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January 12, 2022

VIA ELECTRONIC FILING

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

Re: EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC v. National Fuel Gas Distribution, Docket No. C-2020-3019621; **EXCEPTIONS OF ENERGYMARK LLC, VINEYARD OIL AND GAS COMPANY, MID AMERICAN NATURAL RESOURCES LLC, AND TOTAL ENERGY RESOURCES LLC**

Dear Secretary Chiavetta:

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

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

Very truly yours,

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

TSS/jld
Enclosures
cc: Administrative Law Judge Dennis J. Buckley (via email)
Office of Special Assistants (via email – ra-OSA@pa.gov)
Per Certificate of Service

CERTIFICATE OF SERVICE

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

VIA ELECTRONIC MAIL

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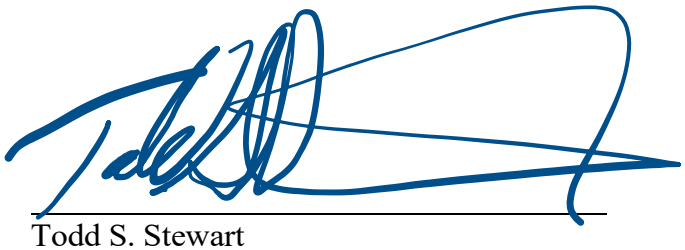

Todd S. Stewart
Bryce R. Beard

DATED: January 12, 2022

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS
OF ENERGYMARK LLC, VINEYARD OIL AND GAS COMPANY,
MID AMERICAN NATURAL RESOURCES LLC,
AND TOTAL ENERGY RESOURCES LLC

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DATED: January 12, 2022

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Pursuant to 66 Pa. C.S. § 332(h) and 52 Pa. Code § 5.533, EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC ("Joint Complainants") files these exceptions to the December 23, 2021, Initial Decision ("ID") of Administrative Law Judge Dennis J. Buckley.

I. INTRODUCTION AND SUMMARY OF EXCEPTIONS

The Joint Complainants filed the instant complaint with the Pennsylvania Public Utility Commission ("Commission"), alleging that National Fuel Gas Distribution Corporation ("NFGD") implemented unreasonable, unjust, and, ultimately, anti-competitive requirements under the guise of cybersecurity protections, and in doing so misled both the Joint Complainants and the Commission on the substantive support for its Tariff Supplement No. 207 ("Supplement No. 207"). At bottom, this case is about a utility seeking to gain an 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. On December 23, 2021, an Initial Decision was entered denying the Complaint on multiple procedural grounds and by misconstruing the record evidence and the relief sought by the Joint Complainants. As discussed herein, the Commission should overrule the ID and sustain the Complaint, as the Joint Complainants have clearly met their burden of proving that the circumstances around Supplement No. 207 have changed so drastically as to render its application unreasonable on the Joint Complaints, and that the audit provisions and additional financial security requirements for suppliers to interface with NFGD's system contained in Supplement No. 207 are impermissible under the Public Utility Code.

With NFGD's Supplement No. 207, NFGD implemented a cybersecurity insurance requirement for any supplier connecting to its data systems, requiring $5,000,000 per incident in

coverage. When Supplement No. 207 was filed, NFGD represented to the Joint Complainants, and more importantly, the Commission, that Supplement No. 207 and Section 33, titled "Data Security Agreement" ("DSA") was "patterned after" the DSA *in use* in New York, insinuating that the provisions had New York approval, and misleading interested parties that the DSA would follow what was to be implemented in New York for uniformity across NFGD's two state system. NFGD, and all but one of the Joint Complainants, operates in both New York and Pennsylvania, with the same operations and information technology systems supporting both states. No parties intervened in or challenged Supplement No. 207, and the Commission, relying on NFGD's representation of uniformity across states, approved the DSA on August 29, 2019, on the basis that it "is patterned after the DSA in NFG's New York service territory." Importantly, the Commission held that the Supplement's approval was without prejudice to any issues that may be raised by any party with respect to the tariff changes. At the time the Commission approved Supplement No. 207, there was in-fact no DSA in place in New York approved by the New York Public Service Commission ("NYPSC"), a fact known by NFGD at the time it misrepresented the basis for Supplement No. 207 to this Commission.

On October 17, 2019, 49 days after the Commission approved Supplement No. 207, the NYPSC rejected ***ALL*** 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. Subsequently, when approached by the Joint Complainants to address the disparity of NFGD's representation of uniformity in its DSA for its two-state system, NFGD refused to reconcile Supplement No. 207 with the now approved NY DSA to remove the insurance requirement, which ultimately led to the initiation of the instant proceeding.

Not only is the cybersecurity insurance requirement in Supplement No. 207 unreasonable and unjust, NFGD's DSA is a blatant attempt to impose additional financial security requirements on suppliers not contemplated by the Commission's regulations, which cannot be done outside of a notice-and-comment rulemaking proceeding to establish such regulations. Further, the DSA as it stands today, as a consequence of the ID correctly rejecting NFGD's request to approve NFGD's revisions in this proceeding[1] 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. This unprecedented authority allows NFGD unfettered access and regulation over NGS 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, and the ID erred in considering the grave consequences of allowing Supplement No. 207 to stand, despite the Joint Complainant's meeting their burden of proof.

II. EXCEPTIONS

A. Joint Complainants Exceptions 1. The ID Erred by Finding that Cybersecurity Insurance does not Constitute an Additional Financial Security Requirement for Suppliers Which is not Authorized by the Commission's Statutes and Regulations. (ID, pp. 22-23).

The ID holds that the cybersecurity insurance requirement enshrined in NFGD's Supplement No. 207 is neither explicitly or implicitly precluded by the *Natural Gas Choice and Competition Act*, 66 Pa.C.S. § 2208, or the Commission's implementing Regulation at 52 Pa. Code § 62.111. The ID goes on to simply quote, without analysis, the argument in NFGD's brief that

[1] NFGD submitted a Revised DSA as Exhibit CC-2, which the ID did not approve.

cybersecurity insurance is separate and apart from an NGS's financial security requirements that are required to obtain a license to operate, and that the "purpose" of cybersecurity insurance is different from the other financial security requirements. *Id*. These findings are plainly in error, as the record evidence and NFGD's own testimony show that NFGD's explicit purpose and intent of the cybersecurity insurance is to ensure the financial ability of an NGS to compensate NFGD in the event of a cybersecurity incident, which is a type of financial security and a financial guarantee that is neither contemplated nor allowed by 66 Pa.C.S. § 2208 or 52 Pa. Code § 62.111.

In this proceeding, NFGD explained that in the event of a cyber-attack on an NGS, the cybersecurity insurance requirement of $5,000,000 per incident in Supplement No. 207 would provide NFGD financial security assurances in exchange for providing suppliers access to NFGD's systems, with the clear purpose of allowing NFGD to tender a damage claim to the NGS pursuant to the indemnification clause included in the DSA:

> 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.

NFGD Statement 2-R at 8:5-12. As demonstrated by NFGD's testimony, by implementing the cybersecurity insurance requirement in Supplement No. 207, NFGD is requiring suppliers operating on its distribution network to post additional financial security requirements as a precursor to interfacing with NFGD's systems. However, NFGD lacks the legal authority to request financial assurances in the form of utility-benefiting insurance coverage, and therefore, the

insurance requirement is both unjust and unreasonable and should be removed from NFGD's tariff pursuant to 66 Pa.C.S. § 1501.

As discussed in Joint Complainants Main Brief at page 16-19, 66 Pa.C.S. § 2208, is the basis of the Commission's authority to license natural gas suppliers in Pennsylvania. Section 2208(c)(1) sets out the specific boundaries of the Commission's authority to establish criteria to ensure "safety and reliability of the natural gas supply service in the Commonwealth" by imposing financial security requirements in bond or other security to ensure each natural gas supplier's financial responsibility. *UGI Utilities, Inc. – Gas Division v. PA PUC,* 878 A. 2d 186 (Pa. Cmwlth. 2005) *appeal den.* 586 Pa. 732; 890 A.2d 1062 (2005)("*UGI*") (the Commission has discretion to approve criteria to be used to determine the financial security necessary based upon financial impact on the NGDC by a default by an NGS). Pursuant to the statute, and subsequent to the *UGI* decision, the Commission implemented 52 Pa. Code § 62.111 which specifies the criteria for financial security requirements that a NGDC can impose on suppliers. *Id.*

Neither 66 Pa.C.S. § 2208 nor 52 Pa. Code § 62.111 allow a NGDC to impose financial security requirements in the form of insurance policies benefiting the NGDC at the expense of a supplier - which includes the $5,000,000 cybersecurity insurance.[2] Indeed, both the statute and the regulations do not contemplate matters unrelated to "reliability" as it is defined in 66 Pa.C.S. § 2202 which allows financial securities to address both adequacy and security to ensure that an NGDC's systems can provide sufficient volumes and deliverability and handle extreme conditions. 66 Pa.C.S. § 2202. As stated by Joint Complainant's witness Mr. Lacey, the PUC's regulations allow only certain forms of financial security:

[2] Even assuming arguendo that Section 62.111 did permit an NGDC to require insurance, which it does not, NFGD's requirement fails to even address the specific requirements that the Regulations require for setting or maintaining security, including the acceptable instruments, which do not include insurance.

> The following legal and financial instruments and property shall be acceptable as security: (i) Bond; (ii) Irrevocable letter of credit; (iii) Corporate, parental or other third-party guaranty; (iv) Escrow account; (v) Accounts receivable pledged ... ; (vi) Calls on capacity, ... or other operational offsets ... : (vii) Cash.

JC Statement No. 1-SR at 12:7-11; citing 52 Pa. Code § 62.111(c)(2)(i) through (vii). None of the financial securities permitted by the Commission allow a NGDC to require a NGS to acquire liability insurance to cover damages to the benefit of the NGDC for an event unknown, no matter what it may be, to ultimately ensure the NGS's financial ability to compensate the NGDC for such unknown event. JC Statement No. 1-SR at 13:1-3. Allowing such financial securities as insurance to now be required by suppliers at the demand of a utility, when the Commission's own regulations provides an exclusive list of acceptable securities (i.e. a list without "for example" or "not limited to" qualifiers) is a slippery slope, and the ID erred in holding that simply because insurance is not explicitly prohibited that it therefore is allowable financial security.[3] The ID ignores the plain language of the Commission's regulations and goes forward with a "judicial rulemaking" approving new types of financial securities imposable by NGDC, which is not allowed.

Simply put, the Commission's regulations do not allow NFGD to impose any type of insurance requirement on NGSs operating on its distribution network. JC St. No. 1-SR. at 13:10-13. Allowing NGDCs to impose whatever insurance or other financial security requirements, without limitation as the ID suggests, would allow NGDCs to expand requirements for any type of insurance it may choose. Clearly the Statute and Regulations, by stating the universe of the security requirements that are permitted, intended to create boundaries on what NGDCs could require. The ID erred in concluding that an insurance policy to the exclusive benefit of the NGDC

[3] The statutory interpretation principle of "*expressio unius est excluisio alterius*" applies here. That is, because the Commission expressly listed in its regulations the forms of security that are permitted, it necessarily excluded those forms of security that are not listed. *Atcovitz v. Gulph Mills Tennis Club, Inc*., 571 Pa. 580, 812 A.2d 1218 (Pa. 2002).

(at the cost of the supplier) is not a financial security – it is indeed just that: a $5,000,000 financial instrument where NFGD's stated purpose is to ensure the NGS's financial responsibility,[4] which is drawable by NFGD should an unforeseen event occur related to a supplier operating on NFGD's IT system. As such, the cybersecurity insurance provision of Supplement No. 207 adds never contemplated financial assurances to NFGD – assurances that are not "legal and financial instruments and property" allowed under 52 Pa. Code § 62.111(c)(2)(i-vii).

As NFGD's cybersecurity insurance requirement lacks both statutory and regulatory support under the Commission's current regulations, such financial securities cannot be forced onto suppliers outside of express authority for the utility to do so. This authority can only come from one source – the Commission would be required to amend or add regulations to 52 Pa. Code to address the concept of insurance policies as acceptable financial securities that must be vetted through a regulatory rulemaking process and proceeding. Precedent supports this requirement. When the Commission last amended 52 Pa. Code § 62.111, it considered multiple amendments to the "types of security" under Section 62.111(c)(2) as well as comments and proposals from interested parties to the rulemaking. *Licensing Requirements for Natural Gas Suppliers; SEARCH Final Order and Action Plan: Natural Gas Supplier Issues*, Docket No. L-2008-2069115, Final Rulemaking Order at 17-20 (Order entered June 17, 2010) (amending Section 62.111(c)(2) to replace 1) "sold" with "assigned", 2) adding "netting as an example of an operational offset, and 3) adding "cash" as an acceptable type of security). The Commission further emphasized that NGS and NGDCs ideally will come to an agreement on the amount and form of security to maintain a license within the scope of the regulations. The Commission, therefore, through the rulemaking process did not consider insurance policies to the benefit of an NGDC purchased by

[4] NFGD's testimony and rationale for the insurance requirement mirrors the purpose stated in 52 Pa. Code § 62.111(b).

an NGS as acceptable financial security. By implementing the cybersecurity insurance provisions in Supplement No. 207, NFGD instituted unlawful and unreasonable legal and financial security requirements not allowed under the Commission's regulations. The ID's hasty dismissal of an insurance policy not constituting a financial instrument, and therefore not barred under 52 Pa. Code § 62.111, must be overturned.

B. Joint Complainants Exception 2. The Initial Decision Erred and Ignored the Record Evidence When Holding that NFGD did not Misrepresent the Basis for the Commission Approving Supplement No. 207. (ID, p. 15).

At the outset, the ID ignored the evidence of record to find that the Joint Complainants failed to prove NFGD's procedural misconduct regarding Supplement No. 207 (which was never alleged) (ID at 15) and ignored the evidence that both the Joint Complainants and the Commission relied on NFGD's misrepresentation that NFGD's Pennsylvania DSA would be patterned after the DSA in use on its systems in New York. *See* Joint Complainant's Main Brief at 19-21. However, as was clear in the record, the Commission explicitly approved the Supplement No. 207 based on NFGD's misrepresentations, and even entered in its order approving Supplement No. 207 that NFGD's proposed DSA "is patterned after the DSA *currently used* in NFG's New York service territory…," a fact shown in the record to be false. This material error warrants the Commission overruling the ID.

Additionally, the ID misapplied the Joint Complainant's burden of proof by modifying, and ultimately holding that because the Joint Complainant's failed to prove any procedural misconduct in the notices and filings of Supplement No. 207, the arguments need not proceed to further disposition as to whether or not any misrepresentation of substance occurred. ID at 15. As discussed below, this holding is shortsighted and ignored the fact that the Joint Complainants proved, and ultimately met the high burden of showing that the circumstances surrounding

Supplement No. 207's approval changed so drastically to warrant a different result as it is now unjust and unreasonable.

i. The Initial Decision erred when it ignored the fact that NFGD represented in the Supplement No. 207 filing to the Commission and to the Joint Complainants that the DSA would be patterned after its New York DSA, when in fact NFGD's New York DSA was not final nor approved and ultimately was not implemented. (ID, p. 19)

The ID erred by willfully ignoring NFGD's misrepresentations as to the status of its New York DSA and its representations that Pennsylvania DSA would be patterned after what was "in use" in New York to both the Joint Complainants and the Commission. In doing so, the ID simply ignored and dismissed the facts of record and arguments thereon and held that NFGD's representations were simply nonbinding matters from other states. ID at 19. The ID goes as far as to imply that the Complaint is premised on what a utility may have done in other states. ID at 19. It is not. The Complaint is based on a utility's representations to the Commission and Pennsylvania suppliers. In coming to its erroneous conclusions, the ID ignored that the Complaint did not seek to have NFGD's DSA simply be uniform across its New York and Pennsylvania territory, or that the Commission adopt what New York approved. Rather, the Complaint seeks to have the $5,000,000 cybersecurity insurance provisions in the DSA, provisions that were never implemented in New York, to be uniform due to the nature of NFGD's systems, which require Pennsylvania NGSs to maintain insurance coverage for everywhere they serve, necessitating coverages on NFGD's New York and Pennsylvania assets (See JC St. 2-SR, pp. 1:16-2:6). This relief was squarely grounded in the acts and misrepresentations of NFGD in the implementation of Supplement No. 207.

Moreover, the ID failed to accept a significant fact, that at the time NFGD filed Supplement No. 207 before the Commission, the DSA proceeding in New York was still pending before the

New York Public Service Commission. (JC St. No. 2 at p. 2:19- 3:9; JC St. No. 1, 12:6-13:19). Regardless of this, NFGD represented to this Commission that the DSA was "patterned after the DSA [NFGD] is currently using in its New York service territory", implying that because it was currently "being used" that it had been approved, when it had not. NFGD's misrepresentation was successful in deceiving the Commission that the DSA was approved in New York, and therefore should exist in Pennsylvania as well. This is not merely a procedural argument as the ID treats it – it was an intentional misrepresentation to this Commission which likely influenced the Commission's review process of Supplement No. 207 as approving the DSA as NFGD represented it would bring uniformity to suppliers who operate in both states. The fact that NFGD never informed the Commission when the New York PSC rejected important portions of the DSA, including the cybersecurity insurance requirement that is at issue here, only strengthens the argument that NFGD did not want the Commission to know what had actually happened in New York. This lack of candor violates the very essence of 66 Pa.C.S. § 1501, and the ID erred in failing to address the Commission's reliance on NFGD's inaccurate representation in the supporting data and rationale for Supplement No. 207.

The ID further erred by not addressing the testimony on this issue by the Joint Complainants. As Joint Complainant's witness Mr. Lacey suggested, NFGD cannot have it both ways. When NFGD filed Supplement No. 207, it relied upon the suggestion that the DSA being used in New York was approved by the PSC and therefore it's DSA "patterned after" the New York DSA should be approved in Pennsylvania. Then, a few months later when the NYPSC rejected the cybersecurity insurance requirement, in its pleadings and testimony in this case, it contends that the New York PSC was incorrect. Having impliedly represented to the Commission that "[t]he proposed DSA (which includes the Self-Attestation form) is patterned after the DSA

[NFGD] is currently using in its New York service territory but is modified to reflect Pennsylvania rules and regulations," (JC St. No. 1 at p.12:9-12) (citing Statement of National Fuel Gas Distribution Corporation in Support of Supplement No. 207 to Tariff Gas – PA. P.U.C. No. 9, at p.3), it was NFGD's obvious intention to obfuscate on the status of the NFGD's DSA in New York. 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 related to the need for cybersecurity insurance. 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.

The ID also ignored that NFGD misrepresented its intentions with regard to the DSA to suppliers. As detailed in Joint Complainant Mr. Wright's testimony, NFGD represented to suppliers, at supplier meetings in March 2019 before it made the Supplement No. 207 filing, and again in October of 2019, after the Commission approved Supplement No. 207, that it would follow the New York requirements, which it did not then do. (JC St. No. 2 p. 5:1-6). Mr. Wright continued to expect, after the NYPSC rejected the insurance requirement, that NFGD would amend its tariff in Pennsylvania to reflect what ultimately was approved in New York and the subject of a December 16, 2019, revised DSA filing in New York, but again, NFGD did not do what it represented it would do. (JC St. No. 2, p. 5: 1-14). It appears that NFGD was successful in convincing suppliers not to participate in the Pennsylvania proceeding because unlike New York, no suppliers participated in the proceeding that approved Supplement No. 207. (JC St. No 2-SR, p. 4:15-20).

In short, NFGD ultimately revealed its true intent, to impose the original and unapproved New York DSA on Pennsylvania suppliers regardless of what was ultimately approved in New York. NFGD knew, based upon its own representations, that if the suppliers were required to procure cybersecurity insurance in either Pennsylvania or New York, that the coverage would necessarily reach across the state line and cover that supplier in both states. (JC St. 2-SR, pp. 1:16-2:6). NFGD chose to deceive rather than be honest with the Commission and with the Suppliers who operate on its system. In both cases, it is important that communications be honest and complete, and in failing to do so, NFGD provided unreasonable service and dishonored the need to be candid in its communication with the Commission and those whom it serves. The Commission should overrule the ID and find this misrepresentation violated NFGD's duties under the Public Utility Code, 66 Pa.C.S. § 1501.

ii. <u>The ID misapplied the Joint Complainant's burden of proof - the complaint is based on misrepresentations of substance and changes in circumstances warranting revisions to Supplement No. 207 not procedural misconduct in the filing of Supplement No. 207. (ID, p. 15)</u>

The ID erroneously states the scope of the burden of proof and ultimately required the Joint Complainants to have first proven that some procedural misconduct occurred regarding the filing and notice of Supplement No. 207 in order to address the contents of the Complaint itself. The ID misapprehends the allegations of the Complaint – it is not a matter that NFGD misled or misconstrued the nature and procedural aspects of NFGD's Supplement No. 207 filing, but rather that the *substance* of the Supplement and its basis in being patterned after New York were intentionally misrepresented by NFGD to the Complainants and ultimately formed the express basis for the Commission's approval. Those circumstances, as discussed at length in Joint Complainants Main Brief at 19-23, changed when the New York DSA, which was in-fact never in

force and effect, was not approved by the NYPSC, leaving the PA DSA's cybersecurity insurance provisions "patterned after" nothing.

Rather than having the burden of proof that some procedural misconduct which was not pleaded, the Joint Complainant's were required to prove by a preponderance of the evidence that NFGD and Supplement No. 207 violated the public utility code. *See Se-Ling Hosiery, Inc.* v. *Margulies,* 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J Lansberry, Inc.* v. *Pa PUC,* 578 A.2d 600 (Pa. Cmwlth. 1990). The Joint Complainants did just that. The ALJ ignores the basis of the misrepresentation, namely that if indeed the insurance requirement was in place in New York, the Pennsylvania requirement would add limited additional burden to suppliers and NFGD's representations that it would therefore make the Pennsylvania rules mirror the New York requirements, which it did not do. The evidence of record demonstrates the pattern of NFGD's deception. The ID ignores the plain fact that the Commission never heard from suppliers because of NFGDs efforts and so never heard that the insurance was a barrier to market entry,[5] as was

[5] While not binding on the Commission, the NYPSC determination on the efficacy of cybersecurity insurance as considered in a multi-year rulemaking is persuasive. In rejecting the cybersecurity insurance requirement, the NYPSC held:

> The Joint Utilities have not established that cyber-security insurance would be an efficient and effective means of mitigating cyber-security risks and financial costs associated with security breaches. Several commenters oppose this requirement as not connected to any reasonable benchmark for the actual risk posed by the entity, or the actual costs of cyber incidents. **Moreover, the insurance requirement would serve to act as little more than a market barrier to entry. The Commission recognizes the need to protect utility IT systems and customer data, but does not see a cyber-security insurance requirement, which is mainly intended to address damages after an incident occurs, as the appropriate means of doing so.** Thus, at this time, the Commission declines to adopt a generic cyber-security insurance provision but may revisit this issue at a future date.

Proceeding on Motion of the Commission Regarding Cyber-Security Protocols and Protections in the Energy Market Place, et al., Case Number 18-M-0376, Order Establishing Minimum Cyber-security and Privacy Protections and Making Other Findings at 58 (Order entered October 17, 2019)(emphasis added).

heard and indeed found to be the case in New York.[6]

C. Joint Complainants Exception 3. The Initial Decision Erred by not Considering that the Facts and Circumstances Surrounding Supplement No. 207's Cybersecurity Insurance Provisions Changed so Drastically as to Render the Provision Unreasonable. (ID, p. 18).

In the ID, the ALJ hastily dismissed the concept that any changed circumstances exist that impact NFGD's Supplement No. 207. (ID, p. 18). As the records shows, and as discussed above, the timeline of events and NFGD's misrepresentations regarding the New York DSA, the PA PUC's approval of Supplement No. 207, and the NYPCS ultimately disapproving the cybersecurity insurance provisions both frustrates the Commission's rationale for approving Supplement No. 207 and negatively impacts the Joint Complainants in a way that has significant impacts on procuring cybersecurity insurance to interface with NFGD's Pennsylvania operations alone. It is because of the changed circumstances that the ID erred and the Joint Complainants indeed met their heavy burden to overturn an existing tariff provision[7] – the application of the Pennsylvania DSA cybersecurity insurance requirement for suppliers to interface with NFGD negatively impacts suppliers access, and ultimately requires Pennsylvania Suppliers to procure coverage for NFGD's New York assets in addition to Pennsylvania due to the nature of NFGD's systems.

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[6] As Mr. Lacey went on to point out:

> New York looked at this issue for over a year before it made its ultimate decision on the insurance requirement. It had input from numerous stakeholders (representing hundreds of different companies) from all the utilities and utility markets . . . after a full review of a voluminous docket . . . rejected the insurance requirement.

JC St. No. 1-SR, pp. 8:24-9:6. In Mr. Lacey's view, the New York process represents the "best policy outcome" even though he clearly understands that the Commission is in no way bound to even consider that decision. *Id.*

[7] *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. Ct. 1981).

The record is clear that NFGD operates a single technology interface for suppliers on a uniform platform for both Pennsylvania and New York. (JC St. 2-SR, pp. 1:16-2:6). This means that for a Pennsylvania supplier to be required to have cybersecurity insurance to interface with NFGD, that supplier must procure insurance coverage that would necessarily reach across the state line and cover that supplier in both states. (JC St. 2-SR, pp. 1:16-2:6). By default, since New York does not require cybersecurity insurance, Pennsylvania Suppliers must procure coverage that encompasses both NFGD's Pennsylvania and New York cyber-interactions and interfaces. By implication, Supplement No. 207 requires Pennsylvania suppliers to bear the costs of insuring NFGD's total assets and systems – systems that are not partitioned or separate assets, and that NFGD uses in both states. This is an unreasonable burden on Pennsylvania Suppliers and is a product of the change in circumstances from when NFGD filed Supplement No. 207 and when the cybersecurity insurance provisions were not approved by the NYPSC that warrants the cybersecurity insurance requirement be overturned. The Commission should overrule the ID and find that Pennsylvania Suppliers should not be forced to acquire insurance coverage which, due to NFGD's single interface system, requires coverage for both NFGD's Pennsylvania and New York information technology assets.

D. Joint Complainants Exception 4. The Initial Decision Erred When it Dismissed Complainants' Expert Witness Testimony and Held that Complainants Were Required to Provide a Formal Study on the Impacts of the Costs of Cybersecurity Insurance Versus the Speculative Benefits that Insurance May Bring. (ID, p. 26).

Next, the ID erroneously held that because the Joint Complainants did not offer a "study or detailed third-party analysis" on the issue that cybersecurity insurance is ineffective at preventing a cybersecurity related incident, the "opinion evidence" alone was not sufficient to meet the Joint Complainants' burden of proof. ID at 26. The ID further goes on to conflate the issues

of what financial compensation would flow from cybersecurity insurance to NFGD and what actual, meaningful real world cybersecurity protections and physical implementations that obtaining insurance entails. ID at 26-27. The ID further errs in accepting NFGD Witness Grice's opinion that the insurance underwriting process mitigates against cybersecurity risks, despite Witness Grice's lack of expertise and experience in both the NGS and insurance industry[8] and testimony that, as discussed below, did not state with certainty that increased protections would occur.

Contrary to the ID's holdings, the Joint Complainants put forth expert witness testimony that explained how insurance coverage and the underwriting process does not lead to meaningful preventative measures being taken. Of critical error, the ID conflates the standards for expert testimony and lay opinion testimony, and what amounts to substantial evidence. Unlike lay opinions, a fact finder may weigh the opinion testimony of a qualified expert,[9] and such expert testimony can form the basis of a finding as it amounts to substantial evidence.[10] Indeed, the ID did not find Joint Complainants' witness Mr. Lacey as non-credible or unqualified – rather the ID skirted the issue and inappropriately concluded that third-party studies or analysis were needed on whether cybersecurity insurance is indeed effective at preventing a cyber incident. ID at 26. As discussed below, the Joint Complainants met their burden of showing that cybersecurity insurance does not lead to any incremental cybersecurity benefits,[11] a fact that NFGD did not dispute outside

[8] See Joint Complainant's Main Brief at 12-15.
[9] See *Gibson v. W.C.A.B.*, 861 A.2d 938, 947 (Pa. 2004); *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).
[10] Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 677 A.2d 861 (Pa.Cmwlth.1996).
[11] JC St. No. 1 at 8:16-21.

of pure speculation that benefits "may" occur from the underwriting process[12] which did not amount to co-equal evidence to rule against the Complainants.

As Joint Complainant's expert Mr. Lacey[13] testified, insurance, for whatever purpose, should be within a supplier's management consideration to determine their individual exposure to and tolerance of risks. NFGD is not in a position to dictate how suppliers manage that monetary exposure and risks by requiring suppliers to purchase cybersecurity insurance, at significant cost, which provide no incremental benefits to cybersecurity. JC Statement No. 1 at 6:14-15. Mr. Lacey addressed the issue clearly of whether cybersecurity insurance enhances cybersecurity protections, which it does not:

> **Q. DOES THE ADDITION OF A $5 MILLION INSURANCE POLICY SUPPLEMENT THE SECURITY OF DATA TRANSFERRED BETWEEN NFGD AND AN ESE [NGS]?**
>
> A. No. Cybersecurity insurance does not enhance cybersecurity protections. Insurance is a mechanism for the insured to recoup losses in the event the losses were incurred. The requirement for an ESE to have insurance provides no incremental security protections to NFGD.

JC St. No. 1 at 8:16-21.

Instead of addressing this fact directly, NFGD and the ID focused on "the underwriting process" as a cybersecurity benefit that comes from an NGS obtaining cybersecurity insurance. ID at 26-27; See also NFGD Statement 2-R at 8:14-23. However, the underwriting process does not require any insurance seeking entity to implement changes to obtain insurance coverage – it is a cost assessment undertaking used to determine what premiums should be assessed to insure the requesting party. Indeed, NFGD's witness Mr. Grice stated:

[12] NFGD Statement 2-R at 8:20-23.
[13] Mr. Lacey has significant experience handling multi-party insurance litigation matters for energy and environmental clients, as well as personal experience with his own business and other insurances. N.T. 57:18-58:21.

> …the underwriting process (which occurs prior to the issuance of a policy) **<u>may</u>** result in the implementation of additional protections by the insured, so that they can obtain the coverage they seek at an acceptable price.

NFGD Statement 2-R at 8:20-23 (emphasis added). By NFGD's own admission, the underwriting process that an NGS would be subjected to when acquiring cybersecurity insurance, provides no material or guaranteed additional protections to an NGS's cybersecurity protocols – at best, such a process "may" lead to an NGS being offered coverage "at an acceptable price" *if* measures are taken. *Id.* As Joint Complainant's witness Mr. Lacey testified showing the flaw in NFGD's logic:

> Stated differently, Mr. Grice is saying that an underwriter might tell a potential insured, "If you do X, the premium for this coverage might be more appealing." Mr. Grice did not testify that a certain set of systems and processes are conditions precedent to obtain cybersecurity insurance.

JC Statement No. 1-SR at 10:12-15. NFGD's speculation of what "may" occur is not and cannot not be substantial evidence to refute the Joint Complainant's expert testimony or support NFGD's claim of the benefits of the underwriting process. Indeed, NFGD pointed to no material benefits that would enhance an NGS's information technology system that interface with NFGD's systems as a result of an NGS being forced to obtain cybersecurity insurance in compliance with NFGD's tariff.

Further, as Mr. Lacey testified regarding NFGD's unproven claim that cybersecurity insurance provides additional protections to NFGD and Pennsylvania customers:

> **MR. GRICE HAS TESTIFIED THAT THE REQUIREMENT FOR NGSS TO HAVE CYBERSECURITY INSURANCE PROVIDES ADDITIONAL PROTECTIONS TO NFGD AND PENNSYLVANIA CUSTOMERS HOW DO YOU RESPOND?** In making this argument, Mr. Grice says that the insurance requirement "assures both Distribution and its Pennsylvania customers that the NGS will have financial resources to address expenses and losses that it would be contractually obligated to pay if associated with a cyberattack that impacts the Pennsylvania

> Customers' PII." If an NGS has a contractual (or legal) obligation to pay costs, it is up to the NGS to determine how to pay those costs. It is unnecessary and unreasonable to have a host utility impose its preferred method of assurance on those obligations.

JC Statement No. 1-SR at 10:17-11:5. As pointed out by Mr. Lacey, NGSs already have a contractual obligation to pay costs to a host utility. Requiring a specific method of financial security, especially one not contemplated by the Commission's regulations, is unnecessary to ensure those obligations can be met. The ID erred when it refused to consider this substantial evidence of record, and the Commission should find that the Joint Complainants met their burden of proof that cybersecurity insurance provides no incremental benefit to cybersecurity, while unreasonably increasing costs to suppliers and acting as an anti-competitive barrier[14] which violates 66 Pa.C.S. § 1301.

E. Joint Complainants Exception 5. The Initial Decision Erred When it Simultaneously Dismissed Complainants' Argument that Supplement No. 207's Audit Provisions Abrogate the Commission's Authority in the Competitive Supplier Industry and Also Dismissed NFGD's Concessions to Amend the DSA to Include a 3rd Party Audit. (ID, p. 28).

Finally, the ID erred by first dismissing the Joint Complainants' arguments that Supplement No. 207 abrogates the Commission's exclusive authority to regulate Natural Gas Suppliers under 66 Pa.C.S. § 2208. As it stands, Supplement No. 207 and the DSA grants NFGD unprecedented auditing and unfettered access to suppliers highly sensitive, proprietary, and confidential information technology systems. While the Joint Complainants agree with the ID that it is inappropriate to approve NFGD's modified DSA contained in Exhibit CC-2 as part of this proceeding, as proper notice and filing need be done to allow all affected parties to participate (see ID at 28), the ID nevertheless let's stand NFGD's invasive and anti-competitive auditing provision currently included in NFGD's in-use DSA. This finding must be overruled, and the ID erred by

[14] See JC Main Brief at 23-24.

both dismissing the Joint Complainant's arguments and simultaneously allowing the audit provision to stand.

As stated in Joint Complainant's Main Brief, it is clear that the Commission alone has the authority to regulate public utilities. See generally *PPL Electric Utilities Corp. v. City of Lancaster*, 125 A.3d 837, (Pa. Cmwlth. 2015); citing *York Water Company v. York*, 250 Pa. 115, 95 A. 396, 396 (1915); *Duquesne Light Co. v. Upper St. Clair Tp.*, 105 A.2d 287 (Pa. 1954); *Chester County v. Philadelphia Electric Co.*, 218 A.2d 331 (Pa. 1966); *PECO Energy Co. v. Township of Upper Dauphin*, 922 A.2d 996 (Pa. Cmwlth. 2007); *Pennsylvania Power Company v. Township of Pine,* 926 A.2d 1241 (Pa. Cmwlth. 2007). To the extent the Code authorizes the Commission to extend such regulation to Natural Gas Suppliers, the authority of the Commission is likewise exclusive. 66 Pa.C.S. § 2208(e). For example, while the Public Utility Code does permit NGDCs to establish requirements for financial security, such requirements are subject to restrictions and Commission review. 52 Pa. Code § 62.111. And there are specific requirements in the Regulations for such security if the NGDC and NGS cannot agree. 52 Pa. Code § 62.111(c)(1). However, there is no provision of the Code that allows a utility to require that a supplier operating on its system, and in this case a competitor, submit to an audit of its highly sensitive, proprietary, and confidential information technology ("IT") systems and data. Such a requirement is contrary to well established law and must be rejected.

Also critical is that the audit requirement is a one-way obligation. That is, while NFGD grants itself the ability to audit those who connect to its system, Supplement No. 207 provides no corollary requirement that a supplier could audit NFGD if NFGD were to be compromised and cause harm to that supplier or the supplier's IT systems. Moreover, giving NFGD the discretion to audit "at will" provides it with an unprecedented tool for peering into the very heart of a

supplier's operation without significant boundaries in place. This advantage is not only anticompetitive, but the overbroad authorization could provide NFGD the opportunity to go on a fishing expedition for sensitive information under the guise of its standardless, yet unlimited in scope cybersecurity auditing power provided in Supplement No. 207. Simply put, the requirement is fraught with peril and the Commission should overrule the ID and find that NFGD's self-granted auditing power over suppliers is unjust and unreasonable.

NFGD's audit provision is best characterized as a utility seeking to impose an audit requirement on its competitors. That notion alone is startling when one considers NFGD's admission that it does not have any expertise in auditing. (JC St. No. 1-SR, p. 4:19-5:4). The so-called scope of such audits is vague and would appear to provide NFGD the authority to audit just about any record related to cybersecurity, any and all of a supplier's IT hardware and services (i.e., servers, storage, accessibility, remote access etc.), and sensitive customer data as well. Moreover, there is no clear standard of compliance against which to judge a supplier as compliant. (JC St. No 1-SR, p. 5:3-12). Considering the heavy consequence of failing to comply with NFGD's vague standards -- essentially refusing to allow an NGS to serve customers on its system -- such lack of specificity is alarming, particularly when one considers that suppliers compete with NFGD for customers. (JC St. No. 1-SR, p.5:11-21).

NFGD's audit provision is proposed in a manner that will cause unwarranted and illegal discrimination in violation of 66 Pa.C.S. §§ 1502 & 2203(4), a fact the ID simply did not address. As noted above, there are no clear standards for when NFGD can impose an audit on a supplier, and no process for a supplier to object -- save filing a complaint with the Commission upon threat of removal or actual removal of an NGSs access to NFGD's systems for "non-compliance". Allowing a competitor (NFGD) that ability is the gateway to arbitrary application of the audit

requirement. This is by definition discriminatory, particularly when NFGD has reserved this right to audit only to itself. If an incident were to occur, it would be NFGD that would solely (as between it and an impacted supplier) have the authority to investigate and audit, leaving the supplier to prove its innocence to remain on NFGD's systems when NFGD alone would retain all the information. The mere imposition of such unbalanced terms is de facto discrimination.[15] When one considers that a possible consequence of such an audit could be for NFGD to remove a supplier from its system and take back its customers at the utility's discretion, the discriminatory character of NFGD's drastic and uneven approach becomes strikingly clear.

While the ID failed to thoroughly analyze this issue, the Commission should find that it is absolutely clear that the cybersecurity requirements including the audit requirement enshrined in NFGD's tariff is a term of service. An NGS has no choice but submitting to the requirements which create an insurmountable barrier to entry for doing business as a supplier on the NFGD system. The service will be discriminatory as between NFGD and suppliers because it will not be reciprocal, thus creating a clear unbalance between NFGD and suppliers on its system to the detriment of suppliers.[16] The vague nature of the requirement also presents the grave potential to be provided in a discriminatory fashion in practice, which also violates the Code.[17] In *Columbia*, the Commission was clear on this issue:

> The language of Section 1502 establishes a broad prohibition on discrimination in the provision of service by prohibiting the unreasonable preference of one party over *any* other party. For example, Section 1502 does not require that the discrimination be against the same type of provider, *i.e.,* favoring one NGS over another NGS. Rather, discrimination will be found if any unreasonable preference or difference in the treatment of one party versus another is shown in the provision of service.[18]

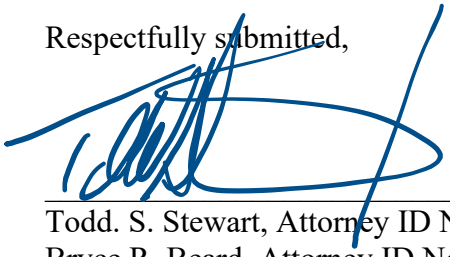
[15] See *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, Opinion and Order (Order entered December 6, 2018)("*Columbia*").
[16] 66 Pa.C.S. § 2203(4).
[17] 66 Pa.C.S. § 1502.
[18] Columbia, slip op. at p. 47 (emphasis in original).

There is little room for doubt that NFGD's Supplement No. 207 is rife with the potential for discriminatory application and is clearly discriminatory on its face based upon the unequal requirements. For these reasons, the ID must be overruled, and Supplement No. 207 must be modified to exclude the audit requirement as it stands.

III. CONCLUSION

WHEREFORE, as demonstrated herein and as supported by the record, the Joint Complainants have satisfied their burden of proof that NFGD's Supplement No. 207 and its Data Security Agreement is unjust and unreasonable and violates 66 Pa. C.S. §§ 1301, 1501, 1502, 2203, and 2208 and the Commission's regulations at 52 Pa. Code § 62.111. Accordingly, the Joint Complainants respectfully request that their Exceptions be granted and that the Initial Decision of Administrative Law Judge Dennis J. Buckley be modified to sustain the Formal Complaint.

Respectfully submitted,



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