is not whether the victim can overcome the discrimination in some less than ideal manner, it is whether the conduct favors one party over another for no good reason. (JC St. No. 1-SR, 18:1-23).

32. Ms. Bortz' testimony on the POR issue is dissembling:

First Energy has made it clear that it does not include uncollectible amounts for their own non-commodity products into the uncollectible expense bucket, but suddenly now, Ms. Bortz claims supplier non-commodity uncollectibles must go there. I made it clear in my testimony that uncollected balances would be written off to the supplier and would not be part of POR or considered an uncollectible expense. It seems implausible to me that First Energy would be unable to address this via an information technology (IT) change. The "Electronic Data Exchange Standards for Electric Deregulation in The Commonwealth of Pennsylvania" already have write-off transactions that allow utilities to remove balances for uncollected charges and send to the supplier to write off. (JC St. No. 1-SR, 21:10-20).

33. In response to Ms. Enterline's claim that the FE EDCs cannot presently bill for non-commodity products and services provided by EGS, Mr. Cusati is clear that he believes the FE EDCs are not being forthright and finds that her testimony "stretches the limits of credulity". He believes the appropriate question is:

How much effort would be required and what would it reasonably cost to modify the system. It does not appear to me to be a herculean task. As to the suggestion that I should have made a proposal on how First Energy should accomplish this task, I find it incredible that they make such a suggestion after labeling the majority of information about their system as highly confidential so I could not see it. We did provide some solutions, but they apparently were rejected as not being "comprehensive" which again, makes me wonder what exactly First Energy would want in a proposal from us other than general points. (JC St. No. 1-SR, 24:8-20).

34. Mr. Cusati agrees with Ms. Enterline that EGSs should pay a reasonable to address the costs of upgrading and operating the FE EDC's billing system to allow for on-bill billing but also believes that EGS must be allowed input into the functionality of the system. (JC St. No. 1-SR, 25:11-20.)

35. Contrary to Ms. Enterline's baseless assertions, Mr. Cusati testifies that the FE EDC call center should be capable of determining whether a question about a billed item is appropriately addressed to the supplier that provided it. He made clear that in many years

of these arrangements with other utilities there have been no problems of the nature of those hypothesized by Ms. Enterline. (JC St. No. 1-SR, 26:6-27:4; Exhibits AC-4 and AC-5).

## **APPENDIX B**

### **Proposed Conclusions of Law**

1. The First Energy EDC's provision of billing service is utility service as defined in the Public Utility Code and is subject to Commission jurisdiction. 66 Pa.C.S. § 102.
2. The First Energy EDC's provision of billing service for non-basic, non-commodity products and services is subject to the anti-discrimination provisions of 66 Pa.C.S. §§ 1502 and 2804(6).
3. Providing a billing service for one's self and/or one's affiliate while refusing to provide it for EGSSs serving customers on its system is discrimination. 66 Pa.C.S. §§ 1502 and 2804(6).
4. The FE EDC's discrimination in favor of itself and/or affiliate is not warranted and is therefore illegal. *Columbia*.
5. The appropriate remedy for discriminatory conduct is to require that the discrimination be immediately ended. In this case, the FE EDCs should be given the choice either to discontinue their on-bill billing service for the EDCs and/or affiliate, or to provide it for all EGSSs subject to a reasonable cost-based fee and Commission Regulations. *Columbia*.

## **APPENDIX C**

### **Proposed Ordering Paragraphs**

1. That the Formal Complaints of the EGS Parties are hereby sustained.
2. That Metropolitan Edison Company's, Pennsylvania Electric Company's, Pennsylvania Power Company's and West Penn Power Company's billing practices of offering separate line item billing for the non-commodity service provided by third parties is subject to the Commission Jurisdiction of provision of service and such practice must comply with Sections 1502 and 2804(6) of the Public Utility Code. 66 Pa.C.S. §§ 1502 and 2804(6).
3. That Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company are hereby Ordered to cease and desist from their current practice of discriminating against EGSs operating on their systems by refusing to provide them with billing services for non-basic, non-commodity products and services which they provide for their affiliate, First Energy Services Company.
4. Within 30 days of the Final Commission Order in this matter, Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company shall submit to the Commission, a response indicating whether they intend to continue providing on-bill billing for their own products and services and if so, shall submit a plan to transition to providing said billing service to EGS serving customers on their systems, said plan to be complete with 90 days of submission, or they shall notify the Commission that they will no longer provide on-bill billing service at all and shall immediately cease and desist from such activity.