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January 12, 2022

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  
**PIOGA Exceptions**

Dear Secretary Chiavetta:

In compliance with 52 Pa. Code § 5.533 and the Secretarial Letter dated December 23, 2022 in this matter, attached are the Exceptions of the Pennsylvania Independent Oil & Gas Association (PIOGA) to the Initial Decision of ALJ Dennis J. Buckley.

Other parties and the ALJ have been served with these exceptions as shown on the attached Certificate of Service.

Sincerely,

  
Kevin J. Moody  
General Counsel

cc: Per Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of PIOGA's Exceptions upon the persons listed below in accordance with requirements of 52 Pa. Code § 1.54 (relating to service by a party).

### **Via Email only**

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Kevin J. Moody, Esquire  
General Counsel, PIOGA

January 12, 2022

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**EXCEPTIONS  
OF  
PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION**

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January 12, 2022

## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	EXCEPTIONS.....	1
	No. 1: The ALJ erred by presuming NFGD tariff Supplement No. 207 to be <i>prima facie</i> reasonable and lawful.....	1
	No. 2: The ALJ erred in finding PIOGA's testimonial evidence to be mere opinion, bald assertions, personal opinions or perceptions.....	2
	No. 3: The ALJ erred in not adopting any of PIOGA's proposed Findings of Fact.....	4
	No. 4: The ALJ erred in stating and applying the burden of proof standard.....	4
	No. 5: The ALJ erred in concluding that PIOGA and the Joint Complainants failed to offer substantial evidence establishing that Supplement No. 207 is unjust, unreasonable, unlawful, unduly burdensome and discriminatory.....	6
III.	CONCLUSION.....	8

## I. INTRODUCTION

Pages 1-5 of the Initial Decision (ID) of ALJ Dennis J. Buckley describe the history of this proceeding. The ALJ's ultimate conclusion is stated on page 5:

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.

In compliance with 52 Pa. Code § 5.533 and the Secretarial Letter dated December 23, 2022 in this matter, the Pennsylvania Independent Oil & Gas Association (PIOGA) files these Exceptions to the ID.

## II. EXCEPTONS

**No. 1: The ALJ erred by presuming NFGD tariff Supplement No. 207 to be *prima facie* reasonable and lawful.**

Conclusion of Law No. 7  
ID pages 13, 17 and 31

The ALJ erred in relying upon the legal principle that “[t]ariff provisions approved by the Commission are *prima facie* reasonable.” While this is a correct statement of law, it does not apply to Supplement No. 207 because the Commission explicitly stated otherwise. In approving Supplement No. 207, the Commission stated:

Accordingly, we grant Supplement No. 207 to become effective on August 30, 2019. *However, approval of this filing does not constitute a determination that this filing is lawful, just, or reasonable.* but only that further investigation or suspension does not appear to be warranted at this time; **THEREFORE,**

**IT IS ORDERED:**

....

2. That this Order is *without prejudice to any issues that may be raised by any party* with respect to the tariff changes implemented by Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9 in future proceedings.<sup>1</sup>

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<sup>1</sup> *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 at 7 (emphasis added).*

A correct legal principle cannot be applied when the Commission explicitly renders it inapplicable. The ALJ's error permeates the other mistakes in the ALJ's statement and application of the burden of proof standard and his analysis of the facts and legal arguments presented by PIOGA and the Joint Complainants, as described below, and thus taints the whole ID, rendering it legally incorrect.<sup>2</sup>

**No. 2: The ALJ erred in finding PIOGA's testimonial evidence to be mere opinion, bald assertions, personal opinions or perceptions.**

Conclusion of Law No. 8  
ID pages 20, 25, 26, 29, 31

Throughout the ID, the ALJ denies that PIOGA's testimony is evidence, and faults PIOGA for not "substantiating" its witness's testimony with documents. For example:

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.<sup>3</sup>

PIOGA's evidence in support of its claims about how much NFGD's cybersecurity insurance requirements would impose on natural gas suppliers (NGSs) is described in its Main Brief, pp. 2-3, 4, and in its Reply Brief, pp. 1-2. NFGD relies upon PIOGA's testimony and one document submitted into the record in support of one cost estimate. NFGD Exhibit JG-1, to

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<sup>2</sup> For example, *see* page 27 of the ID: "We start from the standpoint that this approved tariff provision is lawful and reasonable."

<sup>3</sup> ID at p. 20 (*emphasis* added); *see also*, p. 23 ("The Joint Complainants and PIOGA have not presented evidence or arguments that prove that Tariff Supplement No. 207, Rule 33, is unlawful.") and p. 24 ("With no evidence of actual costs . . .").

support some of its contentions.<sup>4</sup> However, NFGD also describes PIOGA’s testimony “that most of PIOGA’s members have already obtained cybersecurity insurance” as “evidence of record” even though no documents were submitted to “substantiate” this testimony: “The evidence of record does reveal, however, that most of PIOGA’s members have already obtained cybersecurity insurance . . . .”<sup>5</sup>

PIOGA’s Reply Brief<sup>6</sup> explained the errors in NFGD’s argument that PIOGA’s testimony is “assertions and speculation . . . not borne out by any studies, analyses or documents of record”<sup>7</sup> – and not evidence.<sup>8</sup> The ALJ erred in completely ignoring and failing to address PIOGA’s explanation. As summarized in PIOGA’s brief:

National Fuel Gas Distribution Corporation’s (NFGD) Main Brief overstates the significance of evidence it believes supports its legal conclusions but simply denies the existence of evidence that does not support its legal conclusions. The authorities NFGD relies upon to deny the existence of this contrary evidence are not persuasive and do not support NFGD’s argument. These authorities actually demonstrate that PIOGA’s straightforward factual testimony is “actual evidence” that NFGD has not refuted and, if credited by Your Honor and the Commission, is substantial evidence sufficient to support the legal conclusions PIOGA has requested.<sup>9</sup>

The ALJ erred in accepting NFGD’s contradictory argument that PIOGA’s testimony *is not* evidence to support its and the Joint Complainants’ positions but *is* evidence to support NFGD’s positions. PIOGA’s members are businesses run by business men and women who provide PIOGA with the information needed to participate in Commission proceedings. as PIOGA is a

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<sup>4</sup> NFGD Reply Brief at 14-15, 21-22.

<sup>5</sup> *Id.* at 15.

<sup>6</sup> PIOGA Reply Brief at 1, 3-9.

<sup>7</sup> NFGD Main Brief at p. 15.

<sup>8</sup> PIOGA Reply Brief at 1; see ID and p. 20 (“

<sup>9</sup> *Id.* at 1.

trade association and not a producer or NGS. Determining the cost of NFGD's cybersecurity insurance requirements is no different from any other cost determination that PIOGA member businesses must make and this determination, as with most business costs, does not require studies, analyses, or valuations.<sup>10</sup> And clearly, PIOGA's members making this determination have firsthand knowledge of the information they relied upon to make this determination.

The ALJ erred in concluding that PIOGA's testimony is not evidence in the first place, as opposed to evidence that he does not credit. But as explained below, the ALJ also erred in not crediting PIOGA's and the Joint Complainants' testimonial evidence.

**No. 3: The ALJ erred in not adopting any of PIOGA's Proposed Findings of Fact.**

Findings of Fact  
ID pages 5-9.

As required by 52 Pa. Code § 5.501(b)(2), PIOGA's Main Brief included Proposed Findings of Fact. Because of the ALJ's failure to distinguish between what is evidence in the first place and what evidence he credits, he erred in not adopting *any* of PIOGA's Proposed Findings of Fact, which support the positions and arguments of PIOGA and the Joint Complainants.

**No. 4: The ALJ erred in stating and applying the burden of proof standard.**

Conclusions of Law Nos. 10, 11  
ID pages 9-10, 15, 18, 19, 21, 24, 25, 29, 31

The ALJ stated the burden of proof standard as follows:

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<sup>10</sup> PIOGA notes that NFGD's CONFIDENTIAL Reply Brief stated the amount of NFGD's cybersecurity insurance policy coverage, but the record does not contain any documentary evidence substantiating the claimed amount. NFGD CONFIDENTIAL Reply Brief at 2, 4. Nonetheless, NFGD's testimony is evidence of the amount of NFGD's cybersecurity insurance policy coverage, upon which NFGD based Proposed Finding of Fact No. 8. *Id.*, Appendix A at 2.

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).<sup>11</sup>

PIOGA agrees that the first sentence correctly states the burden of proof standard. But the second sentence does not, as it conflates the “burden of proof” and “weight of the evidence” (or burden of persuasion) standards, as explained in the case the ALJ relies upon:

However, “burden of proof” and the “weight of the evidence” are not one and the same; the former remains on the party upon whom is imposed the duty of producing a certain amount of evidence in order that he may not lose summarily while the latter involves the credibility of persuasive quality of the evidence produced and, during a trial, may shift from side to side as the trial proceeds. *See: Henes v. McGovern*, 317 Pa. 302, 176 A. 503 (1935); *Wright v. Straessley*, 321 Pa. 1, 182 A. 682 (1936).

Certain principles of law are presently applicable: . . . (d) the weight of evidence<sup>6</sup> dependent on oral testimony is always for the jury, not the court. (*Springer v. Allegheny County*, 401 Pa. 557, 560, 165 A.2d 383 (1960); *Kosco v. Hachmeister, Inc.*, 396 Pa. 288, 291, 152 A.2d 673 (1959).

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<sup>6</sup> To weigh evidence is to determine its effect in inducing belief or to determine which evidence carries greater conviction or is more worthy of belief.<sup>12</sup>

While the ALJ later in his decision states only the correct burden of proof standard set forth in *Se-Ling Hosiery v. Margulies*,<sup>13</sup> is impossible for the Commission to determine that the ALJ properly applied the correct standard in view of the ALJ’s errors in (i) “start[ing] from the

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<sup>11</sup> ID at pp. 9-10 (*emphasis* added).

<sup>12</sup> *Morrissey v. Pa., Dept. of Highways*, 225 A. 2d 895, 898 (Pa. 1987).

<sup>13</sup> 70 A.2d 854 (Pa. 1950).

standpoint that this approved tariff provision is lawful and reasonable”<sup>14</sup> and (ii) rejecting the testimonial evidence of PIOGA and the Joint Complainants as not evidence in the first place.<sup>15</sup>

As the court stated in *Se-Ling Hosiery*:

Since proof by “a preponderance of the evidence” is the lowest degree of proof recognized in the administration of justice, *the evidence the burdened party offers does not become proof until it preponderates<sup>1</sup> in evidentiary weight against the opposing evidence.*

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<sup>1</sup> In *Thompson v. Dyson*, 120 Kan. 591, 244 P. 867, 868, it was held: “Burden of proof” means preponderance of evidence, that is, greater weight of evidence, in view of all facts and circumstances of case.’ . . . .<sup>16</sup>

The ALJ’s conflation of the “burden of proof” and “weight of the evidence” standards shows that the ALJ misunderstood the difference between “evidence” and “proof.” This requires the Commission to conclude that the ALJ improperly applied the correct burden of proof standard. As the Commission is the ultimate factfinder, the Commission must correct the ALJ’s errors by engaging in a reasoned analysis that accurately addresses the facts and arguments presented by PIOGA and the Joint Complainants.

**No. 5: The ALJ erred in concluding that PIOGA and the Joint Complainants failed to offer substantial evidence establishing that Supplement 207 is unjust, unreasonable, unlawful, unduly burdensome and discriminatory.**

Findings of Fact Nos. 26-29  
Conclusions of law Nos. 9-11  
ID pages 19-27

The ALJ’s errors set forth above resulted in the ALJ’s ultimate error concluding that PIOGA and the Joint Complainants failed to offer substantial evidence establishing that Supplement 207 is unjust, unreasonable, unlawful, unduly burdensome and discriminatory. In

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<sup>14</sup> Exception No. 1, n.2 above.

<sup>15</sup> Exception Nos. 2 and 3 above.

<sup>16</sup> 70 A.2d at 856 (*emphasis* added).

addition to the reasons set forth in the previous Exceptions, the ALJ's error is shown by PIOGA's Main Brief (pp. 2-3, 4) and PIOGA's Reply Brief (pp. 1-2).<sup>17</sup>

In particular, the ALJ erred in ignoring the probative value of PIOGA's testimonial evidence that: (i) 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;<sup>18</sup> (ii) 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;<sup>19</sup> and (iii) NFGD's blanket tariff requirement of \$5 million per incident cybersecurity insurance significantly exceeds the level of coverage acquired by the PIOGA member NGSs operating on NFGD's system (from \$10,000 to \$1,000,000) that are not part of a larger corporate family.<sup>20</sup>

PIOGA offers the following additional arguments with respect to the market entry barrier argument. While NFGD attempts to discredit PIOGA's testimony<sup>21</sup> that the cost to obtain the cybersecurity insurance required by Supplement No. 207 is prohibitive based upon a PIOGA document submitted, NFGD Exhibit JG-4, another PIOGA document submitted supports PIOGA's testimony because it shows that this PIOGA member NGS is unlikely to be able to obtain the \$5 million/per incident cybersecurity insurance required by Supplement No. 207

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<sup>17</sup> Citing PIOGA Statement No. 1 at 4:9-5:2; PIOGA Statement No. 1-SR at 2:5-3:11.

<sup>18</sup> Statement No. 1-SR at 2:5-9; PIOGA Statement No. 1 at 4:14-5:2; Notes of Testimony at hearing (N.T.) 13:6-14:8.

<sup>19</sup> PIOGA Statement No. 1-SR at 3:1-7.

<sup>20</sup> PIOGA Statement No. 1-SR at 2:9-12; N.T. 16:4-9.

<sup>21</sup> PIOGA Statement No. 1 at 4:12-14.

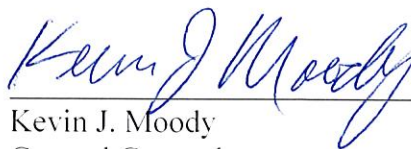
because of its low revenues: “We ideally would not provide a \$5m limit on this due to the size (amount of revenues) of the account.”<sup>22</sup>

Finally, NFGD’s opinion that the approval of Supplement No. 207 and the associated documents indicates that the Commission does not agree with a conclusion that cybersecurity insurance is “nothing more than a market barrier to entry”<sup>23</sup> suffers from the error addressed in Exception No. 1 above.

### **III. CONCLUSION**

For the reasons set forth above, PIOGA respectfully requests that: (i) the Commission exercise its role as the ultimate factfinder and find that the testimonial evidence offered by PIOGA and the Joint Complainants is substantial evidence sufficient to support the position that the cybersecurity insurance and audit provisions contained in NFGD’s Supplement No. 207 and associated documents are unjust, unreasonable, unlawful, unduly burdensome and discriminatory under the Commission’s governing statutes and regulations; (ii) that PIOGA’s Exceptions be granted; and (iii) the Initial Decision of the ALJ be modified to sustain the Joint Complainants Formal Complaint

Respectfully submitted,



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<sup>22</sup> NFGD Exhibit JG-1.

<sup>23</sup> ID at p. 17.