

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interstate Gas Supply, Inc. d/b/a,	:	
IGS Energy, Direct Energy Services, LLC,	:	C-2019-3013805
and Shipley Choice, LLC d/b/a Shipley	:	C-2019-3013806
Energy	:	C-2019-3013807
	:	C-2019-3013808
v.	:	
	:	
Metropolitan Edison Company,	:	
Pennsylvania Electric Company,	:	
Pennsylvania Power Company and	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision sustains a formal complaint filed by three electric generation suppliers against four electric distribution companies. In their complaint, the suppliers averred that the electric distribution companies' provision of "on-bill" billing for non-commodity services and products for the benefit of their own electric distribution customers and not to the suppliers is unreasonably discriminatory in violation of the Public Utility Code. Substantial record evidence demonstrates that the companies do not provide the suppliers' rates, terms of access and conditions that are comparable to their own use of the system. The electric distribution companies have, therefore, made an unreasonable preference or advantage and have established or maintained an unreasonable difference as to service in violation of the Public Utility Code. The electric distribution companies will be given 60 days from the date of a final order in this matter to report to the Commission's Bureau of Technical Utility Services (TUS)

their methodology for coming into compliance with the Public Utility Code and Commission regulations.

HISTORY OF THE PROCEEDING

On October 25, 2019, Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy (collectively referred to as “the EGSs”) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (collectively “the EDCs”). The Commission assigned the following four docket numbers, one for each respondent, to the complaint: C-2019-3013805, C-2019-3013806, C-2019-3013807 and C-2019-3013808.

In their complaint, the EGSs averred that the EDCs’ conduct of providing a billing service, known in the industry as “on-bill” billing, for non-commodity products and services that it provides for the benefit of its electric distribution customers, while refusing to provide on-bill billing for EGSs serving customers on its systems, violates Sections 1502 and 2804(6) of the Public Utility Code, as well as a Commission Opinion and Order in a recent similar case in the natural gas industry. The EGSs provided substantial argument and attachments to their complaint in support of their position and requested that the Commission find that the EDCs’ refusal to provide on-bill billing for EGSs operating in their system violates the Public Utility Code and, as a remedy, requests that the EDCs be required to provide a similar service to the EGSs operating on their systems.

On November 14, 2019, the EDCs filed an answer and new matter in response to the EGSs’ complaint. In their answer, the EDCs admitted or denied the various averments made by the EGSs in their complaint. In particular, the EDCs admitted that they offer non-commodity products and services to their customers but have not authorized the EGSs to bill for non-commodity products and services on the EDCs monthly electric service bills. In their new matter, which was accompanied by a notice to plead, the EDCs argued that their tariffs prohibit the relief requested in the formal complaint. The EDCs further argued that these tariffs were

recently approved as part of their default service plans (DSPs) in 2018 and the EGSs were served copies. The EDCs also addressed other issues raised by the EGSs in their complaint and requested that the complaint be dismissed with prejudice.

On December 4, 2019, the EGSs filed an answer to the EDCs' new matter. In their answer, the EGSs denied the EDCs' claim to the extent they contend it is not appropriate or otherwise permissible to file a complaint regarding the legality of a service or tariff of a public utility. The EGSs also denied, among other things, the EDCs' averment regarding their participation in the EDCs' DSPs in 2018 and its impact on the complaint. The EGSs requested that their complaint be sustained and their requested relief be granted.

On December 23, 2019, a prehearing conference notice was issued establishing a prehearing conference for this matter for February 3, 2020 at 10:00 a.m. in hearing room 5 of the Commonwealth Keystone Building in Harrisburg and assigning me as the presiding officer. On December 26, 2019, a prehearing order was issued that set forth various rules that will govern the prehearing conference.

On January 24, 2020, the Retail Energy Supply Association (RESA) filed a petition to intervene into the proceeding.

The prehearing conference convened on February 3, 2020 as scheduled. Todd Stewart, Esquire, appeared on behalf of the EGSs; Teresa Harrold, Esquire, appeared on behalf of the EDCs; and Deanne O'Dell, Esquire, appeared on behalf of RESA. Each of these parties filed a prehearing memorandum in response to the prehearing conference order. A Scheduling Order was issued on February 5, 2020 memorializing the matters agreed upon at the prehearing conference. Among other things, the petition to intervene filed by RESA was granted and the complaint filed by the EGSs against each EDC were consolidated. The parties agreed to a litigation schedule. The parties were reminded that Commission policy promotes settlements.

On February 7, 2020, the Office of Consumer Advocate (OCA) filed a notice of intervention. Of note, the OCA's intervention recognized that, due to its intervention occurring after the prehearing conference, the OCA accepts the record in this matter as it stands.

Pursuant to the procedural schedule agreed to at the prehearing conference, the EGSs filed their direct testimony on March 24, 2020. On May 13, 2020, the EDCs and the OCA filed rebuttal testimony. On May 27, 2020, the EGSs and the EDCs filed surrebuttal testimony. RESA did not file any written testimony.

On June 9, 2020, the EDCs filed a motion to strike portions of the rebuttal testimony of the OCA. On June 26, 2020, the OCA filed an answer to the EDCs' motion to strike. The motion to strike was denied by order dated July 2, 2020.

On June 30, 2020, an evidentiary hearing was held wherein the parties' pre-served testimony and accompanying exhibits were admitted into the record by stipulation and the parties waived cross examination. The parties also affirmed their intent to submit main briefs on August 18, 2020 and reply briefs on September 11, 2020, as they had originally agreed in the prehearing conference. On July 1, 2020, a briefing order was issued memorializing the dates the main and reply briefs were due and setting forth other requirements for the briefs.

Pursuant to the procedural schedule, the EGSs, the EDCs and the OCA each filed main briefs on August 18, 2020 and reply briefs on September 11, 2020. RESA did not file any briefs.

The record in this case closed on September 11, 2020 when the reply briefs were filed. The EGSs' complaint is ready for disposition. For the reasons discussed below, the complaint will be sustained and the EDCs will be given 60 days from the date of a final order in this matter to report to TUS their methodology for coming into compliance with Sections 1502 and 2804(6) of the Code and Chapter 56.

FINDINGS OF FACT

1. The Complainants in this case are Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice LLC d/b/a Shipley Energy.
2. The Respondents in this case are Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company.
3. The OCA is a Commonwealth agency created by Act 161 of 1976 to represent the interests of consumers before the Commission. 71 P.S. § 309-2.
4. The EDCs have a long history of offering non-commodity products and services, such as surge protection and line repair programs, to their customers. EDC St. 1 at 3; OCA St. 1-R at 6.
5. The billing capability for the EDCs' products and services has been built into the EDCs' SAP billing system for decades. EDC St. 1 at 2.
6. The EDCs rely on their shared service company, First Energy Service Company, to provide administrative support for the Companies' products and services, including billing. EDC St. 2 at 2.
7. Consistent with the Commission's regulations, the EDCs' charges are displayed as separate line items on customers' bills, and a customer's failure to pay for these charges may not result in electric service termination. EDC St. 1-S at 4.
8. All costs associated with the EDCs' products and services are below-the-line and excluded from rate recovery. EDC St. 1-S at 4.

9. The EDCs do not permit any EGS, affiliate, or other third party to include charges for their non-commodity products and services on the Companies' bills. EDC St. 1 at 4-5.

10. Under the EDCs' EGS Coordination Tariffs, EGSs seeking to bill for non-commodity products and services must do so using dual billing, *i.e.*, sending their own separate bill for these items. EDC St. 1 at 5, 9-10.

11. The EGSs currently send their own bills for their non-commodity products and services. EDC St. 1 at 5.

12. The EDCs' current practice allows the EDCs' affiliates to bill for unregulated and non-commodity services and products on its regulated bill for essential distribution and commodity services. EDC St. 1 at 3.

13. There are currently no tariffs or Commission orders permitting EGSs to participate in non-commodity billing practices. OCA St. 1-R at 12.

14. Neither the prices nor the terms and conditions for the non-commodity items currently allowed on the EDCs' bills are regulated. OCA St. 1-R at 3.

15. The inclusion of non-commodity products or services on the EDCs' bill may give rise to an assumption by customers that such services are regulated or supervised by the Commission. OCA St. 1-R at 3-4.

16. Many entities offer the types of services that the EDCs' affiliates offer, only some of which are EGSs. OCA St. 1-R at 12.

17. Including charges for non-commodity services in the total amount owed on a utility bill provides a significant competitive advantage. OCA St. 1-R at 13.

18. It may be unclear to customers that, although non-commodity charges are included in the total amount due on their bill, payment for non-commodity services is not necessary to avoid termination of essential utility service. OCA St. 1-R at 4.

19. The EGSs' proposal to allow EGSs to include non-commodity charges on the EDCs' utility bills raises complex consumer protection issues. OCA St. 1-R at 17.

DISCUSSION

Legal Standard

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701. In this proceeding, the EGSs seek to have the same opportunity regarding the EDCs' provision of a billing service, known in the industry as "on-bill" billing for non-commodity products and services that the EDCs provide for the benefit of their electric distribution customers. The EGSs, therefore, have the burden of proof in this proceeding.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant.

Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

Of note, there are several statutes and regulations relevant to this proceeding. In particular, in 1996, the Pennsylvania General Assembly passed the Electricity Generation Customer Choice and Competition Act (the Act), 66 Pa.C.S. § 2801, *et seq.* The purpose of the Act was to move toward greater competition in the electricity generation market in an effort to lower electric generation rates for the citizens of this Commonwealth. *See generally* 66 Pa.C.S. § 2802 (detailing impetus for, and objectives of, the Act). Relevant to this case is Section 2804 of the Act which pertains to standards for restructuring the electric industry. In particular, Section 2804(6) provides that the following standard shall govern the Commission's assessment and approval, when considering an electric distribution company's restructuring plan, oversight of the transition process and regulation of the restructured electric utility industry:

(6) Consistent with the provision of section 2806, the commission shall require that a public utility that owns or operates jurisdictional transmission and distribution facilities 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). Similarly, Section 1502 of the Public Utility Code provides:

§ 1502. Discrimination in service.

No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.

66 Pa.C.S. § 1502.

Also relevant to this proceeding are several of the Commission’s regulations. For example, Section 56.13 of the Commission’s regulations provides, in pertinent part, that:

Charges for other than basic service – that is, merchandise, appliances and special services, including merchandise and appliance installation, sales, rental and repair costs; meter testing fees; line extension costs; special construction charges and other nonrecurring charges, except as provide in this chapter – must appear after charges for basic services and appear distinctly separate. . . .

52 Pa. Code § 56.13. In addition, Section 56.83(3) of the Commission’s regulations prohibits EDCs from terminating customers’ electric service for failure to pay non-basic services, which include all non-commodity products and services. 52 Pa. Code § 56.83(3).

Finally, as discussed further below, the Commission recently addressed the issue of on-bill billing of third-party services with regard to a natural gas supplier in Pa. Pub. Util. Comm’n v. Columbia Gas of Pa., Inc., Docket No. R-2018-2647577 (Opinion and Order entered Dec. 6, 2018) (Columbia). In Columbia, the Commission addressed a settlement of the company’s rate case, as well as a disputed issue involving Columbia’s billing practice offering third parties “on billing” for non-commodity service provided by the third party. The Commission determined that Columbia’s billing of non-commodity service provided by third parties is a “service” under the Commission’s jurisdiction under Section 1502 of the Public Utility Code which prohibits discrimination in the provision of service. The Commission found

that Columbia's on-bill billing practice was unreasonable and discriminatory and required Columbia to take action to conform its billing practice.

It is against this backdrop that the EGSs' complaint will be disposed.

Disposition

In this case, the EGSs argued that the EDCs' provision of on-bill billing for their own non-commodity, non-basic products and services, while refusing to provide the same service to the EGSs on its system, is discrimination in violation of Sections 1502 and 2804(6) of the Public Utility Code. The EGSs added that the EDCs' discrimination is neither warranted nor reasonable and that the Commission's regulations and precedent authorize on-bill billing for those products and services. The EGSs added that the consumer protection claims raised by the OCA do not supersede those regulations. The EGSs stated that the EDCs must offer service on terms of access and conditions that are comparable to the EDCs' own use of its system and that the Commission should rule consistent with its decision in Columbia and not create different standards for discrimination in the provision of public utility service.

In contrast, the EDCs argued that their non-commodity product and service billing comports with Sections 1502 and 2804(6) of the Public Utility Code and that the EGSs failed to establish otherwise. The EDCs added that the formal complaints filed by the EGSs represent a collateral attack on the EDCs' DSPs and inappropriately challenges their EGS coordination tariffs. The EDCs stated that there are significant implementation challenges, consumer protection concerns, increased risk to the companies and significant implementation costs that justify the continued prohibition of utility consolidated billing for EGSs' non-commodity products and services. Finally, the EDCs argued that the OCA agreed that the EGSs' request for relief should be denied.

The OCA, as intervenor, argued that the EDCs' current on-bill billing practice raises various consumer protection issues and concerns about anti-competitive advantage but the EGSs' requested remedy is neither reasonable nor supported. The OCA added that the EGSs'

status does not entitle them to place their non-commodity products and services on the EDCs' bills. The OCA stated that the EGSs have not met their burden of proving that their requested remedy for on-bill billing access on the EDCs' utility bills is reasonable because there are significant implications for consumers associated with the EDCs' current on-bill billing practices that will be further exacerbated that the EGSs failed to address and offer solutions for and because the EGSs have not demonstrated that the EDCs' projections as to the cost and complexity of amending their billing system is less extensive than the EDCs' claims.

Substantial record evidence demonstrates that the EGSs have satisfied their burden to demonstrate that the EDCs' on-bill billing practices are unreasonably discriminatory, and therefore, violate Sections 1502 and 2804(6) of the Public Utility Code. Therefore, the EGSs' complaints will be sustained and the EDCs will be given 60 days from the date of a final order in this matter to report to TUS their methodology for coming into compliance with Sections 1502 and 2804(6) of the Code and Chapter 56.

To begin, the facts of this proceeding are generally not in dispute. As the EDCs succinctly stated in their main brief:

The Companies have a long history of offering non-commodity products and services, such as surge protection and line repair programs, to their customers. The billing capability for the Companies' products and services has been built into the Companies' SAP billing system for decades. The Companies rely on their shared service company, First Energy Service Company, to provide administrative support for the Companies' products and services, including billing.

The Companies' non-commodity products and services themselves are considered non-utility services that are outside of the Commission's jurisdiction to regulate. However, the Companies' monthly bills to customers, which may include a line item for products and services, are subject to Commission regulation. The Commission's regulations and the Companies' retail Electric Service Tariffs authorize the Companies to offer and bill customers for their own products and services. The Commission's regulations explicitly permit utilities to bill customers for "charges for other than basic service," which include, among other things,

merchandise, appliance repairs, line repairs, and appliance warranty programs. Consistent with the Commission's regulations, these charges are displayed as separate line items on customers' bills, and a customer's failure to pay for these charges may not result in electric service termination. All costs associated with the Companies' products and services are below-the-line and excluded from rate recovery.

The Companies do not permit any EGS, affiliate, or other third party to include charges for their non-commodity products and services on the Companies' bills. Under the Companies' EGS Coordination Tariffs, EGSs seeking to bill for non-commodity products and services must do so using dual billing, *i.e.*, sending their own separate bill for these items. The Joint Complainants currently send their own bills for their non-commodity products and services, demonstrating that they are capable of continuing to offer and bill for their products and services without utility consolidated billing.

EDC M.B. at 8-9 (citations omitted). In other words, the EDCs provide one service to themselves or their affiliates that they do not provide to other entities. As the EGSs noted, "simply put, the discrimination is clear." EGS M.B. at 9.

I agree that the facts as described by the EDCs and generally agreed upon by the parties comprise discrimination. "Discrimination" is "treatment or consideration of, or making a distinction in favor of or against, a person or thing based on the group, class or category to which that person or thing belongs rather than on individual merit."¹ Here, the EDCs are treating entities other than themselves and their affiliates differently than they treat themselves or their affiliates based on the group, class or category to which they belong, rather than on merit, by not allowing the EGSs to have access to on-bill billing for their non-commodity non-basic products and services.

The question then is whether such discrimination is unreasonable and, therefore, in violation of Section 1502 or 2804(6). The record evidence in this proceeding demonstrates

¹ See, definition of "discrimination" at <https://www.dictionary.com/browse/discrimination#> (last visited 11/18/20).

that such discrimination is unreasonable. Neither the EDCs nor the OCA have presented sufficient evidence or argument demonstrating that the discriminatory practice is reasonable.

For example, the EDCs argue that the EGSs' complaint is a "collateral attack on [the EDCs'] default service program order and inappropriately challenges [the EDCs'] EGS Coordination Tariffs." EDC M.B. at 9. The EDCs argued that their EGS Coordination Tariff prohibits an EGS from utilizing utility consolidated billing for non-commodity products and services and that the EGSs either participated in or were notified of the DSP proceeding but did not litigate this issue. Id. The EDCs added that the tariffs are considered *prima facie* reasonable and cannot be modified as part of a complaint proceeding "without strong justification." Id. The EDCs also argued that Section 316 of the Public Utility Code precludes a collateral attack on a Commission order that has not been reversed on appeal. Id. at 11, *citing*, 66 Pa.C.S. § 316. The EDCs added that the EGSs have not met their heavy burden of proof to demonstrate that the tariffs are unreasonable.

The EDCs arguments are without merit and will be rejected. As a preliminary matter, neither the Commission's approval of the EDCs' prior DSP, nor the EDCs' Commission-approved tariffs, trump Sections 1502 or 2804(6) of the Public Utility Code as enacted by the Pennsylvania General Assembly. As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. § 101, *et seq.* Both the Commission's orders approving the EDCs' DSP and the EDCs' tariffs must comply with the Public Utility Code. Whether or not those orders were contested or appealed does not mean that they do not violate Section 1502 or 2804(6) of the Public Utility Code. Simply because the EDCs tariffs, for example, allow the EDCs to prohibit the EGSs from on-bill billing of non-commodity services does not mean that the EGSs cannot bring a complaint that those tariffs are unjust or unreasonable as applied to them. Certainly, Commission-approved tariffs are considered *prima facie* reasonable but that does not preclude further complaints from being filed against them. Rather, it means that the burden of proof to demonstrate that the tariffs may be illegal is higher. In this case, the EGSs have demonstrated that the EDCs' tariffs, as applied to them, violate Sections 1502 and 2804(6) of the Public Utility

Code and, therefore, are unjust and unreasonable. The EDCs' argument to the contrary must be rejected. Sections 1502 and 2804(6) of the Public Utility Code remain paramount.

Similarly, the fact that the Commission approved the EDCs' DSPs also does not preclude the EGSs from filing a complaint arguing that the prohibition is unjust and unreasonable. This is particularly true in light of the Commission's recent decision in Columbia, *supra*, which, as the EGSs noted, was entered after the Commission's approval of the EDCs' DSPs. Here too, the EGSs have demonstrated that, consistent with Columbia, the EDCs' prohibition against EGSs' on-bill billing of non-commodity services is unjust and unreasonable.

First, as the Commission noted in Columbia, billing practice constitutes a "service" under section 102 of the Public Utility Code and subject to section 1502. Columbia at 44, *citing*, 66 Pa.C.S. §§ 102, 1502. Second, the Commission also noted that "discrimination will be found if any unreasonable preference or difference in treatment of one party versus another is shown in the provision of service." Id. at 47. The Commission added that:

In this case, Columbia provides a billing service which is beneficial enough for a third party to pay for the benefit of receiving it. Columbia has offered no reasonable justification for offering the benefit of the billing service to certain third parties, while denying the NGS Parties that same billing service. Therefore, the billing practice at issue discriminates by preferential treatment of the third parties, Columbia's former affiliates, when Columbia affords the option of "on bill" billing for goods and services offered by former affiliated third parties but denies the same billing option to the NGS Parties. We conclude, under the given facts, that Columbia's billing practice is discriminatory.

Id. at 48. The Commission added as an example that "[A]n endorsement granted by Columbia of the former affiliates' service is a clear benefit, *i.e.*, the benefit of the association in the consumer's mind of Columbia with the former affiliates' service, by inclusion on Columbia's utility bill" and that "a third party's ability to have its products and services associated with the Columbia 'brand' in the Commonwealth is arguably a business advantage, albeit an intangible one." Id. at 49-50.

The Commission found that Columbia's billing practice, as previously implemented, was discriminatory, unreasonable and not justified in the given circumstances and ordered that "Columbia must either provide such a service to all entities that provide such non-basic services or must discontinue the 'on bill' billing policy." *Id.* at 50. I find that the facts and circumstances of Columbia are sufficiently similar to the facts in this case as to warrant adopting herein the Commission's reasoning in Columbia, noting again that the Commission's order in Columbia was issued after the Commission's orders approving the EDCs' DSPs. As a result, the EDCs' argument that the EGSs' complaint must be denied in this case because it represents a collateral attack on the EDCs' DSPs is without merit and will be rejected.

With regard to the EDCs' argument that Section 316 of the Public Utility Code warrants dismissing the EGSs' complaint, Section 316 provides in relevant part that "[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facia evidence of the facts found and shall remain conclusive upon all parties affected thereby unless set aside, annulled or modified on judicial review." 66 Pa.C.S. § 316 (effect of commission action). Again, the Commission's orders in the EDCs' DSPs and the EDCs' subsequent EGS Coordination Tariffs are *prima facia* evidence. A higher demonstration of proof is required to demonstrate that those orders are unjust and unreasonable. Again, however, the EGSs have provided the higher demonstration of proof required to show that the EDCs' prohibition of the EGSs' on-bill billing of non-commodity charges is unjust and unreasonable in this case because the prohibition violates Sections 1502 and 2804(6) of the Public Utility Code. Therefore, the EDCs' argument regarding Section 316 is without merit and will also be rejected.

The EDCs next argued that their on-bill billing practice is not discriminatory because they offer "their own billing service at the exclusion of *all* others." EDC M.B. at 13 (emphasis added). The EDCs added that "section 1502 only applies where utility provides an unreasonable preference or advantage to one third party over another." *Id.* The EDCs add that "*all* providers, including the companies, are permitted to send their own monthly bills to customers for their own products and services." *Id.* (emphasis added). The EDCs argued that Section 1502 only applies when a utility is providing a preference to a third party over another and that "neither the Commonwealth Court nor the Commission has found that a utility can

violate section 1502 by offering its own service at the exclusion of others.” Id. at 14. This interpretation of Section 1502, however, is too narrow.

As noted above, Section 1502 states “No public utility shall, as to service, make or grant any unreasonable preference or advantage to **any person, corporation or municipal corporation**, or subject **any person, corporation, or municipal corporation** to any unreasonable prejudice or disadvantage.” 66 Pa.C.S. § 1502 (emphasis added). As such, Section 1502 is broader than the EDCs’ interpretation. The prohibition against unreasonable preference or advantage applies to “any person, corporation or municipal corporation,” which includes the EDCs themselves. This interpretation is supported by Section 2804(6) which provides that “a public utility that owns or operates jurisdictional transmission and distribution facilities 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) (emphasis added). When read in conjunction, it is clear that the EDCs’ argument regarding Section 1502 is too narrow. As argued by the EGSs, the EDCs’ provision of on-bill billing for their own non-commodity services while refusing to provide the same service to the EGSs is discriminatory.

This determination is supported by the Commission’s recent decision in Columbia wherein the Commission held:

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.

Columbia at 47 (emphasis in original). Similarly, the Commission in Columbia also referenced Section 2203(4) of the Public Utility Code which prohibits discriminatory practices for natural gas distribution companies similar to Section 2804(6) of the Public Utility Code prohibiting

discriminatory practices for EDCs, noting that “section 2203, like section 1502, broadly prohibits discrimination in the provision of service.” Id.

The same broad interpretation of Section 1502 is appropriate here and warrants rejecting the EDCs’ argument that the EGSs’ complaint should be dismissed because their on-bill billing practice is not discriminatory since they offer “their own billing service at the exclusion of all others” and “section 1502 only applies where a utility provides an unreasonable preference or advantage to one third party over another.” The EDCs argument will be rejected.

Next, the EDCs’ argument that there are significant implementation challenges, consumer protection concerns, risks and costs that justify continuing the prohibition of utility consolidated billing for EGS non-commodity services is also without merit and will be rejected. The EDCs argued that the difference in billing treatment between the EDCs’ and the EGSs’ non-commodity product and service charges is reasonable and justifiable on the facts and therefore consistent with Section 1502. EDC M.B. at 16. In particular, the EDCs noted that significant information technology changes would be required to implement the EGSs’ requested relief; there is no cost recovery methodology for the system, and procedural changes are required to allow the EDCs to bill for non-commodity products and services on behalf of EGSs; EGSs cannot participate in the EDCs’ purchase of receivables (POR) program for its commodity charges while excluding its non-commodity product and service charges; the EDCs have no billing procedures in place or independent ability to ensure that the charges are not the basis for service termination; and, the EDCs billing EGS non-commodity products and services would create significant customer confusion and increased litigation and risk for the EDC.

These arguments will be rejected. Although the EDCs raise reasonable implementation concerns, none of them justify allowing the EDCs to continue their unreasonable discriminatory practices. For example, it is reasonable to expect that making the changes required to ensure that the EDCs’ practices are not discriminatory may be burdensome or costly. These costs and burdens, however, are not unduly burdensome but, rather, are warranted to ensure that the EDCs’ practices comply with Sections 1502 and 2804(6) of the Public Utility Code. Similarly, to the extent that the EDCs’ tariffs may also need to be modified or billing

procedures created to accommodate the changed practice, such efforts are also required and necessary to ensure that the EDCs' practices comply with Sections 1502 and 2804(6) of the Public Utility Code. Any customer confusion or increased litigation can also be mitigated by consumer education efforts, among other things. Certainly, such efforts have been present throughout the entire transformation of the electric utility industry in Pennsylvania over the past two decades since the Act, *supra*, was enacted. While it is reasonable to seek to avoid or minimize any unnecessary costs, burdens, confusion, etc. to ensure the provision of safe and reliable electric service at just and reasonable rates, such efforts do not outweigh making the necessary changes to ensure that such service is not unreasonably discriminatory. Such efforts should be taken with regard to the issues raised in this case as well, and the EDCs' arguments to the contrary will be rejected.

Similar to the EDCs' argument that their non-commodity product and service billing practice comports with Section 1502 of the Public Utility Code, the EDCs also argued that their non-commodity product and service billing practice comports with Section 2804(6) of the Act. The EDCs argued that "section 2804(6) is inapplicable to this case which relates only to the billing of EGSs' unregulated, non-commodity products and services." EDC M.B. at 25. The EDCs added that the Act "is irrelevant to the billing of non-commodity products and services offered by EGSs, which is entirely separate from EGSs' generation service." *Id.* at 26. The EDCs reiterated their arguments that the Commission's decision in Columbia does not apply to this case.

Again, the EDCs' arguments are without merit and will be rejected. The provision of billing service is within the Commission's jurisdiction to regulate. The Commission reaffirmed this well-established principle in Columbia. Section 102 of the Public Utility Code, the definition section of the Public Utility Code, defines "service" as:

"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, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as

well as the interchange of facilities between two or more of them, but shall not include any acts done, rendered or performed, or any thing furnished or supplied, or any facility used, furnished or supplied by public utilities or contract carriers by motor vehicle in the transportation of voting machines to and from polling places for or on behalf of any political subdivision of this Commonwealth for use in any primary, general or special election, or in the transportation of any injured, ill or dead person, or in the transportation by towing of wrecked or disabled motor vehicles, or in the transportation of pulpwood or chemical wood from woodlots.

66 Pa.C.S. § 102.

In Columbia, the Commission stated: “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.” Columbia at 44. In doing so, the Commission reaffirmed long-standing precedent that a utility’s billing constitutes a “service” that allows for Commission jurisdiction. *See, Aronson v. Pa. Pub. Util. Comm’n*, 740 A.2d 1208 (Pa. Cmwlth 1999). The same reasoning used in Columbia applies here. In this case, the Commission’s jurisdiction over the billing practices involving EDCs and EGSs invokes the protections of Section 2804(6) which the EDCs violated because the EDCs’ prohibition of on-bill billing of EGS non-commodity products and services does not provide the EGSs with “rates, terms of access and conditions that are comparable to the utility’s own use of its system,” as Section 2804(6) requires. The EDCs’ arguments to the contrary will be rejected.

Finally, in response to the EGSs’ complaints, the OCA argued:

While the [EGSs] identify some of the anti-competitive advantages of the [EDCs] for having their affiliates’ non-commodity, non-basic products and service billed to customers on the same bill as its basic electric service, the [EGSs] proposal to simply include more non-commodity charges on the [EDCs] utility bill without addressing the serious consumer protection concerns associated with the practice of ‘on-bill’ billing is unreasonable and unsupported.

OCA M.B. at 1.² The OCA added that the EGSs have failed to address or provide solutions to the many consumer protection concerns stemming from the EDCs' current practice of marketing and providing 'on-bill' billing for the non-commodity, non-basic services of its affiliates on the regulated bill. Id.

The OCA argued that the EDCs' current practice of including the non-commodity, non-basic charges on its utility bills raised many issues related to potential customer confusion. For example, the OCA noted that the non-commodity services are billed in a manner that a customer can reasonably assume that the total must be paid to avoid collection actions, noting that the EDCs' bills do not inform utility customers with a single balance bill of the policies for the allocation of the partial payments and termination of service. Id. at 6, *citing*, 52 Pa.Code § 56.13. The OCA added that the EGSs' proposal to include additional non-commodity product and service charges on customers' bills would not be reasonable. The OCA provided detailed discussion from its witness Barbara Alexander. Id. at 6-10, *quoting*, OCA St. 1-R. The OCA also noted problems when customers call for a payment plan and the advantages provided by on-bill billing. The OCA noted, among other things, the various non-commodity, non-basic products and services provided by the EGSs and questioned the appropriateness for such products to be placed on a regulated electric utility bill, noting the volume of the potential programs and separate charges that could be included on EDC bills. Although never arguing that the EDCs practice is discriminatory, the OCA concluded that the EGSs' proposal to include additional non-commodity charges on customer utility bills should be rejected as a remedy to this proceeding.

The EDCs responded to the OCA's arguments by noting that the OCA opposes the EDCs taking on the responsibility for billing for EGSs non-commodity products and services because doing so raises a number of policy and implementation concerns such as customer confusion and low-income impacts, but believes that the OCA's requested relief of prohibiting

² In its reply brief, the OCA noted its disagreement with the EDCs' claim that they, and not their third-party affiliates, are providing non-commodity products and services billed for on the EDCs' bill. OCA R.B. at n1, *citing*, EDC M.B. at 5. I agree that the reference to either the EDCs or their affiliates has been inconsistent in the record but find that such a distinction is immaterial. The EDCs' unreasonable discrimination in favor of *either* themselves *or* their affiliates both violates Sections 1502 and 2804(6) of the Public Utility Code.

the EDCs from continuing to bill for their own products and services inappropriately expands the scope of the complaint and should be rejected. More specifically, the EDCs argued that the OCA's argument that non-regulated products should not be on the EDCs' monthly bills is undermined by the Commission's Chapter 56 regulations. The EDCs also argued that the OCA's arguments against how the EDCs present the charges on their bills is also undermined because all non-commodity product and service charges appear as distinct separate line items that follow the EDCs' delivery charges on the bills as required by Chapter 56. The EDCs further argued that the OCA's arguments that the EDCs' current practices creates an unfair advantage for the EDCs should be rejected because the EDCs allow all providers of non-commodity products to bill for their own services and because the EDCs make every effort to keep communication with customers limited to traditional utility matters and not non-commodity products and services. Finally, the EDCs argued that the OCA's arguments about payment arrangements is without merit. The EDCs added that the OCA agrees the EGS complaint should be dismissed.

The EGSs responded to the OCA's arguments by noting that the OCA's consumer protection claims cannot supersede the Commission regulations and precedent that authorize on-bill billing for non-basic non-commodity products and services. The EGSs argued that the Commission dismissed the OCA's arguments in Columbia and that "the remedy for the [EDCs'] discrimination is to end the discrimination, not to simply cast stones at the [EDCs'] practices, however accurate those criticisms might be." The EGSs also argued that the OCA has raised concerns about entities that are not parties to this proceeding.

The OCA's arguments will be adopted as part of the resolution of the EGSs complaint. That is, in Columbia, the Commission recognized:

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. 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. Should Columbia provide the service to all entities providing non-basic services, we recognize the potential need for reasonable limitations, such as a requirement that the entities be able to provide information to Columbia in a manner that conforms to Columbia's billing practices, spacing and technologies. As such, we shall require Columbia to report to this Commission's Bureau of Technical Utility Services, within 60 days of the entry day of this Opinion and Order, its methodology for coming into compliance with Section 1502 of the Code. We reiterate the requirements of 52 Pa. Code § 56.83(3) which directs that a customer's service may not be terminated for nonpayment of such nonbasic charges.

Columbia at 50-51. Of note, Section 56.83(3) of the Commission's regulations provides that service may not be terminated, nor will a termination notice be sent, for: "[n]onpayment, in whole or in part, of nonbasic charges for leased or purchased merchandise, appliances or special services including, but not limited to, merchandise and appliance installation fees, rental and repair costs; meter testing fees; special construction charges; and other nonrecurring charges that are not essential to delivery or metering of service, except as provided in this chapter." 52 Pa. Code § 56.83(3).

The same approach used in Columbia will be applied to the disposition of the EGSs' complaint in this proceeding. The issues raised by the OCA are meritorious but do not warrant denying the EGSs' complaints. Instead, to the extent that the EDCs wish to continue to provide the on-bill billing services to themselves or their affiliates for non-basic, non-commodity products and services, the issues raised by the OCA must be addressed to ensure that the EDCs' action both 1) comply with Sections 1502 and 2804(6) of the Public Utility Code and, at the same time, 2) comply with the Commission's consumer protection regulations in Chapter 56. Such actions warrant, as they did in Columbia, allowing the EDCs 60 days from the date of the final action on this proceeding to report to TUS their methodology for coming into compliance with Sections 1502 and 2804(6) of the Code and Chapter 56.

At the same time, the EDCs could also address their concerns regarding the significant implementation challenges they aver exist if they were required to allow all suppliers

to have on-bill billing for non-basic, non-commodity products and services on their bills. As noted above, the EDCs raised concerns regarding implementation challenges, increased risk to the companies and significant implementation costs if the EGSs' complaint were sustained. The EDCs could address those issues in their report to TUS.

As a result, the EGSs have satisfied their burden to demonstrate that the EDCs prohibition of suppliers' on-bill billing of non-commodity, non-basic products and services violates the Public Utility Code, a Commission regulation or order. Therefore, the EGSs' complaints will be sustained. The EDCs' provision of on-bill billing services for non-basic non-commodity products and services to themselves and their affiliates and not to other suppliers in their system is unreasonably discriminatory. The EDCs must either provide on-bill billing for all suppliers' non-basic, non-commodity products and services or to no one at all, including themselves and their affiliates. The EDCs' arguments to the contrary are rejected. The EDCs will be given 60 days from the entry date of a final order in this case to submit to TUS their methodology for coming into compliance with Sections 1502 and 2804(6) of the Code and Chapter 56. The EGSs' complaint will be sustained.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. §§ 701, 1502, 2804(6).

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. A complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990).

4. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

5. The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.

6. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

7. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

8. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa. Super. 1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

9. In 1996, the Pennsylvania General Assembly passed the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801, *et seq.*

10. The purpose of the Electricity Generation Customer Choice and Competition Act was to move toward greater competition in the electricity generation market. 66 Pa.C.S. § 2802(3).

11. Section 2804(6) provides that, when considering an electric distribution company's restructuring plan, oversight of the transition process and regulation of the restructured electric utility industry the commission shall require that a public utility that owns or operates jurisdictional transmission and distribution facilities 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 the system. 66 Pa.C.S. § 2804(6).

12. No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service. 66 Pa.C.S. § 1502.

13. Charges for other than basic service – that is, merchandise, appliances and special services, including merchandise and appliance installation, sales, rental and repair costs; meter testing fees; line extension costs; special construction charges and other nonrecurring charges, except as provide in this chapter – must appear after charges for basic services and appear distinctly separate. 52 Pa. Code § 56.13.

14. The Commission's regulations prohibit EDCs from terminating customers' electric service for failure to pay non-basic services, which include all non-commodity products and services. 52 Pa. Code § 56.83(3).

15. Billing of non-commodity service provided by third parties is a “service” under the Commission’s jurisdiction under Section 1502 of the Public Utility Code which prohibits discrimination in the provision of service. Pa. Pub. Util. Comm’n v. Columbia Gas of Pa., Inc., Docket No. R-2018-2647577 (Opinion and Order entered Dec. 6, 2018); Aronson v. Pa. Pub. Util. Comm’n, 740 A.2d 1208 (Pa. Cmwlth. 1999).

16. The EGSs have satisfied their burden of proof in this proceeding by a preponderance of the evidence to demonstrate that the EDCs have violated the Public Utility Code by failing to provide the EGSs with on-bill billing for their non-basic, non-commodity products and services.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint filed by Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy against Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company at Docket Numbers C-2019-3013805, C-2019-3013806, C-2019-3013807 and C-2019-3013808 dated October 25, 2019 is hereby sustained.

2. That Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company will be given 60 days from the entry of a final order in this matter to report to the Commission’s Bureau of Technical Utility Services their methodology for coming into compliance with Sections 1502 and 2804(6) of the Public Utility Code and Chapter 56.

3. That upon approval by the Commission's Bureau of Technical Utility Services of the methodology for coming into compliance with Sections 1502 and 2804(6) of the Public Utility Code and Chapter 56 this matter be marked closed.

Date: November 18, 2020

_____/s/_____
Joel H. Cheskis
Deputy Chief Administrative Law Judge