# PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

Public Meeting held August 26, 2021

Commissioners Present:

Gladys Brown Dutrieuille, Chairman

David W. Sweet, Vice Chairman

John F. Coleman, Jr.

Ralph V. Yanora

Interstate Gas Supply, Inc., *et al*.

v.

Metropolitan Edison Company, C-2019-3013805

Pennsylvania Electric Company, C-2019-3013806

Pennsylvania Power Company and C-2019-3013807

West Penn Power Company C-2019-3013808

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the joint Exceptions of four electric distribution companies: (1)Metropolitan Edison Company; (2) Pennsylvania Electric Company; (3) Pennsylvania Power Company; and, (4) West Penn Power Company (collectively, “the EDCs” or Respondents), and, the Exceptions of the Office of Consumer Advocate (OCA) filed on December 8, 2020, respectively, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Joel H. Cheskis issued November 18, 2020. Joint Replies to Exceptions were filed by three Electric Generation Suppliers: (1) Interstate Gas Supply, Inc. d/b/a IGS Energy; (2) Direct Energy Services LLC; and (3) Shipley Choice, LLC d/b/a Shipley Energy (collectively, “the EGSs”) on December 18, 2020. This matter is the consolidated formal complaints (Complaint) filed by the EGSs on October 25, 2019, against the EDCs, alleging that the EDCs’ provision of “on-bill billing” for their own non-commodity goods and services, while not offering the same on-bill billing service for the non-commodity goods and services offered by the EGSs is unreasonably discriminatory in violation of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.* (the Code).

For the reasons stated, *infra*, upon consideration of the Exceptions and Replies thereto, we shall grant the Exceptions of the EDCs and reverse the ALJ’s Initial Decision, consistent with this Opinion and Order.[[1]](#footnote-1) Accordingly, as discussed *infra*, we conclude that the EDCs’ billing practice of offering “on-bill billing” for its own non-commodity services is subject to the Commission’s jurisdiction, and conforms with Section 1502 of the Code, 66 Pa. C.S. § 1502, which prohibits discrimination in the provision of service. We note that the EDCs’ billing practices remain subject to all applicable consumer protection regulations, and specifically, 52 Pa. Code § 56.83(3), which directs that a customer’s service may not be terminated for nonpayment of non-basic charges.

# Background

The case concerns a billing practice known in the utility industry as “on-bill billing,” whereby a company includes non-commodity goods and services on its monthly utility bills to its customers. In the present case, the EDCs offer their own non-commodity goods and services *via* “on-bill billing” to their customers. The EGSs are free to do the same *via* their own direct billing of customers. Here, however, the EGSs sought to require the EDCs, which are required by statute to provide customer billing for electric service provided by the EGSs, to also provide the EGSs with the same “on-bill billing” services for non-commodity (other than electric) for the EGSs’ customers as the EDCs were providing its own customers. The ALJ’s Initial Decision sustained the EGSs’ Complaint averring that the EDCs’ provision of “on-bill billing” for the benefit of their own customers, and not to the EGSs’ customers, demonstrates that the companies do not provide the EGS with rates, terms of access and conditions that are comparable to the EDCs’ own use of the system.

The ALJ concluded that the EDC’s practice of offering “on-bill billing” for its own goods and services constitutes discrimination, *i.e.,* an unreasonable preference or advantage to itself over the EGSs and is in violation of the Public Utility Code.

# II. History of the Proceeding

On October 25, 2019, Interstate Gas Supply, Inc. and two other EGSs filed a Formal Complaint (Complaint) against the Respondents alleging that the EDCs’ conduct of providing a billing service, known in the industry as “on-bill billing,” for non-commodity products and services that it provides for the benefit of their own electric distribution customers, while refusing to provide “on-bill billing” for the EGSs serving customers on its systems, violates Sections 1502 and 2804(6) of the Public Utility Code, 66 Pa. C.S. §§ 1502; 2804(6), as well as a Commission Opinion and Order in a recent case involving the similar issue in the natural gas industry.[[2]](#footnote-2) For relief, Interstate Gas Supply, Inc. requested that the Commission sustain the Complaint and require that if the Respondents provide billing services for any provider of non-commodity services on its utility bills, that it provide the same service to similarly situated providers of those services on a non-discriminatory basis, or be prohibited from providing such billing service at all. *See* Complaint at 1-2.

On November 14, 2019, the EDCs filed an Answer and New Matter to the Complaint averring that they offer non-commodity products and services to their customers but have not authorized the EGSs to bill for non-commodity products and services on the EDCs monthly electric service bills. In their New Matter, which was accompanied by a Notice to Plead, the EDCs argued that their tariffs prohibit the relief requested in the Complaint. The EDCs further argued that these tariffs were recently approved as part of their default service plans (DSPs) in 2018 and the EGSs were served copies of those documents. The EDCs also addressed other issues raised by the EGSs in their Complaint and requested that the Complaint be dismissed with prejudice.

On December 4, 2019, the EGSs filed a reply to the EDCs’ New Matter. In their answer, the EGSs denied the EDCs’ claim to the extent they contended it was not appropriate or otherwise permissible to file a complaint regarding the legality of a service or tariff of a public utility. Additionally, the EGSs denied, *inter alia*, the EDCs’ averment regarding their participation in the EDCs’ DSPs proceedings in 2018 and its impact on the Complaint. The EGSs requested that their Complaint be sustained, and their requested relief be granted.

On January 24, 2020, the Retail Energy Supply Association (RESA) filed a Petition to Intervene in the proceeding.

On February 3, 2020, ALJ Cheskis convened an in-person prehearing conference at which Todd Stewart, Esquire, appeared on behalf of the EGSs; Teresa Harrold, Esquire, appeared on behalf of the EDCs; and Deanne O’Dell, Esquire, appeared on behalf of RESA.

A February 5, 2020 Scheduling Order memorialized the matters agreed upon at the prehearing conference. In addition, RESA’s Petition to Intervene was granted and the Complaints filed by the EGSs against each EDC were consolidated. The Parties agreed to a litigation schedule.

On February 7, 2020, the Office of Consumer Advocate (OCA) filed a Notice of Intervention.

On March 24, 2020, the EGSs filed their direct testimony. On May 13, 2020, the EDCs and the OCA filed rebuttal testimony. On May 27, 2020, the EGSs and the EDCs filed surrebuttal testimony. RESA did not file any written testimony.

On June 9, 2020, the EDCs filed a Motion to Strike portions of the rebuttal testimony of the OCA. On June 26, 2020, the OCA filed an Answer to the EDCs’ Motion to Strike. The Motion to Strike was denied by Order dated July 2, 2020.

On June 30, 2020, an evidentiary hearing was held wherein the Parties’ pre-served testimony and accompanying exhibits were admitted into the record. The Parties also affirmed their intent to submit main briefs. On July 1, 2020, a briefing order was issued. Pursuant to the procedural schedule, the EGSs, the EDCs and the OCA each filed Main Briefs on August 18, 2020 and Reply Briefs on September 11, 2020. RESA did not file any briefs. The record closed on September 11, 2020, upon the filing of reply briefs.

In the Initial Decision, issued on November 18, 2020, the ALJ sustained the Complaint finding that the companies do not provide the suppliers’ rates, terms of access and conditions that are comparable to the companies’ own use of the system. The ALJ found that the EDCs have, therefore, made an unreasonable preference or advantage, and established or maintained an unreasonable difference as to service in violation of the Code. Additionally, the ALJ recommended that the EDCs be given sixty (60) days from the date of a final order to report to the Commission’s Bureau of Technical Utilities (TUS) their methodology for coming into compliance with Sections 1502 and 2804(6) of the Code and Chapter 56. *See* I.D. at 1; 22-23.

As previously noted, Exceptions to the Initial Decision were filed by the EDCs and the OCA on December 8, 2020[[3]](#footnote-3). Replies to the Exceptions were filed by EGSs on December 18, 2020.

# Legal Standards

Section 332(a) of the Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa. C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa*., 72 Pa. PUC 196 (1990). “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950). The offense must be a violation of the Public Utility Code, the Commission’s Regulations, or an outstanding order of the Commission. See, 66 Pa. C.S. § 701.

In these Complaint proceedings, the EGSs complain that the EDCs’ provision of “on-bill billing” for their own good non-commodity goods and services, while not offering “on-bill billing” for the EGSs’ non-commodity goods and services, constitutes unreasonable discrimination in the provision of service under the Code. Therefore, the EGSs have the burden of proof in this proceeding.

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

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

The issue presented in this proceeding turns on the Commission’s interpretation of the language of the Code relevant to this proceeding, under Sections 1502 and 2804(6).

Section 1502 of the Code establishes a general prohibition of discrimination in service by a utility, providing:

**§ 1502. Discrimination in service.**

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

66 Pa. C.S. § 1502 (emphasis added)

The term “service” is defined under the Code, at Section 102, in pertinent part, as:

Used in its broadest and most inclusive sense, includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and any and all facilities used furnished or supplied by public utilities…*in their performance of their duties under this part to their patrons, employees or other public utilities, and the public,* as well as the interchange of facilities between two or more of them…

66 Pa. C.S. § 102 (emphasis added).

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

(6) Consistent with the provision of section 2806, the commission shall require that a public utility that owns or operates *jurisdictional transmission and distribution facilities* *shall provide transmission and distribution service* to all retail electric customers in their service territory and to electric cooperative corporations and *electric generation suppliers,* affiliated or nonaffiliated, *on rates, terms of access and conditions* *that are comparable to the utility’s own use of its system.*

66 Pa. C.S. § 2804(6) (emphasis added).

In addition, Section 2807 of the Act establishes the express duties of electric distribution companies. With respect to the duties of electric distribution companies to provide billing services on behalf of the electric generation suppliers, the Act expressly stated at Section 2807(c) (pertaining to customer billing), that:

**Customer billing -** Subject to the right of an end-use customer to choose to receive separate bills from its electric generation supplier, the electric distribution company *may be responsible for billing customers* *for* ***all electric services***, consistent with the regulations of the commission, regardless of the identity of the provider of those services.

66 Pa. C.S. § 2807(c) (emphasis added).

The Chapter 56 billing regulations raised in this proceeding include Section 56.13 of the Commission’s regulations which provides, in pertinent part, that:

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

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

Finally, the Commission recently addressed the issue of a natural gas distribution utility’s provision of “on-bill billing” of a third-party’s non-commodity goods and services, where precluding the same practice for natural gas suppliers in *Pa. PUC v. Columbia Gas of Pa., Inc.,* Docket No. R-2018-2647577 (Opinion and Order entered December 6, 2018) (*Columbia*).

In *Columbia,* the Commission addressed, *inter alia*, a challenge to Columbia’s billing practice offering third parties “on-bill billing” for non-commodity goods and services provided by a third party. The Commission determined that Columbia’s practice of providing “on-bill billing” of non-commodity goods and services for non-affiliated third parties constitutes “service” within the Commission’s jurisdiction and as the term is used under Section 1502 of the Code, which prohibits discrimination in the provision of service. The Commission found that Columbia’s “on-bill billing” practice was unreasonable and discriminatory and required Columbia to take action to conform its billing practice with the provisions of Section 1502.

# Discussion

# ALJ’ s Initial Decision

ALJ Cheskis made 19 Findings of Fact and reached 16 Conclusions of Law. We shall adopt and incorporate herein by reference the ALJs’ Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Order, either expressly or by necessary implication.

The pertinent Findings of Fact taken from the I.D. are reprinted below:

\* \* \*

4. The EDCs have a long history of offering non-commodity products and services, such as surge protection and line repair programs, to their customers. EDC St. 1 at 3; OCA St. 1-R at 6.

5. The billing capability for the EDCs’ products and services has been built into the EDCs’ SAP billing system for decades. EDC St. 1 at 2.

6. The EDCs rely on their shared service company, First Energy Service Company, to provide administrative support for the Companies’ products and services, including billing. EDC St. 2 at 2.

7. Consistent with the Commission’s regulations, the EDCs’ charges are displayed as separate line items on customers’ bills, and a customer’s failure to pay for these charges may not result in electric service termination. EDC St. 1-S at 4.

8. All costs associated with the EDCs’ products and services are below-the-line and excluded from rate recovery. EDC St. 1-S at 4.

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

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

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

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

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

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

\* \* \*

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

\* \* \*

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

I.D. at 5-7.

Based upon the Findings of Fact, the ALJ agreed with the EGSs that the undisputed facts regarding the EDCs’ provision of “on-bill billing” for the non-commodity goods and services which they themselves provide, while refusing to offer “on-bill billing” to the EGSs for the non-commodity goods and services offered by the EGSs, constituted discrimination in service under both Sections 1502 and 2804(6) of the Code. The ALJ concluded that, in the circumstances, the EDCs were required to provide the EGSs with “on-bill billing” for the non-commodity goods and services offered by the EGSs, in the same manner that the EDCs provided “on-billing” for their own non-commodity goods and services.

The ALJ’s analysis turned, first, upon the conclusion that the EDCs’ provision of “on-bill billing” for non-commodity goods and services for themselves and *not* the EGSs constituted “discrimination,” in the most general sense, citing a dictionary definition of the term. I.D. at 12. The ALJ stated:

Here, the EDCs are treating entities other than themselves and their affiliates differently than they treat themselves or their affiliates based on the group, class or category to which they belong, rather than on merit, by not allowing the EGSs to have access to on-bill billing for their non-commodity non-basic products and services.

*Id*. Therefore, based upon a general definition of “discrimination” the ALJ expressly concluded that where the EDCs’ practices, in this instance, billing, draws a distinction between itself and any other entity, here the EGSs, based on “the group, class or category to which they belong, rather than on merit,” the EDCs’’ practice is discriminatory.

Next, the ALJ considered whether the EDCs’ “discrimination” was reasonable under the circumstances, or whether it was “unreasonable” and, therefore, in violation of Sections 1502 and 2804(6) of the Code. The ALJ concluded that:

The record evidence in this proceeding demonstrates that such discrimination is unreasonable. Neither the EDCs nor the OCA have presented sufficient evidence or argument demonstrating that the discriminatory practice is reasonable.

I.D. at 12-13.

The ALJ dismissed the legal arguments raised by the EDCs that the EGSs’ Complaints are an impermissible collateral attack upon the EDCs’ approved default service program (DSP) orders and an inappropriate challenge to the EDCs’ Commission-approved EGS Coordination Tariffs. I.D. at 13. The ALJ reasoned that the Commission’s approval of either a DSP or Tariff did not bar a subsequent challenge to them, stating:

Whether or not those orders were contested or appealed does not mean that they do not violate Section 1502 or 2804(6) of the Public Utility Code.

I.D. at 13-14.

The ALJ then relied upon the Commission’s holding in *Columbia*, as it pertained to a challenge to a utility’s practice of providing “on-bill billing” services to a non-affiliated third party while refusing to provide the same service to other third parties. The ALJ reasoned that the EDCs’ argument regarding the controlling nature of the DSP language is mitigated by the Commission’s decision in *Columbia*, where it found such billing practice to be discriminatory, since *Columbia* was rendered after the Commission’s orders approving the EDCs’ DSPs. *Id*.

In rejecting the EDCs’ arguments that Section 316 of the Code, 66 Pa. C.S. § 316, (pertaining to finality of Commission orders) barred the claims raised by the EGSs, the ALJ reasoned that the EDCs’ approved tariffs (which expressly provided for the provision of “on-bill billing” of the EDCs’ own non-commodity goods and services), only established the *prima facia* lawfulness of the billing practice. The ALJ further concluded that the EGSs had met the higher burden of proof required to overturn the practice as unlawful. I.D. at 15.

The ALJ rejected the EDCs’ argument that their “on-bill billing” practice is not discriminatory because the EDCs’ offer “their own billing service at the exclusion of ***all*** others.” I.D. at 15-16, citing, EDC M.B. at 13 (emphasis added). The ALJ further rejected the EDCs’ argument that the facts in *Columbia* are distinguishable from the present case. The ALJ reasoned that *Columbia* only addressed discrimination in service where a utility provided billing services to a third party, while denying that same service to other third parties for no demonstrable or reasonable purposes. The ALJ expressly disagreed with the EDCs’ reading of Section 1502 of the Code to only apply where a utility provides an unreasonable preference or advantage to one third party over another. *Id*.

The ALJ concluded that the EDCs’ reading of Section 1502, to allow “***all*** providers, including the companies, …to send their own monthly bills to customers for their own products and services” as overly narrow. *Id*. (emphasis added). The ALJ expressly rejected the EDCs’ argument that, in the present case, Section 1502’s prohibition on discrimination in service only applies when a utility is providing a preference to a third party over another, and that “neither the Commonwealth Court nor the Commission has found that a utility can violate section 1502 by offering its own service at the exclusion of others.” I.D. at 16, citing EDC MB at 13-14. In analyzing the language of Section 1502, the ALJ concluded that Section 1502’s prohibition on discrimination in service is broader than the EDCs’ interpretation. The ALJ expressly found that:

The [Section 1502] prohibition against unreasonable preference or advantage applies to “any person, corporation or municipal corporation,” ***which includes the EDCs themselves.***

I.D. at 16. (emphasis added).

The ALJ then dismissed the EDCs’ arguments regarding the practical challenges for implementation of the on-bill billing remedy proposed by the EGSs. The ALJ concluded that, while the EDCs raised genuine implementation challenges, none justified permitting the EDCs to continue their discriminatory billing practices. I.D. at 17.

With respect to the application of Section 2804(6) of the Code to the present case, the ALJ rejected the EDCs’ argument that “Section 2804(6) is inapplicable to this case which relates only to the billing of EGSs’ unregulated, non-commodity products and services.” I.D. at 17-18, citing EDC M.B. at 25. The ALJ was not persuaded that the Act “is irrelevant to the billing of non-commodity products and services offered by EGSs, which is entirely separate from EGSs’ generation service.” *Id.* citing EDC MB at 26. The ALJ again rejected the EDCs’ argument that the Commission’s holding in *Columbia* is distinguishable from the present case. I.D. at 17‑18.

The ALJ then turned to the OCA’s intervention. The OCA intervened to oppose the EGSs’ proposal to require the EDCs to include additional non-commodity goods and services on customers’ monthly bills. The OCA took the position that the proposal was unreasonable and was generally opposed to the practice of “on-bill billing” for non-commodity goods and services as raising many issues related to potential customer confusion.

On consideration of the position of the OCA, ALJ Cheskis concluded that the OCA raised genuine consumer protections issues which must be addressed by whatever manner of “on-bill billing” the EDCs ultimately propose to resolve the finding of discriminatory billing. However, the ALJ rejected the OCA’s requested relief of prohibiting and/or prescribing the way the practice of “on-bill billing” should be conducted to comport with the Commission’s Chapter 56 billing regulations. I.D at 21‑22.

Therefore, based upon the ALJ’s application of the general definition of “discrimination,” the provisions of Sections 1502 and 2804(6) of the Code, 66 Pa. C.S. §§ 1502 and 2804(6), and the Commission’s prior decision in *Columbia*, the ALJ concluded:

The EDCs must either provide on-bill billing for **all suppliers’** non-basic, non-commodity products and services **or to no one at all, including themselves and their affiliates.**

I.D. at 23 (emphasis added).

1. **Exceptions and Replies**

In Exceptions, the EDCs argue that the ALJ erred by concluding in the Initial Decision that the EDCs’ practice of billing for non-commodity goods and services violates Section 1502 of the Code. Further, the EDCs maintain that the ALJ incorrectly applied the Commission’s decision in *Columbia* to the facts of this proceeding. The EDCs argue that the facts in *Columbia* are distinguishable from the facts in the present case in many material respects. EDC Exc.at 1-11.

The EDCs assert that, although both the present case and *Columbia* address a utility’s billing for non-commodity goods and services while prohibiting the EGSs from utilizing the utility’s consolidated billing for their non-commodity goods and services, that is where the similarities between the cases ends. Specifically, the EDCs assert that here, the EDCs bill for their own non-commodity goods and services, whereas in *Columbia*, Columbia was billing for the products and services of certain third parties who were also former affiliates of Columbia. In the present case, the EDCs note that they are not providing preferential treatment between one third party and another – the EDCs are continuing to bill for the goods and services *they themselves* have been offering for decades. The EDCs assert that the EDCs’ billing for non-commodity goods and services is fully consistent with Section 1502 of the Public Utility Code, which prohibits unreasonable discrimination by a utility.

The EDCs note that in *Columbia*, the utility was offering non-commodity billing services to some third parties, which indicated that it was able to offer this same service to other third parties but was arbitrarily choosing not to do so. Here, the EDCs have no system functionality, processes, or procedures that would allow for them to provide non-commodity billing service to third parties. The EDCs maintain that, while the Commission held that Columbia’s billing practice was unreasonably discriminatory in violation of Section 1502, there are many reasonable and factual justifications for the EDCs not offering utility consolidated billing of the EGSs’ non-commodity products and services. Therefore, the EDCs’ practice is consistent with Section 1502 of the Code.

The EDCs further argue that their non-commodity billing practice also remains consistent with Section 2804(6) of the Act. The EDCs assert that the Act imposes no obligation on utilities to bill for the EGSs’ non-commodity product and service charges. Further, the EDCs note that the explicit and implicit purpose of the Competition Act is to ensure the EGSs have an equal opportunity to provide regulated generation service to retail customers, not unregulated products and services, as urged by the EGSs in the present case. Therefore, the EDCs argue that Section 2804(6) of the Act is inapplicable to this proceeding and that the Joint Complainants’ allegations in this respect should be rejected. EDC Exc. at 11-13.

Finally, the EDCs reiterate their arguments that the EDCs’ Commission-approved Electric Generation Supplier Coordination Tariffs prohibit utility consolidated billing of the EGSs’ non-commodity product and service charges, pursuant to Section 316 of the Code. The EDCs assert that these tariffs were approved in the EDCs’ last DSP proceeding. Further, the EDCs note that the EGSs raised no challenge to the prohibitions during the case, although they had the option to do so. Therefore, the EDCs assert that Section 316 of the Public Utility Code precludes the EGSs from now challenging the tariffs as part of this Formal Complaint proceeding. EDC Exc. at 13-16.

Accordingly, the EDCs assert that the ALJ’s Initial Decision should be reversed, and the EGSs’ Formal Complaints should be denied and dismissed.

In its Exception No 1, the OCA takes issue with the ALJ’s conclusion that the remedy sought by the EGSs could be found to be reasonable. OCA Exc. at 1-5. The OCA reiterates its opposition to the practice of “on-bill billing” for non-commodity goods and service and asserts that, as recommended by the OCA’s witness Barbara Alexander, all non-basic, non-commodity products and services should be billed separately to prevent customer confusion and other customer protection issues from arising. *Id*.

In their Replies to the Exceptions, the EGSs assert that the ALJ properly concluded that the EDCs’ billing practice violates Sections 1502 and 2804(6) of the Code, reiterating their arguments before the ALJ. EGS R. Exc. at 1-10. Further, the EGSs reiterate their position that the OCA incorrectly argues that the EGSs’ proposed remedy is unreasonable. The EGSs request that the Exceptions of both the EDCs and the OCA be denied. EGS R. Exc. at 10-13.

1. **Disposition**

We remind the Parties that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. *See* [*Consolidated Rail Corp. v. Pa. PUC*,625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also, see generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984)](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef).

The main issue presented on Exception is whether the EDCs’ (*i.e*., Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company) practice of providing “on-bill billing” for their own non-commodity goods and services, while refusing to provide the same “on-bill billing” to *any* third party, constitutes discriminatory provision of service under either Section 1502 (pertaining to prohibition on discrimination in service) and/or Section 2804(6) of the Code (pertaining to Standards for restructuring of electric industry).

As discussed, in the proceeding before us, the ALJ concluded, based upon the general definition of “discrimination,” and a reading of the applicable statutory language under Sections 1502 and 2804(6) of the Code, 66 Pa. C.S. §§ 1502 and 2804(6), that the EDCs’ “on-bill billing” practice was discriminatory, as against the complaining EGSs. We disagree with that conclusion under the facts of this Complaint. Accordingly, as discussed more fully *infra*., based upon our reading of the applicable statutory provisions, we shall grant the EDCs’ Exceptions, reverse the ALJ’s Initial Decision, and shall deny and dismiss the EGSs’ Complaints.

Consequently, consistent with the discussion *infra.*, in this Opinion and Order, we expressly reverse the ALJ’s Conclusion of Law No. 16, which provides:

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

I.D. at 26.

In the Initial Decision, the ALJ concluded that the EDCs’ practice of “on-bill billing” for non-commodity (other than electric) goods and services for only itself, while denying the provision of “on-bill billing” for other entities, including EGSs, constituted discrimination in service in violation of Section 1502’s prohibition on discrimination in service (*i.e.*, any unreasonable difference as to service), providing:

**§ 1502.  Discrimination in service.**

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

66 Pa. C.S. § 1502 (emphasis added).

In applying the language of Section 1502, the ALJ relied, first, upon the general definition of “discrimination,” which the ALJ read to encompass any preference or advantage afforded *any* entity, including a preference or advantage granted by the utility *to itself*. Based on this broad reading of the definition of “discrimination,” the ALJ reasoned that discrimination in service under Section 1502 may be established by a utility affording *itself* an advantage or preferential treatment over *any other* without regard to “merit.” The ALJ further concluded that, in applying the Commission’s prior decision in *Columbia*, there was no material distinction to the facts in *Columbia* and the present case. We disagree.

We agree with the arguments presented by the EDCs in their Exceptions that, in the present case, to find a violation of the Section 1502 prohibition on discrimination in service, the EGSs would be required to show that the EDCs provide the billing services in question to a third party (*i.e.*, a party other than the EDCs themselves) while refusing to provide the same service to the EGSs. Consequently, we further agree with the EDCs’ arguments that the holding in *Columbia* is materially distinguishable from the circumstances in the present case. Finally, we also agree with the EDCs’ arguments raised on Exceptions that the provisions of Section 2804(6) are inapplicable to the present case.

In applying the Commission’s prior decision in *Columbia* to the present case, the ALJ recounted the material facts in the present case, as follows:

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

The [EDCs’] non-commodity products and services themselves are considered non-utility services that are outside of the Commission’s jurisdiction to regulate. However, the [EDCs’] monthly bills to customers, which may include a line item for products and services, are subject to Commission regulation. The Commission’s regulations and the [EDCs’] retail Electric Service Tariffs authorize the [EDCs] to offer and bill customers for their own products and services. The Commission’s regulations explicitly permit utilities to bill customers for “charges for other than basic service,” which include, among other things, merchandise, appliance repairs, line repairs, and appliance warranty programs. Consistent with the Commission’s regulations, these charges are displayed as separate line items on customers’ bills, and a customer’s failure to pay for these charges may not result in electric service termination. All costs associated with the Companies’ products and services are below-the-line and excluded from rate recovery.

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

I.D. at 11-12, citing EDC M.B. at 8-9 (citations omitted).

Upon review of the facts in the present case, the ALJ found that the Commission’s prior holding in *Columbia* was applicable to conclude that the EDCs’ billing practice was in violation of both the provisions of Section 1502 and 2804(6). The ALJ concluded the facts in *Columbia* were not distinguishable from the present case. Based upon that finding, the ALJ applied the decision in *Columbia* to conclude that if the EDCs’ provided “on-bill billing” for their own non-commodity goods and services, the EDCs were bound to provide “on-bill billing” for the EGSs’ non-commodity goods and services. In summary, in applying *Columbia*, the ALJ concluded that under both Sections 1502 and 2804(6) of the Code, the EDCs are required to provide the EGSs with the same billing services as the EDCs provide themselves.

However, we find that, as the EDCs argued before the ALJ and noted in their Exceptions, the facts in the present case and *Columbia* are distinguishable in several material respects. In *Columbia*, the company’s practice of providing “on-bill billing” for non-commodity goods and service to two third parties (two former Columbia affiliates), where Columbia refused to offer the same billing service to other third parties, was found to be in violation of Section 1502’s prohibition on discrimination in service. The material fact in *Columbia* was that Columbia treated other third parties differently than the third-party former affiliates of Columbia. In the present case, the EDCs are *not* providing “on-bill billing” of non-commodity goods and service to any third party. In this case, the EDCs provide their own customers “on-bill billing” of non-commodity goods and services offered by the EDCs themselves.

Further, *Columbia* dealt with the question arising under Sections 1502 and 2203(4) of the Code. Section 2203(4) is language regarding the applicable standards for restructuring of natural gas utility industry. In the present case, Section 2804(6), although also prohibiting discrimination in service like the language under Section 2203(4), does not contain language identical to that of Section 2203(4). Section 2804(6) contains additional language which narrows the application of that section. In addition, in the present case, the language of Section 2804(6) pertains to the separate Act regarding restructuring of the electric industry and is read in the context of that Act. It is also worthy to note the distinction between Section 2804(6) and the Act, which pertain to implementation of electric competition, and Section 2203(4) which pertains to implementation of natural gas competition. Natural gas transmission and distribution and electric transmission and distribution concern distinct commodities, requiring distinct considerations for the implementation of competition for each.

Clearly the facts in *Columbia* and the present case are distinguishable in several material respects. Therefore, we conclude that the ALJ erred in applying the holding in *Columbia* to the present case to find that the EDCs’ billing practice was in violation of both Section 1502 and 2804(6) of the Code. To the contrary, we conclude that the EDCs’ billing practice comports with Section 1502’s prohibition on discrimination in service and has no implications under Section 2804(6).

Inherent in Section 1502’s prohibition on discrimination in provision of service is a utility’s provision of service to another. Discrimination arises only where the provision of service creates an unreasonable disparity between the parties to which the service may be provided. We note that, without regard to the merits of the ALJ’s application of the general definition of “discrimination,” we disagree with the ALJ’s conclusion that the parameters for finding discrimination in service under Section 1502, albeit broad, are so broad as to prohibit a utility from affording *itself* a preference or advantage in the provision of billing services.

We read nothing in the language of Section 1502 or the decision in *Columbia* to require a utility to provide to a third party the identical services the utility itself provides. Rather, as applied in *Columbia*, Section 1502 requires that where a utility provides utility service to another, the same service must be provided in a nondiscriminatory, or not unreasonably discriminatory manner to other parties.

Further, to the extent the ALJ concluded that Sections 1502 and 2804(6) establish identical prohibitions on discrimination in service, we disagree. Section 1502 establishes a general prohibition on discrimination is service for all utilities. In contrast, Section 2804(6) establishes a prohibition on discrimination in service which is tailored to the legislature’s intentions regarding implementation of electric competition practices under the Act.

The ALJ read Section 2804(6) to require that a utility treat all other parties *as it treats itself* pertaining to any provision of “service,” which the ALJ read to include billing.[[4]](#footnote-4)  The ALJ reasoned, that the prohibition on discrimination under both Section 1502 and 2804(6), require that a company treat all other parties *as it does itself*, pertaining to billing practices. Therefore, the ALJ concluded, if the EDCs provide on-bill billing for themselves, the EDCs are bound to do so for the EGSs.

However, we find that the ALJ erred, to the extent that the ALJ misread the provision of Section 2804(6) that a company “treat others as it does itself” to extend to all aspects of service, including billing. Rather, the EDCs’ duty to “treat others as itself” under Section 2804(6) extends more narrowly to the provision of “transmission and distribution services and facilities.” In contrast, under Section 1502, billing is encompassed by the term “service” as the term is broadly defined and used in Section 1502. However, billing is not the subject of the 2804(6) which is expressly limited to the narrower category of services and facilities (*i.e*., transmission and distribution service and facilities)[[5]](#footnote-5).

Read in context, the prohibition on discrimination in service under Section 2804(6) creates a heightened duty on the part of the EDCs to provide transmission and distribution service to EGSs in a nondiscriminatory manner, in a manner comparable to its own access to its transmission and distribution facilities, for purposes of delivering electric service from any generator to an end-use customer. In this regard, unlike Section 1502, Section 2804(6) does create a duty on the part of the EDCs to treat the EGSs as the EDCs would treat themselves, but this heightened duty is only applicable to the facilities necessary for transmission and distribution of electric service to the end-use customer.

We note that, under the Act, the application of Section 2804(6) is restricted to the EGSs’ “transmission and distribution facilities,” which does not include billing facilities/services. Section 2804(6) provides:

(6) Consistent with the provision of section 2806, the commission shall require that a public utility that owns or operates **jurisdictional transmission and distribution facilities** shall provide **transmission and distribution service to** all retail electric customers in their service territory and to electric cooperative corporations **and electric generation suppliers, affiliated or nonaffiliated, on rates, terms of access and conditions that are comparable to the utility’s own use of its system.**

66 Pa. C.S. § 2804(6)(emphasis added) .

Under the Act, the language of Section 2804(6) prohibiting discrimination in provision of transmission and distribution service, mirrors the prohibition on discrimination in service described by the EGSs’ right of “direct access,” as set forth in Section 2803. Our understanding, that the prohibition on discrimination under Section 2804(6) requiring that the utility provide rates, terms of access and conditions comparable to its own use of its transmission and distribution system is limited to the narrower class of transmission and distribution facilities necessary for the transport of electricity, is corroborated by the Act’s definition of “direct access” under Section 2803.

Under Section 2803 of the Act (pertaining to definitions), the right of the EGSs and consumers to access the EDCs’ transmission and distribution systems and the duty of the EDCs to provide access comparable to, specifically, the EDCs’ *own use* of *its transmission and distribution system* is defined as “direct access.” Section 2803 specifically defines “direct access” as:

The right of electric generation suppliers and end-use customers to utilize and interconnect with the electric transmission and distribution system on a nondiscriminatory basis at rates, terms and conditions of service **comparable to the transmission and distribution companies’ own use of the system to transport electricity from any generator of electricity to any end-use customer.**

66 Pa. C.S § 2803 (emphasis added)

Clearly, the definition of “direct access” describes the EGSs’ specific right to nondiscriminatory access to the EDCs’ transmission and distribution system to transport electricity from any generator of electricity to any end-use customer. The EGSs’ right of direct access then, is limited to the transmission and distribution facilities necessary to transport electricity, and does not encompass billing services and facilities, which are not necessary to/for the transport of electricity. Therefore, based upon our reading of the language of Section 2804(6) in the context of the Act, we conclude that Section 2804(6) does not encompass a right of the direct access by the EGSs’ to the EDCs’ billing service and facilities.[[6]](#footnote-6)

Accordingly, we shall grant the EDCs’ Exceptions pertaining to the ALJ’s application of the Commission’s decision in *Columbia* and finding that the EDCs’ “on‑bill billing” practice was in violation of Sections 1502 and 2804(6) of the Code.

With respect to the OCA’s Exception No. 1, which challenges the ALJ’s Initial Decision approving the continued practice on-bill billing, we shall deny the exception. We agree with the EDCs’ position that the OCA’s Exception goes beyond the issue presented to have the Commission deny a lawful billing practice. Since we conclude that the EDCs’ practice of “on-bill billing” does not violate either Section 1502 or 2804(6) of the Code, the EDCs’ practice of “on-bill billing” for the non-commodity goods and services they themselves provide is permissible. Accordingly, we shall deny OCA’s Exception No. 1. We note however, that the EDCs’ billing practice continues to be subject to the Chapter 56 consumer protection regulations governing customer billing.

1. **Conclusion**

Based on the foregoing discussion, we shall grant the EDCs’ Exceptions, deny the OCA’s Exceptions, reverse the ALJ’s Initial Decision, and deny and dismiss the EGSs’ Complaints, consistent with the discussion in this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That the Exceptions of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company filed on December 8, 2020, to the Initial Decision of Administrative Law Judge Joel H. Cheskis, issued November 18, 2020, at Docket Nos. C-2019-3013805, C-2019-3013806, C-2019-3013807, and C-2019-3013808, are granted, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Joel H. Cheskis issued November 18, 2020, at Docket Nos. C-2019-3013805, C-2019-3013806, C‑2019‑3013807, and C-2019-3013808 is reversed, consistent with this Opinion and Order.
3. That the consolidated Complaints of Interstate Gas Supply, Inc. d/b/a IGS Energy, Direct Energy Services LLC and Shipley Choice, LLC d/b/a Shipley Energy filed on October 25, 2019, at Docket Nos. C-2019-3013805, C-2019-3013806, C‑2019‑3013807, and C-2019-3013808, are denied and dismissed, consistent with this Opinion and Order.
4. That the proceeding at this docket be marked closed.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 26, 2021

ORDER ENTERED: August 26, 2021

1. As discussed, *infra.*, we shall deny the OCA’s Exceptions. [↑](#footnote-ref-1)
2. *See* *Pa. PUC, et al. v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R‑2018-2647577 (Opinion and Order entered December 6, 2018) (*Columbia*). [↑](#footnote-ref-2)
3. A Letter RE Not Filing Exceptions was filed by the EGSs on December 8, 2020. A Letter RE Not Filing Reply Exceptions was filed by the OCA and the EDCs, respectively, on December 18, 2020. [↑](#footnote-ref-3)
4. We note that the ALJ’s conclusion was based, in part, upon the Commission’s decision in *Columbia*. As previously discussed, *supra*., we conclude the ALJ erred in applying *Columbia* in the present case. *Columbia,* which is distinguishable on its facts, dealt only with the issue of “service” encompassing billing where a company provided on-bill billing service to non-affiliated third parties. *Columbia* did not create a rule that if a company itself offered a billing service, it must also provide that billing service for any third party (as against itself) or be found to be in violation of Section 1502’s prohibition on discrimination in service. [↑](#footnote-ref-4)
5. We also note that under the Act, the EDCs’ duty to provide customer billing service to EGSs is established under Section 2807(c), which explicitly refers to billing for “electric services” and no reference to non-commodity goods and services. [↑](#footnote-ref-5)
6. That is not to say that the EDCs could not run afoul of the prohibition of discrimination in service regarding billing which remains under Section 1502, if the circumstances like those presented in *Columbia* should arise. [↑](#footnote-ref-6)