Hawke McKeon & Sniscak LLP
ATTORNEYS AT LAW

Todd S. Stewart
Office: 717 236-1300 x242
Direct: 717 703-0806
tsstewart@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

September 11, 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; **REPLY BRIEF**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Reply 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.

Very truly yours,

Todd S. Stewart
Counsel for Joint Complainants

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)

VIA ELECTRONIC MAIL ONLY

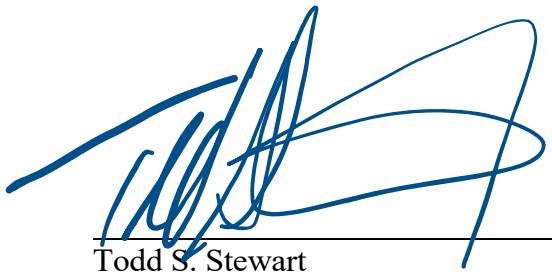
Laura J. Antinucci
Darryl A. Lawrence
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923
LAntinucci@paoca.gov
DLawrence@paoca.gov

Tori L. Giesler
Teresa K. Harrold
FirstEnergy Service Company
2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001
tgiesler@firstenergycorp.com
tharrold@firstenergycorp.com
Counsel for Respondents Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and WestPenn Power Company

Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellott LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
dodell@eckertseamans.com
Counsel for Retail Energy Supply Association

Barbara R. Alexander
Barbara Alexander Consulting, LLC
83 Wedgewood Drive
Winthrop, Maine 04364
barbalexand@gmail.com

The Honorable Joel H. Cheskis
Deputy Chief Administrative Law Judge
3405 North Third Street
Harrisburg, PA 17110
jcheskis@pa.gov



Todd S. Stewart

DATED: September 11, 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	:	

REPLY 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

Todd. S. Stewart, Esquire
Attorney ID No. 75556
Hawke, McKeon & Sniscak, LLP
100 North Tenth Street
Harrisburg, PA 17101
Telephone: (717) 236-1300
Facsimile: (717) 236-4841
tsstewart@hmslegal.com

Counsel for Joint Complainants
Interstate Gas Supply, Inc., dba IGS Energy
Direct Energy Services, LLC and Shipley Choice, LLC dba Shipley Energy

DATED: September 11, 2020

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I. SUMMARY OF THE REPLY ARGUMENT

The FE EDCs argument is flawed from the first word. It seeks to escape responsibility for favoring itself/affiliate in the provision of on-bill billing service for non-commodity products and services it admits that it provides. The FE EDC's only colorable defense is that its tariff as currently constituted, requires that EGS charges on Company bills must go through POR, and these non-basic charges for an EGS cannot be charged using POR, so they cannot be billed through the utility bill. Yet, the FE EDCs bill for these same charges, through the same utility bill, for themselves/affiliate and the charges do not go the POR route. This is an admission that the system was set up to discriminate in favor of the FE EDC's affiliate/self – to prohibit EGSs from having access to the same billing service that the FE EDC's and/or their affiliate enjoy.

That provision and discriminatory conduct, enshrined in the FE EDC's tariffs, was approved before the Commission ruled in the *Columbia* case that the discrimination prohibited by 66 Pa.C.S. § 1502, is ANY discrimination in the provision of utility service, which includes a utility providing a billing service (the PUC found in *Columbia* that on-bill billing is utility service) to its self or affiliates.[1] None of the FE EDC arguments can overcome that determination. The FE EDCs raise various specious arguments: a virtual parade of horribles, such as "the Joint Complainants won't pay for the service", or "our future provision of IT service" will be subject to non-discrimination. These are ridiculous claims in the face of the *Columbia* holding, where the Commission specifically found that on-bill billing is utility *service* under 66 Pa.C.S. § 102. And

[1] *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, Opinion and Order (Order entered December 6, 2018)("Columbia"). This was the first time the Commission explicity found that "on-bill" billing was utility service, that provision of such a utility service was therefore subject to the anti-discrimonation provisions of Sections 1502 and 2203(4), 66 Pa.C.S. §§ 1502 & 2203(4), and that "discrimination" means discrimination as between any two parties.

while the Joint Complainants disagree with the Office of Consumer Advocate that the FE EDCs provision of on-bill billing should be prohibited as offered (assuming of course it is offered to qualifying EGSs), they do agree that the FE EDC's current provision of the billing service is discriminatory. Otherwise, the OCA raises the same arguments here that it raised in *Columbia* and which the Commission rejected.

II. REPLY ARGUMENT

A. The Joint Complainants established new circumstances for the Commission to find that the FE EDCs current tariff provisions enshrining discrimination against EGSs is unreasonable.

In its brief, the FE EDCs argue that the Joint Complainants' (or "EGS Parties") complaint is a "collateral attack" on the Companies' Default Service Program Order and therefore the *prima facie* evidence of the Commission approved tariff warrants dismissal of the Formal Complaint. The FE EDCs go on at length that the discrimination enshrined in their tariff cannot be challenged, and that the Joint Complainants had their due process rights satisfied by either their participation in, or knowledge of FE EDCs proposed DSP and tariff modifications which were ultimately approved by the Commission on September 4, 2018.[2] Further yet, the FE EDCs boldly argue that the Joint Complainants failed to establish any new facts or circumstances that render the Companies' current tariff provisions unreasonable – a drastic mis-representation of the formal complaint and the evidence presented.

The FE EDCs appear to ignore the very basis for the EGS Parties Complaint – after the FE EDCs DSP tariff was approved, the Commission ordered a significant change in the law regarding

[2] *Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 through May 31, 2023*, Docket Nos. P-2017-2637855, *et al.* (Order entered Sept. 4, 2018)

on-bill billing under *Columbia*.[3] The testimony and evidence in this case presented by the EGS Parties established that fact. This change in the law was not simply a passing thought – it was an order by the Commission to stop a distribution company from discriminating against suppliers in the provision of on-bill billing, a "service" under Section 102 now fully recognized by the Commission.[4] This change in circumstances and the law is so drastic that the Commission could not have raised a larger flag indicating that, after December 6, 2018, notably three months **after** the FE EDCs tariff enshrining discrimination against EGSs was approved, the Commission would no longer allow distribution companies to discriminate against suppliers in the provision of billing "service" including on-bill billing of non-basic products and services.[5] Indeed, that the law, as applied in *Columbia*, was changed was the very basis for the EGS Parties at first attempting to work with the FE EDCs to allow on-bill billing and, after no response, the change formed the basis of the EGS Parties' joint complaint and the relief requested therein. This provides the very basis for overcoming the high burden to challenge the FE EDC's tariff as unreasonable.

Pennsylvania Courts and this Commission have repeatedly held that tariff provisions previously approved by the PUC are *prima facie* reasonable and that a complainant seeking to overturn such provisions carries a heavy burden to prove that "the facts and circumstances have

[3] *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, Opinion and Order (Order entered December 6, 2018)("*Columbia*").

[4] *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.") It is obvious that the statutory underpinnings of the holding had not changed, but rather, the Commission's interpretation and application of those provisions is what changed.

[5] *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.")

changed so drastically as to render the application of the tariff provision unreasonable." *Shenango Township Board of Supervisors v. Pa. Pub. Util. Comm'n, 686 A.2d 910, 914 (Pa. Commw. Ct. 1996);* citing *Zucker v. Pennsylvania Public Utility Commission,* 43 Pa. Cmwlth. 207, 401 A.2d 1377 (1979). The EGS Parties have carried that burden. The EGS Parties have shown that because of the change of law after the FE EDC tariff was approved, the circumstances have changed so drastically to render the tariff provision enshrining discrimination of billing service unreasonable.

The FE EDCs hang their hat on a simple fact – their EGS Coordination tariffs were approved as part of the FE EDCs last DSP proceeding, entered on September 4, 2018.[6] It may be true[7] that the EGS parties either participated in or were aware of this proceeding to satisfy the requirements of due process – notably, however, none of the EGS parties signed onto the Joint Petition for Partial Settlement.[8] Therefore, as due process may have been met at the time, the FE EDCs argue that 66 Pa.C.S. § 316 precludes the EGS Parties from now challenging the contents of the approved tariff. This argument is a red herring.

First, the FE EDCs EGS Coordination Tariffs were approved on September 4, 2018. At that time, the Commission had not yet held that on-bill billing for suppliers was considered a

[6] *Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 through May 31, 2023*, Docket Nos. P-2017-2637855, *et al.* (Order entered Sept. 4, 2018).

[7] The FE EDCs make significant factual misrepresentations in their brief regarding RESA. Shipley has never been a RESA member, and Direct has not been a member of RESA since before the instant complaint was filed, https://www.resausa.org/members. Moreover, RESA is an association whose individual members' views are not binding on the association and vice versa. Accordingly, any position RESA may have taken in any prior proceeding cannot be attributed to its individual members.

[8] *Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 through May 31, 2023*, Docket Nos. P-2017-2637855, *et al.* (Joint Petition dated Dec. 11, 2017), pp. 10, 15 (Certificate of Service).

service under Section 102 or that distribution companies must either provide the same access to on-bill billing they and their affiliates enjoy, or not allow on-bill billing at all. On December 6, 2018, this underlying principle of law regarding on-bill billing changed as ordered in *Columbia*.[9] Over three months after the Commission approved the FE EDCs tariff which at that time enshrined the very discrimination the EGS Parties now seek to overcome, the Commission applied the definition of "service" to include billing and barred Columbia from discriminating against NGS access to on-bill billing.[10] Indeed, after December 6, 2018, "the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable" – distribution companies must no longer discriminate against suppliers access to on-bill billing of non-commodity products and services, they must either offer a level playing field to all suppliers for on-bill billing, or not allow on-bill billing at all.[11]

B. Section 1502 applies to unreasonable preference of one party over *any* other party.

The FE EDCs also argue that Section 1502, 66 Pa.C.S. § 1502, only applies when a utility is providing a preference to one third party over another. FE EDCs Brief at 14. This is a gross misrepresentation of the Commission's decision in *Columbia*:

> The language of Section 1502 establishes a broad prohibition on discrimination in the provision of service by prohibiting the unreasonable preference of one party over *any* other party. For example, Section 1502 does not require that the discrimination be against the same type of provider, *i.e.,* favoring one NGS over another NGS. Rather, discrimination will be found if any unreasonable preference or difference in the treatment of one party versus another is shown in the provision of service.

[9] *Columbia* at 44. The Commission's affirming that the discrimination alleged by suppliers, in the provision of billing service by a natural gas utility, was governed by Section 1502, was as case of first impression.
[10] *Columbia* at 50.
[11] *Id.*

Columbia at 47 (emphasis in original). In determining that "service" as defined under Section 102 includes on-bill billing services, the Commission could not have been clearer when applying that definition to discriminatory billing service: Section 1502 prohibits the unreasonable preference of one party over ***any*** other party. Importantly, this is not one EGS over another, not one customer class over another, it is one party over ***any*** other party. Indeed, any party receiving preferential treatment over another is discrimination in the provision of utility service. Here, billing for one's own non-basic, non-commodity products and refusing to do the same for EGSs who serve customers on their system indeed is an unreasonable preference, and surely the FE EDCs and EGSs are in fact "any other party" despite the FE EDCs attempt to limit the Commission's holding on Section 1502.

The FE EDCs go on with a doomsday like scenario – if Section 1502 does apply to a utility as well as third parties, the FE EDCs "would be at risk of violating Section 1502 for situations like conducting their own tree trimming rather than permitting third parties to offer that service, or for maintaining their own information technology ("IT") systems when third-party vendors also have this capability." FE EDCs Brief at 15. This fear mongering is without a basis – the Commission has not already ordered third parties "tree trimming" services to constitute "service" under Section 1502, and it has not ruled that other "information technology" services constitute "service" either. Indeed, as characterized, these other businesses are part of a service, but are not a service that is a utility service, nor does the Commission have such jurisdiction or authority to regulate these potential separate service entities. What the Commission does regulate is what it defines as "service" under Section 102 which, after *Columbia*, undeniably includes billing practices as a term of a utility's provision of service without mention of third party tree trimming or information

technology services.[12] Section 1502 and the Commission's precedent is clear: Section 1502 prohibits the unreasonable preference of one party over ***any*** other party in the provision of billing service.

C. The FE EDCs must offer "service" on terms of access and conditions that are comparable to the FE EDCs own use of its system under 66 Pa.C.S. § 2804(6).

The FE EDCs argue that 66 Pa.C.S. § 2804(6) is inapplicable to this case, irrelevant to the billing of non-commodity products and services, or that it cannot be used as justification to require the FE EDCs to take on on-bill billing service for EGSs. FE EDCs Brief at 25-26. The FE EDCs go on to admit that in *Columbia*, the Commission held that both Section 1502 and 2203(4) of the Public Utility Code "broadly prohibit discrimination in the provision of service."[13]

The FE EDCs attempt to distinguish the Commission ruling under 66 Pa.C.S. § 2203(4) in *Columbia* with the parallel statute for the electric industry, Section 2804(6). This attempt wholly lacks merit. These two statutes provide the same anti-discrimination provisions and were enacted for the same purpose (albeit for natural gas vs. electric industry).[14] These statutes provide a strikingly similar nondiscrimination mandate, that a public utility:

> … shall provide distribution service to all retail gas customers in its service territory and to all natural gas suppliers, affiliated or nonaffiliated, on nondiscriminatory rates, terms of access and other conditions.

66 Pa.C.S. § 2203(4).

> … shall provide transmission and distribution service to all retail electric customers in their service territory and to electric cooperative corporations and electric generation suppliers, affiliated or nonaffiliated, on rates, terms of access and conditions that are comparable to the utility's own use of its system.

66 Pa.C.S. § 2804(6).

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[12] *Columbia* at 47-48.
[13] *Columbia* at 50.
[14] Compare 66 Pa.C.S. § 2203(4) and 66 Pa.C.S. § 2804(6).

In fact, Section 2804(6) goes one step further than Section 2203(4) in prohibiting the very discrimination the FE EDCs seek to continue, that the utility must allow service "comparable to the utility's own use of its systems."[15] Where the Commission ruled in *Columbia* that Section 2203(4) barred discrimination for on-bill billing when Columbia was favoring some NGSs operators, Section 2804(6) is even more clear and on point to the relief the EGS Parties seek – the EGS Parties want to be provided billing service "comparable to the utility's own use of its systems." As the Commission has already determined that billing constitutes "service" under Section 102 and as applied under Section 1502, the FE EDCs must offer that service in a nondiscriminatory manner and, under Section 2804(6), in a manner that is comparable to the utility's own use of on-bill billing for non-commodity products and services. The result is clear.

D. The Commission should rule consistent with *Columbia* and not create different standards for discrimination in the provision of a public utility service.

The FE EDCs in brief argue various technicalities, reasons for, or excuses to justify the continued discrimination against EGSs for on-bill billing services. These includes various red herring arguments like costs, consumer protection concerns, and even the FE EDCs "risk" to justify their continued monopolistic and anti-competitive hold over the non-commodity market through its billing practices, a "service" subject to the Commission's jurisdiction under 66 Pa.C.S. § 102.[16] For its part, the OCA argues similar consumer protection concerns which the Commission already dismissed in *Columbia*.[17] As addressed in both testimony and in Brief, the EGS Parties have shown that none of these are acceptable excuses to allow the discrimination to continue, and that the potential for legitimate compromises exist.[18] The FE EDCs use these excuses to try to

[15] 66 Pa.C.S. § 2804(6).
[16] *Columbia* at 44.
[17] *Columbia* at 50.
[18] See EGS Parties Brief at 9-11.

escape the Commission holding in *Columbia*, arguing that the instant proceeding warrants a different resolution and the discrimination should be permitted. It should not.

It is particularly noteworthy that the FE EDCs contend that cost recovery is an issue, FE EDCs Brief at 19, when the Joint Complainants have repeatedly stated that a reasonable fee to recover the reasonable costs is appropriate. Will there need to be a determination of what is reasonable -- most likely yes -- but such a determination is neither novel nor unprecedented. The FE EDC's skepticism aside, there is no basis, reasonable or otherwise, for their discrimination in the provision of a billing service for non-basic products and services.

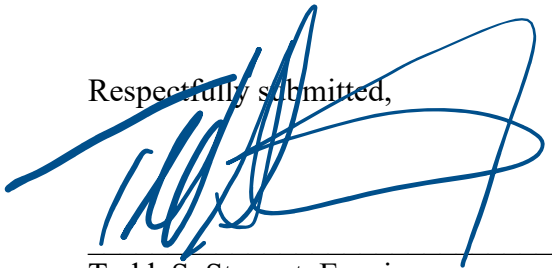
What the FE EDCs argue for here in their request to dismiss the EGS Parties Complaint is a double standard – while 66 Pa.C.S. § 2203(4) prohibits a Natural Gas Distribution Utility from discriminating against Natural Gas Suppliers, its companion statute 66 Pa.C.S. § 2804(6) ***does not*** prohibit an Electric Distribution Utility from discriminating against EGSs for billing service that constitute public utility service as defined by Section 102 and applied under Section 1502, and *Columbia* does not apply here.[19] The legislature enacted both of these statutes to promote competition and reduce the monopolistic hold that Utilities traditionally had over customers. They are equal in application – discrimination must not be permitted in order to foster a competitive market. The Commission should not create two standards, one anti-discrimination and one pro-discrimination in public utility service without the express intent of the legislature. Therefore, the Commission should rule, consistent with *Columbia*, that the FE EDCs billing practices are discriminatory, unreasonable, and not justified under the circumstances and that the FE EDCs may not continue to provide on-bill billing to itself at the exclusion of EGSs.

[19] *Columbia* at 45.

III. CONCLUSION

WHEREFORE, the EGS Parties respectfully request, as they did in their Main Brief, that Your Honor conclude: 1) that First Energy EDCs' current practice of allowing on-bill billing to itself/affiliate First Energy Service Company for non-basic commodity charges and services while refusing to offer those same services to Complainants and other competitive EGSs serving on FE EDCs system is discriminatory under 66 Pa.C.S. § 1502 and 66 Pa.C.S. § 2804(6); 2) that the discrimination is neither warranted nor reasonable under the circumstances; and, 3) that the FE EDCs' must comply with 66 Pa.C.S. § 1502 and provide "on bill" billing, if at all, in a fashion that is nondiscriminatory as the Commission held in *Columbia*. It is clear, that any other conclusion would allow for First Energy to continue its monopolistic and anti-competitive hold over the non-commodity market through its billing practices, a "service" 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.

Respectfully submitted,



Todd. S. Stewart, Esquire
Attorney ID No. 75556
Hawke, McKeon & Sniscak, LLP
100 North Tenth Street
Harrisburg, PA 17101
Telephone: (717) 236-1300
Facsimile: (717) 236-4841
tsstewart@hmslegal.com

DATED: September 11, 2020

Counsel for Joint Complainants
Interstate Gas Supply, Inc., dba IGS Energy
Direct Energy Services, LLC and Shipley Choice, LLC dba Shipley Energy