Hawke McKeon & Sniscak LLP
ATTORNEYS AT LAW

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

Bryce R. Beard
Office: 717 236-1300 x248
Direct: 717 703-0808
brbeard@hmslegal.com

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

June 16, 2021

VIA ELECTRONIC FILING

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

Re: EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC v. National Fuel Gas Distribution, Docket No. C-2020-3019621; **MAIN BRIEF**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Main Brief of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC in the above-captioned matter. 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
Bryce R. Beard
Counsel for the Joint Complainants

TSS/jld
Enclosures
cc: Administrative Law Judge Dennis J. Buckley
Per Certificate of Service

CERTIFICATE OF SERVICE

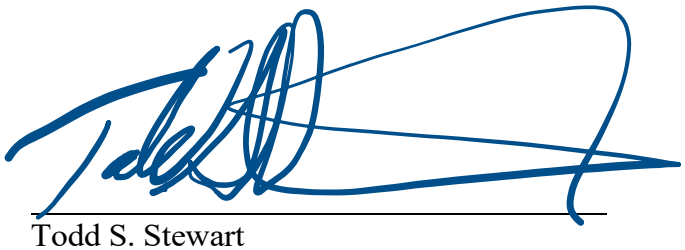
I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL

Honorable Dennis J. Buckley
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd floor
Harrisburg, PA 17120
debuckley@pa.gov

Kevin J. Moody, Esquire
Pennsylvania Independent Oil and Gas Association
212 Locust Street, Suite 300
Harrisburg, PA 17101-1510
kevin@pioga.org

Anthony D. Kanagy, Esquire
Garrett P. Lent, Esquire
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
akanagy@postschell.com
glent@postschell.com



Todd S. Stewart
Bryce R. Beard

DATED: June 16, 2021

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC, Complainants	:	Docket No. C-2020-3019621
v.	:	
National Fuel Gas Distribution Corporation, Respondent	:	

MAIN BRIEF
OF ENERGYMARK LLC, VINEYARD OIL AND GAS COMPANY,
MID AMERICAN NATURAL RESOURCES LLC,
AND TOTAL ENERGY RESOURCES LLC

Todd. S. Stewart, Attorney ID No. 75556
Bryce R. Beard, Attorney ID No. 325837
Hawke, McKeon & Sniscak, LLP
100 North Tenth Street
Harrisburg, PA 17101
Telephone: (717) 236-1300
Facsimile: (717) 236-4841
tsstewart@hmslegal.com
brbeard@hmslegal.com

Counsel for Joint Complainants

DATED: June 16, 2021

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I. INTRODUCTION AND STATEMENT OF THE CASE

Cybersecurity is an ever-growing issue in our increasingly digital world. More and more often, utilities are being targeted by cyber-attacks, which puts both utility service reliability and customer information at risk. Cybersecurity is no longer just a concern for our most critical infrastructure alone - it is an important consideration for all businesses to address to ensure their information technology systems are safe and secure with the best available protections determined by the business for the risks they may face. This case is not about those protections. This case is about an unreasonable, unjust, and, ultimately, an anti-competitive "pay to play" market-barrier implemented by National Fuel Gas Distribution Corporation (NFGD), requiring competitive natural gas suppliers ("NGS") operating on its distribution network to maintain arbitrary and ineffective cybersecurity insurance coverage to the benefit of NFGD while providing no incremental cybersecurity benefit to any customer or business. This case is about a utility seeking to gain a competitive advantage by implementing anti-competitive and far-reaching requirements for supplier access to its systems-- an advantage that if unchecked will irreparably damage the competitive market.

With NFGD Tariff Supplement No. 207, NFGD implemented a cybersecurity insurance requirement for any party connecting to its systems requiring $5,000,000 per incident in coverage. When Supplement No. 207 was filed, NFGD represented to the Joint Complainants, and more importantly, the Pennsylvania Public Utility Commission ("Commission"), that Supplement No. 207 and Section 33, titled "Data Security Agreement" ("DSA") was "patterned after" the DSA in use in New York, insinuating that the provisions had New York approval, and misleading interested parties that the DSA would follow what was implemented in New York for uniformity across NFGD's two state system. NFGD, and all but one of the Joint Complainants, operates in

both New York and Pennsylvania, with operations and information technology systems supporting both states. No parties intervened in or challenged Supplement No. 207, and the Commission, relying on NFGD's representation of uniformity across states, approved the DSA on August 29, 2019, on the basis that it "is patterned after the DSA in NFG's New York service territory." Importantly, the Commission held that the Supplement's approval was without prejudice to any issues that may be raised by any party with respect for the tariff changes. At the time the Commission approved Supplement No. 207, there was in-fact no approved DSA in place in New York approved by the New York Public Service Commission ("NYPSC"), a fact known by NFGD at the time it misrepresented the basis for Supplement No. 207 to this Commission.

On October 17, 2019, 49 days after the Commission approved Supplement No. 207, the NYPSC rejected ***ANY*** cybersecurity insurance requirement in its approved DSA, finding such provisions to be an ineffective means to mitigate cybersecurity risks that only addresses damages *after an incident occurs* and that cybersecurity insurance serves as nothing more than a market barrier to entry to suppliers. Subsequently, NFGD refused to reconcile Supplement No. 207 with the now approved NY DSA to remove the insurance requirement, which ultimately led to the initiation of the instant proceeding.

Not only is the cybersecurity insurance requirement in Supplement No. 207 unreasonable and unjust, NFGD's DSA is a blatant attempt to impose additional financial securities on suppliers not contemplated by the Commission's regulations, which cannot be done outside of a notice-and-comment rulemaking proceeding to establish such regulations. Further, the DSA allows NFGD an unprecedented power over its competitors – the ability for NFGD to audit and regulate a competitor's information technology system under the guise of cybersecurity assurances which allows NFGD unfettered access and regulation over competitors information technology systems,

their internal business practices, and ultimately, their proprietary business information. Cybersecurity is an important aspect of utility infrastructure that the Commission must consider, but the overreaching, unreasonable, and unjust cybersecurity insurance and audit provisions in NFGD's Supplement No. 207 must be overturned.

II. STATEMENT OF QUESTIONS INVOLVED

1. Is the cybersecurity insurance requirement contained in NFGD's Tariff Supplement No. 207 unjust and unreasonable service under 66 Pa.C.S. §§ 102, 1501?

Suggested Answer: Yes

2. Is the cybersecurity insurance requirement contained in NFGD's Tariff Supplement No. 207 an attempt impose additional financial security requirements on suppliers operating on NFGD's system which are not authorized by the 66 Pa.C.S. § 2208(c)(1)(i) and the Commission's regulations at 52 Pa. Code § 62.111?

Suggested Answer: Yes

3. Is the auditing provision contained in NFGD's Tariff Supplement No. 207 which allows NFGD the authority to audit suppliers information technology systems which contain competitors sensitive, proprietary, and internal operations anti-competitive, discriminatory, unjust, and unreasonable service under 66 Pa.C.S. §§ 102, 1501?

Suggested Answer: Yes

4. Have the Joint Complainants met their heavy burden of proving that the circumstances revolving around the Commission's approval of Supplement No. 207 on August 29, 2019 have changed so drastically to as to render the application of the tariff provisions unreasonable?

Suggested Answer: Yes.

III. SUMMARY OF THE ARGUMENT

This case is about NFGD seeking to use a tariff supplement filing to impose demonstrably ineffective and burdensome cybersecurity requirements on suppliers that interface with its systems. These requirements are not only unjust and unreasonable, but if left in effect, would constitute an illegal expansion of the supplier financial security requirements that are authorized by statute and set forth in detail in the Commission's Regulations, as well as allow NFGD unilateral power to audit competitor's information technology systems. Under 66 Pa.C.S. § 1501, a utility must furnish reasonable service, but the facts presented in this case show that NFGD has abrogated its duties to serve as a utility in both a fair and reasonable manner.

The Joint Complainants produced evidence in this proceeding showing a concerning fact of NFGD's conduct before the Commission - NFGD manipulated the Commission process that approved Supplement No. 207 by misrepresenting the status of the DSA included with Supplement No. 207. NFGD based its filing of Supplement No. 207 on its claim that the DSA was "patterned after the DSA in NFG's New York service territory," implying that it had both force and effect as well as the approval of the NYPSC. It did not. At the time Supplement No. 207 was filed, NFGD knew this representation was inaccurate as the DSA was under ongoing review by the NYPSC through a statewide proceeding with a wide range of industry involvement that represented the interest of hundreds of individual stakeholders, including all the investor owned electric and natural gas utilities, industry groups as well as scores of competitive electric and natural gas suppliers. When the NYPSC did rule on the DSA, after a thorough consideration of an extensive record, it rejected the same portion of the DSA that is at issue here – the $5 million cybersecurity insurance requirement. In addition, NFGD misled suppliers to believe that it would adjust its Pennsylvania filing to reflect what ultimately was approved in New York, but NFGD did not do

so. These misrepresentations violate 66 Pa.C.S. § 1501 and are the pinnacle of unreasonable service.

The Joint Complainants presented substantial evidence that the cybersecurity requirements in NFGD's Supplement No. 207 are unjust and unreasonable. Cybersecurity insurance provides no incremental cybersecurity protections to NFGD, while the cost of such insurance must be borne by a supplier every year under a one-size fits all requirement that does not account for the size of the supplier or its revenues on NFGDs system -- to the supplier's detriment. In short, the Joint Complainants proved that the costs in relation to revenue for smaller suppliers will make it difficult for suppliers to remain in the market and which may pose a barrier to some remaining in the market on NFGD's systems.

Important to consider is that NFGD is a competitor of the suppliers it purports to regulate through Supplement No. 207. This created a motive for NFGD's actions, which makes the requirements even more problematic, because part of the DSA included with Tariff Supplement No. 207 is a blanket authorization for NFGD to audit all aspects of an NGS' information technology infrastructure on 30 days' notice. Such a delegation of oversight authority of an NGS cannot be created in the absence of standards and regulations – which do not exist. Further, the auditing provisions are, by definition, discriminatory service which allows unequal applications and standards for supplier access to NFGD's system, while providing no such comparable requirements for NFGD, which cannot stand. The Commission, not a competitive utility, should hold the power to audit an NGSs information technology infrastructure – a power which must ultimately be vetted through a formal rulemaking process.

The Joint Complainants had a heavy burden to show that NFGD's Supplement No. 207 is unjust and unreasonable. The Joint Complainants met this burden, as they proved that

cybersecurity insurance is ineffective, that the costs of insurance acts as a market barrier to suppliers, that NFGD misled the Commission and suppliers when it filed Supplement No. 207, and that NFGD's power grab for unfettered access and control to audit competitive supplier's information technology systems at their will is unreasonable, unlawful, and unjust service. These provisions, enshrined in Supplement No. 207, must be overturned.

IV. ARGUMENT

A. Burden of Proof

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

The Public Utility Code ("Code") requires that utilities provide reasonable service. 66 Pa.C.S. § 1501. The Code defines service as:

> 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 . . .

66 Pa.C.S. § 102.

The Code also requires that rates and tariffs be just and reasonable. 66 Pa.C.S § 1301. Pennsylvania courts have repeatedly held that tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable. *Zucker v. Pa. PUC*, 401 A.2d

1377 (Pa. Cmwlth. Ct. 1979), *Shenango Township Board of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. Ct. 1996), *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. Ct. 1997). Therefore, a complainant seeking to evade the effect of an existing tariff provision carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. *Id.*; *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. Ct. 1981).

B. The Cybersecurity Insurance Provisions of Supplement No. 207 are Unreasonable, Unlawful, Unjust and not in the Public Interest.

On June 14, 2019, NFGD filed Tariff Supplement No. 207 to Tariff Gas Pa.P.U.C. No. 9, which included Section 33, titled "Data Security Agreement" ("DSA"). Section 33 of Supplement No. 207 states:

> As a condition of access to customer information … [NFGD] will require parties requesting such access to sign a Data Security Agreement and require that parties carry and maintain cybersecurity insurance in an amount no less than $5,000,000 per incident.

See JC St. No.1, p.5:14-18; See also NFGD's Tariff supplement No. 207 to Gas Pa.P.U.C. No. 9, Section 33 (effective August 30, 2019). The arbitrary $5,000,000 per incident requirement is unjust, unlawful, and unreasonable as shown by Joint Complainant's witness Mr. Lacey. JC Statement No. 1 at 5:12-20. Next, the opinions offered by NFGD's witness Jeff Grice should be given no weight as Mr. Grice lacks the technical or specialized experience to offer opinion testimony rebutting the unjust and unreasonable Supplement No. 107. Finally, the $5,000,000 per incident insurance requirement, by NFGD's own admission, is nothing more than an attempt to impose additional financial security requirements on suppliers that is not authorized by the Commission's governing statutes and regulations and is unjust and unreasonable. See NFGD Statement No. 2-R at 8:4-12.

a. Supplement No. 207 cybersecurity insurance requirement is unreasonable because it adds cost with no additional benefit.

The issue of the benefits of NFGD's cybersecurity insurance requirement was a heavily contested issue in this proceeding, but at its most basic premise the evidence pointed to a single, unrefuted conclusion – insurance, no matter its purpose, is meant only to compensate parties up to the insurance limits after an insured event and does not reduce or eliminate exposures to risk. JC Statement No. 1 at 6:4-6. This is the same whether the insurance is car insurance, homeowner's insurance, boat insurance, or cybersecurity insurance – each are tools to pay for damages after the fact if an event occurs. *Id.* Insurance is purchased as a means of protection from *financial loss*. JC Statement No. 1-SR at 10:7.

As Joint Complainant's expert Mr. Lacey[1] testified, insurance, for whatever purpose, should be within a supplier's management consideration to determine their individual exposure to and tolerance of risks. NFGD is not in a position to dictate how suppliers manage that monetary exposure by requiring suppliers to purchase cybersecurity insurance, at significant cost, which provide no incremental benefits to cybersecurity. JC Statement No. 1 at 6:14-15. Mr. Lacey addressed the issue clearly of whether cybersecurity insurance enhances cybersecurity protections, which it does not:

> **Q. DOES THE ADDITION OF A $5 MILLION INSURANCE POLICY SUPPLEMENT THE SECURITY OF DATA TRANSFERRED BETWEEN NFGD AND AN ESE?**
>
> A. No. Cybersecurity insurance does not enhance cybersecurity protections. Insurance is a mechanism for the insured to recoup losses in the event the losses were incurred. The requirement for an ESE to have insurance provides no incremental security protections to NFGD.

[1] Mr. Lacey has significant experience handling multi-party insurance litigation matters for energy and environmental clients, as well as personal experience with his own business and other insurances. N.T. 57:18-58:21.

JC St. No. 1 at 8:16-21.

Instead of addressing this fact directly, NFGD focused on "the underwriting process" as a cybersecurity benefit that comes from an NGS obtaining cybersecurity insurance. See NFGD Statement 2-R at 8:14-23. However, the underwriting process does not require any insurance seeking entity to implement changes to obtain insurance coverage – it is a cost determination undertaking. Indeed, NFGD's witness Mr. Grice stated:

> …the underwriting process (which occurs prior to the issuance of a policy) **<u>may</u>** result in the implementation of additional protections by the insured, so that they can obtain the coverage they seek at an acceptable price.

NFGD Statement 2-R at 8:20-23 (emphasis added). By NFGD's own admission, the underwriting process that an NGS would be subjected to when acquiring cybersecurity insurance, provides no material or guaranteed additional protections to an NGS's cybersecurity protocols – at best, such a process "may" lead to an NGS being offered coverage "at an acceptable price" *if* measures are taken. *Id.* As Joint Complainant's witness Mr. Lacey testified showing the flaw in NFGD's logic:

> Stated differently, Mr. Grice is saying that an underwriter might tell a potential insured, "If you do X, the premium for this coverage might be more appealing." Mr. Grice did not testify that a certain set of systems and processes are conditions precedent to obtain cybersecurity insurance.

JC Statement No. 1-SR at 10:12-15. NFGD's speculation of what "may" occur is not and cannot not be substantial evidence to support NFGD's claim of the benefits of the underwriting process. Indeed, NFGD pointed to no material benefits that would enhance an NGS's information technology system that interface with NFGD's systems as a result of an NGS being forced to obtain cybersecurity insurance in compliance with NFGD's tariff.

Further, as Mr. Lacey testified regarding NFGD's unproven claim that cybersecurity insurance provides additional protections to NFGD and Pennsylvania customers:

> **MR. GRICE HAS TESTIFIED THAT THE REQUIREMENT FOR NGSS TO HAVE CYBERSECURITY INSURANCE PROVIDES ADDITIONAL PROTECTIONS TO NFGD AND PENNSYLVANIA CUSTOMERS HOW DO YOU RESPOND?** In making this argument, Mr. Grice says that the insurance requirement "assures both Distribution and its Pennsylvania customers that the NGS will have financial resources to address expenses and losses that it would be contractually obligated to pay if associated with a cyberattack that impacts the Pennsylvania Customers' PII." If an NGS has a contractual (or legal) obligation to pay costs, it is up to the NGS to determine how to pay those costs. It is unnecessary and unreasonable to have a host utility impose its preferred method of assurance on those obligations.

JC Statement No. 1-SR at 10:17-11:5. As discussed below, Mr. Grice lacks the qualifications to provide opinions on cybersecurity issues generally. *Infra* section (B)(b). Regardless, as pointed out by Mr. Lacey, NGSs already have a contractual obligation to pay costs to a host utility. Requiring a specific method to be via insurance coverage is unnecessary to ensure those obligations can be met.

The cybersecurity insurance requirements of Supplement No. 207 provide no incremental benefits to reduce the risks of and exposure to cybersecurity related events. The underwriting process that an NGS may undergo to obtain cybersecurity insurance is in no way a guarantee that increased or intensified cybersecurity protocols or systems will be enacted, as that process is simply to determine the cost for a business to acquire insurance and does not function as a condition precedent to receiving coverage. Therefore, the cybersecurity insurance requirements of Supplement No. 207 are unjust and unreasonable and must be overturned pursuant to 66 Pa.C.S. § 1501.

b. NFGD's witness Mr. Grice's opinion testimony amounts to unqualified testimony which should not be given any weight as Mr. Grice lacks specialized knowledge, skill, experience, training, or education to opine on expert topics outside his direct personal knowledge.

NFGD offered the testimony and opinions of its witness Jeff Grice on the topics of the $5,000,000 insurance requirement, background and policy reasons of Supplement No. 207 and the DSA, and his opinions on the benefits of cybersecurity insurance generally. Joint Complainants do not contest Mr. Grice's qualifications to provide fact-based rebuttal on Supplement No. 207, NFGD internal policy decisions, or NFGDs own cybersecurity insurance coverage. However, to the extent that Mr. Grice offered opinion testimony on specialized or technical topics in this proceeding, including the allegations in the Complaint, those opinions cannot be considered substantial evidence under well settled law and are nothing more than unqualified opinions from a witness who lacks any specialized knowledge, education, training, or experience to opine on these technical topics under Pennsylvania and the Commission's expert witness standards.

Mr. Grice is currently a Risk Manager in the Risk Management Department for National Fuel Gas Distribution Corporation. NFGD Statement No. 2-R at 1:5-7. Mr. Grice's duties as a Risk Manager include: 1) active management of NFGD's corporate insurance and bond programs to include procuring cybersecurity insurance for NFGD, 2) verifying contractor insurance requirements, and 3) investigating claims and loss prevention strategies. NFGD Statement No. 2-R at 1:11-15. Mr. Grice has a Bachelor of Science in Management and was hired by NFGD in July 2008 as a Supervisor in the Land Department. *Id*. at 1:18-19. Mr. Grice began his risk management related duties with NFGD in 2017, where he was promoted to his current position 2 years ago in 2019. *Id*. at 19-21. Mr. Grice has never testified previously before the Commission. *Id.* at 2:2.

Mr. Grice's lack of expert qualifications to opine on cybersecurity insurance matters generally was shown during cross examination at the hearing, at transcript pages N.T. 48-51. In summary:

1. Mr. Grice has not worked as an insurance underwriter. N.T. 48:24
2. Mr. Grice never worked in the insurance industry. N.T. 49:3
3. Mr. Grice has no advanced or specialized degrees in insurance or risk management. N.T. 49:6
4. Mr. Grice has never participated in an insurance underwriting process except in his current position at NFGD on behalf of NFGD. N.T. 49:16.
5. Mr. Grice has no experience with any other company's insurance renewal process. N.T. 49:20.
6. Mr. Grice has never purchased cybersecurity insurance for any company besides NFGD. N.T. 50:8.
7. Mr. Grice has only ever reviewed and renewed one cybersecurity insurance policy on behalf of NFGD. N.T. 54:1.

Based on well settled precedent and Commission decisions, Mr. Grice's opinion testimony on matters outside of his current job responsibilities as a Risk Manager at NFGD cannot be given any weight. Pa. R.E. 702, which is generally applicable to agency proceedings, sets forth the standard for the qualification of expert witnesses and provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
> (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
> (c) the expert's methodology is generally accepted in the relevant field.

225 Pa. Code Rule 702; *see Randall v. PECO Energy Co.*, No. C-2016-2537666, 2019 WL 2250792, at *43 (Pa. P.U.C. May 9, 2019), *citing Gibson v. WCAB*, 580 Pa. 470, 485-86, 861 A.2d 939, 947 (Pa. 2004) (holding, in part, that notwithstanding the statutory maxim of 2 Pa.C.S. § 505,

which mandates a relaxation of the strict rules of evidence in agency hearings and proceedings, the "evidentiary Rules 602, 701, and 702 are applicable to agency proceedings in general…").

To the extent a witness is found to possess specialized knowledge to qualify as an expert on certain subject matters, **the witness's expert testimony is limited to those issues within their specific expertise**. *See Bergdoll v. York Water Co.*, No. 2169 C.D. 2006, 2008 WL 9403180, at *8–9 (Pa. Cmwlth. 2008) (unreported) ("*Bergdoll*") (prohibiting independent contractors from offering expert testimony on water source and cause of sewer blockage; while witnesses were qualified to offer certain testimony as to facts and the extent of damage at issue, the source of the water and cause of the sewer blockage at issue "was not within their expertise"); *see also, Application of Shenango Valley Water Co.*, No. A-212750F0002, 1994 WL 932364, at *19 (Jan. 25, 1994) (President of water company was "not qualified to provide expert testimony regarding the ratemaking value of utility property" when, notwithstanding his skills and expertise as to the operation of a public utility, he was "…not a registered professional engineer and has never been a witness concerning valuation of utility property in any proceeding before the Commission… lacks of knowledge regarding standard ratemaking conventions concerning capital stock as an item of rate base, cash working capital and the ratemaking requirements of Section 1311 of the Public Utility Code.")(internal record citations omitted)("*Shenango*").

Mr. Grice does not have the requisite knowledge, skill, experience, training or education to testify in the form of any opinion on the benefits and implications of cybersecurity insurance on the Joint Complainants, or any other topic except for his job responsibilities and duties on behalf of NFGD. *See* PA R.E. 702; see also *Bergdoll* and *Shenango*. At most, Mr. Grice's limited experience with NFGD as a Risk Manager since 2019 shows he possess limited qualifications that ***may*** include acquiring and managing insurance policies on *behalf of a NGDC*, verifying contractor

insurance requirements *for a NGDC*, and investigating claims and loss prevention strategies *for a NGDC*. NFGD Statement No. 2-R at 1:11-15. Mr. Grice's expertise is limited to these areas which he has shown some experience more than the average person, but his opinions must be limited to those issues and subject matters. *See Bergdoll*.

Mr. Grice is not qualified to provide opinion testimony on the matters affecting the Joint Complainants in this proceeding generally, or to address Mr. Lacey's expert testimony regarding the claims brought by the Joint Complainants. While a factfinder may weigh the opinion testimony of a qualified expert, any such testimony of an unqualified witness must be excluded and should not be given any evidentiary weight. *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995). Mr. Grice's testimony regarding the benefits of the cybersecurity insurance requirements in Tariff Supplement No. 207, opinions on the purpose of insurance, what an insurance underwriting process would entail for the Joint Complainants, the general cybersecurity risks the businesses face today, his opinions on the New York Public Service Commission proceeding, and the financial indemnification and protections that the insurance requirements of Tariff Supplement No. 207 provide cannot be given any evidentiary weight. Mr. Grice's testimony on these topics is unqualified lay opinion testimony that cannot support any finding of fact on the justness, lawfulness, and reasonableness of NFGD's Tariff Supplement No. 207.

c. <u>The Insurance requirement, by NFGD's own admission, is an attempt by NFGD to impose additional financial security requirements on suppliers operating on its system which are not authorized by the Commission's Regulations that address such requirements.</u>

NFGD admitted in rebuttal testimony to a critical fact underlying the insurance requirement enshrined in NFGD's Tariff Supplement No. 207 – its purpose is ensuring an NGS's financial responsibility through the maintenance of cybersecurity insurance coverage to function as a

financial security for NFGD. NFGD explained that in the event of a cyber-attack on an NGS, the cybersecurity insurance requirement of $5,000,000 per incident in Supplement No. 207 would provide NFGD the financial security assurances for providing suppliers access to NFGD's systems with the purpose of allowing NFGD to tender a damage claim to the NGS pursuant to the indemnification clause included in the DSA:

> If Distribution and/or its customers were harmed due to a cyber incident targeting an NGS, Distribution would be able to tender its damage claim to the NGS and its insurers, pursuant to the indemnification clause included in the DSA. The NGS would then be able to seek coverage for these expenses owed to Distribution and/or its customers under the terms of its policy. If the NGS does not possess cyber insurance, however, there is a greater risk that customers and/or Distribution would not be able to recover the costs of the damage suffered as a result of a cyber incident targeting an NGS.

NFGD Statement 2-R at 8:5-12. As shown by NFGD's testimony, by implementing the cybersecurity insurance requirement in Supplement No. 207, NFGD is requesting suppliers operating on its distribution network to post additional financial security requirements to interface with NFGD's systems. However, NFGD lacks the legal authority to request financial assurances in the form of utility-benefiting insurance coverage, and therefore, the insurance requirement is both unjust and unreasonable and should be removed from NFGD's tariff pursuant to 66 Pa.C.S. § 1501.

The Public Utility Code, 66 Pa.C.S. § 2208, is the basis of the Commission's authority to license natural gas suppliers in Pennsylvania. In particular, Section 2208(c)(1) sets out the extent of the Commission's authority to establish criteria to ensure "safety and reliability of the natural gas supply service in the Commonwealth" by the Commission to impose financial security requirements in bond or other security to ensure each natural gas supplier's financial responsibility. *UGI Utilities, Inc. – Gas Division v. PA PUC,* 878 A. 2d 186 (Pa. Cmwlth. 2005) *appeal den.* 586

Pa. 732; 890 A.2d 1062 (2005) (the Commission has discretion to approve criteria to be used to determine the financial security necessary based upon financial impact on the NGDC by a default by an NGS). Pursuant to this statute, the Commission implemented 52 Pa. Code § 62.111 which sets forth the criteria of financial securities that an NGDC can impose on suppliers. *Id.*

Neither 66 Pa.C.S. § 2208 nor 52 Pa. Code § 62.111 allow a NGDC to impose financial security requirements in the form of insurance policies benefiting the NGDC furnished by the supplier, let alone *cybersecurity* insurance. Indeed, both the statute and the regulations do not contemplate matters unrelated to "reliability" as it is defined in 66 Pa.C.S. § 2202 which allows financial securities to address both adequacy and security to ensure that an NGDC's systems can provide sufficient volumes and deliverability and handle extreme conditions. 66 Pa.C.S. § 2202. As stated by Joint Complainant's witness Mr. Lacey, the PUC's regulations allow only certain forms of financial security:

> The following legal and financial instruments and property shall be acceptable as security: (i) Bond; (ii) Irrevocable letter of credit; (iii) Corporate, parental or other third-party guaranty; (iv) Escrow account; (v) Accounts receivable pledged ... ; (vi) Calls on capacity, ... or other operational offsets ... : (vii) Cash.

JC Statement No. 1-SR at 12:7-11; citing 52 Pa. Code § 62.111(c)(2)(i) through (vii). None of the financial securities permitted by the Commission allow a NGDC to require a NGS to acquire liability insurance to cover damages to the benefit of the NGDC for an event unknown, no matter what it may be. *Id.* JC Statement No. 1-SR at 13:1-3. Therefore, the Commission's regulations do not allow NFGD to impose any type of insurance requirement on NGSs operating on its distribution network. *Id.* at 13:10-13.

Assuming, *arguendo*, that 66 Pa.C.S. § 2208 and 52 Pa. Code § 62.111 did contemplate financial securities in the form of a NGDC requiring insurance policies to its benefit from NGSs

as a condition to the NGS operating on the NGDC's system, which they do not, 52 Pa. Code § 62.111(c)(1) provides limits on the financial securities for NGSs, which reads:

> The amount of security should reflect the difference between the cost of gas incurred by [NFGD] and the amount payable by the licensee's retail gas customers during one billing cycle.

52 Pa. Code § 62.111(c)(1); JC Statement No. 1-SR at 11:21 – 12:3. Even if NFGD's $5,000,000 insurance policy was a permissible security, the arbitrary $5,000,000 per incident limit has no relation to the Commission's regulations defining how to calculate that amount of security to be required. Nor was this amount mutually agreeable to the parties pursuant under 52 Pa. Code § 62.111(c). Finally, NFGD's cybersecurity insurance requirement is a static value, regardless of the NGSs size, volumes, load, capacity requirement or any other values – the $5,000,000 is the same for an NGS that would has $200,000 in revenues or $20,000,000 in revenues which does not relate to the financial exposure NFGD is taking on. 52 Pa. Code § 62.111(c)(1).

As NFGD's cybersecurity insurance requirement lacks both statutory and regulatory support, such financial securities are not addressed in the Commission's regulations and cannot be adopted outside of express authority for the utility to do so. Such authority can only come from one source – the Commission would be required to amend or add regulations to 52 Pa. Code to address the concept of insurance policies as acceptable financial securities that must be vetted through a regulatory rulemaking process and proceeding. Precedent supports this requirement. When the Commission last amended 52 Pa. Code § 62.111, it considered multiple amendments to the "types of security" under Section 62.111(c)(2) as well as comments and proposals from interested parties to the rulemaking. *Licensing Requirements for Natural Gas Suppliers; SEARCH Final Order and Action Plan: Natural Gas Supplier Issues*, Docket No. L-2008-2069115, Final Rulemaking Order at 17-20 (Order entered June 17, 2010) (amending Section 62.111(c)(2) to

replace 1) "sold" with "assigned", 2) adding "netting as an example of an operational offset, and 3) adding "cash" as an acceptable type of security. The Commission further emphasized that NGS and NGDCs ideally will come to an agreement on the amount and form of security to maintain a license within the scope of the regulations. The Commission, therefore, through the rulemaking process did not consider insurance policies to the benefit of an NGDC purchased by an NGS as acceptable financial security. By implementing the cybersecurity insurance provisions in Tariff Supplement No. 207, NFGD instituted unlawful and unreasonable financial security requirements not allowed under the Commission's regulations.

NFGD's admitted intent for requiring NGSs to have a $5,000,000 per incident cybersecurity insurance coverage to act as a financial guarantee to provide NFGD reparations after a cybersecurity event occurs is nothing more than an unlawful financial security that, without compliance, would bar an NGS from access to NFGD's system. 66 Pa.C.S. § 2208; 52 Pa. Code § 62.111. The cybersecurity insurance requirements of NFGD's Supplement No. 207 are therefore unreasonable service under 66 Pa.C.S. §§ 102 and 1501 that require Your Honor to find the arbitrary $5,000,000 insurance coverage should be removed for NFGD's Tariff as unreasonable, unlawful, and not in the public interest.

C. NFGD misrepresented the Substance and Status of the Data Security Agreement Before the NYPSC to the Commission, and the Commission should find the NYPSC Decision Persuasive Regarding the rejection of Cybersecurity Insurance Requirements.

At the time NFGD filed Tariff Supplement No. 207 before the Commission, the DSA proceeding in New York was still pending before the New York Public Service Commission. (JC St. No. 2 at p. 2:19- 3:9; JC St. No. 1, 12:6-13:19). That did not stop NFGD from representing to the Commission that the DSA was "patterned after the DSA [NFGD] is currently using in its New York service territory", implying that because it was currently being used that it had been

approved, when it had not. This act appears to have been an attempt, that was successful, in deceiving the Commission that the DSA was approved in New York, and therefore should exist in Pennsylvania as well. The fact that NFGD never informed the Commission when the New York PSC rejected important portions of the DSA, including the cybersecurity insurance requirement that is at issue here, only strengthens the argument that NFGD did not want the Commission to know what had actually happened in New York. This lack of candor violates the very essence of 66 Pa.C.S. § 1501.

a. NFGD misrepresented the substance and status of the NYPSC DSA approval when it filed Tariff Supplement No. 207.

The Joint Complainant's witness, Mr. Lacey, was correct when he suggested that NFGD cannot have it both ways. When NFGD filed Supplement No. 207, it relied upon the suggestion that the DSA being used in New York was approved by the PSC and therefore it's DSA "patterned after" the New York DSA should be approved in Pennsylvania. Then, a few months later when the PSC rejected the cybersecurity insurance requirement, in its pleadings and testimony in this case, it contends that the New York PSC was incorrect. Having impliedly represented to the Commission that "[t]he proposed DSA (which includes the Self-Attestation form) is patterned after the DSA [NFGD] is currently using in its New York service territory but is modified to reflect Pennsylvania rules and regulations," (JC St. No. 1 at p.12:9-12) (citing Statement of National Fuel Gas Distribution Corporation in Support of tariff Supplement No. 207 to Tariff Gas – PA. P.U.C. No. 9, at p.3), it was NFGD's obvious intention to obfuscate on the status of the DSA filing in New York. Not once in its Supplement No. 207 did NFGD represent that the DSA was pending approval in New York, nor did NFGD later inform the Commission that the DSA that was the pattern for the Pennsylvania filing, and which was considered by the Commission as a basis for its approval of Supplement No. 207, was rejected by the NYPSC. The reason NFGD did nothing is

simple: to notify the Commission that circumstances in New York had changed would be to admit that NFGD had misrepresented the status in the first instance, and so NFGD choose to remain silent.

NFGD also misrepresented its intentions with regard to the DSA to suppliers. As detailed in Mr. Wright's testimony, NFGD represented to suppliers, at supplier meetings in March 2019 before it made the Supplement No. 207 filing, and again in October of 2019, after the Commission approved Supplement No. 207, that it would follow the New York requirements, which it did not then do. (JC St. No. 2 p. 5:1-6). Mr. Wright continued to expect, after the NYPSC rejected the insurance requirement, that NFGD would amend its tariff in Pennsylvania to reflect what ultimately was approved in New York and the subject of a December 16, 2019, revised DSA filing in New York, but again, NFGD did not do what it represented it would do. (JC St. No. 2, p. 5: 1-14). It appears that NFGD was successful in convincing suppliers not to participate in the Pennsylvania proceeding because unlike New York, no suppliers participated in the proceeding that approved Supplement No. 207. (JC St. No 2-SR, p. 4:15-20).

In short, NFGD ultimately revealed its true intent, to impose the original New York DSA on Pennsylvania suppliers regardless of what was approved in New York. NFGD knew, based upon its own representations, that if the suppliers were required to procure cybersecurity insurance in either Pennsylvania or New York, that the coverage would necessarily reach across the state line and cover that supplier in both states. (JC St. 2-SR, pp. 1:16-2:6). NFGD chose to deceive rather than be honest with the Commission and with the Suppliers who operate on its system. In both cases, it is important that communications be honest and complete, and in failing to do so, NFGD provided unreasonable service and dishonored the need to be candid in its communication with the Commission and those whom it serves.

b. The Commission should find consistent with the NYPSC holding on cybersecurity insurance.

As critical as it was for NFGD that the Commission be unaware that the DSA upon which NFGD modeled the relevant portion of Supplement No. 207, was rejected in New York, it was equally as important that the Commission not know why the NYPSC rejected the cybersecurity insurance requirement – lest the Commission reject it for the same reasons. That is, NFGD did not want the Commission to be aware of the persuasive determinations of the NYPSC denying the same cybersecurity insurance as an ineffective means of mitigating cybersecurity risks and insurance, which simply addresses damages *after* an incident occurs, provides no cybersecurity risk mitigation and functions only as a costly market barrier for the Joint Complainant's access to NFGD's system to sell competitive natural gas supply. *Proceeding on Motion of the Commission Regarding Cybersecurity Protocols and Protections in the Energy Market Place, et al.*, Case Number 18-M-0376, Order Establishing Minimum Cybersecurity and Privacy Protections and Making Other Findings at 58 (Order entered October 17, 2019); see also JC Statement No. 1 at 19:3-10. As Mr. Lacey pointed out in testimony, "it is quite ironic that they [NFGD] are making this argument now since NFGD is the entity that made New York relevant to this proceeding" by referring to it in its original tariff filing, suggesting that "New York did it, Pennsylvania should do it too." (JC St. No. 1-SR, p. 8:3-17). As Mr. Lacey went on to point out:

> New York looked at this issue for over a year before it made its ultimate decision on the insurance requirement. It had input from numerous stakeholders (representing hundreds of different companies) from all the utilities and utility markets . . . after a full review of a voluminous docket . . . rejected the insurance requirement.

JC St. No. 1-SR, pp. 8:24-9:6. In Mr. Lacey's view, the New York process represents the "best policy outcome" even though he clearly understands that the Commission is in no way bound

to even consider that decision. *Id.* The Joint Complainants submit that a reasoned review of the record in this case should nonetheless produce the same result as New York. There was no evidence presented in this case by NFGD to refute the contentions proved on this record: that cybersecurity insurance is costly, does not provide incremental cybersecurity enhancements, and is a barrier to market entry. The same result is still the best decision.

D. The Tariff Provisions are Cost Prohibitive and Act as a Market Barrier.

There can be no doubt that NFG believes that it is prudent for NGSs to maintain cybersecurity insurance, because it views itself as the primary beneficiary if the need to make a claim ever arises. However, forcing NGSs to purchase such insurance at premiums that will severely and negatively affect an NGS' bottom line, does not make such an expense necessarily prudent for the NGS. As Mr. Wright made clear in his Direct Testimony, the cost of cybersecurity insurance is "significant based on the number of customers and volumetric throughput we have in Pa." (JC St. No. 2, p.8:9-13). Continuing on this theme, Mr. Wright addressed NFGD's suggestion that cybersecurity insurance is a reasonable and "prudent" expense:

> The annual premium to carry the proposed cyber insurance may seem relatively small to NFGD, but it is a significant expense for smaller suppliers. This is a recurring expense that will need to be incorporated into our sales price, which could put our Guaranteed Savings program for our residential and small commercial accounts in jeopardy. Consequently, we would then have to make a management decision to continue to operate in PA or transfer all of our accounts back to the utility. (JC St. No. 2-SR, p 6:4-11)

Mr. Lacey suggested that one of the additional negative impacts of the insurance requirement would be to increase NFGD's unearned market advantage in the gas supply market and create one more barrier to effective competition in the natural gas market in Pennsylvania. (JC St. No. 1, pp. 11:6;12:4). Mr. Lacey refers to the fact that obligation to purchase insurance would not have the same financial impact on a supplier as it would on NFGD and so NFGD's contention that "we

have it, so should you" is without any merit. Mr. Lacey explains that Suppliers are "operating in a competitive market and may or may not be able to add the incremental cost of insurance to its customer's costs", while NFGD "will likely recover the cost of insurance in its base distribution rates, from all customers, including its customers taking gas supply from NGSs." (JC St. No.1, pp.11:4-12:4).

This disparity in the respective ability of a monopoly utility and competitive suppliers to recover such costs would increase NFGD's unearned advantage. The advantage provided to NFGD, according to Mr. Lacey, is the ability to recover such costs in base rates that customers have no choice but to pay, as opposed to suppliers who must recover such costs in their commodity rate, if they are able to do so at all. *Id.* Mr. Lacey's concern, which the New York PSC agreed with, is that such increased costs will create a disincentive for suppliers to enter or remain in the market. *Id.*

In short, whether intentional or not, NFGD's insurance requirement will cause economic harm to suppliers beyond the mere cost. It will diminish the competitiveness of their rates and at the same time make default service more attractive. It is a recipe for lasting harm to the competitive market and should not be permitted.

E. The Tariff Provides NFGD the Ability to Regulate NGSs on its System in Violation of the Commission's Exclusive Authority to do so.

It is clear that the Commission alone has the authority to regulate public utilities. See generally *PPL Electric Utilities Corp. v. City of Lancaster*, 125 A.3d 837, (Pa. Cmwlth. 2015); citing *York Water Company v. York*, 250 Pa. 115, 95 A. 396, 396 (1915); *Duquesne Light Co. v. Upper St. Clair Tp.*, 105 A.2d 287 (Pa. 1954); *Chester County v. Philadelphia Electric Co.*, 218 A.2d 331 (Pa. 1966); *PECO Energy Co. v. Township of Upper Dauphin*, 922 A.2d 996 (Pa. Cmwlth. 2007); *Pennsylvania Power Company v. Township of Pine,* 926 A.2d 1241 (Pa. Cmwlth.

2007). To the extent the Code authorizes the Commission to extend such regulation to Natural Gas Suppliers, the authority of the Commission is likewise exclusive. 66 Pa.C.S. § 2208(e). For example, while the Public Utility Code does permit NGDCs to establish requirements for financial security, such requirements are subject to restrictions and Commission review. 52 Pa. Code § 62.111. And there are specific requirements in the Regulations for such security if the NGDC and NGS cannot agree. 52 Pa. Code § 62.111(c)(1). There is no provision of the Code that allows a utility to require that a supplier operating on its system, and in this case a competitor, submit to an audit of its highly sensitive, proprietary, and confidential information technology ("IT") systems and data. Such a requirement is contrary to well established law and must be rejected.

Also critical is that the audit requirement is a one-way obligation. That is, while NFGD grants itself the ability to audit those who connect to its system, Supplement No. 207 provides no corollary requirement that a supplier could audit NFGD if NFGD were to be compromised and cause harm to that supplier or the supplier's IT systems. Moreover, giving NFGD the discretion to audit at will provides it with an unprecedented tool for peering into the very heart of a supplier's operation without significant boundaries in place. This advantage is not only anticompetitive, but the overbroad authorization could provide NFGD the opportunity to go on a fishing expedition for sensitive information under the guise of its standardless, yet unlimited in scope auditing power provided in Supplement No. 207. Simply put, the requirement is fraught with peril.

In its DSA, NFGD purports to impose a requirement that it be permitted to audit the hardware and software of any supplier (and competitor) on its system on 30 days' notice, and that it be permitted to do so once every twelve months. While NFGD claims that it has agreed in a "collaborative process" to a requirement that the audit be performed by a 3rd party, that makes little difference in this proceeding where the only tariff at issue is Supplement No. 207 and also does

not clarify if NFGD believes it can audit the vendors of suppliers on its system. Mr. Lacey expressed concern about the lack of definition in the scope of any such audit – which, by the standards in the approved DSA appears to be extremely broad. The scope is defined as:

> (A) all national, state, and local laws, regulations, or other government standards relating to the protection of information that identifies or can be used to identify an individual that apply with respect to ESE or its Representative's Processing of Confidential Company Information;
> (B) industry best practices or frameworks to secure information, computer systems, network, and devices using a defense-in-depth approach, such as and including, but not limited to, NIST SP 800-53, ISO 27001 *I* 27002, COBIT, CIS Security Benchmarks, Top 20 Critical Controls as best industry practices and frameworks may evolve over time; and
> (C) the Commission rules, regulations, and guidelines relating to confidential data, including the Commission-approved UBP and UBP DERS.
> (JC St. No. 1, p. 20:14-28) citing DSA Paragraph 1.d.

Not only does NFGD define the scope of the audit in vague and very broad terms, but it also fails to articulate the standard by which a supplier will be found to be compliant. (JC St. No. 1, p. 21:10-14). Despite the broad scope and the vague and unstated standards, the broader issue is that the Commission simply cannot delegate the authority to audit NGSs to NGDCs, period. (JC St. No. 1-SR, p.4:16-18).

NFGD's audit provision is best characterized as a utility seeking to impose an audit requirement on its competitors. That notion alone is startling when one considers NFGD's admission that it does not have any expertise in auditing. (JC St. No. 1-SR, p. 4:19-5:4). The so-called scope of such audits is vague and would appear to provide NFGD the authority to audit just about any record related to cybersecurity, any and all of a supplier's IT hardware and services (i.e. servers, storage, accessibility, remote access etc.), and sensitive customer data as well. Moreover, there is no clear standard of compliance against which to judge a supplier as compliant. (JC St. No

1-SR, p. 5:3-12). Considering the heavy consequence of failing to comply with NFGD's vague standards -- essentially refusing to allow an NGS to serve customers on its system -- such lack of specificity is alarming, particularly when one considers that suppliers compete with NFGD for customers. (JC St. No. 1-SR, p.5:11-21).

NFGD's Audit provision is proposed in a manner that will cause unwarranted and illegal discrimination in violation of 66 Pa.C.S. §§ 1502 & 2203(4). As noted above, there are no clear standards for when NFGD can impose an audit on a supplier, and no process for a supplier to object -- save filing a complaint with the Commission upon threat of removal or actual removal of an NGSs access to NFGD's systems for "non-compliance". Allowing a competitor (NFGD) that ability is the gateway to arbitrary application of the audit requirement. This is by definition discriminatory, particularly when NFGD has reserved this right to audit only to itself. If an incident were to occur, it would be NFGD that would solely (as between it and an impacted supplier) have the authority to investigate and audit, leaving the supplier to prove its innocence when NFGD alone would retain all the information. The mere imposition of such unbalanced terms is de facto discrimination.[2] When one considers that a possible consequence of such an audit could be for NFGD to remove a supplier from its system and take back its customers at the utility's discretion, the discriminatory character of NFGD's drastic and uneven approach becomes strikingly clear.

It is absolutely clear that the cybersecurity requirements including the audit requirement enshrined in NFGD's tariff is a term of service. An NGS has no choice but subjecting to the requirements as a mandatory barrier to entry for doing business as a supplier on the NFGD system. The service will be discriminatory as between NFGD and suppliers because it will not be reciprocal,

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

thus creating a clear unbalance between NFGD and suppliers on its system to the detriment of suppliers.[3] The vague nature of the requirement also presents the grave potential to be provided in a discriminatory fashion in practice, which also violates the Code.[4] In Columbia, the Commission was clear on this issue:

> 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.[5]

There is little room for doubt that NFGD's Supplement No. 207 is rife with the potential for discriminatory application and is clearly discriminatory on its face based upon the unequal requirements. For these reasons Supplement No. 207 must be modified to exclude the audit requirement.

The Commission may someday, perhaps sooner rather than later, seek to implement cybersecurity policies for utilities and suppliers alike. And such policies, to the extent that they create a binding norm, i.e., as regulations, could authorize the Commission to audit suppliers for compliance with such standards. In fact, the Commission has a Bureau of Audits and an Office of Cybersecurity Compliance and Oversight which could be tasked with such reviews. At this time, however, such standards do not exist, and nowhere does the Code or any existing Commission regulation establish a compliance or enforcement mechanism that logically would be overseen by Commission staff, let alone delegate such authority to NGDCs. To the extent that the Commission believes that mandatory cybersecurity protection standards are necessary, it would be far better for

[3] 66 Pa.C.S. § 2203(4).
[4] 66 Pa.C.S. § 1502.
[5] Columbia, slip op. at p. 47 (emphasis in original).

the Commission to establish those standards, and enforce those standards, rather than allowing individual utilities to create possibly contradictory standards that could make statewide compliance nearly impossible for suppliers. NFGD's attempt at imposing its own vague standards is premature, without any statutory or regulatory support, is discriminatory, and would usurp authority that presently is held exclusively by the Commission, which authority has not been delegated. In that regard, NFGD's current effort at imposing an audit requirement is illegal.

In defense of its attempt to usurp the undelegated authority to regulate the conduct of NGSs operating on its system, NFGD's witness, Mr. Cej, cited to three Commission Orders purporting to stand for the proposition that the Commission has delegated such authority in the past. Over the objection of Counsel at the hearing, the lay witness testimony regarding cases he admitted to not having even read, was admitted to the record. Regardless, however, the cases cited do NOT stand for the proposition for which they were cited, namely, that NGDCs have ever been authorized to supervise via an audit, the internal operations of an NGS.[6]

The PECO I case was a settlement that authorized the recovery of the costs of programs designed to enhance competition, and plainly did not provide PECO with any authority to supervise suppliers on its system. The Peoples case was a settlement that approved modifications to its supplier tariff. The issues were not contested, and the proposed change impacted the basis for Peoples' measurement of gas. There was no proposed transfer of authority to supervise suppliers to Peoples by the Commission. Finally, in PECO II, the Commission approved the implementation

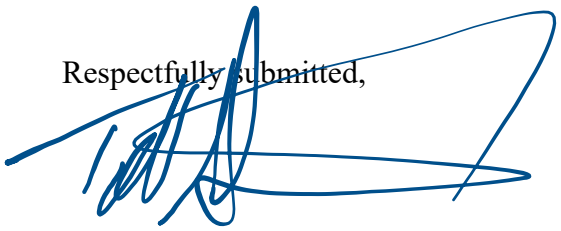
[6] See, e.g., *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 23 2015 through May 31, 2017*, Docket No. P-2014-2409362, 2014 Pa. PUC LEXIS 501 ("PECO I"); *Pennsylvania Public Utility Commission v. Peoples Natural Gas Company*, Docket No. R-2012-2285985, 2012 Pa. PUC LEXIS 665 (Order 4 dated Sept. 27, 2012)("Peoples"); and, *Petition of PECO Energy Company for Approval of its Natural Gas 6 Supplier Purchase of Receivables Program*, Docket No. P-2009-2143588, 2010 Pa. PUC LEXIS 1208 (Order dated Nov. 8, 2010)("PECO II").

of PECO's purchase of receivables ("POR") program for natural gas, something that suppliers agreed-to and supported, and which did not delegate any authority to PECO to supervise or audit the internal operations of any supplier. As with the other cases, PECO II was approved in a settlement. In short, none of the cases cited by witness Cej support his contention that the Commission has delegated authority to an NGDC to regulate or even to audit the internal operations of an NGS.

V. CONCLUSION

WHEREFORE, The Joint Complainants requests that Your Honor conclude that the cybersecurity insurance and audit provisions contained in National Fuel Gas Distribution Corporation's Tariff Supplement No. 207 are unjust, unreasonable, unlawful, and discriminatory under the Commission's governing statutes and regulations. The Joint Complainants have met their heavy burden and showed that cybersecurity insurance is ineffective, provides no incremental cybersecurity benefits, and is a costly barrier to suppliers. The Joint Complainants also showed that NFGD misrepresented that basis for the implementation of these cybersecurity terms to the Commission when it filed Supplement No. 207 on which basis the Commission ultimately approved. Finally, the Joint Complainant's showed NFGD's standardless auditing powers which it granted itself over suppliers' information technology systems is discriminatory and not allowed under the Commissions statues and regulations. Therefore, the Joint Complainant's request Your Honor overturn these portions of NFGD's Tariff Supplement No. 207 as unjust and unreasonable.

Respectfully submitted,



Todd. S. Stewart, Attorney ID No. 75556
Bryce R. Beard, Attorney ID No. 325837
Hawke, McKeon & Sniscak, LLP
100 North Tenth Street
Harrisburg, PA 17101
Telephone: (717) 236-1300
Facsimile: (717) 236-4841
tsstewart@hmslegal.com
brbeard@hmslegal.com

Counsel for Joint Complainants

DATED: June 16, 2021

APPENDIX A

Proposed Finding of Facts

NFGD Tariff Supplement No. 207

1. On June 14, 2019, NFGD filed Tariff Supplement No. 207 to Tariff Gas Pa P.U.C. No. 9, which included Section 33, titled "Data Security Agreement". Included in Section 33, is the following: "As a condition of access to customer information … [NFGD] will require parties requesting such access to sign a Data Security Agreement and require that parties carry and maintain cybersecurity insurance in an amount no less than $5,000,000 per incident." (JC St. No.1, p.5:14-18).
2. NFGD, in its statement in support of Tariff Supplement No. 207, stated "The proposed DSA (which includes the Self-Attestation form) is patterned after the DSA [NFGD] is currently using in its New York service territory but is modified to reflect Pennsylvania rules and regulations." (JC St. No. 1 at p.12:9-12) (citing Statement of National Fuel Gas Distribution Corporation in Support of tariff Supplement No. 207 to Tariff Gas – PA. P.U.C. No. 9, at p.3).
3. The Joint Complainants did not intervene or contest NFGD's Tariff Supplement No. 207 at the time because NFGD had informed them that that the PA DSA would follow the outcome of the New York DSA proceeding. JC St. No. 2 at 4:19-23.
4. NFGD held multiple "marketer meetings" where it continually mislead and reiterated to suppliers that the PA DSA would follow the outcome of the New York Proceeding. JC St. No. 2 at 5:1 – 6:1.

5. EnergyMark relied on NFGD's representations that it would follow the New York requirements and did not intervene in the Supplement No. 207 proceeding. JC St. No. 2 at 6:2-5; JC St. No. 2-SR at 4:13-20
6. On August 29, 2019, the Commission approved NFGD's Tariff Supplement No. 207 and relied on NFGD's misrepresentations of the New York DSA, holding "[NFGD's] proposed DSA, which includes the Self-Attestation form, **is patterned after the DSA currently used** in NFG's New York service territory and modified to reflect Pennsylvania's rules and regulations." *National Fuel Gas Distribution Corporation, Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9*, Docket No. R-2019-3010744, Order at 3 (Order entered August 29, 2019)(emphasis added).
7. The August 29, 2019 Order expressly notes that the uncontested tariff filing approval was "without prejudice to any issues that may be raised by any party with respect to the tariff changes implemented by Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9 in future proceedings." (JC St. No. 1 at p4:17-19).
8. NFGD launched a collaborative process with suppliers, including the Joint Complainants, which did lead to changes to some provisions to the DSA, NFGD refused to address the Joint Complainants primary request to address the insurance requirements. JC St. No. 2-SR at p3:1-4.

<u>The NYPSC Cybersecurity Proceeding</u>

9. Cybersecurity insurance remained a material, contested issue throughout the entire New York Proceeding, and throughout the New York Proceeding, it was apparent that the Utilities had a low degree of certainty that the cybersecurity insurance requirement would result from the proceeding. JC St. No. 1 at 17:11 – 18:2. While some suppliers signed the

New York DSA before it was approved, many did so at fear of loss of ability to interface with utilities, and under protest of the insurance requirement. JC St. No. 1 at 15:4 – 16:31

10. After the PA PUC approved Supplement No. 207 on the basis that it was patterned after the DSA requirements in New York, the New York Public Service Commission entered an Order declining to adopt the cyber-security insurance provision of the DSA because cyber-security insurance would be an inefficient and ineffective means of mitigating cyber-security risks and that the insurance requirement would serve only as a market barrier of entry:

> The Joint Utilities have not established that cyber-security insurance would be an efficient and effective means of mitigating cyber-security risks and financial costs associated with security breaches. Several commenters oppose this requirement as not connected to any reasonable benchmark for the actual risk posed by the entity, or the actual costs of cyber incidents. **Moreover, the insurance requirement would serve to act as little more than a market barrier to entry. The Commission recognizes the need to protect utility IT systems and customer data, but does not see a cyber-security insurance requirement, which is mainly intended to address damages after an incident occurs, as the appropriate means of doing so.** Thus, at this time, the Commission declines to adopt a generic cyber-security insurance provision but may revisit this issue at a future date.

Proceeding on Motion of the Commission Regarding Cyber-Security Protocols and Protections in the Energy Market Place, et al., Case Number 18-M-0376, Order Establishing Minimum Cyber-security and Privacy Protections and Making Other Findings at 58 (Order entered October 17, 2019)(emphasis added). (JC St. No. 1 at p19:3-10).

11. NFGD's New York DSA does not include a requirement for NGSs to purchase and maintain cybersecurity insurance in any amount consistent with the NYPCS October 17, 2019 Order. (JC St. No. 1 at p13:1 - p14:2).

12. NFGD failed to communicate to the PA PUC that the New York DSA no longer contained a cyber-security insurance requirement or that the basis for NFGD's cyber-security DSA provisions in Tariff Supplement No. 207 had changed. (JC St. No. 1 at p19:12-16)

Joint Complainant's Witnesses

13. Mr. Lacey, who testified for the Joint Complainants, has vast experience in competitive energy markets in Pennsylvania and also has significant experience in the insurance industry. JC St. No. 1 at 1-3; Exhibit FPL-1; N.T. 57:18 – 54:21.
14. Mr. Wright, who testified on behalf of the Joint Complainants, is the Vice President of EnergyMark, LLC. JC St. No. 2 at 1:6.

NFGD's $5,000,000 Cybersecurity Insurance Requirement

15. Mr. Lacey concludes that NFGD's cybersecurity insurance requirement "will not provide any incremental cybersecurity benefit to any consumer or business entity in the Commonwealth" and that the tariff requirement that NFGD or its surrogate, be authorized to audit and inspect NGS facilities could "have tremendously negative ramifications on the gas markets in Pennsylvania." (JC St. No. 1 at p.5:12-20)
16. The Joint Complainants agree with the notion that cybersecurity is critically important. (JC St. No.1, p. 6:13-21). However, the Joint Complainants disagree with NFGD that an insurance policy provides any incremental reduction either in the risk of a cybersecurity breach occurring, or the severity of such a breach. Likewise, witness Lacey agrees that NFGD is within its rights to impose reasonable data security standards for those who interconnect with its data systems. But an insurance policy provides no data security functionality.

17. There is nothing inherent in an insurance policy that will improve the protections implemented. JC ST. No. 1, p. 10:19-20.
18. An insurance policy underwriting process does not guarantee additional cybersecurity protections will be implemented – the underwriting process only determines a set price for insurance coverage and does not set system requirements or processes as conditions precedent to obtain cybersecurity insurance. JC Statement No. 1-SR at 10:12-15.
19. NGSs operate in a competitive market and may or may not be able to add the incremental cost of insurance to its customer's costs in order to recover premiums paid, with the ultimate result that NGSs costs will go up while NFGD's costs will not. JC St. No. 1 at p. 11:6-17.
20. Mr. Lacey opined that utilities already have tremendous unearned advantages in the competitive energy markets, and Tariff Supplement No. 207's insurance requirement will allow NFGD "to pad its unearned advantage – allowing the utility to collect insurance in non-competitive rates while compelling ESEs to collect the same costs, if they are able to collect them at all, in the price of competitive products. This requirement creates one more barrier to effective gas competition in the Commonwealth, disincentivizing market entry of competitors and potentially creating incentives for supplier exit from the market." JC St. No. 1 at p. 11:19 to 12:2.
21. Because all but one of the Joint Complainants operate on both NFGD's New York and Pennsylvania systems, the insurance costs and coverage are a backdoor effort for NFGD to get in Pennsylvania what they were denied in New York for the entirety of their system. JC St. No. 2 at 8:6-7.

22. The Joint Complainants' cybersecurity insurance premiums are significant, especially when considering the cost vs. the benefit of maintaining a small, NFGD territory Pennsylvania customer base. JC St. No. 2 at 8:9-16.
23. While the Joint Complainants may contractually pass the cost on to residential and small commercial customers for cybersecurity insurance premiums paid, the additional cost will make them less competitive with larger suppliers and the utility. JC St. No. 2 at 8:19-21. EnergyMark is at risk of losing a significant customer segment on a Guaranteed Savings rate if passing through additional costs, which will ultimately force them to discontinue service and return customers to larger suppliers or NFGD. JC St. No. 2 at 8:21-24.
24. The significant impact of cybersecurity insurance premiums on the Joint Complainants small Pennsylvania footprints would require them to make the management decision of whether to continue to operate in Pennsylvania or to transfer all of their accounts back to the utility. JC St. No. 2-SR at 6:9-11.
25. The insurance underwriting process does not function to audit the insured's cybersecurity or operations for the purpose of security measures; rather, the purpose of underwriting is to determine the premium to be paid for coverage based on existing circumstances. JC St. No. 1-SR at 10:7-15.
26. The Commission's regulations at 52 Pa Code § 62.111, which identifies the financial security requirements that NFGD can impose on NGSs, does not include insurance premiums. JC St No. 1-SR 12:5 – 13:3.
27. One of the purposes behind the insurance requirement is to ensure that if NFGD is harmed by a data breach at an NGS, NFGD wants to be able to bring a claim against the NGS and

wants to ensure that the NGS has the resources to pay for the damages. NFGD St. No. 2-R at 8:1-12

NFGD's Auditing power over suppliers

28. NFGD's DSA states that "Upon thirty (30) days' notice to ESE, ESE shall, and shall require its Third-Party Representatives to permit [NFGD], its auditors, designated representatives, to audit and inspect, at [NFGD's] sole expense (except as otherwise provided by this Agreement), and provided that the audit may occur no more often than once per twelve (12) month period (unless otherwise required by [NFGD's] regulators)." JC St. No. 1 at 19:21 – 20:1. (citing DSA, Paragraph 9, p.8). Mr. Lacey opines that while this sentence is vague about scope, it grants NFGD broad authority to "audit" the SES and go beyond the ESE and into the ESE's Third-Party Representatives' businesses. JC St. No. 1 at 20:2-4.
29. The scope of NFGD's auditing power in the DSA is very broad. JC St. No. 1 at 20:10 – 21:6. Further, NFGD's auditing power sets forth no standards for measuring an ESE's practices and compliance. JC St. No. 1 at 21:8-14.
30. NFGD does not have the technical capabilities to audit the ESE's under the DSA provisions, and offered for the auditing to be outsourced. NFGD Statement No. 1-R at 15.
31. NFGD admitted it lacks the technical knowledge and understanding of cybersecurity management practices and tools: "NFGD is not in the business of designing information technology systems for third parties to withstand cyber-attacks; it is a public utility not a cybersecurity firm or consultant." NFGD Statement No. 2-R at 7
32. NFGD's self-attestation in the DSA includes terms and requirements which NFGD is admittedly unprepared and ill-equipped to audit. JC St. 1-SR at 16:8-15.

33. NFGD does not have the authority to audit another company's compliance with the Commission's rules and regulations. JC St. No. 1 at 21:20
34. Allowing NFGD the authority to audit a competitors sensitive, proprietary, and internal practices and operations would provide NFGD a source of competitive advantage while directly usurping the Commission's authority to regulate supplier operations. JC. St. No. 1 at 22:3-6. If an NGS fails NFGD's audit, the NGS would be subjected to either a dispute resolution process with NFGD or ultimately be required to file a complaint to the Commission , with a possible consequence that NFGD may remove the supplier's access and take back its customers at the utility's discretion. NFGD Exhibit CC-2 at 10 (DSA Paragraph 9).
35. NFGD's DSA auditing provisions are unreasonable and unjustified. JC. St. No. 1 at 23:2-8.
36. NFGD has not justified their need to audit the NGSs serving customers behind their distribution network. JC St. No. 1-SR at 5:12-13

APPENDIX B

Proposed Conclusions of Law

1. The Joint Complainants, as the proponents of a rule or order in this Commission proceeding, bear the burden of proof. 66 Pa.C.S. § 332. Accordingly, the Joint Complainants have the burden of proving by a preponderance of the evidence, which is evidence that is more convincing than the evidence presented by the other parties, that the NFGD has violated the Public Utility Code, 66 Pa.C.S. § 101, *et. seq*. *See Se-Ling Hosiery, Inc.* v. *Margulies,* 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J Lansberry, Inc.* v. *Pa PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990).
2. The Code also requires that rates and tariffs be just and reasonable. 66 Pa.C.S § 1301. Pennsylvania courts have repeatedly held that tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable. *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. Ct. 1979), *Shenango Township Board of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. Ct. 1996), *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. Ct. 1997). Therefore, a complainant seeking to evade the effect of an existing tariff provision carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. *Id.*; *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. Ct. 1981).
3. The evidence of record establishes that the Joint Complainants have met their burden to prove the cybersecurity insurance requirement and auditing powers in NFGD's Tariff Supplement No. 207 are unjust and unreasonable. 66 Pa.C.S. § 1501.

4. NFGD's cybersecurity insurance requirement of $5,000,000 per incident for suppliers accessing their distribution system contained in Tariff Supplement No. 207 is unjust and unreasonable under 66 Pa.C.S. §§ 102, 1501.
5. NFGD's cybersecurity insurance requirement in Tariff Supplement No. 207 is an unauthorized financial security and not an acceptable form of financial security under 66 Pa.C.S. § 2208(c)(1)(i) and 52 Pa. Code § 62.111.
6. NFGD's auditing provisions contained in Tariff Supplement No. 207 is anti-competitive, discriminatory, unjust, and unreasonable under 66 Pa.C.S. §§ 102, 1501, and 2203.

APPENDIX C

Proposed Ordering Paragraphs

IT IS ORDERED THAT:

1. The Complaint of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC, is sustained.
2. That NFGD's Tariff Supplement 207 terms involving the $5,000,000 cybersecurity insurance and supplier auditing provisions shall be removed from NFGD's official tariff as unjust and unreasonable.
3. That NFGD is required to file, within 30 days of any Commission Order in the proceeding, a Tariff Supplement amending its tariff consistent with the Commission Order.