

COMMONWEALTH OF PENNSYLVANIA



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September 11, 2020

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:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Brief 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 (**via email and usps postage prepaid**)
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Certificate of Service

*295908

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 Reply Brief, 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 11th day of September 2020.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Interstate Gas Supply, Inc., <i>et al.</i>	:	
	:	
v.	:	C-2019-3013805
	:	C-2019-3013806
Metropolitan Edison Company,	:	C-2019-3013807
Pennsylvania Electric Company,	:	C-2019-3013808
Pennsylvania Power Company and	:	
West Penn Power Company	:	

REPLY BRIEF OF THE
OFFICE OF CONSUMER ADVOCATE

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Dated: September 11, 2020

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I. INTRODUCTION.

A. Introduction.

The Office of Consumer Advocate (OCA) files this Reply Brief pursuant to the February 5, 2020 Scheduling Order and the July 1, 2020 Briefing Order issued by Administrative Law Judge Joel H. Cheskis (ALJ Cheskis). In this Reply Brief, the OCA responds to the arguments raised in the Main Brief of Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy (collectively, the Suppliers) and the Main Brief of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, the FirstEnergy EDCs). The OCA notes that many of the arguments raised in these respective Main Briefs were addressed fully in the OCA's Main Brief and will not be repeated here. The OCA further notes that no averments in any of the Parties' Main Briefs alter the OCA's position in this proceeding.

On the issue of discrimination, contrary to the Suppliers' statement in their Main Brief, the OCA has not argued, nor implied, in this matter that the FirstEnergy EDCs' practice is discriminatory. Suppliers' M.B. at 6. Rather, the OCA has clearly stated that this practice was unfair and had anti-competitive effects. The burden of proving unreasonable discrimination in this proceeding belongs to the Suppliers who have filed this Formal Complaint.

The OCA also submits that the Suppliers have not met the burden of proof in this matter as to the reasonableness of their requested remedy to have their additional non-commodity products and services charges added to the FirstEnergy EDCs' bill without satisfactorily addressing and resolving the various consumer protection concerns raised by the OCA and accommodation complications raised by the FirstEnergy EDCs. Given the existing issues with the

FirstEnergy EDCs' current "on-bill" billing practice for its affiliates¹ and the wide range of unregulated products and services the Suppliers intend to have charged on the FirstEnergy EDC bill, mandating the Suppliers' non-commodity products and services charges be billed and collected by the FirstEnergy EDCs will exacerbate customer confusion as to the amount necessary to retain basic service and the potential for customer harm as testified by OCA witness Barbara Alexander. Therefore, the OCA maintains that the Suppliers' proposal to include more non-commodity charges on the FirstEnergy EDCs' utility bill is unreasonable and unsupported.

For these reasons and those explained in further detail in this Reply Brief, the OCA submits that the Suppliers' position should not be adopted.

B. Procedural History.

The OCA filed its Main Brief on August 18, 2020. The procedural history of this proceeding is set forth in the OCA's Main Brief.

C. Burden of Proof.

Section 332(a) of the Public Utility Code (Code) provides that the party seeking relief from the Commission has the burden of proof.² In order to prevail, the complainant must, as a matter of law, establish a legally sufficient claim which shows that the named utility is responsible or

¹ The OCA disagrees with the FirstEnergy EDCs' claim that they, and not their third-party affiliates, are providing the non-commodity products and services billed for on the FirstEnergy EDC bill. FirstEnergy EDCs M.B. at 5; FirstEnergy St. 1 at 3. The marketing material and disclosure statement of at least one of the FirstEnergy EDCs contradicts this claim as it clearly represents to customers that services are performed by third-party independent contractors or FirstEnergy affiliates and that the FirstEnergy EDCs are not liable for their actions. OCA St. 1-R at 6. Additionally, the FirstEnergy EDCs did not critique or correct Ms. Alexander's testimony stating, "[t]he FirstEnergy EDCs bill for and collect charges for a wide range of non-commodity services for its affiliated entity, FirstEnergy Service Company." *Id.* at 5.

² 66 Pa.C.S. § 332(a).

accountable for the problem described in the complaint.³ The burden of proof is comprised of both the burden of production and the burden of persuasion.⁴ The standard in this Formal Complaint matter is the “preponderance of the evidence” standard⁵ under which to establish a fact or claim, the party must offer evidence that is of greater weight than the other party, or is more convincing than the evidence presented by the other party.⁶ If the complainant establishes a prima facie case, the burden of persuasion remains with the complainant seeking relief from the Commission, but the burden of production transfers to the other party.⁷ In a matter concerning supplier “on-bill” billing, the Commission will not require distribution utilities to provide “on-bill” billing to all suppliers if it is not reasonable under the circumstances.⁸

The Suppliers have the burden to prove, by a “preponderance of the evidence,” that the FirstEnergy EDCs’ “on-bill” billing practice is unreasonably discriminatory and in violation of Sections 1502 and 2804(6) of the Code and, if a violation is proved, that the proposed remedy proposed by the Suppliers is a “reasonable solution in the circumstances.”⁹

II. REPLY ARGUMENT.

A. Introduction.

³ Patterson v. The Bell Telephone Company of Pennsylvania, 72 Pa. P.U.C. 196 (1990).

⁴ Hurley v. Hurley, 2000 Pa. Super. 178, 754 A.2d 1283 (2000).

⁵ Suber v. Pennsylvania Com'n on Crime and Delinquency, 885 A. 2d 678, 682 (Pa. Cmwlt. 2005); Samuel J. Lansberry, Inc. v. Pa. PUC, 578 A.2d 600 (Pa. Cmwlt. 1990), alloc. denied, 529 Pa. 654, 602 A.2d 863 (1992); see also North American Coal Corp. v. Air Pollution Commission, 279 A.2d 356 (Pa. Cmwlt. 1971).

⁶ Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

⁷ Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217, 1220 (Pa. Cmwlt. 2001).

⁸ Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc., Docket No. R-2018-2647577, et seq., (Opinion and Order entered December 6, 2018) Order at 50 (“Columbia”).

⁹ Id.

As an initial point, the OCA has not argued that the “on-bill” billing practice of the FirstEnergy EDCs is discriminatory in this matter, contrary to the statements of the Suppliers. Rather, the OCA has pointed out that the FirstEnergy EDCs’ “on-bill” billing practice is unfair and ant-competitive across a wide range of service providers. OCA St. 1-R at 3-4. Undue discrimination under Section 1502 and 2804(6) is not the same question. More to the point, the OCA has argued that, even if discrimination or violations of Section 1502 and 2804(6) can be found, the Suppliers’ requested remedy to add their non-commodity charges to the FirstEnergy EDC regulated utility bills would create unreasonable confusion, complexity, expense, and consumer protection concerns. Simply put, the remedy requested is unreasonable and unable to be supported. For these reasons and those detailed further below, the OCA requests that the Suppliers’ requested remedy be rejected as unreasonable under the circumstances.

B. The OCA Has Not Argued That the FirstEnergy EDCs’ Current “On-bill” Billing Practice Is Discriminatory.

The OCA has not argued that the “on-bill” billing practice of the FirstEnergy EDCs is “discriminatory” under either Sections 1502 nor 2804(6) of the Public Utility Code¹⁰ or is otherwise in violation of any statute or Commission regulation. Contrary to the Suppliers’ claim that the OCA agrees with the Suppliers that the FirstEnergy EDCs’ billing practice is discriminatory, the OCA has not made such an argument in its Rebuttal Testimony and Main Brief. Suppliers M.B. at 9-10, see generally, OCA St. 1-R; see generally, OCA M.B. What the OCA has pointed out is that there are certain unfair and anti-competitive aspects of the FirstEnergy EDCs’ billing practice towards not only the Suppliers and other EGSs, but also to any entity who provides

¹⁰ 66 Pa. C.S. §§ 1502 and 2804(6).

the same type of non-commodity products and services as the Suppliers and the FirstEnergy EDCs' affiliates. OCA St. 1-R at 3-4; OCA M.B. at 1 and 8-10. OCA Witness Barbara Alexander states in her Rebuttal Testimony, "...the EDCs are marketing and selling these products and services to their monopoly distribution service customers with sales channels and billing practices that provide an unfair advantage compared to other competitive providers of these services" and "...the fact that Electric and Natural Gas Suppliers seek to bundle or offer these same or related services, but are only allowed to include their commodity service on the EDC bill, exacerbates the appearance of unfair or anti-competitive practices." OCA St. 1-R at 3-4. Additionally, Ms. Alexander testifies, "...the primary concerns in this proceeding should be (1) to protect the customer's access to essential electric service and (2) eliminate the obvious unfair practice of allowing only some of the providers of these non-basic services to obtain access to the regulated EDC bill." *Id.* at 15-16. There is not a sentence in Ms. Alexander's testimony or the OCA's Main Brief that concludes that the FirstEnergy EDCs' practice of billing for the non-commodity products and services of its affiliates, and not the Suppliers, is discriminatory under 66 Pa. Code Sections 1502 or 2804(6). The OCA has argued, though, that a resolution to this anti-competitive outcome does not lie in the remedy offered by the Suppliers.

C. The Suppliers' Status as EGSs Does Not Entitle Them to Place Their Non-Commodity Products and Services on the FirstEnergy EDC Bill.

The Suppliers have misinterpreted the purpose of the Ms. Alexander's argument relating to non-EGS providers of non-commodity products and services similar to those offered by the Suppliers and affiliates of the FirstEnergy EDCs by arguing that the OCA has advocated for the rights of businesses that did not join litigation and are not regulated by the Commission. Suppliers M.B. at 12; OCA St. 1-R at 3. The OCA has not raised the potential concerns of other, non-EGS

entities in an attempt to advocate for their interests. Rather, Ms. Alexander’s testimony draws the comparison between the products and services offered by the Suppliers and these other businesses to demonstrate the lack of disparity between the two groups of providers in the area of providing non-regulated products and services and the unreasonableness of allowing one group of non-commodity providers on the FirstEnergy EDCs bill and not the others. The OCA submits that the Suppliers’ position as EGSs does not provide any type of privileges or assurances over these other businesses involving non-regulated, non-commodity products and services. In other words, the Suppliers have not demonstrated why being regulated by the Commission—to sell energy supply only—is a qualification or characteristic entitling them to “on-bill” billing on the FirstEnergy EDCs’ bill. The OCA’s argument addressing the non-commodity products and services offered by non-EGS businesses is aimed at demonstrating the unreasonableness of placing the same non-regulated products and services offered by the Suppliers’ on the FirstEnergy EDC bill and the potentially blurred standard for what entities should be permitted to charge for which products and services on a regulated utility bill.

D. The Suppliers Have Not Met Their Burden of Proving that Their Requested Remedy is Reasonable under the Circumstances.

As demonstrated in the OCA’s Main Brief, the Suppliers have not satisfactorily supported the reasonableness of adding their own non-commodity products to the FirstEnergy EDCs’ bill in light of the various consumer protection concerns, expenses, and complexity involved with such a remedy. OCA M.B. at 10-14; FirstEnergy M.B. at 17-18 and 21-24. In Columbia, the Commission recognized the consumer protection concerns raised by the OCA in determining that requiring Columbia to include the NGSS’ non-commodity products and services on the distribution bill

would be “unreasonable under the circumstances.”¹¹ If discrimination exists, simply adding the Suppliers’ non-commodity products and services to the FirstEnergy EDCs’ bill would have significant implications, including further customer misinterpretation of charges, risk of termination of service due to misallocation of payments for basic service or slamming, and the expense of upgrading the FirstEnergy EDCs’ billing system, that have not been satisfactorily addressed by the Suppliers in this proceeding. OCA M.B. at 6-10. FirstEnergy M.B. at 17-18 and 21-24. For these reasons, the requested remedy in this proceeding is unreasonable and should be rejected.

1. There Are Significant Existing Implications for Consumers with the FirstEnergy EDCs’ Current “On-bill” Billing Practices Which Will Be Further Exacerbated by the Suppliers’ Proposals.

The FirstEnergy EDCs’ “on-bill” billing practice raises consumer protection issues which demonstrate that having both basic and non-commodity service charges on the same utility bill creates uncertainty around how much a customer must pay the utility to retain service. OCA M.B. at 7-8. OCA witness Barbara Alexander testified at length as to the existing and potential consumer protection concerns relating to the billing of non-commodity products and services on the regulated FirstEnergy EDC bill:

...when a FirstEnergy EDC includes these charges on its bill, customers are presented with a total amount owed that includes these non-commodity services and can reasonably assume that the total must be paid to avoid collection actions. Customers presented with a single balance bill do not know, and are not informed of, the FirstEnergy EDCs’ policies for the allocation of partial payments and termination of service.

¹¹ Columbia at 50.

OCA St. 1-R at 3-4. The OCA has concerns related to the presentation of these charges on the utility bills with a total amount owed that includes the non-commodity services in a manner that a customer can reasonably assume that the total must be paid to avoid collection actions. Id.; OCA St. 1-R, p. 4. Additionally concerning is the fact that customers contacting the FirstEnergy EDCs for payment options are not notified of their ability to remove non-commodity service charges from future bills to alleviate some affordability concerns. OCA M.B. at 7-8. The OCA points out these existing concerns to support its position that simply adding more non-commodity products and services of the Suppliers will add more complexity and confusion to the amount owed by customers to retain basic service.

Also, none of the prices, terms and conditions of the non-commodity products and services being offered by the FirstEnergy EDCs' affiliates or the Suppliers are regulated by the Commission which adds another layer of complexity as to the abundance of product and services charges that could end up on the FirstEnergy EDC bill if the Suppliers' requested relief were to be granted. Id. Of further concern, one of the Suppliers indicated its intention to include bundled electric and gas supply charges along with non-commodity products and services on the FirstEnergy EDC bill. OCA M.B. at 8 and 11; OCA St. 1-R, p. 11; see also, OCA Cross Exhibit 1- Public Version, p. 48. Additionally, the FirstEnergy EDCs indicate that there is the risk of accidental termination of service for customers who fail to pay for the Suppliers' non-commodity products and services charges. FirstEnergy M.B. at 21-22. The OCA submits that including the Suppliers' additional non-commodity products and services along with the additional proposal to have bundled natural gas and electricity on the customer utility bill is unreasonable as it will serve to only exacerbate

the risk of harm to customers due to the confusion and complexity revolving around the amount a customer must pay to retain basic utility service.

2. The Suppliers Fail to Address and Offer Solutions to the Various Consumer Protection Issues In Relation to the FirstEnergy EDCs’ “On-Bill” Billing and the Suppliers’ Proposal to Add Their Own Non-Commodity Charges to the FirstEnergy EDCs’ Bill.

The Commission’s conclusion in Columbia to not require the EDC to provide “on-bill” billing to the NGSs was based, in part, on the consumer protection concerns raised by the OCA. The Suppliers state that, in Columbia, “it [the Commission] gave 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....” and that the OCA’s consumer protection arguments lack any merit. Suppliers’ M.B. at 6-7. This statement is incorrect.

In Columbia, the Commission concluded:

“We find that Columbia’s billing practice, as presently implemented, is discriminatory, unreasonable and not justified in the given circumstances. Therefore, we conclude that Columbia’s billing practice, as implemented, violates the prohibition on discrimination in provision of service under both Sections 1502 and 2204 of the Code. **Notwithstanding this determination, we agree with the OCA’s Reply Exception that it would not be a reasonable solution in these circumstances for the Commission to compel Columbia to provide the NGS Parties “on bill” billing service for non-commodity goods and services offered by the NGS Parties.**”¹²

In Columbia, the Commission recognized the unaddressed consumer protection concerns raised by the OCA. The existing flaws of the FirstEnergy EDCs “on-bill” billing practices and the Suppliers’ proposals present similar consumer protection concerns.

¹² Columbia at 50 (emphasis added).

The Suppliers claim that such consumer protection concerns have no merit and that they can be addressed in time. Suppliers M.B. at 7 and 11. The OCA submits that the Suppliers' lack of attention to the OCA's significant consumer protection concerns contributes to the Suppliers' failure to meet its burden of proof in this proceeding. With such consumer protection concerns ignored, the Supplier's proposed remedy in this proceeding cannot be found reasonable.

3. The Suppliers Have Not Demonstrated That the FirstEnergy EDCs' Projections as to the Cost and Complexity of Amending Their Billing System is Less Extensive than the FirstEnergy EDCs' Claim.

The FirstEnergy EDCs' claim that it currently does not have the information technology (IT) functions necessary to include the EGSs' non-commodity products and services on its bill and modifying the FirstEnergy EDCs' billing system would cost approximately \$3 million. FirstEnergy M.B. at 17-18; see also, FirstEnergy St. No. 2 at 4-6. This expense, the FirstEnergy EDCs claim, would justify their exclusion of the Suppliers' non-commodity products and services from the First Energy EDCs' distribution bills and cause any found discrimination to be reasonable and not in violation of Section 1502 of the Code. FirstEnergy M.B. at 18. While the Suppliers have addressed this accommodation expense in their Testimony and Main Brief, they suggest that the \$3 million is a vague estimate without any evidence to prove this claim. Suppliers M.B. at 10. FirstEnergy also expresses uncertainty about the Suppliers' proposal to contribute to the projected \$3 million expense FirstEnergy EDCs would need to expend to provide such service for the Suppliers. FirstEnergy EDCs M.B. at 18-19. The Suppliers have not met their burden of proving by a preponderance of the evidence that the FirstEnergy EDCs' projected IT expense to accommodate the Suppliers' request to have the FirstEnergy EDCs charge for the Suppliers' non-

commodity products and services on the FirstEnergy EDCs' bill is inaccurate or an unreasonable basis for denying such request.

4. Conclusion.

The OCA's analysis of the FirstEnergy EDCs' current marketing and billing of non-commodity products and services provides strong reasoning for the rejection of the Suppliers' request to simply add their non-commodity products and services on to the FirstEnergy EDCs' bills. The Suppliers have failed to address such concerns and the OCA submits that simply including more non-commodity charges on the utility bill is unreasonable and unsupported and should be rejected.

III. CONCLUSION.

For the reasons set forth in the OCA's Main Brief and this Reply Brief, the OCA respectfully submits that the Suppliers' requested relief be rejected and that additional non-commodity charges not be added to the FirstEnergy EDCs' customer bills.

Respectfully Submitted,

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