

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EnergyMark LLC, Vineyard Oil & Gas	:	
Company, Mid American Natural	:	
Resources LLC, and Total Energy	:	
Resources LLC,	:	C-2020-3019621
Complainants	:	
v.	:	
	:	
National Fuel Gas Distribution Corporation	:	
Respondent	:	

**REPLY BRIEF OF
PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION**

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I. SUMMARY OF REPLY ARGUMENT

National Fuel Gas Distribution Corporation's (NFGD) Main Brief overstates the significance of evidence it believes supports its legal conclusions but simply denies the existence of evidence that does not support its legal conclusions. The authorities NFGD relies upon to deny the existence of this contrary evidence are not persuasive and do not support NFGD's argument. These authorities actually demonstrate that PIOGA's straightforward factual testimony is "actual evidence" that NFGD has not refuted and, if credited by Your Honor and the Commission, is substantial evidence sufficient to support the legal conclusions PIOGA has requested.

II. REPLY ARGUMENT

A. Whether PIOGA or any of its members believe cyber protection measures or cybersecurity insurance are important is immaterial.

NFGD's cross-examination of PIOGA witness Dan Weaver focused on whether Mr. Weaver and PIOGA member producers and natural gas suppliers (NGSs) operating on NFGD's system believe acquiring cybersecurity insurance is important. Notes of Testimony at hearing (N.T.) 11:22-14:8. NFGD relies upon this cross-examination to argue that "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."

Mr. Weaver did not admit that NFGD "is permitted to implement reasonable requirements for those to interface with its systems" or that NFGD's \$5 million per incident cybersecurity insurance requirement at issue in this matter is reasonable. Mr. Weaver did acknowledge that companies should take cyber protection measures as determined by the information technology (IT) professionals the companies, including PIOGA, rely upon. N.T. 10:9-16; 12:3-19. Mr. Weaver's direct testimony explained some of the cyber protection

measures of PIOGA producer and NGS members operating on NFGD's system. PIOGA Statement No. 1 at 4:18-24.

But the point of Mr. Weaver's testimony is that, as explained in the Main Briefs of the Joint Complainants' and PIOGA, whether to acquire cybersecurity insurance coverage and the level of coverage to acquire are decisions that should be left to individual companies, based upon based on each company's particular circumstances, and not mandated by NFGD:

Q. [ATTORNEY KANAGY] Okay. But would you agree with me that these PIOGA members' acquisition of cyber security insurance indicates that these members consider acquiring cyber security insurance to be important?

A. [MR. WEAVER] It depends. Again, I go back to my other statement earlier. It depends on each individual member company. There are certain members of ours that are larger than others that would be of the potential to need to acquire said insurance, and there are other members that do not.

N.T. 13:6-15.

Mr. Weaver's testimony explained why NFGD's mandated \$5 million per incident cybersecurity insurance coverage is unjust, unreasonable, and unduly burdensome, and showed why the acquisition of cybersecurity insurance by the small number of PIOGA members operating on NFGD's system does not support maintaining this requirement in NFGD's tariff. PIOGA Main Brief at 4. By PIOGA's responses to NFGD's discovery, NFGD knows that not all PIOGA member producers and NGSs operating on its system have cybersecurity insurance and, as Mr. Weaver testified, PIOGA has over 350 member companies. N.T. 14:9-14.

The extent to which PIOGA or any of its member companies, including its producer and NGS members operating on NFGD's system, believe cyber protections or cybersecurity insurance are important is not material to the disposition of the legal issues in this matter. Similarly, any additional protections and procedures that may result from obtaining cybersecurity insurance have, by NFGD's own logic, already been factored into the costs of cybersecurity

insurance policies obtained by the PIOGA member producers and NGSs operating on NFGD's system, which as shown by PIOGA's testimony, are for significantly lower coverage (\$10,000 to \$1,000,000, for PIOGA member NGSs operating on NFGD's system that are not part of a larger corporate family) than NFGD's \$5,000,000 requirement. Any such additional protections and procedures are not material to the disposition of the legal issues in this matter.

B. PIOGA's witness testimony is evidence sufficient to support the legal conclusions requested.

NFGD argues that there is no "actual evidence" to support the legal conclusions PIOGA requests in this matter, and that studies, analyses, valuations and comparative costs estimates are needed to establish the facts stated in Mr. Weaver's testimony. NFGD does not deny the truth of Mr. Weaver's straightforward factual statements regarding costs of obtaining cybersecurity insurance and the impacts of those costs on its members' businesses but instead simply denies that Mr. Weaver's testimony is evidence in the first place. NFGD's assertions that Mr. Weaver's factual statements are merely personal opinions and concerns does not make them so.

The authorities relied upon by NFGD refute its argument. In *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n*, the Commonwealth Court rejected the argument that the testimony supporting the factual findings of the Special Civil Service Commission was not "credible evidence," stating that the "entirely factual" statements were testimonial evidence that was credited by the factfinder and thus sufficient to support the Special Commission's findings and conclusions.¹ Similarly, in *Allied Mechanical and Electrical, Inc. v. Pennsylvania Prevailing Wage Appeals Board*, the Commonwealth Court held that the straightforward factual testimony of four former workers for Allied that was relied upon by the factfinder "constitutes

¹ 942 A.2d 274, 281-83 (Pa. Cmwlth. 2008).

substantial evidence in support of the Secretary's conclusion that Allied had intentionally violated the Act.”²

NFGD cites *Mid-Atlantic Power Supply Ass'n v. Pa. PUC* for the legal proposition that , “[m]ere bald assertions, personal opinions or perceptions do not constitute evidence.”³ However, *MAPSA* did not involve mere bald assertions, personal opinions or perceptions, as *MAPSA*’s evidence was the undisputed fact that “the PUC . . . failed to require Distributors to grant Suppliers complete access to all customer information for promotional purposes.” It is clear that the court’s statement preceding the cited legal proposition⁴ faulted *MAPSA* for not providing any legal authority that the PUC’s failure to do so established an abuse of discretion. The court was not referring to any deficiency in *MAPSA*’s evidence, which was credited.

Regarding the *Bureau of Corrections* decision, NFGD mentions only the objectors’ testimony concerning “the effect that granting the conditional use application would have on property values” (NFGD Min Brief at 35) but that testimony addressed just a small part of the legal standard that the state prisoner pre-release center “would pose a threat to the community.” In concluding that the Commonwealth Court correctly held that the objectors did not establish that the City Council, abused its discretion, our Supreme Court described the testimonial evidence provided by the objectors, which NFGD omits from its quoted portion of the Court’s decision:

The evidence presented by the objectors consisted of testimony of various residents of the Soho/Bluff area of Pittsburgh. The testimony showed that many of the residents perceived that the addition of the center to the

² 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007).

³ 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (*MAPSA*) (citing *Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987).

⁴ “*MAPSA* cites no authority to support the position that the PUC abused its discretion by not making all customer information fully available to Suppliers.”

neighborhood would ruin the neighborhood for various reasons. R. 26a-28a. For example, **there were statements made concerning the high crime rate in the area, the number of bars in the area, and the existence of a house of prostitution in the area. There was also concern voiced about the numerous elderly and female residents in the area.** Finally, concern over the effect on property values which would be caused by the center was expressed.⁵

The objectors' testimonial *evidence* emphasized above is clearly factual and not "bald assertions, personal opinions, and perceptions," but was not accepted as substantial evidence to support the required legal conclusion that the state prisoner pre-release center would pose a threat to the community because it was not credited by the fact finder – *not* because the testimony was not *evidence*.

Finally, the unpublished *West Penn Power Co.* decision⁶ does not stand for the legal proposition cited ("[m]ere bald assertions, personal opinions or perceptions do not constitute evidence"). Review of the ALJ's decision shows clearly that the court's (and NFGD's) description of the evidence offered by the complainant as "nothing more than his personal opinion" as well as the court's statement that "the complainant presented no evidence regarding alternative vegetation management practices" were simply not true:

ALJ Dunderdale made seventy-three (73) Findings of Fact and reached nine Conclusions of Law. I.D. at 3-13, 18-19.⁶ We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are

⁵ *Bureau of Corrections*, 532 A.2d at 14 (emphasis added).

⁶ *West Penn Power Co. v. Pa. PUC*, 219 A.3d 716, 2019 Pa. Commw. Unpub. LEXIS 532, at *24-25 (Pa. Cmwlth. 2019).

reversed or modified by this Opinion and Order, either expressly or by necessary implication.

⁶ Said Findings of Fact are detailed, thorough, and invaluable to our disposition of this matter.

The essential Findings of Fact are reprinted below:

* * *

4. Since 1968, West Penn has maintained a 100-foot wide right-of-way that transects the service address property, and on which West Penn constructed a 138,000 kV electric transmission line, known as "PMU-652" or the "Kiski Valley to Cabot 138 kV line", located at 1,070 feet above sea level to 1,160 feet above sea level. (Tr. 19, 50, 51, 158, 168, 169, 202, 204; West Penn Exhibits 1 & 13).

5. The sole water sources for the service address are two water wells located on Complainant's property behind the residence. (Tr. 23, 28; West Penn Exhibit 13).

6. Public water is not available to Complainant at the service address or to any of his neighbors. (Tr. 23).

7. One well (Well #1) is a hand-dug well that is 15 feet deep, and the other well (Well #2) is 68 feet deep. (Tr. 23, 31).

8. Well #1 and Well #2 were dug during the 1950's and are located at 1,070 feet above sea level. (Tr. 31, 34, 159-161, 169; West Penn Exhibit 13).

9. Both wells are situated approximately 70 feet downhill from West Penn's right-of-way and on level ground with Complainant's residence. (Tr. 31, 34, 159-161, 169; West Penn Exhibit 13).

* * *

12. The shallow water well contains water from a natural spring located behind the residence and which is accessed through a vertical well at the base of the hillside that contains Respondent's right-of-way. (Tr. 33; West Penn Exhibit 13).

13. Complainant's property contains a fish pond which is located at 1,070 feet above sea level and is, in part, under the transmission line and less than 100 feet downhill from an area upon which Respondent proposes to apply herbicide. (Tr. 24, 159-161; West Penn Exhibits 13 & 15).

14. The terrain at the subject property is hilly and bottoms out (or flattens) behind the residence and behind the fish pond. (West Penn Exhibits 13 through 15).

15. Complainant's residence sits downhill from the transmission line and approximately 70 feet from the transmission line. (Tr. 29; West Penn Exhibits 13 & 15).

16. The right-of-way covers a section of Complainant's property that is approximately 200 yards long by 100 feet wide which includes a hilly section that is not maintained or mowed by Complainant and which West Penn proposes to spray with herbicides. (Tr. 24-30, 164; West Penn Exhibits 13 & 15).

* * *

....

23. Complainant expressed concern about the work plan because the proposed herbicides might leach into the water wells and travel down the steep slopes, making the water unsuitable for fish in his fish pond and making water from the two wells unpotable or unsafe for drinking at the service address. (Tr. 113, 223, 268).

24. Complainant did not object if Davey removed trees and vegetation from the right-of-way, and objected only to the use of herbicides. (Tr. 223; West Penn Revised Exhibit 2).

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71. The testimony offered by Robert M. Mattu was accepted as relevant and credible. (Tr. 18-45).

72. The testimony offered by Shawn Standish was accepted as relevant and credible. (Tr. 46-177).⁷

⁷ *Robert M. Mattu v. West Penn Power Company*, C-2016-2547322, Order entered October 25, 2018, at 25-30.

That the court's (and NFGD's) description of the evidence offered by the complainant as well as the court's statement that "the complainant presented no evidence regarding alternative vegetation management practices" were simply not true is shown by the PUC's order, quoting its previous decision:

The lay testimony of Mr. Mattu, corroborated by the uncontested facts regarding the close proximity to his wells to the ROW where the herbicides are proposed to be applied supports our determination that we articulated in the July 2017 Order. In our *July 2017 Order*, we analyzed the record and concluded that, on the particular facts present here, Mr. Mattu is entitled to relief. More specifically, we stated as follows:

We believe that the use of herbicides, which are by their very nature hazardous, can be properly used in some circumstances. However, in the present case, **the Complainant has established that his circumstances require more care in choosing and applying vegetation management methods than many other landowners' circumstances.** We note that our decision to grant this Petition for Relief is fact-specific and not intended to create a bright line test by which future cases should be evaluated. **Rather, we find that the totality of the circumstances here, in this specific case, is sufficient to grant the Complainant relief by directing West Penn Power to maintain its right-of-way where it crosses the Complainant's land by means which do not include the use of herbicides. Given this unique fact pattern, the use of herbicides would be unreasonable.** Our decision in this case does not bar West Penn Power from utilizing other vegetation management methods including grinding tree stumps or assessing the vegetation growth within this right-of-way on a shorter time frame. **We note that this is consistent with the methods used to maintain this portion of the right-of-way in past vegetation management cycles.**⁸

There is a reason unpublished decisions cannot be cited as precedent, and this unpublished decision is not persuasive, as shown above.

⁸ *Id.* at 31 (quoting *July 2017 Order* at 11) (emphasis added).

PIOGA's testimonial evidence, if credited, is substantial evidence to support the legal rulings requested, notwithstanding NFGD's contrary evidence. *Allied Mechanical and Elec., Inc.*, 923 A.2d at 1228 (The "presence of conflicting evidence in the record does not mean that substantial evidence is lacking.").

III. CONCLUSION

For the reasons set forth above and in PIOGA's Main Brief, PIOGA respectfully requests that Your Honor (1) conclude that the cybersecurity insurance and audit provisions contained in NFGD's Tariff Supplement No. 207 are unjust, unreasonable, unlawful, unduly burdensome, and discriminatory under the Commission's governing statutes and regulations, and (2) overturn the cybersecurity insurance and audit provisions in NFGD's Supplement No. 207.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this day I served copies of the foregoing PIOGA Main Brief on the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

Via Email only

THE HONORABLE DENNIS J. BUCKLEY, Administrative Law Judge
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