

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Decision dismisses the Complaint of EnergyMark LLC, Vineyard Oil & Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC (Joint Complainants or the NGSs¹) against National Fuel Gas Distribution Corporation (NFGD) alleging that NFGD filed with the Commission an unreasonable and unlawful tariff provision with respect to data security (cybersecurity) insurance requirements in violation of 66 Pa.C.S. 1501.

HISTORY OF THE PROCEEDING

On April 27, 2020, the Joint Complainants filed a Complaint in the above-captioned matter against NFGD alleging that NFGD filed with the Commission unreasonable

¹ In their Briefs, the Joint Complainants refer to themselves as, “NGCs,” or natural gas companies. That abbreviation is being changed in this Decision to, “NGS,” or natural gas suppliers, which is a more common term used by the Commission.

tariff provisions with respect to data security requirements and did so in a deceptive and misleading way so as to deprive the Joint Complainants of the ability to challenge the tariff prior to implementation. The Joint Complainants submit that this behavior constitutes unreasonable service under 66 Pa.C.S. § 1501. The Joint Complainants also alleged that the facts and circumstances regarding NFGD's implemented tariff provisions have changed so drastically as to render the application of the data security requirement tariff provisions unreasonable.

The Joint Complainants contend that because NFGD misrepresented the basis of its data security tariff not only to the Joint Complainants but to the Commission that the tariff provision should be held to be void, *ab initio*. Finally, the Joint Complainants contend that the tariff provision grants NFGD illegal authority to supervise and regulate natural gas suppliers in abrogation of the Commission's exclusive authority to do so.

The Joint Complainants requested the following relief: (1) that the Joint Complainant's Complaint be sustained; (2) that NFGD's Tariff Supplement No. 207 as it pertains to cybersecurity, be found to be unjust and unreasonable and be suspended pending a statewide proceeding addressing cybersecurity protections; (3) that NFGD be found to have violated Sections 1501 and 1301 of the Code; (4) that NFGD be ordered to cease and desist from efforts to impose cybersecurity requirements upon suppliers pending the outcome of the proceeding requested; (5) that NFGD be required to implement a "Pennsylvania only" credential for its data systems; and, (6) that the Commission impose such other relief that it determines to be just, reasonable and necessary under the circumstances.²

On May 20, 2020, NFGD filed an Answer and New Matter to the Complaint, denying the material allegations therein.

On May 22, 2020, NFGD filed a letter stating that it was voluntarily suspending enforcement of the cybersecurity insurance requirements contained in Rule 33 of its Tariff and the Data Security Agreement (DSA), pending the outcome of this proceeding.

² Joint Complaint at 14.

On June 9, 2020, the Joint Complainants filed an Answer to NFGD's New Matter admitting in part and denying in part the averments in the same.

On October 23, 2020, a Joint Motion for Protective Order was filed by the Joint Complainants and NFGD. A Protective Order was issued on January 20, 2021.

On November 23, 2020, a prehearing Conference Notice was issued for a telephonic prehearing on January 19, 2021

On January 15, 2021, the Pennsylvania Independent Oil & Gas Association (PIOGA) filed a Petition to Intervene.

On January 19, 2021, a telephonic prehearing conference was held. Todd S. Stewart, Esquire appeared on behalf of the Joint Complainants. Anthony D. Kanagy, Esquire, appeared on behalf of NFGD. Kevin J. Moody, Esquire, appeared on behalf of PIOGA. A litigation schedule was established, and the intervention of PIOGA was granted without opposition.

On April 29, 2021, a telephonic evidentiary hearing was held. The above-named counsel once again attended the hearing. At this hearing, the parties submitted verified testimony and related exhibits that were admitted into the record:

By the Joint Complainants:

Joint Complainants' Statement No. 1: Direct Testimony and Exhibits of Frank Lacey

Joint Complainants' Statement No. 1-SR: Surrebuttal Testimony 7 of Frank Lacey

Joint Complainants' Exhibit FPL-1: Resume of Frank Lacey

Joint Complainants' Exhibit FPL-2: Detailed List of Testimony, Speeches and Papers Relative to Mr. Lacey's Qualifications

Joint Complainants' Statement No. 2: Direct Testimony of Timothy D. Wright

Joint Complainants' Statement No. 2-SR: Surrebuttal Testimony of Timothy D. Wright

By PIOGA:

PIOGA Statement No. 1: Testimony of Dan Weaver

PIOGA Statement No. 1-SR: Testimony of Dan Weaver

By NFGD:

NFGD Statement No. 1-R: Rebuttal Testimony of Chris Cej (corrected)

NFGD CC-1: PA PUC Press Release of 3/10/2021

NFGD CC-2: Revised Data Security Agreement

NFGD CC-3: NFGD Teleconference Agenda of 10/09/2018, with Related Presentations

NFGD CC-4: NFGD Teleconference Agenda 03/21/2019, with Related Presentations

NFGD CC-5: NFGD Teleconference, 10/10/2019, with Related Presentations

NFGD CC-6: Pennsylvania Data Security Agreement and Self-Attestation Email of 3/17/2020 to Pennsylvania Marketers from NFGD

NFGD CC-7: Current NFGD Data Security Agreement and Self Attestation of Information Security Protocols and Third Party Representative Agreement

NFGD CC-8: NFGD Teleconference, 03/19/2020, with Related Presentations

NFGD CC-9: A Series of Tariff Request Emails

NFGD CC-10: Joint Complainants' Responses to NFGD Interrogatories and Production of Documents, Set III

NFGD CC-11: Joint Complainants' Responses to NFGD Interrogatories and Production of Documents, Set III

NFGD CC-12: PIOGA's Responses to NFGD Interrogatories and Requests for Production of Documents, Set II

NFGD Statement No. 2-R: Rebuttal Testimony of Jeff Grice

NFGD Exhibit JG-1: Interrogatories and Requests, PIOGA's Responses to NFGD Interrogatories and Requests for Production of Documents, Set I

NFGD Exhibit JG-2: Joint Complainants' Responses to NFGD Interrogatories and Production of Documents, Set II

NFGD Exhibit JG-3: Joint Complainants' Responses to NFGD Interrogatories and Production of Documents, Set II

NFGD Exhibit JG-4: PIOGA's Responses to NFGD Interrogatories and Requests for Production of Documents, Set I

NFGD Exhibit JG-5 (CONFIDENTIAL)

NFGD Exhibit JG-6: Joint Complainants' Responses to NFGD Interrogatories and Production of Documents, Set IV, No. 5

NFGD Exhibit JG 7 (CONFIDENTIAL)

Limited cross-examination of the sponsoring witnesses was conducted after which the following briefing schedule was established: Main Briefs would be due on June 16, 2021; and Reply Briefs would be due on July 9, 2021. The briefs were duly filed, and the record closed on July 10, 2021.

This matter is ready for adjudication.

For the reasons stated herein, I find that the Joint Complainants have not met their burden of proving, by a preponderance of the evidence, that NFGD has violated a provision of the Public Utility Code (Code) or a regulation of the Commission, and thus their Complaint must be dismissed.

FINDINGS OF FACT

1. NFGD is a Commission jurisdictional natural gas distribution company that owns property in Pennsylvania for the transmission and distribution of natural gas and provides natural gas distribution service.

2. EnergyMark LLC, Vineyard Oil & Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC are Commission jurisdictional natural gas suppliers (NGSs) and are the Complainants in this case.

3. PIOGA is a nonprofit trade association representing Pennsylvania's independent crude oil and natural gas producers, marketers, service companies and related businesses and is an Intervenor in this case.

4. NFGD provides service to approximately 200,000 customers in various communities in the counties of Armstrong, Butler, Cameron, Clarion, Clearfield, Crawford, Elk, Erie, Forest, Jefferson, McKean, Mercer, Venango and Warren, Pennsylvania.

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

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

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

8. NFGD is also covered by a cybersecurity insurance policy.

9. NFGD's IT department is aware of attempted cyber-attacks. NFGD St. 1-R at 6-7.

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

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

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

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

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

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

16. Notice of the Supplement No. 207 and the associated DSA filing was provided to NGSs via the Company’s website and a copy of the filing was e-mailed to all NGSs operating in the Company’s service territory, including the Complainants. NFGD St. 1-R at 24.

17. No complaints or interventions were filed, and Supplement No. 207 was approved by the Commission on August 20, 2019. NFGD St. 1-R at 24.

18. The Commission’s order approving Supplement No. 207 and the associated DSA and SA does not contain a condition or requirement that NFGD modify or revise the DSA in accordance with the outcome of the NYPSC proceeding. NFGD St. 1-R at 20.

19. The currently-effective Commission approved DSA applicable to Pennsylvania entities contains a provision that requires Pennsylvania NGSs operating on

NFGD’s system to, “carry and maintain Cybersecurirty insurance in an amount of no less than \$5,000,000 per incident” and also requires NFGD to “maintain at least \$5,000,000 of Cybersecurity insurance.” NFGD Tariff Supplement 207, Rule 33.

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

21. The collaborative to discuss and evaluate possible revisions to the Pennsylvania DSA and SA was initiated on September 22, 2020. NFGD St. 1-R at 12.

22. NRG Energy, Inc., EnergyMark LLC, Vineyard Oil and Gas Company³, Direct Energy Business Marketing LLC⁴, MidAmerican Natural Resources LLC and Total Energy Resources, LLC, participated and provided the Company with feedback regarding the DSA. NFGD St. 1-R at 12.

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

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

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

³ PIOGA member.

⁴ PIOGA member.

26. As the NGSs will not only interface with NFGD's systems but will also be in possession of NFGD's customers' Personal Identifiable Information (PII), it is reasonable to ensure that NGSs that interface with NFGD have financial resources available to help protect the customer in the event of a cyber incident. NFGD St. 2-R at 5.

27. Cyber insurance is now part of the normal cost of doing business and is critically important when customer PII is involved. NFGD St. 2-R at 10.

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

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

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

DISCUSSION

Pursuant to Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), the burden of proof is on the proponent of an order. In this proceeding, the Joint Complainants and PIOGA are the proponents of an order that would void NFGD Tariff Supplement 207, Paragraph 33, *ab initio*, and therefore they bear the burden of proof. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). The Joint Complainants and PIOGA must establish their case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). To meet its burden of proof, the

Joint Complainants and PIOGA must present evidence more convincing, by even the smallest amount, than that presented by NFGD. *Se-Ling Hosiery v. Margulies, supra*.

If a party has satisfied its burden of proof, it must then be determined whether the opposing party has submitted evidence of “co-equal” value or weight to refute the first party’s evidence. *Morrissey v. Pa., Dept. of Highways*, 225 A. 2d 895 (Pa. 1987). Furthermore, any order of this Commission granting an application, in whole or in part, must be based on substantial evidence. The term “substantial evidence” has been defined by the Pennsylvania Courts as such relevant evidence as 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. *Murphy v. Pa. Dept. of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961).

A. Joint Complainant’s Position

In their Main Brief, the Joint Complainants argue that Tariff Supplement 207, Rule 33 and the DSA constitutes an unreasonable, unjust, and ultimately anti-competitive, “pay to play” market-barrier implemented by NFGD. According to the Joint Complainants, the provision requires competitive natural gas suppliers operating on NFGD’s distribution network to maintain arbitrary and ineffective cybersecurity insurance coverage to the benefit of NFGD while providing no incremental cybersecurity benefit to any customer or business. Joint Complainants contend that this case is about a utility seeking to gain a competitive advantage by implementing anti-competitive and far-reaching requirements for supplier access to its systems - an advantage that if unchecked will irreparably damage the competitive market in the estimation of the NGSs. Joint Complainant’s Main Brief at 1.

The Joint Complainants contend that because NFGD allegedly misrepresented the basis of its data security tariff not only to the Joint Complainants but to the Commission that the tariff provision should be held to be void, *ab initio*.

Finally, the Joint Complainants contend that the tariff provision grants NFGD illegal authority to supervise and regulate natural gas suppliers in abrogation of the Commission's exclusive authority to do so.

The Joint Complainants requested the following relief: (1) that the Joint Complainant's Complaint be sustained; (2) that NFGD's Tariff Supplement No. 207 as it pertains to cyber-security, be found to be unjust and unreasonable and be suspended pending a statewide proceeding addressing cybersecurity protections; (3) that NFGD be found to have violated Sections 1501 and 1301 of the Code; (4) that NFGD be ordered to cease and desist from efforts to impose cybersecurity requirements upon suppliers pending the outcome of the proceeding requested; (5) that NFGD be required to implement a "Pennsylvania only" credential for its data systems; and, (6) that the Commission impose such other relief that it determines to be just, reasonable and necessary under the circumstances. Joint Complaint at 14.

B. PIOGA's Position

PIOGA adopts and supports the positions and arguments of the Joint Complainants that the tariff provisions contained in NFGD's Tariff Supplement No. 207, Rule 33, are unjust, unreasonable, unlawful, unduly burdensome, and discriminatory under the Commission's governing statutes and regulations, and asks that the Commission overturn the cybersecurity insurance and audit provisions in NFGD's Supplement No. 207.

Additionally, PIOGA contends that what it characterizes as the arbitrary \$5,000,000 per incident cybersecurity insurance requirement is unjust, unlawful, unreasonable and unduly burdensome. PIOGA Main Brief at 2. PIOGA contends that PIOGA member NGSs have acquired cybersecurity insurance and adopted other measures that each member independently determined, based on each member's particular circumstances, are narrowly tailored to fit their needs and are cost-effective, and an NGS's decision to acquire cybersecurity insurance should not be mandated by a utility that is likely unaware of the circumstances and needs of each NGS serving customers on the utility's system. PIOGA Brief at 2-3.

PIOGA maintains that the tariff provisions are prohibitively expensive and serve as a barrier to market entry. PIOGA argues that members independently acquiring cybersecurity insurance does not indicate that they recognize the value of \$5 million per incident cybersecurity insurance, the value in making the acquisition of \$5 million per incident cybersecurity insurance mandatory, or that they see this tariff requirement as anything but a market barrier and attempt to exercise authority NFGD does not have. PIOGA Main Brief at 4.

C. NFGD's Position

NFGD argues that its Data Security Agreement (DSA) and Self-Attestation (SA) in Tariff Supplement No. 207, Rule 33, which include cybersecurity insurance requirements applicable to NGSs in Pennsylvania, are just and reasonable and are in conformity with the Code. NFGD avers that it did not mislead NGSs when it obtained approval of the DSA and SA tariff provisions. NFGD asserts that the DSA and SA are necessary to protect confidential customer information, to protect NFGD's information technology systems from cyber-attack, and to ensure that if an NGS's IT system is breached and confidential customer information is disclosed, there will be funds available to reimburse customers for disclosure of their sensitive information. NFGD Main Brief at 1.

NFGD states that it collects and maintains certain customer sensitive information that is deemed confidential. This confidential information is stored in the Company's computer systems. NGSs that are licensed to provide service to customers in NFGD's service territory have direct access to this information through the eligible customer list. NGSs are also able to access NFGD's IT system via the Transportation Scheduling System, marketer specific website data files under the Security Transactions tab, and other indirect methods. NFGD has strict policies and procedures for acquiring, accessing, storing and disposing of confidential information on its system. NFGD Main Brief at 1.

NFGD states that it is covered by a cybersecurity insurance policy in part, in case of a breach of its IT system and subsequent disclosure of confidential customer information. NFGD contends that cyber-attacks, including attempts to breach utility IT systems, have become

more prevalent over the past several years. As a result, NFGD has taken additional steps to protect confidential customer information and the Company's IT systems. In Pennsylvania, this included seeking and obtaining Commission approval of Supplement No. 207 and the associated DSA and SA. NFGD Main Brief at 1-2.

NFGD maintains that the DSA and SA requirements under the Company's tariff, including the cybersecurity insurance requirement, are just and reasonable and do not violate the Code. NFGD requests that the Complaint be denied. Main Brief at 2.

D. Analysis

At issue, here, is the lawfulness and reasonableness of NFGD's Tariff Supplement 207, specifically the DSA and SA with the requirement that NGSs carry \$5,000,000 cybersecurity insurance coverage. The requirement has already been approved by the Commission and is part of NFGD's lawfully filed tariff. "Tariff provisions approved by the Commission are prima facie reasonable." *Kossmann v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979).

In essence, the Joint Complainants allege that NFGD, by amending its tariff through misleading the Joint Complainants, failed to provide reasonable service as required by the Code at Section 1501. Section 1501 states, in pertinent part:

Character of service and facilities.

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders

of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service.

66 Pa.C.S. § 1501.

The statute at 66 Pa.C.S. § 1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa. C.S. § 1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Tel. Co.*, 372 A.2d 1203 (Pa. Super. 1977) *aff'd* 420 A.2d 371 (Pa. 1977); *Behrend v. Bell Tel. Co.*, 243 A.2d 346 (Pa. 1968). The Public Utility Code at 66 Pa.C.S. § 1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Laboratory Servs., Inc. v. Metropolitan Edison Co.*, Docket No. C-2006608 (Order entered December 21, 2007); *Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-00015494 (Order entered June 14, 2002); *Re: Metropolitan Edison Co.*, 80 Pa. PUC 662 (1993).

The present controversy had its genesis on June 14, 2019, when NFGD filed a Supplement to its tariff which Supplement contained, among other items, a provision for a Data Security Agreement⁵:

33. DATA SECURITY AGREEMENT As a condition of access to customer information via publicly available Company business systems, including but not limited to web portals, the Company will require parties requesting such access to sign a Data Security Agreement and require that parties carry and maintain Cybersecurity insurance in an amount no less than \$5,000,000 per incident. A standard form Data Security Agreement will be provided in the Company's Operational Procedures Manual.

⁵ To clarify, the NYPSC matter had its beginning as the result of a cyber incident described by NFGD: “[A]s explained in Distribution’s New Matter, a cyber-attack occurred on a prominent electronic data interchange (“EDI”) Service Provider that acts as an external vendor for Distribution in March 2018. Although this event did not result in a successful cyber-attack of Distribution’s Information Systems, it precipitated Distribution taking several actions to respond to the attack and also prevent future attacks. Distribution: (a) discussed the event internally, with New York DPS Staff and with other public utilities; (b) notified billing contacts by e-mail and posting on the Company’s website impacted by the event; (c) provided notice when the EDI service was restored; and (d) began coordinating with other utilities regarding the development of a DSA and cyber-security insurance requirements.” Surrebuttal Testimony of Christopher Cej at 7.

Such requirement shall not apply to customers with usage less than 5,000 mcf per year that seek to access their own customer account information. Further, the Company may accept Cybersecurity insurance provided under another agreement, provided that such agreement is substantially identical in form and effect as the standard form Data Security Agreement.

National Fuel Gas Distribution Corporation Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9. (Effective August 30, 2019).⁶

This tariff filing was reviewed and subsequently approved by the Commission. No party had filed a complaint with respect to the tariff filing.

1. Identification of the Issues

Joint Complainants make several arguments with respect to the lawfulness and reasonableness of the Supplement. The essential argument that pervades the Complaint and which is, in fact, the foundation of the Complaint, is the allegation that NFGD misled the Joint Complainants in such a way that the Joint Complainants rested on their right to initiate a Complaint proceeding when NFGD filed Supplement 207. Joint Complainants maintain that they will now be harmed based on that alleged misconduct and the Commission's approval of Supplement 207, specifically the cybersecurity provision of Rule 33 and the requirement of \$5,000,000 in insurance coverage by an NGS. Because this allegation is inextricably interwoven with the substance of the Complaint as a whole, in order to successfully prosecute the present Complaint, it would be necessary to produce evidence that this misconduct occurred. As will be explained, below, I agree with NFGD that the Joint Complainants have failed to meet their burden of proof in this regard. Thus, the only remaining issue is the lawfulness and reasonableness of the DSA portion of Supplement 207, itself, as approved by the Commission. Again, for the reasons stated below, I find that the Joint Complainants and PIOGA have not met their burden of showing that this existing tariff provision is unlawful or unreasonable, or that circumstances have changed so dramatically as to warrant cancellation of the tariff provision.

⁶ See *National Fuel Gas Distribution Corporation, Supplement No. 207 Tariff Gas Pa. P.U.C. No. 9*, Docket No. R-2019-3010744 (Order entered Aug. 29, 2019).

2. The Allegation of Misconduct

Significantly, NFGD had previously notified potentially affected NGSs, including the Joint Complainants, that this filing would be made, and NFGD served the filing on those entities thereafter:

The Company provided notice to NGSs of its intention to file the instant tariff changes to NGSs at semi-annual “Marketer Meetings” held by conference calls held on October 9, 2018 and March 21, 2019. The Company will post the instant filing on its website and notice will be sent via email to NGSs operating in its service territory. Additionally, the Company will mail notice to DMT and DMLMT transportation customers.

NFGD Cover Letter of June 14, 2019, accompanying Supplement No. 207.

NFGD summarized the chronology of the filing as follows:

On June 14, 2019, NFGD filed Supplement No. 207 and the associated DSA and SA with the Commission at Docket No. R-2019-3010744. NFGD St. 1-R at 24. In its Statement in Support, Distribution stated that the proposed Pennsylvania requirements were patterned after similar requirements in New York, where both NFGD and the NGCs also operate. NFGD St. 1-R at 24. Both the Statement in Support and the Tariff filed in Pennsylvania clearly identified the cybersecurity insurance requirement. NFGD St. 1-R at 24. Notice of the June 14, 2019, filing was provided to NGSs via the Company’s website and a copy of the filing was e-mailed to all NGSs operating in the Company’s service territory, including the Complainants. NFGD St. 1-R at 24. No complaints or interventions were filed, and Supplement No. 207 was approved on August 20, 2019. NFGD St. 1-R at 24; see also National Fuel Gas Distribution Corporation, Supplement No. 207 Tariff Gas, Pa. P.U.C. No. 9, Docket No. R-2019-3010744 (Order entered Aug. 29, 2019).

Answer of NFGD at 19-20, ¶¶18-21.

The Joint Complainants had notice and an opportunity to be heard before the Commission acted on the proposed Supplement and the cybersecurity section/DSA therein along

with the insurance requirement. No complaints were filed to the Supplement, which became effective on August 30, 2019. Tariff provisions approved by the Commission are *prima facie* reasonable. See *Kossmann et seq.* Further, a utility tariff has the force and effect of law in Pennsylvania, and is legally binding upon the utility, its customers and the public. 66 Pa.C.S. § 1303; *DiSanto v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth 1981).

The Joint Complainants assert that they effectively relied not only on representations by NGDC in connection with Supplement No. 207 but also on a proceeding before the NYPSC:

On October 17, 2019, 49 days after the Commission approved Supplement No. 207, the NYPSC rejected ANY cybersecurity insurance requirement in its approved DSA, finding such provisions to be an ineffective means to mitigate cybersecurity risks that only addresses damages after an incident occurs and that cybersecurity insurance serves as nothing more than a market barrier to entry to suppliers.

Joint Complainants' Main Brief at 2.

The Joint Complainants reliance on the NYPSC to act in such a way as to require the *post-facto* modification of a tariff already filed with and approved by the Pennsylvania Public Utility Commission was and is misplaced. That was a judgment made by the Joint Complainants that, while it may affect the Joint Complainants and members of PIOGA, is not proof that NGDC engaged in an effort to deny those parties notice and an opportunity to be heard in the filing of Supplement 207 with the Pennsylvania Commission. Further, the action of the NYPSC is not binding on the Commission, nor may it serve as a modification to a lawfully filed tariff in Pennsylvania unless accepted by the Commission. Given the Commission's approval of Tariff Supplement No. 207 and the DSA, it would seem that the Commission does not agree with a conclusion that cybersecurity insurance is, "nothing more than a market barrier to entry." Joint Complainants' Reply Brief at 13.

This leads us to the Joint Complainants' contention that circumstances have so changed as to require voiding Tariff Supplement No. 207, Paragraph 33. That contention is based on the following argument presented by the Joint Complainants:

Not once in its Supplement No. 207 did NFGD represent that the DSA was pending approval in New York, nor did NFGD later inform the Commission that the DSA that was the pattern for the Pennsylvania filing, and which was considered by the Commission as a basis for its approval of Supplement No. 207, was rejected by the NYPSC. The reason NFGD did nothing is simple: to notify the Commission that circumstances in New York had changed would be to admit that NFGD had misrepresented the status in the first instance, and so NFGD choose to remain silent.

Joint Complainants' Main Brief at 20-21.

Setting aside for the moment the assumption that a proceeding before the NYPSC would induce the Pennsylvania Public Utility Commission to void or accept the amendment of a lawfully filed tariff here in Pennsylvania, the Joint Complainants failed to explain how, or to show why, NFGD had a duty to inform the Commission of the NYPSC proceeding and its outcome.⁷ The outcome of that proceeding, which is in no way binding on the Commission, was not some sort of mandatorily reportable event by NGDC to the Commission. How the outcome of the NYPSC proceeding constitutes "changed circumstances," is nothing more than an admission by the Joint Complainants that they did not anticipate that unwelcome outcome. That hardly qualifies as "changed circumstances," that would support revising a Commission approved tariff provision in Pennsylvania where no material facts have changed since the filing of that tariff provision.

A complainant seeking to avoid the effect of existing tariff provisions carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to

⁷ Those NYPSC proceedings were: *Proceeding on Motion of the Commission Regarding Cyber Security Protocols and Protections in the Energy Market Place*, Case 18-M-0376 (Order of June 8, 2018), and *Order Establishing Minimum Cybersecurity and Privacy Protections and Making Other Findings*, Case 18-M-0376 (Order of October 17, 2019).

render the application of the tariff provisions unreasonable. *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981). The Joint Complainants have not met that burden.

I find that the Joint Complainants have not presented substantial evidence that they were intentionally misled by NGDC so as to persuade the Joint Complainants not to take part in the Pennsylvania tariff proceeding that led to the Commission's approval of Supplement No. 207.⁸ Regardless of whether the Joint Complainants relied on representations from NFGD about what another state Commission might do and/or what NFGD might do in conformity, the opportunity for filing a complaint before the Pennsylvania Commission with respect to Supplement 207 in 2019 still existed, but the Joint Complainants and PIOGA did not avail themselves of that opportunity.

If the Commission is going to entertain complaints based on what a utility might have done with respect to a tariff filing, then the certainty of tariffs will become open to question. This is why I agree with all of the parties in their statements which unanimously recognize that asking the Commission to void an already filed and approved tariff provision is a very heavy burden indeed. I agree with NGDC that it is a burden that has not been met in this case.

3. Allegation of the Unlawfulness and Unreasonableness of the Cybersecurity Requirement of Tariff Supplement 207

The NGSs have also alleged in their Complaint that the insurance requirement of Supplement 207 is unlawful and unreasonable. This allegation could have been brought as a stand-alone Complaint in its own right.⁹ In sum, the Joint Complainants argue that the tariff

⁸ Joint Complainants' witness Lacey refers to the alleged representation of NFGD that it would amend Supplement No. 207 to conform with the actions of the NYPSC as, an "implied" position. Lacey Rebuttal Testimony at 8.

⁹ The prosecution of the present Complaint in this regard is arguably the case that the complaining parties might have put on had they filed complaints against, or intervened in, the tariff filing that became approved Supplement No. 207 and the related insurance requirement. Given that the Complaint is now being heard, this, and the suspension of action by NFGD on the \$5,000,000 DSA requirement during the course of this litigation renders what is, in essence, an allegation of bad-faith dealing by NFGD even more specious.

provision constitutes an unreasonable, unjust, and, ultimately, an anti-competitive, “pay to play” market-barrier implemented by NFGD, requiring competitive natural gas suppliers operating on its distribution network to maintain arbitrary and ineffective cybersecurity insurance coverage to the benefit of NFGD while providing no incremental cybersecurity benefit to any customer or business.

Considering the lawfulness and reasonableness of the cybersecurity DSA in total, I agree with NFGD’s argument that neither the Joint Complainants nor PIOGA have presented any studies, analyses, valuations, comparative cost estimates, or any other type of verifiable, substantive evidence in the record in this proceeding that supports their claims regarding the costs of obtaining cybersecurity insurance or the impacts of those costs on their members’ businesses. NGDC Reply Brief at 8. This is a critical point. The Joint Complainants presented no evidence of actual costs for complying with the DSA cybersecurity insurance requirements and did not evaluate the effects of such costs on their businesses. Further, I agree with NGDC that the evidence presented by the NGSs in this respect was the opinion testimony of their witness, Mr. Lacey.¹⁰ As NGDC states in its Reply Brief:

Mr. Lacey, however, lacks experience beyond that of an average lay person regarding the acquisition and management of insurance policies (including cybersecurity insurance) for a company. There is no evidence regarding the number of insurance policies Mr. Lacey has procured on behalf of a business. More specifically, Mr. Lacey admitted that he has never acquired cybersecurity insurance for any company. Tr. 58 (“Q. [ATTORNEY KANAGY] Sure. Okay, so have you ever acquired cyber security insurance for any company? A. [MR. LACEY] I have not.”). Rather, when it comes to the acquisition and management of insurance policies, it appears that Mr. Lacey attempts to rely upon his experience as a lay person. Tr. 58 (“And then, as an owner and homeowner, owner of my own business, I deal with business liability insurance and obviously

¹⁰ As PIOGA and the Joint Complainants have failed to meet their burden of proof, I will not repeat the rebuttal evidence of NGDC beyond the points that argue that fact. I do, however, agree with NGDC that its witness, “Mr. Grice is the only witness that testified in this proceeding that is actually tasked with obtaining cybersecurity insurance on behalf of any party. He is the only witness that provided firsthand knowledge of the process to acquire corporate insurance policies, including cybersecurity insurance policies. Similarly, he is the only witness that provided firsthand knowledge of the underwriting process associated with obtaining corporate insurance policies, including cybersecurity insurance policies.” NGD Reply Brief at 13.

the home/auto stuff that, I think, everyone deals with.”). Moreover, the Joint Complainants simply ignore the fact that Distribution witness Mr. Grice credibly testified that insurance also (a) “ensures financial obligations can be met in the event of an accident or other unforeseen incident to the insured” and (b) “mitigates against the risk of a successful cyber-attack due to a review of policies and procedures by the insurance underwriter.” NFGD St. 2-R at 3. Mr. Lacey’s testimony regarding the purpose of obtaining insurance has been fully rebutted.

NFGD Reply Brief at 9.

PIOGA’s and the Joint Complainants’ contention that PIOGA member NGSs have acquired cybersecurity insurance and adopted other measures that each member independently tailored to fit their individual needs, and which are cost-effective, does not invalidate NFGD’s assessment of its own needs and the steps NFGD must take to address its own responsibilities. This is the “first party/third party” coverage issue addressed by NFGD witness Grice:

QUESTION: Joint Complainants’ witness Mr. Lacey testifies regarding the differences between “First-Party” and “Third-Party” coverage. Joint Compl. St. 1 at 8-9. Do you agree with his description?

ANSWER: While the technical definitions of these terms provided by Mr. Lacey are correct, his attempt to differentiate the two misses the point. If Distribution and/or its customers were harmed due to a cyber incident targeting an NGS, Distribution would be able to tender its damage claim to the NGS and its insurers, pursuant to the indemnification clause included in the DSA. The NGS would then be able to seek coverage for these expenses owed to Distribution and/or its customers under the terms of its policy. If the NGS does not possess cyber insurance, however, there is a greater risk that customers and/or Distribution would not be able to recover the costs of the damage suffered as a result of a cyber incident targeting an NGS.

Rebuttal Testimony of Grice at 8.

I find Mr. Grice’s testimony credible and persuasive in every particular.

The Joint Complainants also allege that the cybersecurity insurance requirement contained in NFGD's Tariff Supplement No. 207 is an attempt to impose additional financial security requirements on suppliers operating on NFGD's system which are not authorized by 66 Pa.C.S. § 2208(c)(1)(i) and the Commission's regulations at 52 Pa. Code § 62.111. Joint Complainants' Main Brief at 4.

Section 2208(c)(1)(i) of the Code states:

In order to ensure the safety and reliability of the natural gas supply service in this Commonwealth, no natural gas supplier license shall be issued or remain in force unless the applicant or holder, as the case may be, complies with all of the following:

(i) Furnishes a bond or other security in a form and amount to ensure the financial responsibility of the natural gas supplier. The criteria each natural gas distribution company shall use to determine the amount and form of such bond or other security shall be set forth in the natural gas distribution company's restructuring filing. In approving the criteria, commission considerations shall include, but not be limited to, the financial impact on the natural gas distribution company or an alternative supplier of last resort of a default or subsequent bankruptcy of a natural gas supplier. The commission shall periodically review the criteria upon petition by any party. The amount and form of the bond or other security may be mutually agreed to between the natural gas distribution company or the alternate supplier of last resort and the natural gas supplier or, failing that, shall be determined by criteria approved by the commission.

66 Pa.C.S. § 2208(c)(1)(i)

This section of the Code is a bonding requirement for natural gas suppliers. It does not preclude, explicitly or by implication, further security requirements that may be imposed on a natural gas supplier. In this regard, I agree with NGDC, which stated the following in its Reply Brief:

Section 2208(c)(1)(i) of the Public Utility Code makes clear that a bond or other financial security is meant to account for "the financial impact on the natural gas distribution company or an

alternative supplier or [sic] last resort of a default of subsequent bankruptcy of a natural gas supplier.” NFGD MB at 42-43 (quoting 66 Pa.C.S. § 2208(c)(1)(i) and associated case law). On the other hand, the purpose of the cybersecurity insurance requirement is two-fold as noted above.^[11] The purpose of cybersecurity insurance is different than the purpose of the financial security provisions under the Public Utility Code. Once it is recognized that the cybersecurity insurance requirement fulfills a separate purpose than the financial security requirements permitted under 66 Pa.C.S. § 2208 and 52 Pa. Code § 62.111, the remainder of the Joint Complainants’ arguments are exposed as unavailing. Therefore, this argument should be rejected.

NFGD Reply Brief at 18.

The Joint Complainants and PIOGA have not presented evidence or arguments that prove that Tariff Supplement No. 207, Rule 33, is unlawful.

4. Allegation that Supplement No. 207 is a Barrier to Market Entry

Joint Complainants also contend that this case is about a utility seeking to gain a competitive advantage by implementing anti-competitive and far-reaching requirements for supplier access to its systems — an advantage that if unchecked will irreparably damage the competitive market. Once again, neither PIOGA nor the Joint Complainants have presented evidence that persuades me that the requirements of Supplement 207 were formulated as a barrier to market entry that is anti-competitive and that will irreparably damage the competitive market, nor have PIOGA or the Joint Complainants demonstrated that this is even an unintended and unacceptable consequence of Supplement 207.

Again, it needs to be pointed out that much of the Complaint and the arguments propounded by the Joint Complainants contain a strong overtone of intentionality to mislead on the part of NGDC in filing Supplement 207. Nowhere in the record do I find credible evidence

¹¹ “First, it enhances cybersecurity protections by incentivizing the insured to adopt additional policies, procedures and protections that it might not otherwise put in place, in order to obtain a better price. See NFGD MB at 19-22. Second, it offers financial protections to Distribution’s customers in the event of an attack. See NFGD MB at 22.” NFGD Reply Brief at 17-18.

that NGDC filed Supplement 207 with the *intention* of creating a barrier to market entry. If such a purpose was possible, then it is unclear why PIOGA and the Joint Complainants did not file a complaint when Supplement 207 was originally filed. It is unreasonable to accept that given such a potential outcome, PIOGA and the Joint Complainants would choose to await the outcome of a proceeding in another state on representations by any third party (the outcome of which proceeding the Commission might not even accept), before filing a complaint with the PUC.

As posed by the Joint Complainants, the contention that the cost of compliance with the financial requirements of the DSA poses an obstacle to market entry might be made against any provision that increases the cost to a potential market participant seeking to enter the market. I agree with NFGD that neither the Joint Complainants nor PIOGA presented evidence that substantiates the actual costs that would be incurred to obtain cybersecurity insurance. “With no evidence of actual costs or a comparison or analysis of actual costs to actual revenues in the record, there is no basis upon which the Commission could determine cybersecurity insurance is [unduly] costly for the Joint Complainants to obtain.” NFGD Reply Brief at 22. No persuasive evidence was presented to establish that the insurance requirement is a barrier to market entry.

5. Allegation that Tariff Supplement No. 207 Abrogates the Authority of the Commission

Joint Complainants also contend that the tariff provision grants NFGD illegal authority to supervise and regulate natural gas suppliers in abrogation of the Commission’s exclusive authority to do so. The Joint Complainants assert:

[T]he DSA allows NFGD an unprecedented power over its competitors – the ability for NFGD to audit and regulate a competitor’s information technology system under the guise of cybersecurity assurances which allows NFGD unfettered access and regulation over competitors information technology systems, their internal business practices, and ultimately, their proprietary business information. Cybersecurity is an important aspect of utility infrastructure that the Commission must consider, but the overreaching, unreasonable, and unjust

cybersecurity insurance and audit provisions in NFGD's Supplement No. 207 must be overturned.

Joint Complainants' Main Brief at 3

Joint Complainants and PIOGA did not present persuasive evidence in this regard. Tariff Supplement 207 is not an abrogation of the Commission's authority. Again, I agree with NFGD, which stated the following in its Reply Brief:

Finally, the Joint Complainants' claims that the audit provision contained in the DSA usurps the Commission's authority to regulate NGSs are flawed. The Joint Complainants rely on inapplicable law, and simply ignore the fact that the Public Utility Code authorizes Distribution to impose reasonable rules and regulations governing the conditions under which it shall be required to render service. Distribution was well within its rights to seek and obtain Commission approval of the data security requirements contained in Supplement No. 207, the DSA and the SA, which it has done. Relatedly, the revisions to the audit provision contained in NFGD Exhibit CC-2 resolve the Joint Complainants' assertions that the provision is somehow vague and, in fact, more closely align the DSA with the agreement in place in New York that the Joint Complainants have favored throughout this proceeding.

NGDC Reply Brief at 5.

Further discussion with respect to the revised DSA will be set forth below.

6. The Assertion that Cybersecurity Insurance is Not Effective

Joint Complainants assert that insurance policies do not in any way prevent damages from occurring in the first place. Joint Complainants' Statement No. 1 at 5. The Joint Complainants also assert that, "[C]ybersecurity insurance does not enhance cybersecurity protections," or otherwise provide, "incremental security protections to NFGD." Joint Complainants' Statement No. 1 at 8. PIOGA similarly states that, "cybersecurity insurance does not prevent a cyber incident." PIOGA Statement No. 1 at 4.

First, the basis of the Complaint before us is that NFGD misled the Joint Complainants and so was able to file an unlawful and unreasonable tariff provision without opposition. That issue has already been addressed. To the extent that this proceeding takes up arguments that could have been made in 2019 but were not, the Joint Complainants' and PIOGA's claims that cybersecurity insurance is not effective are unsupported save by opinion evidence. There was no study or detailed third-party analysis on this issue presented to establish this contention as fact. Mere opinion, without more, is insufficient to meet the complainant's burden. *Richard Kirby v. PPL Elec. Utils. Corp.*, Docket No. C-20066297 (Final Order entered November 16, 2006) (citing *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A. 2d 12 (1987)). Bald assertions, personal opinions or perceptions do not constitute evidence. *Orlando Rivera v. Philadelphia Gas Works*, Docket No. C-2010-2164222 (Order entered January 12, 2012); citing, *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

The burden, here, is not on NFGD to prove that the DSA and the \$5,000,000 cyber insurance coverage amount is lawful and reasonable, although NFGD witness Grice does provide a succinct explanation of why such insurance is necessary:

[I]f Distribution and/or its customers were harmed due to a cyber incident targeting an NGS, Distribution would be able to tender its damage claim to the NGS and its insurers, pursuant to the indemnification clause contained in the DSA. The NGS would then be able to seek coverage for these expenses owed Distribution and/or its customers under the terms of its policy. In the scenario where Distribution's customers' PII is exfiltrated, an applicable NGSs' cybersecurity policy would likely come into play to address costs associated with items such as a forensic investigation to determine the scope of the data affected by the exfiltration, notification of affected customers, credit monitoring to watch for any fraudulent activity stemming from the incident, and payment for other losses stemming from the incident. Without this policy in place, Distribution and ultimately its customers could be subject to these expenses despite the NGS being the target of the attack.

Rebuttal Testimony of Grice at 9.

When the Commission approved Tariff Supplement 207, it did not do so in a vacuum as the filing was reviewed by Commission’s technical staff. We start from the standpoint that this approved tariff provision is lawful and reasonable. The Joint Complainants and PIOGA have not proven that it is not.

No party disagrees with the fact that cybersecurity attacks on infrastructure are extremely serious and are increasing in frequency. NFGDs’ witness, Mr. Grice credibly testified that insurance: “. . .ensures financial obligations can be met in the event of an accident or other unforeseen incident to the insured” and, “. . .mitigates against the risk of a successful cyber-attack due to a review of policies and procedures by the insurance underwriter.” NFGD Statement No. 2-R at 3. It is the latter review, which it is certainly in the interest of a cybersecurity insurance underwriter to perform, that promotes deterrence.

7. Joint Complainants’ Request that the Cybersecurity Requirement of Tariff Supplement No. 207 be Voided

The Joint Complainants contend that because NFGD misrepresented the basis of its data security tariff not only to the Joint Complainants but to the Commission that the tariff provision should be held to be void, *ab initio*. This contention, and the request for voiding the DSA provision of Supplement 207 depends on proving that NGDC misled the Commission or that the tariff provision is otherwise unlawful and unreasonable. Neither has been proven. The Joint Complainants have not established that such a misrepresentation occurred. NFGD had no way of knowing what the NYPSC would decide in its proceeding. Neither did the Joint Complainants, as they concede. Joint Complainants’ Reply Brief at 15. This is all the more reason why the Joint Complainants should have taken action when Supplement 207 was filed with the Commission. The request that the Commission should now hold a lawfully filed tariff void *ab initio* because of an affirmative strategic decision that the Joint Complainants made but which seems to have been incorrect is without merit and is nothing more than a request to roll the calendar back on a matter that PIOGA and the Joint Complainants had every opportunity to litigate in 2019. The Joint Complainants’ and PIOGA’s legal argument that Tariff Supplement

No. 207, Rule 33 is not authorized by 66 Pa.C.S. § 2208(c)(1)(i) and the Commission's regulations at 52 Pa. Code § 62.111 has already been addressed, above, and rejected.

8. NFGD's Request that Its Revised DSA be Approved in this Proceeding

In both its Main and Reply Briefs, NGDC asks that the Commission approve the revised version of the Pennsylvania DSA and SA set forth in NFGD Exhibit CC-2, “. . .as a part of its resolution of this proceeding.” NGDC Main Brief at 49; NGDC Reply Brief at 31-32. First, the fact that NGDC is presenting a revised DSA and related SA does not establish that the documents the Commission originally approved are not valid. If the revised documents (NFGD Exhibit CC-2) were offered to resolve an assertion that the provision is somehow vague, which is not at issue here, that may be proper, but this is a Complaint proceeding, the scope of which is to address the formal Complaint filed by the Joint Complainants and as supported by PIOGA. There is no legal basis to widen the scope of this proceeding to rule on the Revised DSA and SA. With respect to NFGD Exhibit CC-2, the revised DSA and SA, while the proffer of that document may be evidence of NGDC's willingness to work with parties and to improve the DSA, the proposed revisions to the DSA are extensive and are beyond the scope of this proceeding. Tariff revisions need to be filed with the Commission with appropriate notice to all potentially affected parties. To approve the revised DSA and SA in this proceeding would be, potentially, to explicitly create a situation in which any other affected party could file a Complaint based on failure to provide proper notice and an opportunity to be heard, and so NGDC's request is denied.

H. Conclusions

The Joint Complainants did not file a complaint at the time that the Commission was considering the requirements of Supplement 207 in 2019. Instead, the Joint Complainants elected to focus on a proceeding before the NYPSC in the expectation that the PA PUC ultimately would modify the requirements of Supplement 207 based on the outcome of that New York proceeding. That was a choice made by the Joint Complainants, and they have failed to show by a preponderance of the evidence that NFGD prevented them, by act or implication, from

filing a Complaint against Supplement 207 in 2018-2019. Further, the Joint Complainants and PIOGA have now been afforded an opportunity to present the evidence and arguments that they might have produced in 2019. I agree with NFGD that the positions of the Joint Complainants and PIOGA are supported by opinion evidence offered by witnesses who have no particular expertise with respect to cybersecurity insurance let alone the effectiveness (or lack thereof) of such insurance. No evidence in the form of a study or factual analysis in this regard was presented by the Joint Complainants or PIOGA or with respect to any issue. Therefore, and as is explained above, the arguments of the Joint Complainants and PIOGA are unpersuasive.

The Joint Complainants have not demonstrated by a preponderance of the evidence that NFGD misled them or misled the Commission with respect to NFGD Tariff Supplement 207.

The Joint Complainants and PIOGA have not shown that the provisions of NFGD Tariff Supplement No. 207 abrogate the lawful authority of the Commission or that such authority has been unlawfully assumed by NFGD.

The Joint Complainants and PIOGA have not established by a preponderance of the evidence that Supplement 207 is unreasonable or unlawful, or that NFGD has failed to furnish service in violation of Section 1501 or a regulation of the Commission.

There has been no persuasive evidence presented or argument made that the circumstances at the time of the Commission's approval of Supplement No. 207 on August 29, 2019, have changed so drastically so as to render the application of the tariff provisions unreasonable.

Finally, the Joint Complainants and PIOGA have not established by a preponderance of the evidence grounds for suspending NFGD Tariff Supplement 207 pending a statewide proceeding addressing cyber-security protections, though the Joint Complainants and PIOGA are not foreclosed from requesting that the Commission consider initiating such a proceeding.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "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*, 70 A.2d 854 (Pa. 1950).

4. Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990) *alloc. den.*, 602 A.2d 863 (Pa. 1992). In addition, the Commission's findings of fact must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact," is insufficient. *Norfolk and W. Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

5. Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. 66 Pa.C.S. § 1501.

6. A utility tariff has the force and effect of law in Pennsylvania, and is legally binding upon the utility, its customers and the public. 66 Pa.C.S. § 1303; *DiSanto v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n.*, 437 A.2d 1067 (Pa. Cmwlth 1981).

7. “Tariff provisions approved by the Commission are prima facie reasonable.” *Kossmann v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979).

8. Mere opinion, without more, is insufficient to meet the complainant’s burden. *Richard Kirby v. PPL Elec. Utils. Corp.*, Docket No. C-20066297 (Final Order entered November 16, 2006) (citing *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A. 2d 12 (Pa. 1987)). Bald assertions, personal opinions or perceptions do not constitute evidence. *Orlando Rivera v. Philadelphia Gas Works*, Docket No. C-2010-2164222 (Order entered January 12, 2012) (citing, *Pa. Bureau of Corr. v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)).

9. The purpose of cybersecurity insurance is different and distinct from the purpose of the financial security bond provisions under the Public Utility Code at 66 Pa.C.S. § 2208 and 52 Pa. Code § 62.111.

10. The Joint Complainants and PIOGA have not met their burden of proof of showing by a preponderance of the evidence that NFGD has violated a provision of the Public Utility Code or a regulation of the Commission. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992).

11. The Joint Complainants and PIOGA have not established by a preponderance of the evidence that Supplement 207 is unreasonable or unlawful, or that NFGD has failed to furnish service in violation of Section 1501 or a regulation of the Commission.

