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January 24, 2022

***VIA ELECTRONIC FILING***

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

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

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Dear Secretary Chiavetta:

Attached please find the Replies to Exceptions filed on behalf of National Fuel Gas Distribution Corporation in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,



Anthony D. Kanagy

ADK/kl  
Attachment

cc: The Honorable Dennis J. Buckley  
Office of Special Assistants (*via email – ra-osa@pa.gov*)  
Certificate of Service

**CERTIFICATE OF SERVICE**

**C-2020-3019621**

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: January 24, 2022

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Anthony D. Kanagy

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**NATIONAL FUEL GAS DISTRIBUTION CORPORATION'S  
REPLIES TO EXCEPTIONS**

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## **I. INTRODUCTION**

On December 23, 2021, the Secretary of the Pennsylvania Public Utility Commission (“Commission”) issued the Initial Decision (“ID”) of Administrative Law Judge Dennis J. Buckley (the “ALJ”) in the above-captioned proceeding. In the ID, the ALJ dismissed the Complaint of EnergyMark LLC, Vineyard Oil & Gas Company, Mid American Natural Resources LLC and Total Energy Resources LLC (collectively the “Complainants”). The ID found that National Fuel Gas Distribution Corporation’s (“Distribution” or the “Company”) tariff Supplement No. 207, which has previously been approved by the Commission, was just and reasonable.<sup>1</sup>

The Complainants and the Pennsylvania Independent Oil & Gas Association (“PIOGA”) filed Exceptions to the ID. The Exceptions filed by the Complainants and by PIOGA largely focus on the cybersecurity insurance requirements and related audit provisions of Supplement No. 207. Distribution hereby files these Replies to Exceptions in response thereto. The ALJ’s ID is well-reasoned and supported by applicable law and the record evidence. The Complainants’ and PIOGA’s Exceptions should be denied, and the ID should be approved by the Commission.

## **II. SUMMARY OF REPLIES TO EXCEPTIONS**

The threat of cyber attacks on public utility Information Technology (“IT”) systems cannot be overstated. The risk is quite serious and is ever increasing. No party in this proceeding disputed that the risk of cyber attacks to utilities is severe. Distribution’s Supplement No. 207 mitigates this risk by requiring entities, such as Natural Gas Suppliers (“NGSs”), that interface with its IT system to have a minimum cybersecurity insurance policy of \$5 million.

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<sup>1</sup> The ID also denied a proposal by Distribution to adopt certain changes to the data security requirements of its tariff in response to a collaborative held with NGSs. Distribution did not file Exceptions as to this issue.

The cybersecurity insurance policy requirement is a reasonable tariff rule given the risk of attack and the benefits associated with having a cybersecurity insurance policy. In order to obtain a cybersecurity policy, an independent insurance underwriter will review the potential insured entity's cybersecurity protections to ensure that the entity has minimum protections to allow the insurance company to provide insurance. In addition, the underwriter may suggest or require additional cybersecurity protections that incentivize an entity to increase its cybersecurity protection measures. These actions protect the utility and protect customers. In addition, the cybersecurity policy provides a source of funds for customers in the event of a breach of an NGS' system.

The Complainants' and PIOGA's arguments against requiring cybersecurity insurance are unavailing. Primarily, they argue that the cost of obtaining cybersecurity will be a significant barrier to entry into the market and to competition. However, neither the Complainants nor PIOGA adequately supported their claims. For example, they did not present any evidence regarding the cost of obtaining insurance compared to how it would affect their profitability. In addition, the majority of PIOGA's members already have cybersecurity insurance. The record evidence demonstrates that obtaining cybersecurity insurance is a prudent, reasonable and necessary business expense.

The Complainants also argue the Distribution cannot require that NGSs have cybersecurity insurance because it is a form of security that is not authorized by the Public Utility Code or the Commission's regulations. The argument is in error. Under Section 1501 of the Public Utility Code, Distribution is authorized to implement reasonable rules for providing service, which includes service to NGSs. It is reasonable to require NGSs to have cybersecurity insurance, which both ensures that they have minimum insurable cyber protections in place and provides a source

of funds for customers in the event confidential customer information is released due to a breach of an NGS IT system.

The Complainants also argue that Distribution misrepresented the status of the DSA to the Commission and also misrepresented to NGSs that the Pennsylvania and New York DSA provisions would be the same. These allegations are also incorrect. Distribution did not represent the status of the DSA proceeding in New York to the Commission. When Distribution filed the DSA in Pennsylvania, it explained that the DSA was currently in use in New York. This statement was correct – the DSA was being used and had been signed by a number of NGSs in New York at that time. In addition, when Distribution filed the DSA in Pennsylvania, both the DSA in Pennsylvania and New York contained the cybersecurity requirement. Notably, after the DSA was approved in Pennsylvania, the New York Public Service Commission (“NYPSC”) eliminated the cybersecurity insurance provision. Distribution never stated that it would revise the DSA in Pennsylvania, after it had been approved by the Commission, to reflect the NYPSC revisions.

Both the Complainants and PIOGA argue that the ALJ misapplied the burden of proof. This is incorrect. The ALJ applied the burden of proof that was set forth in Complainants’ Main Brief, which was adopted by PIOGA. The Complainants and PIOGA argue that the ALJ erred by not accepting the testimony of their witnesses. Again, these arguments are in error. The ALJ properly weighed the evidence and determined that Distribution’s witness, who was the only witness with experience in obtaining cybersecurity insurance, was more credible than the Complainants’ and PIOGA’s witnesses who had no such experience.

Complainants also argue that the audit requirements of Supplement No. 207 are unlawful because they abrogate the Commission’s authority to regulate NGSs. The Complainants argument is incorrect because Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501, allows utilities to

have reasonable rules for providing service to NGSs. The audit requirement is limited in scope and is reasonable to ensure compliance with the DSA. Distribution also proposed to modify the audit provisions to be consistent with the New York DSA, which provide for an independent third-party audit at the utility's cost – and the Complainants rejected this proposal.

For the reasons explained herein, and in Distribution's Main and Reply Briefs, the Commission should adopt the Initial Decision of the ALJ.

### **III. REPLIES TO EXCEPTIONS**

#### **1. REQUIRING NGSS TO HAVE CYBERSECURITY INSURANCE IS NOT PROHIBITED BY STATUTE OF REGULATION (RESPONSE TO COMPLAINANTS' EXC. A.)**

The Complainants argue that Distribution's cybersecurity insurance requirement is a financial security requirement that is not expressly permitted under either 66 Pa. C.S. § 2208 or 52 Pa. Code § 62.111. Therefore, the Complainants argue that the cybersecurity insurance requirement is prohibited by law. Complainants' Exc. at 3-8. The Complainants' arguments fail for several reasons.

First, the Complainants fail to acknowledge that Distribution's authority to require cybersecurity insurance lies under Section 1501 of the Public Utility Code, which states:

...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.

Distribution demonstrated in this proceeding that requiring entities that interconnect with its IT system to have cybersecurity insurance is reasonable. No party disputed that cyber attacks are increasing and pose a severe threat to utilities and the customers. ID at 27. Requiring cybersecurity insurance decreases the risk of breach of the Company's IT system because in order to obtain cybersecurity insurance, a party must undergo an independent review of its security

protections by an insurance underwriter, which increases cybersecurity protections in the event that the parties' IT protections are inadequate. NFGD St. 2-R at 3. The insurance premium amount, premium limit and whether the policy can be retained is based upon the underwriting information. NFGD Exhibit JG-1 at 1; Distribution MB at 21. The Complainants' witness, Mr. Lacy, admitted that if companies are required to obtain insurance, they have an incentive to increase the security of their IT systems to achieve a lower-cost policy. Tr. 62-63; Distribution MB at 22.

Obtaining cybersecurity insurance has become a normal expenditure for prudent businesses. PIOGA's witness, Mr. Weaver, admitted that most of PIOGA's members already have cybersecurity insurance and that they would not spend money on something that they didn't benefit from. Tr. 13-14; Distribution MB at 23.

The Complainants' argument that cybersecurity insurance is an unlawful form of financial security under 66 Pa. C.S. § 2208 and the Commission's regulations at 52 Pa. Code § 62.111 also fails. The financial security provisions under Section 2208 are designed to provide for financial protection for utilities related to the costs of natural gas supplies in the event of a supplier default. *See* Distribution MB at 42-43. The cybersecurity insurance provisions are different and multi-purposed. They ensure that NGSs that interface with the Company's IT system have a source of funds for customers in the event of a system breach. The other purpose is to ensure that NGSs that interface with the Company's system have adequate cybersecurity protections that have been verified by an independent third-party, in this case the insurance underwriter. The record evidence is clear that requiring cybersecurity insurance enhances cybersecurity protection and decreases the risk of breach. Distribution MB at 19-23.

Requiring cybersecurity insurance for entities that interconnect with a utility's IT system is a reasonable tariff requirement and, therefore, is permitted by Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501.

**2. DISTRIBUTION DID NOT MAKE MISREPRESENTATIONS TO THE NGSS OR TO THE COMMISSION. (RESPONSE TO COMPLAINANTS' EXC. B.)**

Throughout its Exceptions, the Complainants accuse Distribution of misrepresenting facts to both the Complainants and to the Commission. The Complainants go so far as to allege that Distribution intentionally misrepresented facts. These accusations are improper, not true and should not be accepted by the Commission.

First, the Complainants argue that it was a misrepresentation for Distribution to say that the DSA was patterned after the DSA in use in New York. Complainants' Exc. at 2. The Complainants fail to acknowledge that this statement was correct at the time it was made.

A timeline of communications with NGSs is provided on pages 39-40 of Distribution's Main Brief. Initially, both the New York and Pennsylvania DSA's contained the cybersecurity provision. In addition, the New York DSA, which then included the cybersecurity provision, was being used in New York before it was filed in Pennsylvania and before it was modified by the New York Commission. NFGD St. 1-R at 7; *see also* Distribution MB at 4. At the time when Distribution stated that the Pennsylvania DSA would follow the New York DSA, both DSA's included the cybersecurity provision. Distribution MB at 5.

Distribution filed Supplement No. 207 with the PUC on June 14, 2019. The PUC subsequently approved the DSA on August 20, 2019. The New York Commission subsequently revised the DSA in New York on October 17, 2019.

The Complainants allege that Distribution's statement that the DSA was in use in New York when Distribution filed the DSA in Pennsylvania suggested that the DSA was approved by

the NYPSC. The Complainants' allegation should be denied. Distribution did not state that the DSA had been approved by the NYPSC. Moreover, the NGSs that operate in both Pennsylvania and New York were certainly aware of the status of the DSA in New York and failed to intervene in the Pennsylvania proceeding. Notably, at no time did Distribution state that it would modify the DSA in Pennsylvania after it was approved by the Commission. Complainants make a huge leap in arguing that Distribution's statements that the Pennsylvania DSA would follow the New York DSA, meant that Distribution would modify the Pennsylvania DSA after it was approved by the Pennsylvania Commission to incorporate any revisions made by the NYPSC.

The Complainants also argue that Distribution showed a lack of candor by not informing the PUC when the NYPSC did not adopt the cybersecurity insurance provision. Complainants' Exc. at 10. As explained above, the NYPSC modified the DSA after it had been approved by the PUC. The PUC-approved tariff was already in effect. Distribution did not have any obligation to inform the PUC that the DSA in New York had been modified and had no obligation to amend the DSA in Pennsylvania.

The Complainants attempt to put great weight on the fact that the NYPSC did not adopt the cybersecurity provision. This is irrelevant. First, the PUC is not bound by any action taken by the New York PSC. Distribution MB at 44-47 (citing *Petition of Columbia Gas of Pennsylvania, Inc. for Approval of its Long-Term Infrastructure Improvement Plant; Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge*, Docket No. P-2012-2338282, et al., 2014 Pa. PUC LEXIS 93, at \*34-35 (Recommended Decision Feb. 25, 2014) ("*Columbia 2014 RD*"), *adopted*, Docket Nos. P-2012-2338282, et al. (Order entered May 22, 2014), *Elder v. Orlucky*, 515 A.2d 517, 522 (Pa. 1986), and *Performance Metrics & Remedies*

(*PMO III F0013*) 2008 Guidelines Updates, 2008 Pa. PUC LEXIS 1105, at \*19-20 (Order entered July 22, 2008)).

Moreover, when the New York PSC amends the DSA, it did not foreclose the imposition of a cybersecurity insurance requirement in New York, stating:

...at this time, the [NYPSC] declines to adopt a generic cybersecurity insurance provision but may revisit this issue at a later date.

Distribution MB at 48; NYPSC October 2019 Order at 58.

In this Exception B, the Complainants also argue that the ID erroneously states the scope of the burden of proof and required the Complainants to prove procedural misconduct prior to addressing the “contents of the Complaint itself.” Complainants’ Exc. at 12. The Joint Complainants say that their burden was to prove by a preponderance of the evidence that Supplement No. 207 violated the Public Utility Code and suggest that the ID did not address this issue. Complainants’ Exc. at 13. The Complainants are clearly misreading the ID. In the ID and in the Conclusions of law, the ALJ directly addresses this issue, stating:

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. *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).

The ALJ also addressed these issues throughout the body of the ID. *See, e.g.*, ID at 10 (“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.”), 13 (“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.”), 19-23. Indeed, the ALJ specifically explained:

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.

ID at 20 (emphasis added).

The Complainants distort the ALJ’s findings in this proceeding and these distortions should  
not be accepted.

**3. CIRCUMSTANCES HAVE NOT CHANGED TO MAKE IT  
UNREASONABLE TO REQUIRE CYBERSECURITY INSURANCE  
(COMPLAINANTS’ EXC. NO. C)**

In this Exception, the Complainants argue that changed circumstances warrant revising the  
DSA to eliminate the cybersecurity insurance requirement. These changed circumstances,  
according to the Complainants, include Distribution’s alleged misrepresentation regarding the  
status of the DSA proceeding in New York and the NYPSC’s elimination of the cybersecurity  
provision. Complainants’ Exc. at 14.

These are not changed circumstances that warrant elimination of the cybersecurity  
requirement. First, as explained above, Distribution did not misrepresent the status of the DSA  
proceeding. Second, the PUC is not bound by any action of the New York PSC. Distribution MB  
at 44-47 (citing authorities listed above).

The Complainants also argue that because Distribution has a single IT interface for both Pennsylvania and New York that this requires NGSs to obtain insurance coverage for both states. Complainants' Exc. at 15. The Complainants then argue that this is an "unreasonable burden" on Pennsylvania suppliers. Complainants' Exc. at 15. Complainants' statement is flawed because it is not supported by any actual evidence. Complainants did not produce evidence on the record in this proceeding regarding the cost of obtaining cybersecurity insurance and how that cost would or would not burden their business. As explained in the Company's Main Brief, neither the Complainants nor PIOGA admitted any evidence into the record supporting their unsubstantiated claim that the cost of cybersecurity insurance would be an unreasonable burden. Distribution MB at 32-37.

The record is clear that cyber attacks pose a serious threat to utilities and their customers. Many companies already have cybersecurity insurance. Distribution MB at 33 (quoting Tr. 42 and PIOGA St. 1 at 4). Requiring NGSs that interface with Distribution's IT system to have cybersecurity insurance is a reasonable tariff rule, and the Complainants have not demonstrated that it will unreasonably burden them.

**4. THE ID GAVE PROPER WEIGHT TO COMPLAINANTS' WITNESS TESTIMONY. (COMPLAINANTS' EXC. D.)**

The Complainants argue that the ALJ failed to give proper credit to their witness's testimony and that his opinion testimony should have been accepted without any additional support. Complainants' Exc. at 16. Complainants' arguments should be denied.

The ALJ properly weighed the evidence that was presented and found that Distribution's witness, who had actual experience obtaining cybersecurity insurance, should be accepted over the Complainants' witness, who had never procured cybersecurity insurance and was not a cybersecurity expert. The record evidence demonstrated that Complainants' witness:

1. Has never acquired cybersecurity insurance for any company. Tr. at 58.
2. Has no work experience or formal education regarding cybersecurity issues. Tr. 57.
3. Attempted to use his general knowledge as a layperson to support his claims. Distribution RB at 9 (quoting Tr. 58).

On the other hand, Distribution's witness:

1. Is responsible for procuring all insurance policies for Distribution, including cybersecurity insurance. NFGD St. No. 2-R at 1.
2. Has participated in the insurance underwriting process approximately 200 times, including the underwriting of its cybersecurity insurance policy. Tr. 53.
3. Explained the difference between the process to obtain cybersecurity insurance versus other insurance. Tr. 44.

The ALJ properly evaluated the witnesses' qualifications and experience and determined that Distribution's witness was more credible based upon his actual experience.

The Complainants also allege that the ALJ erred in concluding that third party studies or analyses were needed on whether cybersecurity insurance is effective at preventing a cyber incident. Complainants' Exc. at 16. The ALJ did not err in this regard. The ALJ noted on page 26 of the ID that the Complainants and PIOGA's testimony in this regard was their witnesses' opinions. The Complainants' and PIOGA's witness testimony was opinion testimony because none of these witnesses had any actual experience in obtaining cybersecurity insurance. Therefore, their lay opinions needed to be supported by something more. On the other hand, Distributions' witness had actual experience obtaining cybersecurity insurance and explained that the underwriting process review of IT systems reduces the risk of cyber attack. Distribution MB at 19-23; Distribution RB at 12-13. It was reasonable for the ALJ to accept Distribution's witness

testimony over the opinion testimony of the Complainants and PIOGA's witnesses, who had no experience in obtaining cybersecurity insurance.

The Complainants allege that Distribution's testimony from a witness with experience in obtaining cybersecurity insurance was not equal to the Complainants' witness, who had no experience in obtaining cybersecurity insurance. Complainants' Exc. at 17. This argument is clearly in error. Moreover, even the Complainants' witness admitted that the underwriting process for obtaining cybersecurity insurance could incentivize companies to increase their cybersecurity protection measures. Tr. 62-63.

The Complainants argue that Distribution's witness, Mr. Grice, only testified that the underwriting process "may" enhance protections. Complainants' Exc. at 18. The attempt to distort this statement into an argument that obtaining cybersecurity insurance does not protect against cyber attacks is misguided. If a company already has outstanding cybersecurity protections, the underwriting process may not identify additional necessary measures, and the fact that the Company has outstanding protections will be reflected in the cost of the policy. *See* Distribution MB at 20-21; Distribution RB at 10. On the other hand, if the entities' existing cybersecurity measures are inadequate, the underwriting process will identify steps the entity should take to increase protections, and the insurance company will reflect such inadequate measures in an increased cost, due to increased risk, or deny coverage. *See* Distribution MB at 20-21; Distribution RB at 10. Both of these options incentivize the potential insured to increase its cybersecurity protections. Mr. Grice's testimony was supported by PIOGA's very own documents produced in discovery. Therein, an insurance underwriter stated to a PIOGA member that the cybersecurity insurance premium amount, coverage limit and retention ability were all dependent upon the information obtained through the underwriting process. NFGD Exhibit JG-1 at 1; Distribution

MB at 21. In addition, Complainants' witness testified that the underwriting process could incentivize companies to increase cybersecurity protections. Tr. 62-63. PIOGA's witness similarly conceded that the fact that its members purchased insurance meant that they believed they benefited from it. Tr. 13-14. The Complainants' and PIOGA's claims that cybersecurity insurance does not increase cybersecurity protections is refuted by their own testimony and documents produced in discovery.

**5. THE AUDIT PROVISIONS DO NOT ABROGATE THE COMMISSION'S AUTHORITY. (COMPLAINANTS' EXC. E.)**

In this Exception, the Complainants argue that the audit provisions abrogate the Commission's authority to regulate NGSs under 66 Pa. C.S. § 2208. Complainants' Exc. at 19. The Complainants argue that the DSA gives Distribution unfettered access to suppliers' "highly sensitive, proprietary, and confidential information technology systems."

As an initial matter, Distribution proposed to address NGSs' concerns regarding the audit provisions through a collaborative meeting with all interested NGSs on its system. As part of this collaborative, Distribution agreed to revise the auditing provision of the DSA to confirm that, if an audit is necessary, a third-party auditor would be selected through a competitive solicitation process and would be conducted at the Company's expense. See Distribution MB at 29. This would make the audit provision consistent with the audit provisions in New York. NFGD St. 1-R at 13.

Despite these proposed changes, the Complainants objected to the proposed revised DSA. Distribution attempted to resolve the Complainants' and other NGSs' concerns regarding the audit provisions, and those attempts were denied.

The Complainants argue that the Commission alone can regulate NGSs, and the audit requirement is an improper regulation of the NGSs by Distribution. Complainants' Exc. at 20.

Distribution addressed this argument on pages 30-32 of its Main Brief and on pages 25-30 of its Reply Brief and will summarize its arguments herein.

As explained above, Section 1501 of the Public Utility Code allows public utilities to have reasonable rules and regulations governing its relationship with energy suppliers operating on its system. 66 Pa. C.S. § 1501. The ALJ recognized this on page 25 of the ID.

Allowing a utility to audit an NGS to ensure compliance with tariff rules is certainly reasonable. Otherwise, NGSs could simply ignore the tariff obligations. The audit provision is limited and provides notice and protection to NGSs. The audit provisions require a minimum of 30 days' notice and cannot be conducted more than annually unless required by the Company's regulations. NFGD Exhibit CC-2, p. 32. The audit requirements are limited to verifying the NGS's compliance with the DSA, including data protection requirements. The NGS can also choose to complete an independent third-party audit at its expense.<sup>2</sup>

The Complainants also allege that the audit requirement is unreasonable because it is a one-way obligation with no corollary requirement if Distribution's system is breached. Complainants' Exc. at 20. This provision is not unreasonable. Complainants have recourse at the Commission if Distribution's system is breached and they do not believe that Distribution has adequately remedied the situation. Moreover, it is the NGS that is connecting to Distribution's system, not Distribution connecting to the NGS's system.

The Complainants also argue that the audit provision is unreasonable because the NGSs are competitors with Distribution. These statements are not correct. Distribution provides gas supply service to customers on a cost basis. It has no basis on which to compete with an NGS for customers and is not a competitor.

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<sup>2</sup> Under the revised DSA, which is opposed by the Complainants, a third-party audit would be conducted at Distribution's expense.

The Complainants also argue that the audit provisions will cause unlawful discrimination in violation of Pa. C.S. §§ 1502 and 2203(4). Complainants' Exc. at 21. This argument is related to Complainants' averment that Distribution is a competitor and that the audit standards are not clear. As stated above, Distribution is not a competitor. Moreover, the audit requirements are clearly set forth in the DSA, including the limitation on the scope of the audit. It is not discriminatory for Distribution to have rules and regulations setting forth requirements for NGSs to access the Company's IT system for sensitive, private customer information. In addition, the DSA applies to all NGSs—none will be given preferential or differential treatment.

Distribution further addressed Complainants' discrimination arguments on pages 27-29 of its Reply Brief. Therein, the Company explained why the Commission's order in *Pa. PUC et al v. Columbia Gas of Pennsylvania, Inc.*, Docket No. R-2018-2647577, 2018 Pa. PUC LEXIS 431 (Order entered December 6, 2018) ("*Columbia*") does not support their argument. *Columbia* is factually distinguishable in that it dealt with the provision of a billing service by Columbia to third-parties (which were former affiliates of Columbia) and not to NGSs that serve on its system. *See Columbia*, 2018 Pa. PUC LEXIS 431, at 77. Moreover, the Commission specifically explained that discrimination can be allowable "so long as it is not undue" and that "[i]n order for the discrimination to be reasonable in the circumstances, the discrimination between the parties must be based on facts which warrant the distinction, and not simply preferential treatment." *Id.*, at \*78 (emphasis added). The practice in question was only found to be unlawful was because "all the reasons Columbia gives for providing its former affiliates 'on bill' billing service point to a preferential relationship and weigh against any justifiable distinction between Columbia's former affiliates and the NGS Parties for billing purposes." *Id.*, at \*78. Here, no such preferential

treatment exists. All NGSs that seek to interconnect to the Company's IT system will be treated the same under the tariff rules and the DSA.

Finally, the Complainants argue that the audit requirement creates an "insurmountable barrier to entry for doing business as a supplier on the NFGD system." Complainants' Exc. at 22. This argument also fails. First, Complainants provided no analysis as to how the audit requirement will create an "insurmountable barrier." Second, Distribution proposed to align the requirement in Pennsylvania with the audit requirement in New York, and the Complainants rejected this proposal. Allowing Distribution to conduct a no-more-frequent than annual, limited audit to ensure NGSs are complying with the tariff rules does not create an insurmountable barrier to market entry.

**6. THE ALJ DID NOT ERR WHEN FINDING THAT THE COMMISSION-APPROVED TARIFF IS *PRIMA FACIE* REASONABLE. (PIOGA EXC. NO. 1)**

In its first Exception, PIOGA argues that the ALJ erred in finding that Supplement No. 207 was *prima facie* reasonable. According to PIOGA, the Commission stated that its decision approving Supplement No. 207 did not constitute a determination that the filing was "lawful, just or reasonable" and that the Commission's Order was without prejudice to issues raised in later proceedings and therefore Supplement No. 207 is not *prima facie* reasonable. PIOGA further states that: "A correct legal principle cannot be applied when the Commission explicitly renders it inapplicable." PIOGA Exc. at 1-2.

PIOGA's argument is contrary to law and cannot be accepted. The Commission is itself a creature of statute and cannot render a statute inapplicable. *See, e.g., Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977) (holding that the Commission is a creature of statute and has only those powers which are expressly conferred upon it by necessary implication). Section 316 of the Public Utility Code, 66 Pa. C.S. § 316, provides that:

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.

Under Section 316, when the Commission issued its Order approving Supplement No. 207, it became *prima facie* reasonable. The Commission cannot void the effect of Section 316. Moreover, Pennsylvania courts have repeatedly held that tariff provisions previously approved by the PUC are prima facie reasonable. See *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910 (Pa. Cmwlth. 1996). Further, a complainant seeking to evade the effect of an existing tariff provision “carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable.” *Shenango*, at 914. See also *Philadelphia Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044 (Pa. Cmwlth. 2002); *Pennsylvania Electric Co. v. Pa. PUC*, 663 A.2d 281 (Pa. Cmwlth. 1995); *Philadelphia Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044 (Pa. Cmwlth. 2002).

Even if PIOGA’s argument was correct, which it is not, PIOGA already admitted in its Main Brief that Supplement No. 207 was *prima facie* reasonable and waived any right to make this contrary argument in its Exceptions. In its Main Brief, PIOGA adopted the Burden of Proof argument in the Main Brief of the Joint Complainants. PIOGA MB at 2. In the Joint Complainants Main Brief, they agreed that tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable, stating:

Pennsylvania courts have repeatedly held that tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable.

Complainants MB at 7.

Complainants go on to state:

Therefore, a complainant seeking to evade the effect of an existing tariff provision carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provision unreasonable. *Id.*; *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. Ct. 1981).

Complainants MB at 8.

This is the very standard that was agreed to by PIOGA and adopted by the ALJ in this proceeding. PIOGA cannot completely reverse its stated position in Exceptions. *Andrew Maholik v. PECO Energy Company*, Docket No. F-2011-2263263, 2012 Pa. PUC LEXIS 1281, at \*16 (Opinion and Order entered Aug. 2, 2012) (denying an exception because a party cannot take one position at the hearing and then take a contrary position in its exceptions).

Contrary to PIOGA's assertions, the ALJ correctly determined and applied the law in this proceeding.

**7. THE ALJ CORRECTLY WEIGHED THE EVIDENCE SUBMITTED BY THE PARTIES. (PIOGA EXC. NO. 2)**

In its second Exception, PIOGA argues that the ALJ erred by not finding that PIOGA's testimony was evidence. PIOGA Exc. at 2. PIOGA does not fully explain the ALJ's determination.

In this proceeding, both the Joint Complainants' and PIOGA's witnesses argued that the cost to obtain cybersecurity insurance was unduly burdensome. PIOGA MB at 2; Complainants MB at 5. In the ID, the ALJ explained that neither the Complainants nor PIOGA evaluated the effects of the cost of obtaining cybersecurity insurance on their businesses to support their opinions that the cost would be unduly burdensome. ID at 20. Moreover, Complainants' and PIOGA's testimony regarding the costs being unduly burdensome is directly contrary to the uncontested fact that most of PIOGA's members already have cybersecurity insurance.

Further, the ALJ weighed the expertise of the witnesses and determined that Distribution's witness was more credible than the PIOGA or Complainant witnesses. The ALJ stated:

I do, however, agree with [NFGD] 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."

ID at 20, fn 10.

The ALJ clearly weighed the credibility of the witnesses, and correctly determined that Distribution's witness, who had actual experience with obtaining cybersecurity insurance, was more credible than Complainants' and PIOGA's witnesses who had no such experience and did not provide any analysis to support their claims.

**8. THE ALJ DID NOT ERR REGARDING PIOGA'S FINDINGS OF FACT. (PIOGA EXC. NO. 3)**

Next PIOGA argues that the ALJ erred by not adopting any of PIOGA's proposed findings of fact. PIOGA Exc. at 4. Contrary to PIOGA's implication, the ALJ is not required to adopt every party's proposed findings of fact. It is up to the ALJ to determine the credibility of the evidence and to determine which facts he deems to be appropriate. *See, e.g., Application of JET Sedan Services, LLC*, Docket No. A-2009-2120781, at p. 6 (Order entered August 23, 2010) ("The credibility of witnesses, their manner of testifying, their apparent candor, intelligence, personal intent and bias, or lack thereof, are all considered in determining what weight should be given to their testimony." (citing *Danovitz v. Portnoy*, 399 Pa. 599, 161 A.2d 146 (Pa. 1960))). As explained above, the ALJ weighed the evidence submitted by the parties and determined that Distribution's witness was more credible because he was the only witness with any actual

experience with cybersecurity insurance. The ALJ also correctly determined that the Complainants and PIOGA did not meet their burden of proof.

**9. THE ALJ PROPERLY APPLIED THE BURDEN OF PROOF TO THE COMPLAINANTS. (PIOGA EXC. NO. 4)**

In Exception Number 4, PIOGA states that the ALJ erred in stating and applying the burden of proof standard. PIOGA Exc. at 4. PIOGA is clearly in error.

First, all of the parties in this proceeding agreed that the Joint Complainant's bear the burden of proof. In its Main Brief, Complainants stated:

The Joint Complainants, as the proponents of a rule or order in this Commission proceeding, bear the burden of proof. 66 Pa. C.S. § 332. Accordingly, the Joint Complainants have the burden of proving by a preponderance of the evidence, which is evidence that is more convincing than the evidence presented by the other parties, that the NFGD has violated the Public Utility Code, 66 Pa.C.S. § 101, *et. seq.* See *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.3d 854 (1950); *Samuel J Lansberry, Inc. v. Pa PUG*, 578 A.2d 600 (Pa. Cmwlth. 1990).

As noted above, PIOGA adopted the Joint Complainants statement of the burden of proof. PIOGA MB at 2.

In its Exceptions, PIOGA states that it is impossible for the Commission to determine whether the ALJ applied the correct burden of proof because the ALJ started from the standpoint that Distribution's tariff, which had already been approved by the Commission was just and reasonable. As explained above, Section 316 of the Public Utility Code expressly provides that Commission-approved tariffs are *prima facie* reasonable. 66 Pa. C.S. § 316. Moreover, PIOGA admitted this in its Main Brief by adopting the Joint Complainants' burden of proof section. PIOGA is in error by claiming that the ALJ started from an incorrect standpoint.

PIOGA also repeats its argument in this section that the ALJ erred by rejecting PIOGA's and Complainants' evidence. PIOGA MB at 6. As stated in Section III.8. above, this argument should be denied because the ALJ properly weighed the evidence that was presented.

PIOGA also argues that the ALJ misunderstood the difference between "evidence" and "proof." PIOGA MB at 6. PIOGA's assertion is clearly in error. The ALJ weighed the evidence that was presented and determined that the Complainants and PIOGA did not meet their burden of proof. This is evident by simply reviewing Conclusion of Law Number 10 which provides that "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." ID at 31. *See also* ID, Conclusion of Law Number 11.

**10. THE ALJ PROPERLY WEIGHED THE EVIDENCE IN FINDING THAT THE COMPLAINANTS AND PIOGA FAILED TO MEET THEIR BURDEN OF PROOF (PIOGA EXC. NO. 5)**

In Exception Number 5, PIOGA argues that the ALJ erred in concluding that PIOGA and the Joint Complainants failed to offer substantial evidence that Supplement 207 is unjust, unreasonable, unlawful, unduly burdensome and discriminatory. PIOGA Exc. at 6. In support of this Exception, PIOGA cites to the testimony of its witness. Again, the ALJ properly evaluated the credibility of the witnesses and all of the evidence that was provided and found that PIOGA and the Joint Complainants did not meet their burden in this proceeding. The ALJ agreed with Distribution's witnesses that obtaining cybersecurity insurance is a reasonable and prudent cost of doing business, which both provides a source of funds for customers and the utility in the event of a successful cyber attack on an NGS and also serves to ensure that NGSs have adequate cybersecurity measures in place. The ALJ did not err in finding that Supplement 207 was just, reasonable and in the public interest.

**IV. CONCLUSION**

WHEREFORE, National Fuel Gas Distribution Corporation respectfully requests that the Pennsylvania Public Utility Commission adopt the Initial Decision of Administrative Law Judge Dennis J. Buckley, deny the Exceptions filed by EnergyMark LLC, Vineyard Oil & Gas Company, Mid American Natural Resources LLC and Total Energy Resources LLC, deny the Exceptions filed by the Pennsylvania Independent Oil & Gas Association, deny the Complaint of EnergyMark LLC, Vineyard Oil & Gas Company, Mid American Natural Resources LLC and Total Energy Resources LLC and close the above-captioned docket.

Respectfully submitted,



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