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June 16, 2021

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Attached for filing on behalf of National Fuel Gas Distribution Corporation (“Distribution”) is the Main Brief (public version). Copies will be provided as indicated on the Certificate of Service.

Distribution will also be filing a **CONFIDENTIAL** version of its Main Brief, sent to your attention via email. Distribution respectfully requests that the **CONFIDENTIAL** version of the Main Brief be maintained in the Commission’s non-public files and only made accessible to appropriate Commission staff, consistent with the Protective Order issued in the above-referenced proceeding. The **CONFIDENTIAL** version of Distribution’s Main Brief will also be provided to parties that have executed an appropriate non-disclosure certificate, pursuant to the Protective Order issued in this proceeding.

Respectfully submitted,



Anthony D. Kanagy

Rosemary Chiavetta, Secretary
June 16, 2021
Page 2

ADK/kl
Attachment

cc: The Honorable Dennis J. Buckley
Certificate of Service

CERTIFICATE OF SERVICE

C-2020-3019621

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: June 16, 2021

Anthony D. Kanagy

PUBLIC VERSION – CONFIDENTIAL MATERIALS REDACTED

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MAIN BRIEF OF
NATIONAL FUEL GAS DISTRIBUTION CORPORATION**

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I. INTRODUCTION

National Fuel Gas Distribution Corporation (“Distribution” or the “Company”) hereby files its Main Brief in opposition to the Complaint of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC (collectively the “Joint Complainants” or the “NFG NGSs”), filed on April 27, 2020, at Docket No. C-2020-3019621. The Complaint alleges, *inter alia*, that Distribution’s tariffed and Pennsylvania Public Utility Commission (“Commission”) approved Data Security Agreement (“DSA”) and Self-Attestation (“SA”), which include cybersecurity insurance requirements, applicable to natural gas suppliers (“NGSs”) in Pennsylvania, are unjust and unreasonable and violate the Pennsylvania Public Utility Code. The Complainants further allege that Distribution mislead NGSs when it obtained approval of the DSA and SA tariff provisions. Contrary to the Joint Complainants’ allegations, the DSA and the SA are just and reasonable. The DSA and SA are necessary to protect confidential customer information, protect Distribution’s information technology (“IT”) systems from cyber-attack and ensure that if an NGS IT system is breached and confidential customer information is disclosed, there will be funds available to reimburse customers for disclosure of their sensitive information.

As part of providing utility service to customers, Distribution collects and maintains certain customer sensitive information that is deemed confidential. This confidential information is stored in the Company’s computer systems. NGSs that are licensed to provide service to customers in Distribution’s service territory have direct access to this information through the eligible customer list. NGSs are also able to access Distribution’s IT system via the Transportation Scheduling System, marketer specific website data files under the Security Transactions tab, and other indirect methods. Distribution has strict policies and procedures for acquiring, accessing, storing and disposing of confidential information on its system. In addition, Distribution is covered by a

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cybersecurity insurance policy in an amount of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] in part, in case of a breach of its IT system and subsequent disclosure of confidential customer information. Cyber-attacks, including attempts to breach utility IT systems have become more prevalent over the past several years. As a result, Distribution has taken additional steps to protect confidential customer information and the Company's IT systems. In Pennsylvania, this included seeking and obtaining Commission approval of Supplement No. 207 and the associated DSA and SA.

Despite the undisputed facts that cybersecurity is an issue that strains networked infrastructure across the globe, and constitutes a very real threat, the Joint Complainants have alleged Supplement No. 207 and the associated DSA and SA, which require Pennsylvania NGSs to obtain cybersecurity insurance in an amount of \$5,000,000, are unjust and unreasonable. The Joint Complainants have also alleged that the Company's actions to obtain Commission approval of these documents violates the Public Utility Code and the Commission's regulations. Central to the Joint Complainants' claims, they assert that: (a) the costs to comply with the cybersecurity insurance requirement set forth in the DSA are unreasonable,¹ (b) the cybersecurity insurance requirement does not protect Distribution or its customers,² and (c) the cybersecurity insurance requirement would create a "barrier to effective gas competition."³

As explained herein, the DSA and SA requirements under the Company's tariff, including the minimum cybersecurity insurance requirement, are just and reasonable and do not violate the Pennsylvania Public Utility Code. Distribution respectfully requests that the above-captioned Complaint be denied.

¹ Joint Compl. St. 1 at 5.

² See Joint Compl. St. 1 at 5, 8.

³ Joint Compl. St. 1 at 11-12.

II. STATEMENT OF THE CASE

A. INTRODUCTION

Distribution is a “public utility” and “natural gas distribution company” as those terms are defined under Sections 102 and 2202 of the Public Utility Code. 66 Pa.C.S. §§ 102 (defining “public utility”) and 2202 (defining “natural gas distribution company”).

Distribution owns property in Pennsylvania for the transmission and distribution of natural gas and provides natural gas distribution service to approximately 200,000 customers in various communities in the counties of Armstrong, Butler, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Forest, Jefferson, McKean, Mercer, Venango and Warren, Pennsylvania, which territory is more fully described in its Tariff Gas – PA PUC No. 9.

In order to provide service to customers, Distribution collects and maintains certain sensitive information that is deemed confidential that is stored in the Company’s computer systems. NFGD St. 1-R at 6. For example, applicants requesting gas service from Distribution will provide personal information that includes name, address, phone numbers, employment information and Social Security Number (“SSN”), although the provision of employment information and a SSN is voluntary. NFGD St. 1-R at 6. Existing customers may also utilize the Company’s electronic services to submit payments or meter reading. NFGD St. 1-R at 6.

In order to adequately protect this confidential and sensitive information, Distribution has strict policies and procedures for acquiring, accessing, storing and disposing of confidential information that includes customer personal identifiable/health information and sensitive company business information. NFGD St. 1-R at 6. As an example, Distribution policy requires that all confidential or non-public information must be securely managed and accessible to only approved company employees with a legitimate business reason. NFGD St. 1-R at 6. Distribution is also

covered by a cybersecurity insurance policy in an amount of [BEGIN CONFIDENTIAL]
[REDACTED] [END CONFIDENTIAL].

While Distribution has not experienced a successful cyber-attack upon its IT systems, Distribution's IT department is aware of attempted cyber-attacks. NFGD St. 1-R at 6-7. Moreover, a March 2018 cyber-attack of an EDI service provider that acts as an external vendor for Distribution, in part, precipitated the events leading up to this proceeding. *See* NFGD St. 1-R at 7. Although this event did not result in a successful cyber-attack of Distribution's IT systems, Distribution: (a) discussed the event internally, with staff and with other public utilities; (b) notified billing contacts by e-mail and posting on the Company's website impacted by the event; (c) provided notice when the EDI service was restored; and (d) began coordinating with other utilities regarding the development of a DSA and cybersecurity insurance requirements. *See* NFGD St. 1-R at 7.

B. NEW YORK PROCEEDINGS

In 2018, a group of utilities, including Distribution, that provide service in New York (the "Joint Utilities") notified energy service companies ("ESCOs") in New York that they planned to require ESCOs to submit a "data security agreement" and a "self-attestation" of information security controls. NFGD St. 1 at 7. Distribution provided such notice to ESCOs in New York on June 8, 2018. NFGD St. 1 at 7.

On June 14, 2018, the New York Public Service Commission ("NYPSC") issued an Order instituting *Proceeding on Motion of the Commission Regarding Cyber Security Protocols and Protections in the Energy Market Place*, Case 18-M-0376 (Order dated June 14, 2018) ("*NYPSC June 2018 Order*"). NFGD St. 1-R at 7.

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This proceeding dealt with the review and consideration of a data security agreement and self-attestation applicable to ESCOs in New York, before the NYPSC, which was the subject of discussion by the Joint Complainants’ witnesses. NFGD St. 1-R at 7.

On October 17, 2019, the NYPSC issued an Order wherein it declined to adopt a generic cybersecurity insurance provision in its October 17, 2019 Order, but it explicitly stated that it “may revisit this issue at a future date.” *Order Establishing Minimum Cybersecurity and Privacy Protections and Making Other Findings*, Case 18-M-0376 (Order dated Oct. 17, 2019) (“*NYPSC October 2019 Order*”).

C. PENNSYLVANIA PROCEEDINGS

On September 20, 2018, the Commission announced the creation of a new Office of Cybersecurity Compliance and Oversight (“OCCO”). NFGD St. 1-R at 8. OCCO would advise the Executive Director and Commissioners on policy issues and procedural improvements involving cybersecurity oversight functions of regulated utilities; draft proposed cyber-related regulations; and oversee the preparation of orders, rulemakings, policy statements, Secretarial Letters and memoranda related to cybersecurity policies and procedures of those regulated utilities. NFGD St. 1-R at 8.

Although OCCO was not immediately prepared to implement industrywide cybersecurity actions, the Commission was actively encouraging utilities to consider and implement various cybersecurity measures to protect their systems from attack. NFGD St. 1-R at 8.

On June 14, 2019, Distribution filed Supplement No. 207 and the associated DSA and SA with the Commission at Docket No. R-2019-3010744. NFGD St. 1-R at 24. In its Statement in Support, Distribution stated that the proposed Pennsylvania requirements were “patterned” after the New York requirements. NFGD St. 1-R at 24. At the time, both the Pennsylvania DSA and the New York proposed data security agreement included a cybersecurity insurance requirement.

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Distribution did not represent in its Statement in Support that the proposed Pennsylvania requirements and the New York requirements were or would be identical or uniform. NFGD St. 1-R at 24. Both the Statement in Support and the Tariff filed in Pennsylvania clearly identified the cybersecurity insurance requirement. NFGD St. 1-R at 24.

Notice of the June 14, 2019 filing was also provided to NGSs via the Company’s website and a copy of the filing was e-mailed to all NGSs operating in the Company’s service territory, including the Complainants. NFGD St. 1-R at 24.

No complaints or interventions were filed, and Supplement No. 207 was approved on August 20, 2019. NFGD St. 1-R at 24; *see also National Fuel Gas Distribution Corporation, Supplement No. 207 Tariff Gas Pa. P.U.C. No. 9, Docket No. R-2019-3010744* (Order entered Aug. 29, 2019) (“*PA DSA Order*”). The *PA DSA Order* was issued prior to the *NYPSC October 2019 Order*. NFGD St. 1-R at 20; Joint Compl. St. 1 at 19.

The Commission’s order approving Supplement No. 207 and the associated DSA and SA does not contain a condition or requirement that Distribution modify or revise the DSA in accordance with the outcome of the NY PSC proceeding. NFGD St. 1-R at 20; *see also PA DSA Order*.

D. THE PENNSYLVANIA COMPLAINT PROCEEDING

On April 27, 2020, Joint Complainants filed the above-captioned Complaint against Distribution.

On May 20, 2020, Distribution filed and served its Answer and New Matter to the Complaint, and denied the material allegations advanced in the Complaint.

On May 22, 2020, Distribution filed a letter representing that it was voluntarily suspending enforcement of the cybersecurity insurance requirements contained in Rule 33 of its Tariff and the DSA, pending the outcome of the above-captioned Complaint proceeding. The letter further

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indicated that Distribution had previously extended the requirement to execute a DSA due to the COVID-19 pandemic.⁴

On October 23, 2021, a Joint Motion for Protective Order was filed by the Joint Complainants and Distribution.

On November 23, 2020, the Commission issued a Call-In Telephone Prehearing Conference Notice, which scheduled a prehearing conference to occur at 10:00 a.m. on January 19, 2021.⁵ Administrative Law Judge Dennis J. Buckley (the “ALJ”) was assigned to the proceeding.

The Joint Complainants filed their prehearing memorandum on January 12, 2021.

Distribution filed its prehearing memorandum on January 15, 2021.

Also on January 15, 2021, the Pennsylvania Independent Oil & Gas Association (“PIOGA”) filed a Petition to Intervene and a prehearing memorandum.

A litigation schedule was adopted by the ALJ at the January 19, 2021 prehearing conference.

A Protective Order was issued by the ALJ on January 20, 2021.

The parties served various discovery requests and responses throughout the course of the proceeding.

On March 5, 2021, the Joint Complainants and PIOGA served written direct testimony. The Joint Complainants’ direct testimony was comprised of: (1) Joint Compl. St. 1, the direct testimony of Mr. Frank Lacey and Exhibits FPL-1 and FPL-2; and (2) Joint Compl. St. 2, the direct

⁴ On March 27, 2020, Distribution notified NGSs operating in its Pennsylvania service territory via a website posting and e-mail that the deadline was extended to April 30, 2020. Distribution further extended the deadline to May 31, 2020.

⁵ The notice did not establish a deadline for the filing of a Prehearing Conference Memorandum, and no Prehearing Order setting forth such deadline has been issued at this time.

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testimony of Mr. Timothy D. Wright. PIOGA’s direct testimony was comprised of PIOGA St. 1, the direct testimony of Mr. Dan Weaver.

On March 10, 2021, while this proceeding was ongoing, the Commission issued a cybersecurity advisory on threats to utility systems to water utilities across Pennsylvania with specific cybersecurity information following a recent cyberattack on a water system in Florida and also encouraged all other utilities to maintain good cyber hygiene and remain vigilant in a press release.⁶ NFGD St. 1-R at 8-9; *see* NFGD Exhibit CC-1.

On March 25, 2021, Distribution served written rebuttal testimony. Distribution’s rebuttal testimony was comprised of: (1) NFGD St. 1-R,⁷ the rebuttal testimony of Mr. Christopher Cej and NFGD Exhibits CC-1 through CC-12; and (2) NFGD St. 2-R, the rebuttal testimony of Mr. Jeffrey Grice and NFGD Exhibits JG-1 through JG-4.

On April 16, 2021, the Joint Complainants and PIOGA served written surrebuttal testimony. The Joint Complainants’ surrebuttal testimony was comprised of: (1) Joint Compl. St. 1-SR, the surrebuttal testimony of Mr. Frank Lacey; and (2) Joint Compl. St. 2-SR, the surrebuttal testimony of Mr. Timothy D. Wright. PIOGA’s surrebuttal testimony was comprised of PIOGA St. 1-SR, the surrebuttal of Mr. Dan Weaver.

On April 26, 2021, Distribution served written outlines of rejoinder testimony, and served rejoinder exhibits. The rejoinder exhibits served by Distribution included: CONFIDENTIAL NFGD Exhibit JG-5; NFGD Exhibit JG-6; and CONFIDENTIAL NFGD Exhibit JG-7.

⁶ <https://www.puc.pa.gov/press-release/2021/puc-issues-cybersecurity-advisory-on-threats-to-utility-systems>.

⁷ Distribution made certain corrections to NFGD St. 1-R at the April 29, 2021 evidentiary hearing. Tr. 19-20. The corrected version of NFGD St. 1-R was admitted into the record. Tr. 21.

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On April 29, 2021, a telephonic evidentiary hearing was held. At the end of the hearing, the parties agreed to, and the ALJ adopted, the following modified deadlines for briefs: Main Briefs would be due on June 16, 2021; and Reply Briefs would be due on July 9, 2021.

Distribution hereby submits this Main Brief in accordance with the ALJ's directive at the April 29, 2021 evidentiary hearing.

E. THE DSA COLLABORATIVE

While the above-captioned Complaint proceeding occurred before the Commission, Distribution hosted a collaborative with Pennsylvania NGSs that provide service in Pennsylvania on Distribution's system to discuss and evaluate possible revisions to the Pennsylvania DSA and SA. NFGD St. 1-R at 12.

The collaborative was initiated on September 22, 2020. NFGD St. 1-R at 12.

A number of NGSs, including NRG Energy, Inc., EnergyMark LLC, Vineyard Oil and Gas Company (PIOGA member), Direct Energy Business Marketing LLC (PIOGA member), MidAmerican Natural Resources LLC and Total Energy Resources, LLC, participated and provided the Company with feedback regarding the DSA. NFGD St. 1-R at 12.

Based upon the feedback received, Distribution provided the participating NGSs with a redline version of the DSA, and requested further feedback by December 18, 2020, and indicated that it would hold another collaborative meeting to review and discuss any additional feedback if necessary. NFGD St. 1-R at 12.

NRG Energy, Inc., Direct Energy Business Marketing LLC, Vineyard Oil and Gas Company and Stand Energy Corporation provided their comments related to the redline version to the Company. NFGD St. 1-R at 12.

The Company provided additional edits to Pennsylvania NGSs on February 26, 2021, and further indicated it would hold another collaborative if necessary. NFGD St. 1-R at 12.

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As a part of its rebuttal testimony, Distribution adopted various of the substantive changes proposed by the NGSs, that result in the DSA and SA more closely aligning with the versions of those documents that apply in New York, which some NGSs have indicated are preferable. NFG St. 1-R at 13; *see also* NFGD Exhibit CC-2.

NFGD Exhibit CC-2 is an updated version of the DSA that reflects these changes. NFGD Exhibit CC-2 was admitted into the record at the evidentiary hearings. Tr. 21. Distribution requests that the Commission approved the updated version of the DSA in this proceeding.

III. LEGAL STANDARDS

A. APPLICABLE STANDARDS UNDER THE PUBLIC UTILITY CODE

Section 1501 of the Public Utility Code materially states:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public...Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service...

66 Pa.C.S. § 1501 (emphasis added). “Service,” as defined by Section 102 of the Public Utility Code, is “[u]sed in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed...in the performance of their duties under this part to...the public...” 66 Pa.C.S. § 102.

Section 1301(a) of the Public Utility Code further states, “Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission.” 66 Pa.C.S. § 1301(a). Tariffs that have been approved by the Commission have the force and effect of law.

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See 66 Pa.C.S. § 1303; *see also PPL Elec. Utils. Corp. v. Pa. PUC*, 912 A.2d 386, 402 (Pa. Cmwlth. 2006); *Di Santo v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197, 201 (Pa. Super. 1981).

Pennsylvania courts have also made clear that tariff provisions approved by the Commission are *prima facie* reasonable. *Kossmann v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. Ct. 1997); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. Ct. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. Ct. 1979). Therefore, a complainant seeking to evade the effect of existing tariff provisions carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provisions unreasonable. *Id.*; *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. Ct. 1981).

B. BURDEN OF PROOF

Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. A litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence, which is substantial and legally credible. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Cmwlth. v. Williams*, 557 Pa. 207, 732 A.2d 1167 (Pa. 1999). Only if the proponent of the rule or order present evidence found to be of greater weight than the other parties, will it have carried its burden of proof. *Morrissey v. Commonwealth*, 225 A.2d 895 (Pa. 1986); *Burleson v. Pa. PUC*, 641 A.2d 1234, 1236 (Pa. 1983); *V.J.R. Bar Corp. v. P.L.C.B.*, 390 A.2d 163 (Pa. 1978); *Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001).

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Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm’n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). The “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mechanical and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted). However, “[m]ere bald assertions, personal opinions or perceptions do not constitute evidence.” *Mid-Atlantic Power Supply Ass’n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987)); see also *West Penn Power Co. v. Pa. PUC*, 219 A.3d 716, 2019 Pa. Commw. Unpub. LEXIS 532, at *24-25 (Pa. Cmwlth. 2019).

IV. SUMMARY OF ARGUMENT

As a public utility, Distribution has an obligation to protect the sensitive and confidential information that its customers provide it as a condition to obtaining service. It is undisputed that cybersecurity issues have come to the forefront of business concerns, and that Distribution and other entities that interface with public utility customer data are increasingly targeted by cyberattacks designed to exfiltrate this data. In order to protect its customers and maintain reasonably safe and reliable service, Distribution has developed strict policies and procedures for acquiring, accessing, storing and disposing of confidential information that includes customer personal identifiable/health information and sensitive company business information. The data security requirements set forth in Supplement No. 207 and the associated DSA and SA are an important aspect of the Company’s overall policies and procedures for protecting confidential information.

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Despite admitting that cybersecurity issues are important and that it is reasonable for Distribution specifically, and other companies generally, to develop cybersecurity requirements for those that interface with their IT systems, the Joint Complainants assert the data security requirements set forth in Supplement No. 207 and the associated DSA and SA are unjust and unreasonable. They claim that certain non-cybersecurity insurance requirements are unjust and unreasonable and usurp the Commission's jurisdiction to regulate NGSs providing service in Pennsylvania. The Joint Complainants further allege that the minimum cybersecurity insurance requirement contained in the DSA is unreasonable, provides no incremental benefit and acts as a barrier to competitive markets in Pennsylvania. The Joint Complainants' arguments are without merit and should be rejected.

As an initial matter, it is important to recognize that Distribution sought and obtained Commission approval of these requirements at Docket No. R-2019-3010744. By approving the data security requirements, the Commission has deemed them *prima facie* reasonable and they carry the force and effect of law. In addition, by seeking and obtaining approval of these requirements, Distribution did not usurp the Commission's authority as the Joint Complainants' suggest. Instead, it sought to implement reasonable rules and regulations governing the relationship between it and the NGSs that operate on its system, consistent with the Public Utility Code and the Commission's regulations.

The record evidence in this case further shows that the Joint Complainants have not carried their heavy burden to demonstrate either the minimum cybersecurity insurance requirement or the non-cybersecurity insurance requirements are unjust and unreasonable. Regarding the minimum cybersecurity insurance requirement, the record demonstrates that it provides important incremental benefits in addition to the data security requirements set forth in Supplement No. 207

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and the associated DSA and SA. Importantly, Distribution witness Mr. Grice testified that the underwriting process—a necessary prerequisite to obtaining cybersecurity insurance—involves a review of the insured’s systems, policies and procedures. The price to obtain coverage is then, in part, based on this review and the types of systems, policies and procedures that an applicant has or does not have in place. However, by identifying systems, policies and procedures that an applicant does not have in place, the price quoted incentivizes the applicant to implement missing protections in order to obtain a better price. The import of this process was corroborated by documents produced by PIOGA and the testimony of the Joint Complainants’ witness Mr. Lacey on cross examination.

With respect to the non-cybersecurity insurance requirements, Distribution has explained that these requirements are developed as part of an overall approach to protect confidential and sensitive information from exfiltration. Moreover, the Joint Complainants’ and PIOGA’s own witnesses admit that cybersecurity issues are important and that Distribution is permitted to implement reasonable requirements for those to interface with its systems. In addition, even if the Joint Complainants were able to show the requirements set forth in Supplement No. 207 and the associated DSA and SA are unjust and unreasonable (and they have not done so), Distribution has proposed specific changes to these requirements based upon feedback obtained during a collaborative it hosted with NGSs operating on its Pennsylvania system. Distribution has requested that the ALJ and the Commission approve these revisions as a part of their resolution of this proceeding in order to resolve this issue.

In addition, the Joint Complainants’ and PIOGA’s claims that the cost to obtain cybersecurity insurance is prohibitive or otherwise acts as a barrier to competition should be rejected. The record in this case is devoid of any actual evidence that the cost to obtain

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cybersecurity insurance is prohibitive or otherwise acts as a barrier to competition. Rather, the Joint Complainants' theory rests upon assertions and speculation that are not borne out by any studies, analyses or documents of record. The evidence of record does reveal, however, that most of PIOGA's members have already obtained cybersecurity insurance and that cybersecurity insurance is simply becoming part of the cost of doing business.

The Joint Complainants further attempt to paint a picture where Distribution misrepresented the data security requirements set forth in Supplement No. 207 and the associated DSA and SA in its filing at Docket No. R-2019-3010744 and in its communications with suppliers. These claims lack context and also attempt to ignore the simple fact that the Joint Complainants did not participate in the Commission's review at Docket No. R-2019-3010744.

The Joint Complainants also claim that the minimum cybersecurity insurance requirement constitutes an impermissible form of financial security. However, the purpose of this requirement is not to protect Distribution or an alternative supplier if an NGS defaults. Rather, its purpose is to ensure that Distribution's customers, as well as Distribution, are not subject to the costs associated with investigating and resolving a cyber-attack on an NGS that results in the exfiltration of sensitive information from Distribution's systems.

Finally, Distribution notes that the Joint Complainants have repeatedly pointed to the NYPSC's review of data security requirements applicable to entities providing service in New York and, effectively, claimed the requirements applicable to entities providing service in Pennsylvania in Supplement No. 207 and the associated DSA and SA are unreasonable because they do not match the New York requirements. The Joint Complainants' position is inconsistent with the law and, moreover, the NYPSC has made clear that its resolution of certain of the issues

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(*i.e.*, a minimum cybersecurity insurance requirement) with respect to entities providing service in New York is not final.

For these reasons, and the reasons more fully explained below, the Complaint should be denied in its entirety and, as a part of its denial of the Complaint and resolution of the issues in this proceeding, the ALJ and the Commission should approve the revised DSA and SA proposed by Distribution and entered into the record as NFGD Exhibit CC-2.

V. ARGUMENT

A. **THE DATA SECURITY REQUIREMENTS APPLICABLE TO PENNSYLVANIA NGSS WERE REVIEWED AND APPROVED BY THE COMMISSION.**

As an initial matter, it is important to recognize that it is not disputed that Distribution filed Supplement No. 207 and the associated Pennsylvania DSA and SA consistent with the Public Utility Code and Commission regulations applicable to tariff revisions at Docket No. R-2019-3010744 on June 14, 2019. It is also undisputed that NGSS operating on Distribution's Pennsylvania system, including the Joint Complainants, were notified of the filing and that no parties intervened or otherwise participated in the proceeding at Docket No. R-2019-3010744.⁸ Finally, it is undisputed that the Commission approved Supplement No. 207, the DSA and SA in the *PA DSA Order* on August 20, 2019, and that this order does not contain a condition or requirement that Distribution modify or revise the DSA in accordance with the outcome of the NY PSC proceeding.

Consistent with these undisputed facts, Supplement No. 207, and the incorporated DSA and SA are considered Commission-approved tariffs and, therefore, are *prima facie* reasonable. *Kossmann*, 694 A.2d at 1151; *Shenango Twp.*, 686 A.2d at 914; *Zucker*, 401 A.2d at 1380. Moreover, unless revised, Supplement No. 207 and the associated DSA and SA have the force and effect of law. *See* 66 Pa.C.S. § 1303; *PPL Elec. Utils. Corp.*, 912 A.2d at 402; *Di Santo*, 436 A.2d at 201; *see also* NFGD Exhibit CC-9 at 4. As such, the Joint Complainants and PIOGA carry a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provisions unreasonable. *Id.*; *Brockway Glass*, 437 A.2d at

⁸ Although the Joint Complainants attempt to argue that they decided not to participate in this proceeding based upon alleged misrepresentations made by Distribution, the Commission should reject this argument for the reasons set forth in Section V.E *infra*.

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1071-72. As explained in the Sections below, the Joint Complainants’ and PIOGA cannot meet this heavy burden with respect to any of their claims challenging Supplement No. 207 and the associated DSA and SA.

B. THE DATA SECURITY REQUIREMENTS SET FORTH IN THE DATA SECURITY AGREEMENT AND SELF ATTESTATION ARE JUST AND REASONABLE.

1. Introduction.

The Joint Complainants’ claims regarding the data security requirements in Supplement No. 207 and the associated DSA and SA, can be broken down into two categories: (1) the specific requirement contained in the DSA which states that NGSs operating on Distribution’s system in Pennsylvania must obtain cybersecurity insurance with a minimum coverage of \$5 million per incident; and (2) the non-cybersecurity insurance data security requirements.

Regarding the minimum cybersecurity insurance requirements, the record evidence shows that cybersecurity insurance is just and reasonable because it provides for an independent review of an NGS’ security protections by an insurance underwriter, which can increase cybersecurity protections. Cybersecurity insurance also provides a source of funds in the event that an NGS system is breached. The evidence also demonstrates that obtaining cybersecurity insurance constitutes a reasonable and necessary business expense.

Regarding the non-cybersecurity insurance requirements, Distribution has revised the DSA and SA based upon feedback received from NGSs operating on its system through a collaborative process. These changes address many of the concerns raised by the Joint Complainants, and, therefore, Distribution requests that the revised DSA (NFGD Exhibit CC-2) be approved as a part of the resolution of this proceeding.

These issues are addressed in more detail below.

2. The Cybersecurity Insurance Requirement Is Reasonable And Provides Important Protections For Distribution And Its Customers.

Both the currently-effective Commission approved DSA applicable to Pennsylvania entities and the revised DSA contained in NFGD Exhibit CC-2 contain a provision that requires Pennsylvania NGSs operating on Distribution’s system to “carry and maintain Cybersecurity insurance in an amount of no less than \$5,000,000 per incident” and also requires Distribution to “maintain at least \$5,000,000 of Cybersecurity insurance.” *See* NFGD Exhibit CC-2 at 33 (indicating no changes between the currently effective DSA and the revised DSA). The Joint Complainants’ and PIOGA disputed this provision as a part of their direct case, and continue to dispute this provision with respect to the revised DSA as a part of their surrebuttal.

a. Cybersecurity Insurance Enhances Cybersecurity Protection And Decreases The Risk Of Breach.

Despite Joint Complainants’ witness Mr. Lacey testifying that “[t]he threat of cybersecurity events is very real” and that “it is very understandable that NFGD has cause to be concerned about cybersecurity and related risks,” Joint Compl. St. 1 at 4-5, he asserts (1) insurance policies “do not in any way prevent damages from occurring in the first place” (Joint Comp. St. 1 at 5), (2) “[c]ybersecurity insurance does not enhance cybersecurity protections” or otherwise provide “incremental security protections to NFGD” (Joint Compl. St. 1 at 8). *See also* Joint Compl. St. 1 at 10-11. PIOGA witness Mr. Weaver similarly relies upon Mr. Lacey’s testimony to state that “cybersecurity insurance does not prevent a cyberincident.” PIOGA St. 1 at 4.

Distribution rebutted these claims and the record evidence shows that they lack merit. Distribution witness Mr. Grice has participated in the underwriting process on behalf of Distribution approximately 200 times, including the underwriting of its cybersecurity insurance policy. Tr. 53 (confirming Mr. Grice has gone through the underwriting process approximately 200 times on behalf of Distribution), 54. Based on his experience, Mr. Grice explained that

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insurance, generally, and cybersecurity insurance, specifically, has “several purposes.” NFGD St. 2-R at 3. Mr. Grice acknowledged that “[i]nsurance is purchased as a means of protection from a financial loss.” NFGD St. 2-R at 3. However, he further explained that it also (a) “ensures financial obligations can be met in the event of an accident or other unforeseen incident to the insured” and (b) “mitigates against the risk of a successful cyber-attack due to a review of policies and procedures by the insurance underwriter.” NFGD St. 2-R at 3.

With respect to this latter point, Mr. Grice explained that obtaining and maintaining insurance involves an underwriting process where “underwriters will perform a review of systems and exposures of the party seeking insurance before coverage is issued to ensure an acceptable standard is being followed.” NFGD St. 2-R at 3. As an example, he provided an overview of the annual survey process conducted by the Company’s underwriters and explained “our cybersecurity insurance underwriters perform an annual survey of our policies and procedures, and our property insurance underwriters conduct periodic engineering loss control reviews of our compressor stations and other large value facilities.” NFGD St. 2-R at 3. Mr. Grice further affirmed Distribution’s experience with obtaining cybersecurity insurance, and represented that “the underwriting process includes an initial review followed up by an annual survey conducted by a third party expert to assess the cybersecurity readiness of its systems and processes with improvements suggested where necessary.” NFGD St. 2-R at 8. Based upon this review process (which occurs prior to the issuance or renewal of a policy), Mr. Grice concluded that obtaining cybersecurity insurance “may result in the implementation of additional protections by the insured, so that they can obtain the coverage they seek at an acceptable price.” NFGD St. 2-R at 3.

Mr. Grice’s testimony regarding the incremental benefits that result from the underwriting process was further corroborated by documents presented by PIOGA, and the testimony of the

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Joint Complainants’ and PIOGA’s witnesses. In his rebuttal testimony, Mr. Grice identified PIOGA’s response to NFGD-PIOGA-I-4 (admitted into the record as NFGD Exhibit JG-1), which included correspondence between a PIOGA member producer and an underwriter regarding the costs of cyber insurance. NFGD St. 2-R at 3-4. In this correspondence, an underwriter indicated to the PIOGA member producer that “[t]he premium, limit and retention are all subject to change based on the underwriting information they provide. Subject [to] a satisfactory, completed Cyber application.” NFGD Exhibit JG-1 at 1 (emphasis added). Not only is this response from the underwriter consistent with Distribution’s experience, but it also makes clear that the underwriting involves an evaluation of the systems and processes the insured has in place, and the key terms of the policy are subject to change based on those systems and processes. As such, obtaining cybersecurity insurance can result in additional protections and procedures beyond what may already be in place.

Joint Complainants’ witness Mr. Lacey confirmed that his testimony that cybersecurity insurance will not provide any incremental benefit is solely based on his reading of the Distribution’s policy and “research that I did in preparation for this testimony.” Tr. 59. However, while Mr. Lacey was “confident that there is an underwriting process for obtaining any kind of insurance...[i]ncluding cyber security insurance,” his awareness of the underwriting process was limited solely “[t]o the extent that I was able to find some questionnaires, some underwriting questionnaires online.” Tr. 59-60. In addition, he admitted that he has never acquired cybersecurity insurance for a company. Tr. 58.

Nevertheless, Mr. Lacey confirmed on cross examination that a company that seeks to acquire cybersecurity insurance has an incentive to reduce risk by implementing specific measures identified in the underwriting process. He responded to questions as follows:

Q. [ATTORNEY KANAGY] So, if an underwriter looks at a company and says, "Wow, you have the best cyber security measures I have ever seen", do you think that underwriter is going to give a lower price to that company as opposed to a company that does not have as good of cyber security measures in place?

A. [MR. LACEY] I would think if the insurance company said, "Wow, I've never seen risk protections like this", they would offer a different price to -- than they would to a company that had lesser risk protections, yes.

Q. [ATTORNEY KANAGY] So, if an underwriter goes to a company and says, "Look, I see your protections are -- could be better. Here's the price at what you have now, and here's the price if you have better protections", does that incent the company to get a lower-priced insurance by putting in additional protections?

A. [MR. LACEY] Yeah, I think that is exactly what I testified to. Yes, it's so that the security or the data elements or the data security elements are not conditions precedent to getting insurance. But the lower the risk to the insurance company, the -- you would think the lower the premiums would be, yes.

Q. [ATTORNEY KANAGY] So, a company that is acquiring cyber security insurance has an incentive to reduced risk, in order to get a lower-priced policy; is that correct?

A. [MR. LACEY] Well, I can't speak for a company's incentives, but that trade-off would exist, I believe, yes.

Tr. 62-63 (emphasis added). Mr. Lacey's cross examination makes clear that companies are incentivized through the underwriting process to increase cyber security protections in order to reduce policy costs.

PIOGA witness Mr. Weaver similarly admitted on cross that there must be a benefit to obtaining cybersecurity insurance, otherwise the PIOGA members that have already obtained cybersecurity insurance would not have purchased it. The following exchange occurred:

Q. [ATTORNEY KANAGY] So, the fact -- you're not sure then? I guess, is what -- are you saying that you're not sure of whether or not if they have insurance they deem it important to have insurance?

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A. [MR. WEAVER] Well, if our particular member company purchases insurance; therefore, they thought that that would benefit them somehow because --

Q. [ATTORNEY KANAGY] Okay.

A. [MR. WEAVER] -- they are not going to spend money on something that they didn't feel that they would benefit from.

Tr. 13-14 (emphasis added).

b. Cybersecurity Insurance Provides A Source Of Funds In The Event An NGS IT System Is Breached Causing The Release Of Confidential Customer Data.

Mr. Grice identified an additional, incremental benefit of cybersecurity insurance: “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 contained in the DSA.” NFGD St. 2-R at 9. He further explained the indemnification process, and concluded that “[w]ithout this policy in place, Distribution and ultimately its customers could be subject to these expenses despite the NGS being the target of the attack.” NFGD St. 2-R at 9. In this regard, cybersecurity insurance policies will “(a) involve an underwriting process that ensures reasonable systems and processes; (b) offer financial protections to any of Distribution’s customers affected by an attack; and (c) ensure that the NGS has financial means toward meeting its indemnification obligations.” NFGD St. 2-R at 10.

c. The Cost Of Cybersecurity Insurance Is A Reasonable And Necessary Cost Of Doing Business.

In addition to the incremental benefits provided by cybersecurity insurance, Mr. Grice also explained why obtaining cybersecurity insurance is a reasonable and prudent business practice. He testified that “as a general matter for any business, both the frequency and severity of cybersecurity incidents and resulting claims continue to increase.” NFGD St. 2-R at 4. Based upon the increasing risks associated with cybersecurity incidents, he explained that:

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Distribution maintains cybersecurity insurance to address both first party risks (e.g., damaged equipment, business interruption coverage, cyber extortion coverage, breach response services, failure to supply coverage, etc.), and like other businesses who maintain Personally Identifiable Information (“PII”) of its customers, Distribution also looks to address the risks to its customers (including notices, credit monitoring, and other losses) should any of Distribution’s data be exfiltrated during a cyber incident.

NFGD St. 2-R at 4 (emphasis added). He went on to explain that “[a]s the NGSs will not only interface with Distribution’s systems, but will also be in possession of Distribution’s customers’ PII, it is reasonable to ensure that NGSs that interface with Distribution have financial resources available to help protect the customer in the event of a cyber incident.” NFGD St. 2-R at 5. He further testified that “cyber insurance...is now part of the normal cost of doing business and is critically important when customer PII is involved.” NFGD St. 2-R at 10.

The facts that cybersecurity insurance has become a normal cost of doing business and is a reasonable risk management practice are further confirmed by the undisputed evidence that only one of PIOGA’s members believes the cost to obtain \$5 million per incident cybersecurity insurance is prohibitive. NFGD Exhibit JG-4.⁹ Moreover, PIOGA’s own witness testified that “Most of the PIOGA member NGSs on NFGD’s system already have cybersecurity insurance policies.” PIOGA St. 1 at 4. Indeed, “[t]he fact that the other parties in the proceeding have already obtained this insurance demonstrates that it is not unreasonable, and cyber insurance is becoming a necessary cost of doing business.” Tr. 42.

⁹ Distribution further notes that the public information relied upon by this entity to assert the cost to obtain cybersecurity insurance is cost prohibitive appears to be for a \$10,000,000 “maximum limit” policy, and does not appear to be for a quote obtained after the completion of an underwriting process. NFGD Exhibit JG-4 at 3.

d. Conclusion Regarding Cybersecurity Insurance.

In conclusion, the record evidence in this case demonstrates that cybersecurity insurance requirement contained in the DSA provides important incremental benefits and protections to Distribution and its customers, and that obtaining cybersecurity insurance is rapidly becoming a normal cost of doing business. As summarized by Distribution witness Mr. Grice:

Cyber insurance ensures that while the NGSs are in possession of Pennsylvania customers PII they have financial resources to indemnify customers and/or Distribution in the event of a cyber incident, including notifying, providing for monitoring services, and addressing financial losses for customers who are affected by a cyber incident. Additionally, this coverage traditionally entails a system review by the insurer prior to coverage being issued. These reviews often will result in suggestions or requirements to improve controls before coverage will be issues, further protecting all parties from impacts associated from a cyber incident.

NFGD St. 2-R at 12. For these reasons, the Joint Complainants' and PIOGA's claims that the cybersecurity insurance requirement is unreasonable and does not provide any incremental benefits should be denied.

3. The Non-Cybersecurity Insurance Data Security Requirements In The DSA And The SA Are Just And Reasonable.

The Joint Complainants' argue that certain of the non-cybersecurity insurance data security requirements in the DSA and SA are unreasonable. They specifically assert that:

- The SA is vague (Joint Compl. St. 1 at 7-8);
- The NYPSC approved a data security agreement that contains different requirements than the DSA approved by the Commission; (Joint Compl. St. 1 at 12-13);
- The audit requirements are unreasonable, unjustified, lack appropriate standards, and would be bad public policy (Joint Compl. St. 1 at 19-23; Joint Compl. St. 1-SR at 5-6);
- Distribution does not possess specific expertise to conduct an audit of NGS IT systems (Joint Compl. St. 1 at 20; Joint Compl. St. 1-SR at 4-5); and

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- The audit requirement would permit Distribution to “access the operations of its competitors into areas that are in many instances extremely sensitive, proprietary and potentially, a source of competitive advantage” (Joint Compl. St. 1 at 22).

As explained below, however, not only do the Joint Complainants’ agree that Distribution is permitted to establish data security requirements for entities that interconnect with its IT systems, but Distribution has also proposed revisions to the DSA and SA that address the Joint Complainants’ concerns. Therefore, the Joint Complainants have failed to demonstrate that the non-insurance requirements are unreasonable and the Complaint should be denied.

a. Distribution Can Establish Reasonable Security Standards For Entities That Interface With Its IT Systems.

Section 1501 of the Public Utility Code clearly states that “Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service...”

66 Pa.C.S. § 1501. Consistent with this statutory authority, Distribution has implemented data security standards in direct response to unsuccessful cybersecurity attacks on Distribution’s system, and a cyber-attack against an EDI service provide that acts as an external vendor for NFGD St. 1-R at 5-6. The development and filing of these standards for Commission approval is also consistent with the Commission’s increased attention to cybersecurity issues. *See* NFGD St. 1-R at 8, 23.

It is important to recognize that these standards are designed to protect the sensitive information of Distribution’s that is stored in the Company’s IT systems, as a condition of receiving service from Distribution. NFGD St. 1-R at 6. This data includes the customer’s name, address, and phone numbers, and can also include their employment information and Social Security Number if provided. NFGD St. 1-R at 6. In addition, customers that use the Company’s electronic services to submit payments or meter reading also provide confidential financial and

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usage information to the Company. NFGD St. 1-R at 6. When NGSs interface with Distribution’s system to provide natural gas supply service to customers served by Distribution, this sensitive and confidential information is at risk of exposure.

Perhaps for this reason, Joint Complainants’ witness Mr. Lacey candidly admitted that Distribution “is well within its rights to impose reasonable data security standards on any company with which it interfaces and shares data.” Joint Compl. St. 1 at 6. Mr. Lacey confirmed this testimony on cross examination, as follows:

Q. [ATTORNEY KANAGY] Okay. Could you please turn to Page 6 of your direct testimony?

A. [MR. LACEY] Okay.

Q. [ATTORNEY KANAGY] Line 10, you state that NFGD is well within its rights to impose reasonable data security standards on any company it interfaces with; is that correct?

A. [MR. LACEY] That is correct.

Tr. 63. Counsel for Distribution revisited this issue, and the following exchange occurred:

Q. [ATTORNEY KANAGY] Okay. Could you please turn to Page 11 of your direct testimony?

A. [MR. LACEY] Okay. Yeah.

Q. [ATTORNEY KANAGY] Beginning on Line 7, you state that it isn't in anyone's interest to allow a utility to compel risk management practices of a company it interfaces with; is that correct?

A. [MR. LACEY] That is correct.

Q. [ATTORNEY KANAGY] Okay. Now, we discussed earlier your testimony. You said that National Fuel can impose reasonable data security standards; correct?

A. [MR. LACEY] That is correct.

Q. [ATTORNEY KANAGY] So, if National Fuel is imposing security standards, wouldn't that be compelling risk management practices?

A I guess what I meant by the prior statement is that you -- the idea is that National Fuel will set up its standards so that the market will comply with those standards, not the other way around. Like, so my testimony is not that National Fuel would have to meet the standards of fifty different companies, rather they could set the standard because companies are interfacing with it, and I think that is what I meant by the first part of that.

So, here, you're talking about risk management practices complying with, you know, meeting the interconnection requirements, the EDI requirements, whatever. To me, that's a rule of the market. That's not a risk management practice. When you compel insurance, you're saying, "I need you to manage your risk this way. That way might not be the best for my company." So, they don't contract[sic] each other. They are different in scope.

Q. [ATTORNEY KANAGY] So, if you go back to Page 6, you said "data security standards". Can -- to me, data security standards means more than just interfacing rules? Right? Does that mean -- are you saying data security standards are just interfacing rules?

A. [MR. LACEY] Well, that is, I guess, kind of what I was referring to in that statement. So, I -- you know, I think I've testified that the complainants don't have issues with the acquisition requirements, the physical requirements. Right? So, you know, to the extent that if -- you know, if that's what you mean by the data security standards, then they're -- those are what I was talking about, those security standards.

Tr. 65-67 (emphasis added). Mr. Lacey's testimony is contradictory in that, according to him, Distribution both can and cannot impose data security requirements or standards for companies that interface with it. However, he clearly admits that Distribution acted within its rights in imposing data security requirements.

b. Distribution Has Revised The Data Security Agreement And The Self Attestation To Address Many NGS' Concerns.

Despite seeking and obtaining Commission approval of the subject data security requirements at Docket No. R-2019-3010744 and disputing the Joint Complainants' claims, Distribution initiated a collaborative that has resulted in numerous revisions to the DSA and SA. Distribution witness Mr. Cej testified that the collaborative was initiated on September 22, 2020,

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and NGSs, including NRG Energy, Inc., EnergyMark LLC, Vineyard Oil and Gas Company (PIOGA member), Direct Energy Business Marketing LLC (PIOGA member), MidAmerican Natural Resources LLC and Total Energy Resources, LLC, participated and provided the Company with feedback regarding the DSA. NFGD St. 1-R at 12. After receiving multiple rounds of edits, and evaluating and incorporating the feedback received, the Company agreed to adopt the revisions set forth in NFGD Exhibit CC-2.

The revisions to the DSA more closely align the DSA and SA applied to Pennsylvania entities with the documents applicable to New York entities, which the NGSs have indicated are preferable. NFGD St. 1-R at 13. The revisions include, among other things:

- The auditing requirements have been modified to confirm that a third-party auditor selected through a competitive solicitation process, and not Distribution, will conduct any audit at the Company’s expense to confirm compliance with the standards set forth in the DSA (NFGD St. 1-R at 13, 15; Tr. 24-25; NFGD Exhibit CC-2 at 10, 31-32);
- A revised affirmation that the NGS (included in the term “ESE”) will determine and implement the necessary Data Protection Requirements needed to be in compliance with the DSA and SA (NFGD St. 1-R at 13; NFGD Exhibit CC-2 at 19, 41);
- Elimination of the requirement that an NGS will require a third-party representative that is not connected to Distribution’s system to abide by the DSA and SA (NFGD St. 1-R at 13; NFGD Exhibit CC-2 at 7, 27); and
- A confirmation that no encryption in transit is required for email communications (NFGD St. 1-R at 13; NFGD Exhibit CC-2 at 6, 26).

These requirements also addressed the Joint Complainants’ claim that the SA is “vague.” NFGD St. 1-R at 14.

4. The Commission Should Approve The Revised Data Security Agreement And Self Attestation Admitted Into The Record As NFGD Exhibit CC-2.

As explained above, Distribution can impose reasonable security standards for entities that interface with its information technology systems. Distribution initially did so by seeking and obtaining Commission approval of Supplement No. 207 and the associated DSA and SA.

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Nevertheless, Distribution has continued to work with the NGSs that operate on its Pennsylvania system and proposed to adopt various revisions to the DSA and SA that make these documents more consistent with the documents in place for the Company’s New York footprint, with the primary exception related to the cybersecurity insurance provision as discussed above. These revisions also address many of the Joint Complainants’ and PIOGA’s concerns. Therefore, Distribution requests that the Commission approve the revised version of the Pennsylvania DSA and SA set forth in NFGD Exhibit CC-2 as a part of its resolution of this proceeding.

C. THE COMMISSION’S JURISDICTION TO REGULATE NATURAL GAS SUPPLIERS IS NOT USURPED BY THE DSA AND SA TARIFF PROVISIONS THAT GOVERN THE RELATIONSHIP BETWEEN DISTRIBUTION AND ENERGY SUPPLIERS.

In their Complaint, the Joint Complainants asserted that Supplement No. 207 and the associated DSA and SA are unjust, unreasonable and “strictly prohibited because the PUC has exclusive authority to regulate public utilities and NGSs under the Public Utility Code. Compl. ¶ 31. The Joint Complainants specifically reference Section 9 of the DSA, which they alleged “allows NFGD or any agent it appoints to audit and inspect...the facilities of an ESE [NGS] and third-party representatives... and any equipment used to process confidential information, the ESE’s security practices, facilities, books and records, etc.” Compl. ¶ 31. Joint Complainants’ witness Mr. Lacey further argued that Distribution does not have the authority to audit an NGSs compliance with the DSA, and that the requirement “usurps the authority of the Commission.” Joint Compl. St. 1 at 21-22. Each of these arguments should be denied.

Distribution first notes that the case law cited in Paragraph 31 of the Complaint is inapplicable to the instant proceeding. See Compl. ¶ 31 (citing 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.

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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).”). Importantly, each of these cases deals with the issue of whether the Public Utility Code preempts municipalities from regulating public utility services and facilities. None of them deal with the question of whether a public utility may establish reasonable rules and regulations governing its relationship with energy suppliers operating on its system.

Indeed, “every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service...” 66 Pa.C.S. § 1501. Public utilities regularly propose, and the Commission regularly approves, rules and regulations that govern the relationship between public utilities and energy suppliers consistent with the Public Utility Code. *See, e.g., Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017*, Docket No. P-2014-2409362, 2014 Pa. PUC LEXIS 501 (Recommended Decision Sept. 19, 2014) (recommending approval of settlement to revise portions of EDC’s supplier tariff); *Pennsylvania Public Utility Commission v. Peoples Natural Gas Company*, Docket No. R-2012-2285985, 2012 Pa. PUC LEXIS 665 (Order dated Sept. 27, 2012) (approving modifications to NGDC supplier tariff in the context of a base rate proceeding); *Petition of PECO Energy Company for Approval of its Natural Gas Supplier Purchase of Receivables Program*, Docket No. P-2009-2143588, 2010 Pa. PUC LEXIS 1208 (Order dated Nov. 8, 2010) (approving NGDC NGS POR program and associated modifications to NGDC supplier tariff). In each of these proceedings, where a change to the rules and regulations governing the relationship between a public utility and a competitive energy supplier was

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proposed, the public utility sought and obtained Commission approval of the change, and notified the suppliers of the change. The same happened here.

The crux of the Joint Complainants’ argument appears to be that, despite being notified of Distribution’s proposed changes at Docket No. R-2009-3010744, they did not participate in this proceeding. Distribution responds to their claims in this regard in Section V.E *infra*. Materially, however, Distribution’s cybersecurity requirements were filed, noticed and approved by the Commission consistent with the Public Utility Code and the Commission’s regulations as explained above. Distribution has not usurped the Commission’s authority to regulate NGSs and the Joint Complainants’ claims should be denied.

D. THE JOINT COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE REQUIREMENTS OF SUPPLEMENT NO. 207, THE DATA SECURITY AGREEMENT OR SELF ATTESTATION ARE COST PROHIBITIVE OR A BARRIER TO MARKET ENTRY FOR PENNSYLVANIA NATURAL GAS SUPPLIERS.

Central to the Joint Complainants’ and PIOGA’s claim that Supplement No. 207 and the associated DSA and SA are unreasonable is their assertion that applicable data security requirements, in particular the \$5 million minimum cybersecurity insurance policy requirement, would impose unnecessary, unreasonable and/or prohibitive costs on NGSs that operate on Distribution’s Pennsylvania system. The ALJ and the Commission should reject this assertion, because neither the Joint Complainants’ nor PIOGA admitted into the record any documents or other evidence that substantiates these claims.

Joint Complainants’ witness Mr. Lacey concluded that “NFGD’s requirements for ESEs to maintain \$5 million in cybersecurity insurance is unreasonable” (Joint Compl. St. 1 at 5) and further asserted that this requirement will require ESEs to collect the costs of insurance, if possible through competitive products and will create “one more barrier to effective gas competition in the Commonwealth.” Joint Compl. St. 1 at 11-12. Joint Complainants’ witness Mr. Wright similarly

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asserts that EnergyMark LLC “sought insurance quotes and realized it was far too expensive for the number of customers that we supplied gas to in the state [of Pennsylvania].” Joint Compl. St. 2 at 8. He also claims that the cost of cybersecurity insurance that satisfies the Company’s requirements “is a significant cost based on the number of customers and volumetric throughput we have in PA.” Joint Compl. St. 2 at 8. PIOGA witness Mr. Weaver also avers the requirements “would unnecessarily impose increased costs on NGSs that, under some circumstances, the NGSs may be able to pass onto their producers, in whole or in part.” PIOGA St. 1 at 4. He further notes that one, unidentified PIOGA member “estimated that the cost of a cybersecurity insurance policy with coverage of \$5 million per incident would cost between \$25,000-\$30,000 per year” and that “[m]ost of the PIOGA member NGSs on NFGD’s system already have cybersecurity insurance policies...” PIOGA St. 1 at 4.

However, the Joint Complainants did not introduce into the record any evidence or analysis of, or support for, the actual costs of obtaining cybersecurity insurance compared to the actual revenue streams of any one of their businesses. Rather, Mr. Lacey and Mr. Wright baldly assert that the \$5 million requirement is unreasonable and/or “far too expensive.” *See* Joint Compl. St. 1 at 5; Joint Compl. St. 2 at 8. Furthermore, Mr. Lacey admitted on cross examination that he has never acquired cybersecurity insurance for any company. Tr. 58 (“Q. [ATTORNEY KANAGY] Sure. Okay, so have you ever acquired cyber security insurance for any company? A. [MR. LACEY] I have not.”)

Similarly, although Mr. Weaver identified an estimated cost to obtain a cybersecurity policy, no evidence was introduced as to how this quote was obtained or how this cost compared to the unidentified PIOGA member’s revenue streams. PIOGA St. 1 at 4. Rather, Mr. Weaver

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also merely asserts that the insurance requirement would “unnecessarily impose increased costs.”
PIOGA St. 1 at 4.

Pennsylvania law is clear that “[m]ere bald assertions, personal opinions or perceptions do not constitute evidence.” *Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987)); see also *West Penn Power Co. v. Pa. PUC*, 219 A.3d 716, 2019 Pa. Commw. Unpub. LEXIS 532, at *24-25 (Pa. Cmwlth. 2019). In addition, the Commonwealth Court has explained that the Commission may properly refuse to address a complainant’s contention regarding the calculation of costs where the Complainant provides no evidence to substantive, prove, their contention. *Dorsey v. Pa. PUC*, No. 519 C.D. 2014, 2015 Pa. Commw. Unpub. LEXIS 137, at *16 (Pa. Cmwlth. 2015).

In *Bureau of Corrections*, objectors to a conditional use permit application for the placement of a state prisoner pre-release center raised several concerns over the effect that granting the conditional use application would have on property values. *Bureau of Corrections*, 532 A.2d at 14. On appeal, the Supreme Court of Pennsylvania explained that:

The testimony of the neighborhood’s residents, however, was not substantiated by facts but was no more than their bald assertions, personal opinions, and perceptions of the pre-release center and the area. They did not present any studies, police records, property valuations or any type of substantive evidence upon which their fears were based, which would lead a reasonable mind to conclude that the facility would be detrimental to the community's general welfare. Although it had ample opportunity to do so at prior stages of these proceedings, the City, for whatever reason, failed to introduce any evidence to bolster the claims voiced by the objectors.

Bureau of Corrections, 532 A.2d at 14 (emphasis added).

The Commonwealth Court recently reached a similar conclusion in *West Penn Power Co.*, where it analyzed a complainants’ claims regarding the effects of herbicide use on his property.

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West Penn Power Co., 2019 Pa. Commw. Unpub. LEXIS 532, at *24. Although the Commission had granted the subject complaint, the Commonwealth Court reversed and explained that “A review of the record evidence reveals that...Complainant offered nothing more than his personal opinion in seeking to establish his burden that West Penn's proposed herbicide use would harm his property and was, thus, unreasonable.” *West Penn Power Co.*, 2019 Pa. Commw. Unpub. LEXIS 532, at *24. The court further explained that the complainant presented no evidence regarding alternative vegetation management practices and “offered no scientific evidence or expert testimony” on this topic. *West Penn Power Co.*, 2019 Pa. Commw. Unpub. LEXIS 532, at *24.

Moreover, in *Dorsey*, the Commonwealth Court evaluated various challenges to a customer payment plan and calculation of account arrearages before the Commission. *See Dorsey*, 2015 Pa. Commw. Unpub. LEXIS 137, at *14. With respect to the complainants’ claim that her arrearages were miscalculated, the Commonwealth Court upheld the Commission’s denial of the complaint because “Ms. Dorsey did not provide any evidence to substantiate, or prove, her contention,” citing *Mid-Atlantic Power Supply Ass'n. Dorsey*, 2015 Pa. Commw. Unpub. LEXIS 137, at *16.

Like the objectors in *Bureau of Corrections* and the Complainant in *West Penn Power Co.*, the Joint Complainants and PIOGA have presented no studies, analyses, valuations, comparative costs estimates, or any other type of substantive evidence that supports their claims regarding costs of obtaining cybersecurity insurance or the impacts of those costs on their members’ businesses. Rather, the Joint Complainants’ and PIOGA’s testimony only includes their assertions, personal opinions and concerns regarding the costs of obtaining cybersecurity insurance and the impact of those costs. In addition, like the complainant in *Dorsey*, the Joint Complainants’ and PIOGA have provided no evidence to substantiate or prove any contention that the costs of obtaining cybersecurity insurance are unreasonable. Indeed, with the exception of the unsubstantiated

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estimate of one unidentified PIOGA member noted in PIOGA witness Mr. Weaver’s testimony, the record is devoid of any evidence of the actual costs any of the Joint Complainants would incur to obtain cyber security insurance.

The Joint Complainants’ claims that the cybersecurity insurance requirement somehow would somehow create “one more barrier to effective gas competition in the Commonwealth” are similarly meritless. Joint Compl. St. 1 at 11-12. Importantly, none of the parties to this proceeding dispute that cybersecurity insurance constitutes an important aspect of managing business risk¹⁰ and all of them agree that cybersecurity issues are important.¹¹ Although Joint Complainants’ witness Mr. Lacey claims that the Joint Complainants “may or may not be able to add the incremental cost of insurance to its customer’s costs in order to recover the premiums paid” and that “customers might not accept that outcome and might move to another supplier or to NFGD for supply,” he presents no underlying analysis or support for these contentions. *See* Joint Compl. St. 1 at 11. Rather, setting aside the fact that his testimony presents no evidence of the costs he considers, Mr. Lacey’s testimony confirms it is merely speculating about what the Joint Complainants “may or may not” be able to recover and what customers “might” do in response. This is not an analysis of competitive effects. It is mere speculation and the courts have repeatedly held that such speculation is not evidence.

Finally, even if the Joint Complainants had satisfied their heavy burden to demonstrate the costs to obtain cybersecurity insurance, the Joint Complainants would still carry a heavy burden to demonstrate such costs were unreasonable. As explained in Section V.B. *supra*, the evidence of record reveals that the data security requirements set forth in Supplement No. 207, the DSA and

¹⁰ *See* NFGD St. 1-R at 6-7; Tr. 64-65; PIOGA St. 1-SR at 3.

¹¹ *See* NFGD St. 1-R at 6-7; Joint Compl. St. 1 at 5-6; PIOGA St. 1 at 4 (listing the measures PIOGA members have in place to address cybersecurity issues).

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the SA for Pennsylvania NGSs operating on Distribution’s Pennsylvania system are reasonable and necessary to protect sensitive and confidential customer information. Moreover, Distribution presented credible evidence showing that cybersecurity insurance specifically provides important incremental benefits, which justify requiring NGSs to obtain it in order to operate on Distribution’s system. *See* Section V.B. *supra*.

For all of the reason explained above, the Joint Complainants have failed to demonstrate that the data security requirements set forth in Supplement No. 207, the DSA and the SA, including the \$5 million cybersecurity insurance requirement, are cost prohibitive

E. THE JOINT COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT DISTRIBUTION’S COMMUNICATIONS WITH NATURAL GAS SUPPLIERS REGARDING SUPPLEMENT NO. 207, THE DATA SECURITY AGREEMENT OR SELF ATTESTATION CONSTITUTED UNREASONABLE SERVICE.

The Joint Complainants also raised several arguments regarding Distribution’s alleged representations and communications with NGSs that operate on its system, leading up to and after the filing of Supplement No. 207. Joint Complainants’ witness Mr. Wright specifically focuses on marketer meetings held by Distribution on March 21, 2019 and October 10, 2019, and describes presentations made by Distribution at those meetings. *See* Joint Compl. St. 2 at 5-6. In addition, Mr. Wright describes further conversations between representatives from Distribution and EnergyMark LLC that occurred on the phone, over email and in teleconference. *See* Joint Compl. St. 2 at 6-7. Based on these interactions he claims that “NFGD was going against their statements” and suggests that “this is becoming a troubling trend by NFGDC as that they make statements that their actions don’t follow.” Joint Compl. St. 2 at 7. The Joint Complainants appear to assert that these communications violate Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, because “[p]roviding reasonable service means providing truthful service.” *See* Compl. ¶ 29. None of these claims have any merit.

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Fatal to these claims is the fact that the Joint Complainants could have, but did not, intervene in or comment upon the Commission’s review of Supplement No. 207 and the DSA and SA at Docket No. R-2019-3010744. Joint Complainants’ witness Mr. Wright admits that EnergyMark LLC did not participate in this proceeding (Joint Compl. St. 2 at 4, 5) and a cursory review of Docket No. R-2019-3010744 reveals that no parties intervened or otherwise participated in the review of Supplement No. 207. If the Joint Complainants believed that the as-filed Supplement No. 207 and the Pennsylvania DSA were unreasonable, they could have and should have participated in that proceeding. NFGD St. 1-R at 22.

Nevertheless, Joint Complainants’ witness Mr. Wright tries to salvage the Joint Complainants’ failure to participate at Docket No. R-2019-3010744 by constructing a narrative where Distribution is responsible for the decisions of the Joint Complainants’ to participate (or not) in the Commission’s review and consideration of Supplement No. 207 and the Pennsylvania DSA. Mr. Wright makes reference to “the 3/21/19 and 10/10/10 NFGD marketer meetings [where NFGD] stated in their presentation that NFGD would track/follow the NY requirements.” Joint Compl. St. 2 at 5. He further claims that “[d]ue to the statements from the 3/21/19 marketer meeting, we did not file a protest or send questions to NFGD based on the 7/19/19 email notice of changes to the PA GTOP.” Joint Compl. St. 2 at 5.

Distribution witness Mr. Cej showed that Mr. Wright did not accurately describe Distribution’s communications with Pennsylvania NGSs regarding its plans to implement cybersecurity requirements. Mr. Cej explained that neither the October 10, 2019 presentation (NFGD Exhibit CC-5) nor the March 21, 2019 presentation (NFGD Exhibit CC-4) states the requirements would be identical in both states. NFGD St. 1-R at 22. The March 21, 2019 presentation states that the “Pennsylvania Tariff Filing (Planned for May-June)” includes “1.

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Cyber-Security requirements” and that “[t]he proposed requirements would track the New York requirements.” NFGD Exhibit CC-4 at 29. Similarly, the October 10, 2019 presentation states that the “Pennsylvania Tariff Filing (Approved 8/29/19)” included “1. Cyber-Security requirements” and that “[t]he proposed requirements would follow the New York requirements.” NFGD Exhibit CC-5 at 21. Neither of these presentations states that the Pennsylvania requirement would be “the same” or “identical” to the New York requirements and, moreover, at the time that these presentations were made, the requirements were consistent with (*i.e.*, did “track” or “follow”) the requirements that were applicable in New York. *See* NFGD St. 1-R at 24-25.

Furthermore, Mr. Cej walked-through the other presentations made by Distribution at its Market/Supplier Teleconferences for Fall 2018, Spring 2019, Fall 2019, and Spring 2020, and other communications and notifications issued by Distribution to NGSs operating on its system regarding the tariff changes. *See* NFGD St. 1-R at 22-25. Materially:

- On October 9, 2018, Distribution made a presentation that explained the contemplated Pennsylvania tariff filing and indicated PUC staff was aware of the proposal. *See* NFGD St. 1-R at 23; NFGD Exhibit CC-3 at 38.¹²
- On March 21, 2019, Distribution made another presentation that explained the contemplated Pennsylvania tariff filing, as described above. *See* NFGD St. 1-R at 24; NFGD Exhibit CC-4 at 29.¹³
- On June 14, 2019, Distribution filed Supplement No. 207 with the Commission at Docket No. R-2019-3010744, and provided the filing to NGSs via the Company’s website and a copy of the filing was e-mailed to all NGSs operating in the Company’s service territory, including the Complainants. NFGD St. 1-R at 24.¹⁴
- On October 10, 2019, Distribution made another presentation that explained the Pennsylvania tariff filing had been approved, as described above. *See* NFGD St. 1-R at 25; NFGD Exhibit CC-5 at 21.¹⁵

¹² At this time, the data security agreement and self-attestation in effect in New York contained a minimum cybersecurity insurance requirement of \$5,000,000, consistent with the requirement contemplated by Supplement No. 207 and the DSA and SA in Pennsylvania.

¹³ *See* footnote 12.

¹⁴ *See* footnote 12.

¹⁵ *See* footnote 12.

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- On March 17, 2020, Distribution e-mailed copies of the Pennsylvania DSAs and SAs to NGSs operating in its Pennsylvania service territory. *See* NFGD St. 1-R at 25; NFGD Exhibits CC-6 and CC-7.
- On March 19, 2020, Distribution made another presentation that explained the Pennsylvania tariff filing, stated it had been approved by the Commission and that DSAs were due on March 31, 2020. NFGD St. 1-R at 25; NFGD Exhibit CC-8.

Contrary to the Joint Complainants’ assertions, the record evidence shows that Distribution engaged in consistent communication with its suppliers regarding the implementation of cybersecurity requirements in Pennsylvania, and implemented cybersecurity requirements consistent with its representations and the tariff approved by the Commission. NFGD St. 1-R at 25-26. To the extent that any confusion was had by the Joint Complainants as a result of Distribution’s efforts to be open and transparent, such confusion is the result of the Joint Complainants’ own inaction.

The Joint Complainants’ inaction is made further evident by Mr. Wright’s statement that “[w]e thought once everything was completed in NY that NFGD would then amend their filing to update to the NY requirements.” Joint Compl. St. 2 at 5. Yet, the *PA DSA Order* did not condition its approval of Supplement No. 207 or the DSA and SA upon such an amendment. If the Joint Complainants believed this condition should have been imposed, they could have and should have participated in the Docket No. R-2019-3010744 proceeding. *See* NFGD St. 1-R at 22. However, they did not do so.

Joint Complainants’ witness Mr. Wright makes further reference to communications EnergyMark LLC had with Distribution through phone calls, emails and teleconference. Joint Compl. St. 2 at 6-7. He then states that EnergyMark LLC was “taken aback that NFGD was going against their statements and we were forced to file a complaint against NFGDC” and that it “view[s] these actions by NFGD as heavy-handed directives placed on a competitor and are unacceptable, unfair, and unreasonable.” Joint Compl. St 2. At 7.

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Mr. Cej rebutted Mr. Wright's claims regarding these further communications. With respect to subsequent telephone conversations, Mr. Cej indicated that he recalled a single telephone call occurring with EnergyMark LLC's former employee and a separate phone call occurring between the Commission and EnergyMark LLC. NFGD St. 1-R at 26. Importantly, Mr. Cej's testimony makes clear that Mr. Wright did not participate in those conversations and, therefore, his testimony regarding any such phone calls should be afforded no weight.

Regarding the e-mails exchanged between representatives from Distribution, EnergyMark LLC and the Commission, Mr. Cej produced copies of the referenced e-mails. *See* NFGD Exhibit CC-9. The e-mail reveal that Mr. Wright's testimony is inaccurate and warrants correction. *See* NFGD St. 1-R at 26-27. Chief among these corrections, is the exchange that occurred between EnergyMark LLC's former employee, Mr. Cej and Dan Mumford of the Commission. Contrary to Mr. Wright's statements that "we also asked if NFGD had the ability to follow the NY proceedings and file an amendment to the tariff to remove the insurance. Dan Mumford stated NFGD had the ability to do so. Chris Cej stated that he'd be happy to look at anything the commission would like them to" (Joint Compl. St. 2 at 7), Mr. Cej's response made no such statement (NFGD Exhibit CC-9 at 5). Rather, Mr. Cej wrote:

NFGDC intends to comply with its approved tariff and GTOP, which include the cybersecurity insurance requirements in the DSA. NFGDC believes that the technical and insurance provisions specified in the current Pa. DSA/SA protect the Company and, importantly, its ratepayers from physical and financial damages that may result from cyberattack infiltration through external user activities.

NFGD Exhibit CC-9 at 5. Mr. Cej further stated, "As Mr. Mumford suggested during yesterday's teleconference, you are welcome to submit your comments to Pa. Staff for their consideration. Of course, NFGDC would welcome further discussion on this issue with Pa. Staff and the marketers operating on our system upon Pa. Staff's suggestion." NFGD Exhibit CC-9 at 5. Further

responding to this conversation, Mr. Mumford of the Commission stated that “Tariff provisions have the force of regulation – and failure to comply can lead to being restricted from access to NFG’s system.” NFGD Exhibit CC-9 at 4. Indeed, as Mr. Cej and Mr. Mumford indicated, Distribution is obligated to enforce the provisions of its Commission-approved tariff.

For the reasons explained above, the Joint Complainants’ claims that Distribution’s communications with NGSs operating on its system regarding Supplement No. 207

F. THE JOINT COMPLAINANTS HAVE FAILED TO DEMONSTRATE THAT THE MINIMUM CYBERSECURITY INSURANCE REQUIREMENT CONSTITUTES AN IMPERMISSIBLE FORM OF FINANCIAL SECURITY.

In their surrebuttal testimony, the Joint Complainants argued for the first time that the minimum cybersecurity insurance requirement constitutes an impermissible form of financial security. Joint Compl. St. 1-SR at 10-13. Mr. Lacey cites 66 Pa.C.S. § 2208(c)(1)(i) and 52 Pa. Code § 62.111 and asserts that “[t]he purpose of the security requirement “is to ensure the [NGS’s] financial responsibility.” Joint Compl. St. 1-SR at 11 (quoting 52 Pa. Code § 62.111(b)). He then goes on to recite the regulations requirements for the amount and type of financial security that may be obtained, and argues the insurance requirement is a not an acceptable form of financial security. Joint Compl. St. 1-SR at 12-13. The Joint Complainants’ argument is irrelevant and incorrect.

Importantly, Section 2208(c)(1)(i) of the Public Utility Code makes clear that a bond or other financial security is meant to account for “the financial impact on the natural gas distribution company or an alternative supplier or last resort of a default of subsequent bankruptcy of a natural gas supplier.” 66 Pa.C.S. § 2208(c)(1)(i); *see also Re Licensing Requirements for Natural Gas Suppliers*, Docket No. L00000150, 2001 Pa. PUC LEXIS 24 at *37 (Order entered April 20, 201) (“We...have interpreted this provision to establish a purpose of the bond for the security is to

afford natural gas distribution companies some financial protection for the costs of natural gas supplies in the event of supplier default on its obligation to provide supply for its customers or supplier bankruptcy.”). Distribution has explained that the purpose of the cybersecurity insurance requirement is to ensure that the Company’s customers, as well as the Company, are able to tender any claims resulting from a cyber incident targeting an NGS. NFGD St. 2-R at 8. Without a policy in place, Distribution’s customers could be subject to expenses related to “forensic investigation to determine the scope of the data affected by the exfiltration, notification of affected customers, credit monitoring to watch for any fraudulent activity stemming from the incident, and payment for other losses stemming from the incident.” NFGD St. 2-R at 9. Unlike a bond or a financial security requirement, which is designed to only protect a utility or alternative supplier in the event of an NGS default, the cybersecurity insurance requirement contained in the DSA is designed to protect Distribution’s customers in the event of a cyber-attack targeting an NGS. Rather, Distribution’s minimum cybersecurity insurance requirement is in furtherance of its obligation to provide safe and reliable service to its customers. 66 Pa.C.S. § 1501.

G. THE JOINT COMPLAINANTS’ RELIANCE ON THE NYPSC’S REVIEW OF A DATA SECURITY AGREEMENT AND SELF ATTESTATION PROPOSED BY NEW YORK PUBLIC UTILITIES, FOR APPLICATION TO NEW YORK ENERGY SERVICE COMPANIES THAT OPERATE IN NEW YORK IS IRRELEVANT TO THE COMMISSION’S REVIEW OF SUPPLEMENT NO. 207 AND THE ASSOCIATED DATA SECURITY AGREEMENT AND SELF ATTESTATION FOR PENNSYLVANIA ENTITIES.

In their Complaint and throughout this proceeding, the Joint Complainants have principally relied upon the NYPSC’s review of a data security agreement and self-attestation proposed by New York public utilities to be applied to ESCOs that provide service in New York. *See, e.g.*, Joint Compl. St. 1 at 12-19; Compl. ¶¶ 6, 32. Contrary to the Joint Complainants’ claims, the NYPSC’s review and consideration of a New York specific data security agreement applicable to

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entities providing service in New York is not relevant to the Commission’s consideration of the Pennsylvania-specific Supplement No. 207, DSA and SA applicable to entities providing service in Pennsylvania for three reasons.

First, the Commission is not bound by the NYPSC’s review of cybersecurity requirements, which are **only** applicable to New York entities providing services in New York. Any suggestion that the Commission is required to follow or defer to the actions of the NY PSC should be rejected. The Commission possesses the exclusive authority to regulate public utilities and NGSs in Pennsylvania. *See, e.g., PPL Electric Utilities Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019) (“*City of Lancaster*”).

Distribution anticipates that the Joint Complainants will rely upon the Commonwealth Court’s decision¹⁶ in *City of Lancaster*—albeit with respect to their meritless argument that Distribution seeking and obtaining approval of Supplement No. 207 and the associated DSA and SA somehow usurps the Commission’s authority—as a basis for their Complaint. *See* Compl. ¶ 31 (citing *City of Lancaster* and other cases). However, the Supreme Court of Pennsylvania made clear in affirming the Commonwealth Court’s holding that certain provisions of a local ordinance were preempted by the Public Utility Code, that “that the General Assembly long has intended, and continues to intend, that its comprehensive statutory framework for utility regulation, as complemented by the PUC’s voluminous complementary regulations, reflect its general intention wholly to occupy the field of utility regulation at the state level.” *City of Lancaster* 214 A.3d at 652. *City of Lancaster* makes clear that the Commission’s authority over public utilities in Pennsylvania is exclusive.

¹⁶ *PPL Electric Utilities Corp. v. City of Lancaster*, 125 A.3d 837 (Pa. Cmwlth. 2015) (*en banc*).

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The NYPSC has no such authority and, moreover, the Commission has repeatedly rejected parties' attempts to rely upon the decisions of other states' regulatory commissions because of the significant differences that may exist between such states' statutes, regulations and precedent and Pennsylvania's statutes, regulations and precedent. *Petition of Columbia Gas of Pennsylvania, Inc. for Approval of its Long-Term Infrastructure Improvement Plant; Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge*, Docket No. P-2012-2338282, et al., 2014 Pa. PUC LEXIS 93, at *34-35 (Recommended Decision Feb. 25, 2014) ("*Columbia 2014 RD*"), *adopted*, Docket Nos. P-2012-2338282, et al. (Order entered May 22, 2014); *see also Elder v. Orlucky*, 515 A.2d 517, 522 (Pa. 1986) (noting it was not appropriate to consider another jurisdiction's statute where there was no indication that the General Assembly based Pennsylvania legislation on legislation adopted in other jurisdictions). Importantly, the Commission has previously explained that it will not act based solely upon the actions of another regulatory body. *See Performance Metrics & Remedies (PMO III F0013) 2008 Guidelines Updates*, 2008 Pa. PUC LEXIS 1105, at *19-20 (Order entered July 22, 2008) (explaining that the Commission will independently review and consider a telecommunications carrier's performance assurance plan metrics, and that metrics adopted by another state commission "does not control" the Commission's review and approval of similar metrics).

In *Performance Metrics & Remedies (PMO III F0013) 2008 Guidelines Updates*, the Commission adopted proposed changes to the "Pennsylvania Carrier-to-Carrier Guidelines" proposed by Verizon Pennsylvania, Inc. *See Performance Metrics & Remedies (PMO III F0013) 2008 Guidelines Updates*, 2008 Pa. PUC LEXIS 1105, at *1, 22. As a part of its review of these proposed guidelines, the Commission noted that Verizon Pennsylvania, Inc. raised an argument in favor of the guidelines because they were consistent with the guidelines it adopted in New York

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and would, therefore, be uniform. *See id.*, at *19. Despite this argument, the Commission made clear that it would not “adopt changes or refrain from adopting changes for use in Pennsylvania based solely on what happens in NY or any other jurisdiction.” *Id.*, at *20 (emphasis added). It further explained:

We do not predicate our decision to adopt the proposed changes merely on Verizon PA’s argument in favor of uniformity in the footprint or its recitation of NY-based arguments in support of the changes. Specifically, whether the NY PSC has adopted a particular change for use in NY (or whether other states in the footprint have adopted a particular change) does not control Pennsylvania’s decision to adopt or reject a particular change for use in Pennsylvania.

We have not adopted the NY Guidelines (or NY PAP) for use in Pennsylvania; we have merely based the PA Guidelines (and PA PAP) on the NY-style models.

Id., at *19-20.

The Commission’s reluctance to base decisions under the Public Utility Code upon the decisions of other jurisdictions was further explained in the *Columbia 2014 RD*. There, the administrative law judges explained that “[t]he Statutory Construction Act does not specifically provide for consideration of an issue by another jurisdiction as a basis for determining legislative intent.” *Columbia 2014 RD*, 2014 Pa. PUC LEXIS 93, at *34. The Recommended Decision further noted that, although “Section 1927 of the Statutory Construction Act provides that statutes uniform with those of other states shall be interpreted and construed to affect their general purpose to make laws uniform among jurisdictions.” Where “there is no uniformity among jurisdictions” then Section 1927 is inapplicable. *See id.*, at *34-35.

These decisions are consistent with the general principle set forth in *Elder v. Orlucky*, that it is inappropriate to consider another jurisdiction’s statute where there was no indication that the General Assembly based Pennsylvania legislation on legislation adopted in other jurisdictions.

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Elder v. Orlucky, 515 A.2d 517, 522 (Pa. 1986). In the same vein, the determinations of another state regulatory body pursuant to the specific statutory authority granted to it by the applicable state legislature are generally irrelevant to the Commission’s determinations made pursuant to the Public Utility Code. Such determinations would only be relevant upon a showing that each regulatory body was acting under similar statutory authority. No such showing has been made by the Joint Complainants and, therefore, their reliance on the NYPSC’s findings should be rejected.

Second, Distribution’s implementation of Supplement No. 207 and the DSA and SA in Pennsylvania is made consistent with an order of the Commission that was issued before the NYPSC’s decision and did not condition such implementation upon any decision by the NYPSC. Importantly, it is undisputed that the Commission’s *PA DSA Order* was issued prior to the *NYPSC October 2019 Order*. Compare Joint Compl. St. 1 at 19 and Compl. ¶ 15 with NFGD St. 1-R at 20. Similarly, it is undisputed that the Commission did not condition the approvals granted in the *PA DSA Order* upon the outcome of the proceeding before the NYPSC. NFGD St. 1-R at 20 (“NYPSC did not issue its order until October 17, 2019. Furthermore, *PA DSA Order* did not contain a condition or requirement that Distribution modify or revise the DSA in accordance with the outcome of the NYPSC proceeding.”); see also *PA DSA Order*, Ordering Paragraph 1 (“That National Fuel Gas Distribution Corporation Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9 is hereby permitted to become effective on August 30, 2019.”). In this regard, Distribution has done precisely what it was authorized by the *PA DSA Order* to do; it made Supplement No. 207 effective in Pennsylvania on August 30, 2019, consistent with the authority granted to it by the Commission.

Finally, even if the *NYPSC October 2019 Order* were relevant to the Commission’s considerations in this case, the *NYPSC October 2019 Order* did not even foreclose the imposition of a cybersecurity insurance requirement in New York. Although the NYPSC declined to adopt a

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generic cybersecurity insurance provision in this order, it explicitly stated that it “at this time, the [NYPSC] declines to adopt a generic cybersecurity insurance provision but may revisit this issue at a future date.” *NYPSC October 2019 Order* at 58.¹⁷ In this regard, the *NYPSC October 2019 Order* is not an outright rejection of the imposition of a cybersecurity requirement as the Joint Complainants suggest.

For all of these reasons, the Joint Complainants have failed to demonstrate that the NYPSC’s review of a data security agreement and self-attestation proposed by New York public utilities to be applied to ESCOs that provide service in New York is relevant to the Commission’s review of Supplement No. 207 and the associated DSA and SA applicable to entities providing service in Pennsylvania.

¹⁷ Distribution notes that the factual record developed before the Commission demonstrates that the cybersecurity insurance requirement provides incremental benefits by subjecting NGSs to the underwriting process, which is a prerequisite to obtaining cybersecurity insurance. *See* Section V.B.2.a. *supra*. In addition, Distribution notes that the record in this case is devoid of any evidence of actual anticipated costs that NGSs would incur to obtain cybersecurity insurance. *See* Section V.D. *supra*. These facts appear to significantly differ from the record developed before the NYPSC.

VI. CONCLUSION

WHEREFORE, National Fuel Gas Distribution Corporation respectfully requests that the Pennsylvania Public Utility Commission: (a) deny the Complaint of EnergyMark LLC, Vineyard Oil & Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC; and (b) approve the use of the Revised Data Security Agreement and Self-Attestation admitted into the record in this proceeding as NFGD Exhibit CC-2; and (c) close the above-captioned docket.

Respectfully submitted,



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Date: June 16, 2021

Counsel for National Fuel Gas Distribution Corporation

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APPENDIX A
PROPOSED FINDINGS OF FACT

National Fuel Gas Distribution Corporation (“Distribution” or the “Company”) proposes the following findings of fact:

1. Distribution is a “public utility” and “natural gas distribution company” as those terms are defined under Sections 102 and 2202 of the Public Utility Code. 66 Pa.C.S. §§ 102 (defining “public utility”) and 2202 (defining “natural gas distribution company”).

2. Distribution owns property in Pennsylvania for the transmission and distribution of natural gas and provides natural gas distribution service to approximately 200,000 customers in various communities in the counties of Armstrong, Butler, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Forest, Jefferson, McKean, Mercer, Venango and Warren, Pennsylvania, which territory is more fully described in its Tariff Gas – PA PUC No. 9.

3. In order to provide service to customers, Distribution collects and maintains certain sensitive information that is deemed confidential that is stored in the Company’s computer systems. NFGD St. 1-R at 6.

4. For example, applicants requesting gas service from Distribution will provide personal information that includes name, address, phone numbers, employment information and Social Security Number (“SSN”), although the provision of employment information and a SSN is voluntary. NFGD St. 1-R at 6.

5. Existing customers may also utilize the Company’s electronic services to submit payments or meter reading. NFGD St. 1-R at 6.

6. Distribution has strict policies and procedures for acquiring, accessing, storing and disposing of confidential information that includes customer personal identifiable/health information and sensitive company business information. NFGD St. 1-R at 6.

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7. Distribution policy requires that all confidential or non-public information must be securely managed and accessible to only approved company employees with a legitimate business reason. NFGD St. 1-R at 6.

8. Distribution is also covered by a cybersecurity insurance policy in an amount of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].

9. Distribution has not experienced a successful cyber-attack upon its IT systems, but Distribution's IT department is aware of attempted cyber-attacks. NFGD St. 1-R at 6-7.

10. In March 2018, a cyber-attack of an EDI service provider that acts as an external vendor for Distribution, occurred. NFGD St. 1-R at 7.

11. Although this event did not result in a successful cyber-attack of Distribution's IT systems, Distribution: (a) discussed the event internally, with staff and with other public utilities; (b) notified billing contacts by e-mail and posting on the Company's website impacted by the event; (c) provided notice when the EDI service was restored; and (d) began coordinating with other utilities regarding the development of a DSA and cybersecurity insurance requirements. NFGD St. 1-R at 7.

12. In 2018, a group of utilities, including Distribution, that provide service in New York (the "Joint Utilities") notified energy service companies ("ESCOs") in New York that they planned to require ESCOs to submit a "data security agreement" and a "self-attestation" of information security controls. NFGD St. 1 at 7.

13. Distribution provided such notice to ESCOs in New York on June 8, 2018. NFGD St. 1 at 7.

14. On June 14, 2018, the New York Public Service Commission ("NYPSC") issued an Order instituting *Proceeding on Motion of the Commission Regarding Cyber Security*

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Protocols and Protections in the Energy Market Place, Case 18-M-0376 (“*NYPSC June 2018 Order*”). NFGD St. 1-R at 7.

15. On October 17, 2019, the NYPSC issued an Order wherein it declined to adopt a generic cybersecurity insurance provision in its October 17, 2019 Order, but it explicitly stated that it “may revisit this issue at a future date.” *Order Establishing Minimum Cybersecurity and Privacy Protections and Making Other Findings*, Case 18-M-0376 (Order dated Oct. 17, 2019) (“*NYPSC October 2019 Order*”).

16. On September 20, 2018, the Commission announced the creation of a new Office of Cybersecurity Compliance and Oversight (“OCCO”). NFGD St. 1-R at 8.

17. OCCO would advise the Executive Director and Commissioners on policy issues and procedural improvements involving cybersecurity oversight functions of regulated utilities; draft proposed cyber-related regulations; and oversee the preparation of orders, rulemakings, policy statements, Secretarial Letters and memoranda related to cybersecurity policies and procedures of those regulated utilities. NFGD St. 1-R at 8.

18. Although OCCO was not immediately prepared to implement industrywide cybersecurity actions, the Commission was actively encouraging utilities to consider and implement various cybersecurity measures to protect their systems from attack. NFGD St. 1-R at 8.

19. On June 14, 2019, Distribution filed Supplement No. 207 and the associated DSA and SA with the Commission at Docket No. R-2019-3010744. NFGD St. 1-R at 24. In its Statement in Support, Distribution stated that the proposed Pennsylvania requirements were “patterned” after the New York requirements. NFGD St. 1-R at 24.

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20. At the time, both the Pennsylvania DSA and New York proposed data security agreements included a cybersecurity insurance requirement.

21. Distribution did not represent in its Statement in Support that the proposed Pennsylvania requirements and the New York requirements were or would be identical or uniform. NFGD St. 1-R at 24.

22. Both the Statement in Support and the Tariff filed in Pennsylvania clearly identified the cybersecurity insurance requirement. NFGD St. 1-R at 24.

23. Notice of the June 14, 2019 filing was provided to NGSs via the Company’s website and a copy of the filing was e-mailed to all NGSs operating in the Company’s service territory, including the Complainants. NFGD St. 1-R at 24.

24. No complaints or interventions were filed, and Supplement No. 207 was approved on August 20, 2019. NFGD St. 1-R at 24; *see also National Fuel Gas Distribution Corporation, Supplement No. 207 Tariff Gas Pa. P.U.C. No. 9, Docket No. R-2019-3010744 (Order entered Aug. 29, 2019) (“PA DSA Order”)*.

25. The *PA DSA Order* was issued prior to the *NYPSC October 2019 Order*. NFGD St. 1-R at 20; Joint Compl. St. 1 at 19.

26. The Commission’s order approving Supplement No. 207 and the associated DSA and SA does not contain a condition or requirement that Distribution modify or revise the DSA in accordance with the outcome of the NY PSC proceeding. NFGD St. 1-R at 20; *see also PA DSA Order*.

27. Both the currently-effective Commission approved DSA applicable to Pennsylvania entities and the revised DSA contained in NFGD Exhibit CC-2 contain a provision that requires Pennsylvania NGSs operating on Distribution’s system to “carry and maintain

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Cybersecurity insurance in an amount of no less than \$5,000,000 per incident” and also requires Distribution to “maintain at least \$5,000,000 of Cybersecurity insurance.” *See* NFGD Exhibit CC-2 at 33 (indicating no changes between the currently effective DSA and the revised DSA).

28. Distribution hosted a collaborative with Pennsylvania NGSs that provide service in Pennsylvania on Distribution’s system to discuss and evaluate possible revisions to the Pennsylvania DSA and SA. NFGD St. 1-R at 12.

29. The collaborative was initiated on September 22, 2020. NFGD St. 1-R at 12.

30. A number of NGSs, including NRG Energy, Inc., EnergyMark LLC, Vineyard Oil and Gas Company (PIOGA member), Direct Energy Business Marketing LLC (PIOGA member), MidAmerican Natural Resources LLC and Total Energy Resources, LLC, participated and provided the Company with feedback regarding the DSA. NFGD St. 1-R at 12.

31. Based upon the feedback received, Distribution provided the participating NGSs with a redline version of the DSA, and requested further feedback by December 18, 2020, and indicated that it would hold another collaborative meeting to review and discuss any additional feedback if necessary. NFGD St. 1-R at 12.

32. NRG Energy, Inc., Direct Energy Business Marketing LLC, Vineyard Oil and Gas Company and Stand Energy Corporation provided their comments related to the redline version to the Company. NFGD St. 1-R at 12.

33. The Company provided additional edits to Pennsylvania NGSs on February 26, 2021, and further indicated it would hold another collaborative if necessary. NFGD St. 1-R at 12.

34. As a part of its rebuttal testimony, Distribution adopted various of the substantive changes proposed by the NGSs, that result in the DSA and SA more closely aligning with the

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versions of those documents that apply in New York, which some NGSs have indicated are preferable. NFG St. 1-R at 13; see also NFGD Exhibit CC-2.

35. NFGD Exhibit CC-2 is an updated version of the DSA that reflects these changes. NFGD Exhibit CC-2 was admitted into the record at the evidentiary hearings. Tr. 21.

36. Although “[t]he threat of cybersecurity events is very real” and that “it is very understandable that NFGD has cause to be concerned about cybersecurity and related risks,” Joint Compl. St. 1 at 4-5, Joint Complainants’ witness Mr. Lacey asserts (1) insurance policies “do not in any way prevent damages from occurring in the first place” (Joint Comp. St. 1 at 5), (2) “[c]ybersecurity insurance does not enhance cybersecurity protections” or otherwise provide “incremental security protections to NFGD” (Joint Compl. St. 1 at 8). *See also* Joint Compl. St. 1 at 10-11.

37. PIOGA witness Mr. Weaver similarly states that “cybersecurity insurance does not prevent a cyberincident.” PIOGA St. 1 at 4.

38. Distribution witness Mr. Grice has participated in the underwriting process on behalf of Distribution approximately 200 times, including the underwriting of its cybersecurity insurance policy. Tr. 53 (confirming Mr. Grice has gone through the underwriting process approximately 200 times on behalf of Distribution), 54.

39. Insurance, generally, and cybersecurity insurance, specifically, has “several purposes.” NFGD St. 2-R at 3. Mr. Grice acknowledged that “[i]nsurance is purchased as a means of protection from a financial loss.” NFGD St. 2-R at 3.

40. Cybersecurity insurance also (a) “ensures financial obligations can be met in the event of an accident or other unforeseen incident to the insured” and (b) “mitigates against the

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risk of a successful cyber-attack due to a review of policies and procedures by the insurance underwriter.” NFGD St. 2-R at 3.

41. Obtaining and maintaining insurance involves an underwriting process where “underwriters will perform a review of systems and exposures of the party seeking insurance before coverage is issued to ensure an acceptable standard is being followed.” NFGD St. 2-R at 3.

42. For example, Distribution’s “cybersecurity insurance underwriters perform an annual survey of our policies and procedures, and our property insurance underwriters conduct periodic engineering loss control reviews of our compressor stations and other large value facilities.” NFGD St. 2-R at 3.

43. “The underwriting process includes an initial review followed up by an annual survey conducted by a third party expert to assess the cybersecurity readiness of its systems and processes with improvements suggested where necessary.” NFGD St. 2-R at 8.

44. Based upon this review process (which occurs prior to the issuance or renewal of a policy), cybersecurity insurance “may result in the implementation of additional protections by the insured, so that they can obtain the coverage they seek at an acceptable price.” NFGD St. 2-R at 3.

45. PIOGA’s response to NFGD-PIOGA-I-4 includes correspondence between a PIOGA member producer and an underwriter regarding the costs of cyber insurance. NFGD St. 2-R at 3-4; NFGD Exhibit JG-1.

46. An underwriter indicated to the PIOGA member producer that “[t]he premium, limit and retention are all subject to change based on the underwriting information they provide.

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Subject [to] a satisfactory, completed Cyber application.” NFGD Exhibit JG-1 at 1 (emphasis added).

47. Mr. Lacey’s testimony that cybersecurity insurance will not provide any incremental benefit is solely based on his reading of the Distribution’s policy and “research that I did in preparation for this testimony.” Tr. 59.

48. While Mr. Lacey was “confident that there is an underwriting process for obtaining any kind of insurance...[i]ncluding cyber security insurance,” his awareness of the underwriting process was limited solely “[t]o the extent that I was able to find some questionnaires, some underwriting questionnaires online.” Tr. 59-60.

49. Mr. Lacey has never acquired cybersecurity insurance for a company. Tr. 58.

50. Mr. Lacey testified that a company that seeks to acquire cybersecurity insurance has an incentive to reduce risk by implementing specific measures identified in the underwriting process. Tr. 62-63.

51. PIOGA witness Mr. Weaver testified that there must be a benefit to obtaining cybersecurity insurance, otherwise the PIOGA members that have already obtained cybersecurity insurance would not have purchased it. Tr. 13-14.

52. An additional, incremental benefit of cybersecurity insurance is that “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 contained in the DSA.” NFGD St. 2-R at 9.

53. “Without this policy in place, Distribution and ultimately its customers could be subject to these expenses despite the NGS being the target of the attack.” NFGD St. 2-R at 9.

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54. Cybersecurity insurance policies will “(a) involve an underwriting process that ensures reasonable systems and processes; (b) offer financial protections to any of Distribution’s customers affected by an attack; and (c) ensure that the NGS has financial means toward meeting its indemnification obligations.” NFGD St. 2-R at 10.

55. “As a general matter for any business, both the frequency and severity of cybersecurity incidents and resulting claims continue to increase.” NFGD St. 2-R at 4.

56. Mr. Grice explained that:

Distribution maintains cybersecurity insurance to address both first party risks (e.g., damaged equipment, business interruption coverage, cyber extortion coverage, breach response services, failure to supply coverage, etc.), and like other businesses who maintain Personally Identifiable Information (“PII”) of its customers, Distribution also looks to address the risks to its customers (including notices, credit monitoring, and other losses) should any of Distribution’s data be exfiltrated during a cyber incident.

NFGD St. 2-R at 4 (emphasis added).

57. “As the NGSs will not only interface with Distribution’s systems, but will also be in possession of Distribution’s customers’ PII, it is reasonable to ensure that NGSs that interface with Distribution have financial resources available to help protect the customer in the event of a cyber incident.” NFGD St. 2-R at 5.

58. “[C]yber insurance...is now part of the normal cost of doing business and is critically important when customer PII is involved.” NFGD St. 2-R at 10.

59. Only one of PIOGA’s members believes the cost to obtain \$5 million per incident cybersecurity insurance is prohibitive. NFGD Exhibit JG-4.

60. “Most of the PIOGA member NGSs on NFGD’s system already have cybersecurity insurance policies.” PIOGA St. 1 at 4.

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61. “The fact that the other parties in the proceeding have already obtained this insurance demonstrates that it is not unreasonable, and cyber insurance is becoming a necessary cost of doing business.” Tr. 42.

62. Distribution “is well within its rights to impose reasonable data security standards on any company with which it interfaces and shares data.” Joint Compl. St. 1 at 6; Tr. 63.

63. Distribution witness Mr. Cej testified that a collaborative was initiated on September 22, 2020, and NGSs, including NRG Energy, Inc., EnergyMark LLC, Vineyard Oil and Gas Company (PIOGA member), Direct Energy Business Marketing LLC (PIOGA member), MidAmerican Natural Resources LLC and Total Energy Resources, LLC, participated and provided the Company with feedback regarding the DSA. NFGD St. 1-R at 12.

64. After receiving multiple rounds of edits, and evaluating and incorporating the feedback received, the Company agreed to adopt the revisions set forth in NFGD Exhibit CC-2.

65. The revisions to the DSA more closely align the DSA and SA applied to Pennsylvania entities with the documents applicable to New York entities, which the NGSs have indicated are preferable. NFGD St. 1-R at 13.

66. The auditing requirements in the revised DSA have been modified to confirm that a third-party auditor selected through a competitive solicitation process, and not Distribution, will conduct any audit at the Company’s expense to confirm compliance with the standards set forth in the DSA. NFGD St. 1-R at 13, 15; Tr. 24-25; NFGD Exhibit CC-2 at 10, 31-32.

67. The revised DSA and SA include a revised affirmation that the NGS (included in the term “ESE”) will determine and implement the necessary Data Protection Requirements needed to be in compliance with the DSA and SA. NFGD St. 1-R at 13; NFGD Exhibit CC-2 at 19, 41.

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68. The revised DSA and SA eliminates the requirement that an NGS will require a third-party representative that is not connected to Distribution’s system to abide by the DSA and SA. NFGD St. 1-R at 13; NFGD Exhibit CC-2 at 7, 27.

69. The revised DSA and SA confirms that no encryption in transit is required for email communications. NFGD St. 1-R at 13; NFGD Exhibit CC-2 at 6, 26.

70. The Joint Complainants’ did not introduce into the record any evidence or analysis of, or support for, the actual costs of obtaining cybersecurity insurance compared to the actual revenue streams of any one of their businesses.

71. Mr. Lacey and Mr. Wright only assert that the \$5 million requirement is unreasonable and/or “far too expensive.” *See* Joint Compl. St. 1 at 5; Joint Compl. St. 2 at 8.

72. Mr. Lacey testified that he has never acquired cybersecurity insurance for any company. Tr. 58 (“Q. [ATTORNEY KANAGY] Sure. Okay, so have you ever acquired cyber security insurance for any company? A. [MR. LACEY] I have not.”)

73. Although Mr. Weaver identified an estimated cost to obtain a cybersecurity policy, no evidence was introduced as to how this quote was obtained or how this cost compared to the unidentified PIOGA member’s revenue streams. PIOGA St. 1 at 4.

74. Mr. Weaver only asserts that the insurance requirement would “unnecessarily impose increased costs.” PIOGA St. 1 at 4.

75. Mr. Lacey claims that the Joint Complainants “may or may not be able to add the incremental cost of insurance to its customer’s costs in order to recover the premiums paid” and that “customers might not accept that outcome and might move to another supplier or to NFGD for supply,” but he presents no underlying analysis or support for these contentions. *See* Joint Compl. St. 1 at 11.

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76. If the Joint Complainants believed that the as-filed Supplement No. 207 and the Pennsylvania DSA were unreasonable, they could have participated in the review of Supplement No. 207 at Docket No. R-2019-3010744. NFGD St. 1-R at 22.

77. Neither the October 10, 2019 presentation (NFGD Exhibit CC-5) nor the March 21, 2019 presentation (NFGD Exhibit CC-4) states the requirements would be identical in both states. NFGD St. 1-R at 22.

78. The March 21, 2019 presentation states that the “Pennsylvania Tariff Filing (Planned for May-June)” includes “1. Cyber-Security requirements” and that “[t]he proposed requirements would track the New York requirements.” NFGD Exhibit CC-4 at 29.

79. The October 10, 2019 presentation states that the “Pennsylvania Tariff Filing (Approved 8/29/19)” included “1. Cyber-Security requirements” and that “[t]he proposed requirements would follow the New York requirements.” NFGD Exhibit CC-5 at 21.

80. On October 9, 2018, Distribution made a presentation that explained the contemplated Pennsylvania tariff filing and indicated PUC staff was aware of the proposal. *See* NFGD St. 1-R at 23; NFGD Exhibit CC-3 at 38.¹

81. On March 21, 2019, Distribution made another presentation that explained the contemplated Pennsylvania tariff filing, as described above. *See* NFGD St. 1-R at 24; NFGD Exhibit CC-4 at 29.²

82. On June 14, 2019, Distribution filed Supplement No. 207 with the Commission at Docket No. R-2019-3010744, and provided the filing to NGSs via the Company’s website and a

¹ At this time, the data security agreement and self attestation in effect in New York contained a minimum cybersecurity insurance requirement of \$5,000,000, consistent with the requirement contemplated by Supplement No. 207 and the DSA and SA in Pennsylvania.

² *See* footnote 1.

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copy of the filing was e-mailed to all NGSs operating in the Company's service territory, including the Complainants. NFGD St. 1-R at 24.³

83. On October 10, 2019, Distribution made another presentation that explained the Pennsylvania tariff filing had been approved, as described above. *See* NFGD St. 1-R at 25; NFGD Exhibit CC-5 at 21.⁴

84. On March 17, 2020, Distribution e-mailed copies of the Pennsylvania DSAs and SAs to NGSs operating in its Pennsylvania service territory. *See* NFGD St. 1-R at 25; NFGD Exhibits CC-6 and CC-7.

85. On March 19, 2020, Distribution made another presentation that explained the Pennsylvania tariff filing, stated it had been approved by the Commission and that DSAs were due on March 31, 2020. NFGD St. 1-R at 25; NFGD Exhibit CC-8.

86. Distribution engaged in consistent communication with its suppliers regarding the implementation of cybersecurity requirements in Pennsylvania, and implemented cybersecurity requirements consistent with its representations and the tariff approved by the Commission. NFGD St. 1-R at 25-26.

87. Mr. Cej recalled a single telephone call occurring with EnergyMark LLC's former employee and a separate phone call occurring between the Commission and EnergyMark LLC. NFGD St. 1-R at 26.

88. Mr. Cej produced copies of the e-mails between representatives from Distribution, EnergyMark LLC and the Commission. *See* NFGD Exhibit CC-9.

89. In these e-mails Mr. Cej wrote:

NFGDC intends to comply with its approved tariff and GTOP, which include the cybersecurity insurance requirements in the

³ *See* footnote 1.

⁴ *See* footnote 1.

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DSA. NFGDC believes that the technical and insurance provisions specified in the current Pa. DSA/SA protect the Company and, importantly, its ratepayers from physical and financial damages that may result from cyberattack infiltration through external user activities.

NFGD Exhibit CC-9 at 5.

90. Mr. Cej further stated, “As Mr. Mumford suggested during yesterday's teleconference, you are welcome to submit your comments to Pa. Staff for their consideration. Of course, NFGDC would welcome further discussion on this issue with Pa. Staff and the marketers operating on our system upon Pa. Staff's suggestion.” NFGD Exhibit CC-9 at 5.

91. Mr. Mumford of the Commission stated that “Tariff provisions have the force of regulation – and failure to comply can lead to being restricted from access to NFG's system.” NFGD Exhibit CC-9 at 4.

92. the purpose of the cybersecurity insurance requirement is to ensure that the Company's customers, as well as the Company, are able to tender any claims resulting from a cyber incident targeting an NGS. NFGD St. 2-R at 8.

93. Without a policy in place, Distribution's customers could be subject to expenses related to “forensic investigation to determine the scope of the data affected by the exfiltration, notification of affected customers, credit monitoring to watch for any fraudulent activity stemming from the incident, and payment for other losses stemming from the incident.” NFGD St. 2-R at 9.

APPENDIX B
PROPOSED CONCLUSIONS OF LAW

National Fuel Gas Distribution Corporation (“Distribution” or the “Company”) proposes the following conclusions of law:

1. Under Section 1501 of the Public Utility Code, “every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service...” 66 Pa.C.S. § 1501 (emphasis added).

2. “Service,” as defined by Section 102 of the Public Utility Code, is “[u]sed in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed...in the performance of their duties under this part to...the public...” 66 Pa.C.S. § 102.

3. Section 1301(a) of the Public Utility Code further states, “Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission.” 66 Pa.C.S. § 1301(a).

4. Tariffs that have been approved by the Commission have the force and effect of law. *See* 66 Pa.C.S. § 1303; *see also PPL Elec. Utils. Corp. v. Pa. PUC*, 912 A.2d 386, 402 (Pa. Cmwlt. 2006); *Di Santo v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197, 201 (Pa. Super. 1981).

5. Supplement No. 207, and the incorporated Data Security Agreement and Self-Attestation are Commission-approved tariffs and, therefore, have the force and effect of law.

6. Tariff provisions approved by the Commission are *prima facie* reasonable. *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlt. Ct. 1997); *Shenango Township Board of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlt. Ct. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlt. Ct. 1979).

7. Supplement No. 207, and the incorporated Data Security Agreement and Self-Attestation are Commission-approved tariffs and, therefore, are *prima facie* reasonable.

8. A complainant seeking to evade the effect of existing tariff provisions carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provisions unreasonable. *Id.*; *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. Ct. 1981).

9. Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.

10. The Joint Complainants have the burden of proof to demonstrate that Supplement No. 207, the Data Security Agreement and the Self-Attestation are unjust and unreasonable.

11. A litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence, which is substantial and legally credible. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Cmwlth. v. Williams*, 557 Pa. 207, 732 A.2d 1167 (Pa. 1999). Only if the proponent of the rule or order present evidence found to be of greater weight than the other parties, will it have carried its burden of proof. *Morrissey v. Commonwealth*, 225 A.2d 895 (Pa. 1986); *Burleson v. Pa. PUC*, 641 A.2d 1234, 1236 (Pa. 1983); *V.J.R. Bar Corp. v. P.L.C.B.*, 390 A.2d 163 (Pa. 1978); *Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001).

12. Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Substantial evidence is such relevant evidence

that a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, 942 A.2d 274, 281 (Pa. Cmwlth. 2008). The “presence of conflicting evidence in the record does not mean that substantial evidence is lacking.” *Allied Mechanical and Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007) (citation omitted).

13. “Mere bald assertions, personal opinions or perceptions do not constitute evidence.” *Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987)); *see also West Penn Power Co. v. Pa. PUC*, 219A.3d 716, 2019 Pa. Commw. Unpub. LEXIS 532, at *24-25 (Pa. Cmwlth. 2019).

14. The Joint Complainants and PIOGA have failed to carry their very heavy burden of proof to demonstrate that the Commission-approved Supplement No. 207, the Data Security Agreement and the Self-Attestation are unjust and unreasonable.

APPENDIX C
PROPOSED ORDERING PARAGRAPHS

National Fuel Gas Distribution Corporation (“Distribution” or the “Company”) proposes the following ordering paragraphs:

1. The Complaint of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC filed against Natural Fuel Gas Distribution Corporation at Docket No. C-2020-3019621 is denied.

2. The Pennsylvania Public Utility Commission orders and authorizes Distribution to implement the revised Data Security Agreement and Self-Attestation applicable to Pennsylvania natural gas suppliers operating on Distribution’s system that was admitted into the record as NFGD Exhibit CC-2, as a part of its resolution of this proceeding.

3. The above-captioned docket is marked closed.