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July 9, 2021

**VIA ELECTRONIC FILING**

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

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

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Reply Brief of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC in the above-captioned matter. Copies of this Brief have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact me.

Very truly yours,

Todd S. Stewart  
Bryce R. Beard  
*Counsel for the Joint Complainants*

TSS/jld

Enclosures

cc: Administrative Law Judge Dennis J. Buckley (via electronic mail)  
Per Certificate of Service

**CERTIFICATE OF SERVICE**

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

**VIA ELECTRONIC MAIL**

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A handwritten signature in blue ink, appearing to read 'Todd S. Stewart', is written over a horizontal line.

Todd S. Stewart  
Bryce R. Beard

DATED: July 9, 2021

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EnergyMark LLC, Vineyard Oil and 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	:	

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**REPLY BRIEF  
OF ENERGMARK LLC, VINEYARD OIL AND GAS COMPANY,  
MID AMERICAN NATURAL RESOURCES LLC,  
AND TOTAL ENERGY RESOURCES LLC**

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DATED: July 9, 2021

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## I. INTRODUCTION AND SUMMARY OF REPLY ARGUMENT

All of the Joint Complainants are natural gas suppliers (“NGS”) that provide natural gas supply service to customers on National Fuel Gas Distribution’s (“NFGD”) Pennsylvania system. This status makes them customers for some services, such as billing and collections related to NFGD’s delivery of gas to their common customers, and at the same time makes them competitors of NFGD because NFGD, as the default service provider, still sells gas to the majority of customers on its system. In its role as the only party authorized to provide a unified bill that includes both distribution and commodity charges, NFGD is required to maintain information technology systems that are capable of exchanging information with NGSs serving customers on its system. It is this role, as the single biller, and the role of natural gas delivery provider, that prompted NFGD to demand that NGSs connecting with its IT systems engage in the self-attestation process as set forth in its Data Security Agreement (“DSA”) presented in NFGD’s Tariff Supplement No. 207 to ensure that its IT systems are adequately protected from a cyberattack that might be result of the two entities interacting.

Contrary to NFGD’s hyperbolic and false “doomsday” allegation, the Joint Complainants have not and do not oppose the DSA’s requirements that provide real data security protection -- the many effective data-security requirements of the DSA or the DSA as a whole are *not* contested by the Joint Complainants in this proceeding. Rather, it is the provisions that provide no data security -- the \$5 million cybersecurity insurance requirement and the anticompetitive, vague, and discriminatory audit requirement – that are opposed. The former because cybersecurity insurance is prohibitively expensive for small NGSs to purchase, and because it does not provide even a minute measure of cybersecurity protection, and the latter because the broad and potentially abusive audit requirement goes far beyond the authority of any NGDC to enact reasonable

standards for suppliers connecting to its systems. The Joint Complainants also complained of the deception practiced by NFGD in implementing Tariff Supplement No. 207, which contained the DSA, by implying to the Commission that the DSA was approved in New York, when it was not, and convincing suppliers not to participate in the filing in Pennsylvania, by stating that the Pennsylvania DSA would be “patterned after” what was used in New York.

In its Main Brief, NFGD takes the bold, and completely disingenuous approach of claiming that a newly modified DSA, that is the half-baked product of a “collaborative” process begun by NFGD *after* the instant complaint was filed, and which contains no real compromise on any of the issues raised by the instant Complaint, should be approved in this case an adequate resolution of the complaint issues. Such a suggestion is ridiculous and legally incorrect. While it is true that the Joint Complainants did offer comments in the so-called “collaborative,” those comments were ignored by NFGD. To be clear, NFGD’s suggestion that the modification to the audit requirement to provide for a 3<sup>rd</sup> party auditor is a reasonable compromise, is simply untrue. NFGD has no expertise in auditing IT systems and has admitted that fact on this record, and so their so-called “compromise” provides nothing to the Joint Complainants that NFGD would have had to do in any event and is certainly no basis to suggest that there has been any sort of compromise. NFGD is simply seeking to mislead the Commission once more.

The bulk of NFGD’s Main Brief is a fruitless effort to claim that the Joint Complainants have failed to carry the burden of proving that two isolated provisions of Supplement No. 207 and the supporting DSA are unjust and unreasonable, simply because they have already been approved. While that status does increase the burden, the Joint Complainants have more than adequately proven that: 1) cybersecurity insurance requirement of the DSA provides no incremental cybersecurity protection; 2) the cybersecurity insurance requirement is prohibitively expensive; 3)

the cybersecurity insurance requirement creates a barrier to market entry; and therefore the 4) the cybersecurity insurance requirement is unjust and unreasonable.

NFGD also argues that the Joint Complainants have failed to show that Supplement No. 207's audit requirement, with or without the superficial change of providing for an outside audit firm, is unjust or unreasonable. The Joint Complainants have proven that the audit provision is not only unjust and unreasonable, but that it is contrary to the Public Utility Code and the Commission's Regulations.

NFGD's deception continues when it asserts that the Joint Complainants rely on the decision of the New York Public Service Commission ("NYPSC") on the very same DSA, where the NYPSC rejected the cybersecurity insurance requirement on a variety of grounds. That decision is important to this case for multiple reasons, but it is not legally binding precedent, nor have the Joint Complainants ever asserted as much. Rather, the timing and substance of the decision are important because it demonstrates NFGD's attempt to deceive the Commission into believing that the DSA that was "in use" in New York, was approved in New York, which it was not. It also is important, because the Commission, in approving Supplement No. 207, cited the fact that the DSA was in use in New York as a basis for approving it, clearly indicating that the Commission understood that Supplement No. 207 had been approved in New York. That timing is critical because when the NYPSC did finally rule on the DSA, it rejected the very same provision that is at issue here, the cybersecurity insurance requirement- a fact which NFGD never shared with the Commission. Even though the Joint Complainants did not rely upon the October 17, 2019, Order of the NYPSC as precedent in this case, it is nonetheless evidence of a different nature, in addition to being a model for the Commission to adopt on the insurance issue.

## **II. REPLY ARGUMENT**

### **A. The Joint Complainants Presented Substantial Evidence That The Data Security Requirements Applicable To Pennsylvania NGSs Are Unjust And Unreasonable.**

In its Main Brief, NFGD argues that the Joint Complainants did not prove various matters in this proceeding and therefore no relief is warranted. NFGD's assertion is provably incorrect. The Joint Complainants met their burden in this proceeding that the data security requirements and portions of NFGD's DSA are unjust and unreasonable and must be overturned.

#### **1. The Data Security Requirements**

In its Brief, NFGD goes to great lengths to characterize the two portions of the DSA that are the subject of the Complaint -- the cybersecurity insurance requirement and audit provision -- as "data security provisions". Nothing could be farther from the truth. The record makes it clear that the insurance requirement provides no incremental cybersecurity benefit. (JC Statement No. 1 at 6:14-15). Likewise, the record is clear that the audit requirement is an arbitrary provision that is so ill-conceived and one-sided that it will not increase the level of security, while at the same time it will create opportunities for anti-competitive conduct that simply lacks statutory and regulatory authority. See JC Main Brief at 24-30.

The fact that the Commission did approve the provisions that are at issue here, in an uncontested proceeding with the caveat that approval was without prejudice to positions taken in future proceedings, does nonetheless increase the burden on the Joint Complainants, as was acknowledged both in the Complaint and in the Joint Complainant's Main Brief. See Complaint at ¶ 20; JC Main Brief at 7-8. The tariff provisions' status of being *prima facie* reasonable does not mean, however, that an impenetrable wall has been erected around those provisions, or that a

complaint cannot succeed. *Id.* In fact, the Joint Complainants have proven that facts and circumstances have changed so dramatically as to render these provisions unreasonable.

The critical fact is NFGD's misrepresentation to the Commission in its Tariff Supplement No. 207 filing regarding the status of the DSA in New York; NFGD clearly implied, by stating that it was "in use" in New York, that it had been approved in New York, when it had not. More critical is that the NYPSC eventually rejected the mandatory insurance requirement finding it to be anti-competitive and a barrier to entry. Clearly, the representation that NFGD's DSA was in use in New York turned out to be false, and NFGD never corrected the record. It is obvious that the Commission relied upon the representation, as it was recited in the Commission's Order approving the tariff. *National Fuel Gas Distribution Corporation, Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9*, Docket No. R-2019-3010744, Order at 3 (Order entered August 29, 2019). This well-documented turn of events, standing alone, is more than sufficient to meet the "changed circumstances" standard and is one of several examples of incidents discussed in this matter of NFGD providing unreasonable service.

## **2. The Cyber Security Insurance Requirement**

Despite NFGD's mantra-like repetition of the premise, there simply is no competent evidence on the record in this case to show that there is any incremental cybersecurity benefit from a cybersecurity insurance policy. Rather, the evidence suggests the opposite; that cybersecurity insurance provides no material benefit. Mr. Lacey made this abundantly clear. JC St. No. 1 at 6:4-6, 6:14-15, 8:16-21; JC St. No. 1-SR 10:7,10:12-15, 10:17-11:5; See also JC Main Brief at 9-11. NFGD's witness, Mr. Grice testified that it is typical for insurance companies to review the protections employed by a potential insured, based solely on his minimal experience as a Risk Manager at NFGD since 2017, and yet did not claim that a single demand was ever made for

NFGD to make any changes to *its own systems*, let alone for any other insured, suppliers in particular, because he has no experience with any other company. See JC Main Brief at 12-15. At its greatest level of impact, as admitted by NFGD in testimony, a cybersecurity insurance policy and the underwriting process *may* provide a speculative financial incentive for a supplier to make changes to its system. (NFGD Statement 2-R at 8:20-23). However, there is no evidence on this record that any insurer ever required any system modifications which may improve either NFGD's or a supplier's IT infrastructure and there is no evidence that such modifications ever were made as a prerequisite to insurance coverage.

Apart from the simple fact that there is no support in the record for the premise that insurance increases data security, NFGD admitted in testimony that the primary purpose of the insurance is to provide the means for NFGD to recover any financial losses that might result from a breach of a supplier's systems that harms NFGD (NFGD Statement 2-R at 8:5-12). As such, the insurance is simply another form of financial security. However, the Commission's regulations, which are quite explicit in describing forms of financial security, do not list insuring against the financial loss that could result from a cybersecurity breach as a basis for requiring financial security, do not provide for insurance as a form of security, do not permit the amount of security being required, and include specific means of determining the necessary amount of security if the parties do not agree. See JC Main Brief at 15-19. NFGD's insurance requirement complies with none of these. 52 Pa. Code § 62.111. NFGD's response to the regulations is pure sophistry, suggesting that the insurance is not intended to protect NFGD in the case of a supplier default but rather is to ensure that NFGD and its customers are not subject to costs of a breach caused by an NGS. NFGD Main Brief at 42-43. This sounds impressive until you parse it out and realize that it is the same thing. If a supplier has a data breach that causes NFGD or its customers to suffer a

loss, and that breach was actionable, the supplier would be liable for the damages. If the supplier was able to pay those damages, the inquiry stops. If the supplier was unable to pay those damages, the supplier would be in default. The only difference is that the insurance policy approach might speed up the process. More importantly, the Commission's Regulations are explicit that the "purpose of the security requirement is to ensure the licensee's financial responsibility." 52 Pa. Code § 62.111(b). The insurance requirement's intention is the same.

Finally, NFGD tries, and fails, to pull a rabbit out of its hat on pages 27 – 28 of its Main Brief by accusing Mr. Lacey of taking opposite positions on whether NFGD is able to impose data security requirements. As Mr. Lacey testified, in context, he does not view insurance to be a data security tool or protection, rather, he views it as a financial risk management tool. Mr. Lacey testified throughout that insurance provides no data security benefit, and yet NFGD attempts, and fails, to suggest that he is being inconsistent. The only way to view Mr. Lacey's testimony as inconsistent is to adopt NFGD's incorrect view that insurance improves data security in the first place – a view Mr. Lacey *never* adopts given the accuracy of that fact shown in the record. At most, Mr. Lacey's view of on cybersecurity insurance is indeed inconsistent with NFGD's baseless assertion not supported by this record but not with his own testimony. The fact is, insurance is a financial, after-the-fact instrument, not an upfront data security protection.

### **3. The Supplier IT System Audit Requirement**

The audit requirement, like insurance, is likely to be employed after an incident has occurred as a means of finding out what happened and why. The manner in which the audit has been proposed makes it likely to cause harm in that NFGD can employ the audit at its own discretion and authorize its agents to inspect any and all aspects of a supplier's IT operations – which makes up a suppliers' entire business. The standards to which suppliers are expected to

conform, and by which they will be found to be compliant (or not) by NFGD, are vague to the point of being unenforceable and there is no evidence that such a requirement accomplishes any increase in security. Rather it is an effort to provide NFGD with an asymmetrical means of competitive surveillance with no practical boundaries and with the supplier's ability to serve customers hanging in the balance. There is no authority in the Public Utility Code for a utility to audit suppliers on its system - "reasonable conditions" for competitive suppliers to connect to a utility's data exchange systems have never included the right to audit or even to regulate those systems and NFGD can point to no regulation or Commission decision where such a requirement has been authorized or approved. There simply is no legal basis for a utility to regulate the manner in which a supplier does business in such an intrusive and potentially anticompetitive manner.

**4. The Complaint Should Be Sustained Based on The Substantial Evidence of Record.**

In short, the substantial evidence on this record proves that the cybersecurity insurance requirement provides no incremental cybersecurity benefit. Even NFGD admits that any benefit is speculative at most. (NFGD Statement 2-R at 8:20-23). In light of the evidence that the costs of such insurance would be crippling to suppliers and would likely impact the ability of suppliers to continue to serve customers, there is no justification for the requirement, which will only ever benefit NFGD. The simple fact is that even if the cost were not a significant barrier standing alone, the fact that suppliers would be required to spend any amount for a requirement that provides no cybersecurity benefit makes it inherently unreasonable. Additionally, the evidence shows that the auditing provisions are not and cannot be supported under the Public Utility Code, and that NFGD lacks the requisite experience or standards to conduct or implement such audits in the first place.

It is notable that NFGD makes numerous references to the fact that none of the Joint Complainants, indeed no supplier serving in NFGD's Pennsylvania territory, participated in the

proceeding in which Supplement No. 207 was approved. The implication being that somehow, they should be prevented from now arguing that the Supplement is unreasonable. To the contrary, it was NFGD's misleading conduct that induced the Joint Complainants to not participate, and subsequently file the complaint initiating this proceeding when NFGD would not hold true to its representations to the Commission.

**B. NFGD's Newly Revised DSA, NFGD Exhibit CC-2, Is Nothing More Than a Distraction – The Revised DSA Does Not Eliminate Or Adequately Address The Matters Raised By The Joint Complaints.**

In its Main Brief, NFGD takes the bold, and completely disingenuous approach of claiming that a newly modified DSA, that is the half-baked product of a "collaborative" process begun by NFGD *after* the instant complaint was filed should be approved in this case an adequate resolution of the complaint issues. See NFGD Main Brief at 29-30. Such a suggestion is ridiculous and legally incorrect – NFGD Exhibit CC-2 contains no real compromise on any of the issues raised by the instant Complaint. While it is true that the Joint Complainants did offer comments in the so-called "collaborative," those comments were ignored by NFGD, and that point must be made clear – the Joint Complainants in no way support NFGD Exhibit CC-2 as a reasonable resolution of the instant complaint as the issues raised in the complaint were completely ignored during the "collaborative" process leading to Exhibit CC-2's creation.

To be clear, NFGD's suggestion that the modification to the audit requirement in NFGD Exhibit CC-2 to provide for a 3<sup>rd</sup> party auditor is a reasonable compromise to the complaint, is simply untrue. NFGD has no expertise in auditing IT systems and has admitted that fact on this record, and so their so-called "compromise" provides nothing to the Joint Complainants. Based on NFGD's admitted inexperience, it would have had to seek a 3<sup>rd</sup> party auditor to carry out any IT audits regardless and incorporating that into the DSA is certainly no basis to suggest that there has

been any sort of compromise. Additionally, NFGD Exhibit CC-2 does nothing to address the cybersecurity insurance matters raised in the Complaint. Simply put, regardless of whether NFGD Exhibit CC-2 is implemented, the matters raised by the complaint must be resolved as the revised DSA does nothing to alleviate the matters raised by the Joint Complainants. NFGD is simply seeking to mislead the Commission once more based on the inaccurate representation that NFGD Exhibit CC-2 resolves any issues in this proceeding.

**C. The Proposed Audit Provisions Would Usurp The Commission’s Authority To Regulate Suppliers.**

NFGD argues that its audit requirement is authorized by the Public Utility Code, despite the indelible fact that there is no specific authorization for NGDCs to audit the information technology systems of NGSs, which contain sensitive business and proprietary information of those competitive suppliers. In its vain effort to support a requirement that it be permitted to audit any supplier’s IT systems, NFGD cites to the general requirement of 66 Pa.C.S. § 1501, which allows utilities to “have reasonable rules and regulations governing the conditions under which it shall be required to render service”; thus, inherently claiming that its audit requirement is a “reasonable” requirement. NFGD Main Brief at 31-32. This contention is incorrect. A review of the cases cited by NFGD makes the point – each was a settlement and non-precedential, and none involves any utility supervision or intrusion into the operations of a supplier. *Id.* While the Code does authorize NGDCs to implement rules on managing the physical flow of gas and other similar physical reliability requirements, even authorizing a communication protocol, nowhere does the Code provide the authority to an NGDC to audit supplier’s systems to determine compliance.<sup>1</sup> There are also supplier tariffs that govern these same mechanics of utility/supplier interaction, as

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<sup>1</sup> 66 Pa.C.S. § 2205(a)(2).

NFGD's cited cases reveal, but not one of them suggests stepping over the line and allowing a utility to affirmatively reach into the operation of any part of a supplier's business, let alone such a critical part as its IT systems, to review and be able to disapprove of that supplier's processes and ultimately determine its ability to serve customers on that utility system; yet that is exactly what NFGD's asymmetrical audit requirement does. There simply is no legal support for so great a leap. The audit requirement simply is not authorized by any statute or regulation.

Arguably the Public Utility Code does provide the Commission the authority to audit suppliers' data security operations.<sup>2</sup> To date, however, the Commission has not yet proposed any data security regulations under which it might regulate the security practices of entities subject to its jurisdiction. The absence of such regulations, and the specific absence of any delegation of such regulatory authority to any entity, considering the many other express delegations of authority, means the general assembly intended to not grant the authority to audit suppliers' IT systems to utilities.<sup>3</sup>

If NFGD were to have a security breach that harmed a supplier, the proposed audit requirement does not provide the injured supplier(s) the ability to audit NFGD's systems to gather information on what caused the breach. JC Main Brief at 24-30. Consequently, not only does the audit requirement provide NFGD with an unprecedented ability to delve directly into the operations of its competitors, it makes that ability a one-way street. Accordingly, the provision violates 66 Pa.C.S. 2203(4) which requires that NGDCs provide access on "non-discriminatory

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<sup>2</sup> See 66 Pa.C.S. § 2208(e) and 66 Pa.C.S. § 501.

<sup>3</sup> *Popowsky v. Pennsylvania Public Utility Commission*, 869 A, 2d 1144 (Pa.Cmwlth. 2005) ("The maxim *expressio unius est exclusion alterius* states that inclusion of specific matter in a statute implies the exclusion of other matters").

rates, terms of access and other conditions. Providing itself the ability to audit suppliers without allowing suppliers the same ability is discriminatory service.<sup>4</sup>

**D. The Joint Complainants Have Proven That the Requirements of Supplement No. 207 Are Cost Prohibitive And Are a Barrier To Market Entry For Pennsylvania Natural Gas Suppliers.**

NFGD raises an argument that the Joint Complainants have not proven that the requirements of Supplement No. 207 are cost prohibitive and a barrier to market entry, based solely on an arcane argument that that only documentary evidence would be sufficient to prove that the cost of cyber security insurance was a barrier to entry or otherwise cost prohibitive. NFGD Main Brief at 32-37. NFGD’s argument is misplaced. None of the cases cited by NFGD stand for the proposition that some form of written testimony is necessary to prove that the cyber security insurance requirement is a barrier to entry. Rather, the first case NFGD cites is *Mid-Atlantic Power Supply Association v. Pa. P.U.C.*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000)(“MAPSA”), which in turn relies on *Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987)(“BOC”). The BOC case stands for the proposition that lay testimony about certain expected harms is not sufficient to establish that those things are likely. In this case, Mr. Lacey, who testified at length about the anticompetitive impacts of requiring cybersecurity insurance, provided expert testimony. See JC St No. 1 at 11:4-12:4. Likewise, in the MAPSA case, MAPSA literally cited no evidence on the issue of the failings of the Commission’s requirements. Indeed, that is not the case here. Rather, here there is testimony on the financial and competitive harms of the insurance requirement. (*Id.*; see also JC St. No. 2-SR 6:4-11; see also JC Main Brief at 23-24) There is testimony of the probable impacts on the businesses of suppliers – probable because

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<sup>4</sup> *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, Opinion and Order (Order entered December 6, 2018).

nowhere has the requirement yet been implemented and so the actual impact is not yet known. (See NFGD May 22, 2020 letter voluntarily suspending Tariff Rule 33 and the DSA; NFGD Main Brief at 6). In short, the argument that there is no evidence on the competitive and financial harms that will result from the imposition of cybersecurity insurance requirement is incorrect and is premised on cases where the testimony was lay opinion testimony or where there was no evidence presented.

NFGD takes issue with what it claims is the “speculative” nature of the testimony on the harms of its cybersecurity insurance requirement. As Mr. Lacey’s testimony made clear, that is because such a requirement does not exist elsewhere and so one is left to opine on the impacts. Additionally, while not binding here, the NYPSC rejected NFGD’s proposed cybersecurity insurance requirement, upon which the Pennsylvania requirement was modeled as it found such requirements to be nothing more than a market barrier to entry. The Joint Complainants produced substantial evidence to prove that NFGD’s cybersecurity insurance requirement presents a significant financial hurdle to NGSs, which ultimately pads NFGD’s competitive market advantage. See JC Main Brief at 23-24.

**E. The Joint Complainants Proved That NFGD’s Communications With Natural Gas Suppliers Regarding Supplement No. 207 Constituted Unreasonable Service.**

Providing reasonable service means not deceiving or misleading customers. 66 Pa.C.S. §§ 1501, 1504. It also means not deceiving or attempting to deceive the Commission. Contrary to NFGD’s argument in its Main Brief, it did both. (See JC Main Brief at 19-21). In a series of communications, both written and oral, NFGD represented to suppliers that the Pennsylvania requirements would follow or track those proposed in New York, convincing the Joint Complainants to not participate in the proceeding before the Commission that approved

Supplement No. 207. (JC St. No. 2 at 5:1-14; JC St. No. 2-SR at 1:16-2:6, 4:15-20). NFGD claims in its Main Brief that the Joint Complainant's position that they were deceived by NFGD does not count because the Joint Complainants could have but did not participate in the Commission Proceeding that approved Supplement No. 207. Such a position is akin to NFGD saying, "Why would you believe us? You should have just intervened." NFGD does not and cannot deny that it repeatedly told suppliers that the PA requirements would track New York, and it did not live up to that representation. The Joint Complainant's are not alone in having believed similar statements made by NFGD in its Supplement No. 207 filing, the Commission recited a similar representation that turned out to be false as well. (See JC Main Brief at 19-21).

NFGD's suggestion that Mr. Wright did not accurately describe the communication between NFGD and EnergyMark is a hollow attempt to discredit a witness that NFGD did not even bother to cross examine. N.T. 73:19 – 74:6. Mr. Wright's surrebuttal makes clear that it was NFGD's Mr. Cej, not him, that got the dates wrong. JC St. No. 2-SR at 5. Nonetheless, the content of the communications from NFGD, the part that matters, was consistent, the "Pennsylvania requirements will track New York." JC St. No. 2-SR at 5:11-13. For suppliers that may not have the unlimited resources of a Utility, trusting the Utility seemed to be an acceptable risk. To their dismay, that trust appears to have been grossly misplaced. Similarly, the argument that NFGD promotes claiming that they only said the PA requirements would "track" the New York requirements also rings hollow. The unambiguous language notwithstanding, it was obvious what NFGD intended, as related in Mr. Wright's statement that he took NFGD at its word, only to have them refuse to do what they said they would. NFGD knew, based upon its testimony, that the insurers would rate the cost of a policy for New York and Pennsylvania regardless of whether both states had a requirement. NFGD accordingly hedged its bet and manipulated the suppliers – all

the suppliers, since not one intervened – into believing it would do in Pennsylvania what resulted in New York. So, when New York rejected the insurance requirement (after the PAPUC approved Tariff Supplement No. 207), its only chance to keep the insurance requirement in place was to have Pennsylvania not track New York, and to no longer have the Pennsylvania DSA “patterned after” what was implemented in New York – a change in circumstances NFGD never made the Commission aware of.

NFGD claims that the entire issue could have been addressed had the suppliers intervened and raised the issue of the two states potentially being different but fails to mention that at the time it filed Supplement No. 207, the suppliers had no reason to know: 1) what the NYPSC would do; or, 2) that NFGD was deliberately misleading them. The end result is clear, the communications from NFGD surrounding Supplement No. 207, it being “patterned after” the New York DSA, and the various other misrepresentations made by NFGD constitutes unreasonable service under 66 Pa.C.S. § 1501.

**F. The Joint Complainants have proved That The Cybersecurity Insurance Requirement Is An Impermissible Form Of Financial Security.**

The Commission has established specific criteria for financial security for NGSs.<sup>5</sup> These requirements are subject to authority conveyed by the *Natural Gas Customer Choice and Competition Act*.<sup>6</sup> The basis for the requirement is to “ensure the financial responsibility of the natural gas supplier.”<sup>7</sup> The statute also requires that if the parties disagree on the amount of security, the amount and form of the security shall be determined by criteria established by the Commission. The Commission has not established any specific criteria for financial security for

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<sup>5</sup> 52 Pa. Code § 62.111

<sup>6</sup> 66 Pa.C.S. § 2208(c)(1)(i)(“*Choice Act*”).

<sup>7</sup> *Id.*

cybersecurity losses or expenses either in form or amount. In fact, while the regulations clearly contemplate that there can be financial security to address the potential default or bankruptcy of a supplier there is nothing in the current regulations that identifies or permits separate financial security for cybersecurity-related defaults, costs, or expenses. However, regardless of whether it is intended to protect NFGD and/or its customers, insurance is form of financial security, and is thus governed by the Commission’s regulations and is in violation of those requirements as they exist today. There is no mechanism in the DSA for the resolution of a dispute over the form or amount of security, and the basis for determining the across-the-board \$5,000,000 amount is not based upon any of the criteria established in the regulations.

In its Main Brief, NFGD suggests that the purpose of the financial security is to “account for” the financial impact on the natural gas distribution company “of a default or subsequent bankruptcy” of a supplier.<sup>8</sup> But that is not what the statute or the Regulations require. NFGD confuses the methodology for determining the amount of financial security (“the amount of financial security should be reasonably related to the financial exposure imposed on the NGDC or supplier of last resort resulting from the default or bankruptcy of the licensee”)<sup>9</sup> with the clearly stated purpose of financial security (“the purpose of the security requirement to ensure licensee’s financial responsibility”)<sup>10</sup> in an effort to deflect the correct argument that the insurance requirement is a form of financial security and is not authorized, either in form or amount, by the Commission’s regulations. There is no evidence on the record that shows that any supplier ever defaulted or declared bankruptcy over its inability to pay a legitimate claim resulting from a cyber security breach, and yet NFGD blithely assumes that such claims would go unpaid as the

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<sup>8</sup> 66 Pa.C.S. § 2208(c)(1)(i).

<sup>9</sup> 52 Pa. Code § 62.111(c)(1).

<sup>10</sup> 52 Pa. Code § 62.111(b).

fundamental premise of its argument in favor of an additional financial security requirement, in the form of insurance. If NFGD believed that additional financial security was required to protect customers, in a form and amount that differs from what the regulations require, it should have petitioned the Commission for a rulemaking to change the regulations. Instead, it sought to demand an unauthorized form and amount of financial security in a tariff filing.

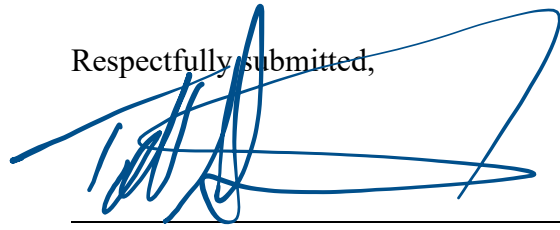
**G. The Joint Complainants have not relied upon the NYPSC’s Ruling But Have Instead Pointed Out The Deception Employed By NFGD In Misrepresenting Its Status And Contents To The Commission And Have Suggested That It Would Be An Appropriate Result In Pennsylvania.**

As its final argument, NFGD makes the accusation that the Joint Complainants have “principally relied upon the NYPSC’s review of the data security agreement and self-attestation” that were rejected by the New York Public Service Commission. The Joint Complainants did point out that NFGD misrepresented the status of the New York proceeding in its filing of Supplement No. 207 to the Commission; and the Joint Complainants did explain how NFGD made statements that the Pennsylvania filing would track or be “patterned after” the New York filing, and then did not when the NYPSC rejected critical portions of the DSA. The Joint Complainants also suggested that the result in New York would be an appropriate result in Pennsylvania but did not even once suggest that the New York decision was precedential or in any way controlling over any determination by the Pennsylvania Public Utility Commission. Regardless of what was finally approved by the NYPSC and for what reasons, the substantial evidence of record in this proceeding shows the Joint Complainants proved that the cybersecurity insurance requirement in the DSA is unreasonable in that it provides no additional cybersecurity protection, and instead is merely an alternative, and unauthorized form of financial security.

### III. CONCLUSION

Despite all the arguments and counter arguments being raised and addressed in this matter, there are only a few items that truly matter. First, contrary to NFGD's representations to the Commission, the DSA as reflected in Supplement No. 207, was never approved in New York. Second, the cyber security insurance requirement does not provide any measurable increment of additional data protection and is instead a means of providing additional financial security for NFGD. Third and finally, the audit requirement is not a reasonable requirement for allowing suppliers to connect to NFGD's data systems. There are other critical facts but from these three springs the basis of the Complaint – NFGD's misrepresentations regarding its intent and the status of the DSA; NFGD's unsupported contention that the cybersecurity insurance requirement provides some incremental data security benefit so as to raise it above the level of mere financial security, which is in the end, all that it is; and NFGD's self-granted auditing power over competitive suppliers that usurps the Commission's jurisdiction. But these items also chart the course for correcting the problems they have caused. Reject the DSA entirely or, alternatively, the cybersecurity and audit provisions, and suggest to the Commission that a statewide rulemaking would be an appropriate means of addressing these issues if the Commission is so inclined and find that NFGD provided unreasonable service when it misled the Commission and the NGSs on its system regarding its intentions. The facts and the law point to this as the only tenable result, and accordingly, the Joint Complainants request that the Honorable Presiding Administrative Law Judge and the Commission so find.

Respectfully submitted,

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

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