PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Public Meeting held April 14, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC — C-2020-3019621

v.

National Fuel Gas Distribution Corporation

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC (collectively, the Joint Complainants), and the Pennsylvania Independent Oil & Gas Association (PIOGA), on January 12, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Dennis J. Buckley issued on December 23, 2021, in the above-captioned proceeding. The Initial Decision dismissed the Formal Complaint (Complaint) filed by the Joint Complainants on April 27, 2020. National Fuel Gas Distribution Corporation (NFGD) filed Replies to Exceptions on January 24, 2022. For

the reasons stated below, we shall deny the Joint Complainants' and PIOGA's Exceptions, and adopt the ALJ's Initial Decision, consistent with this Opinion and Order.

I. History of Proceeding

On April 27, 2020, the Joint Complainants filed a Complaint in the above-captioned matter against NFGD with the Commission alleging that NFGD filed with the Commission unreasonable tariff provisions on data security requirements in a deceptive and misleading manner depriving the Joint Complainants of the ability to challenge the tariff prior to implementation, that the facts and circumstances regarding NFGD's implemented tariff provisions have changed so drastically as to render the application of the data security requirement tariff provisions unreasonable, and that the tariff provision grants NFGD illegal authority to supervise and regulate natural gas suppliers in abrogation of the Commission's exclusive authority to do so. Complaint at 2-3.

NFGD filed an Answer and New Matter to the Complaint, on May 20, 2020, denying the material allegations in the Complaint. Answer at 1-2. On May 22, 2020, NFGD submitted a letter voluntarily suspending enforcement of the cybersecurity insurance requirements contained in Rule 33 of its Tariff and the Data Security Agreement (DSA), pending the outcome of this proceeding.

On June 9, 2020, the Joint Complainants filed an Answer to NFGD's New Matter admitting, in part, and denying, in part, the averments in the same. Answer to New Matter at 1-8.

A Protective Order was issued on January 20, 2021. PIOGA's intervention was granted without opposition at the telephonic prehearing conference on January 19, 2021.[1]

On April 29, 2021, a telephonic evidentiary hearing was held. The Parties were represented by counsel, and limited cross-examination of witnesses was conducted. The Parties submitted verified testimony and related exhibits that were admitted into the record.[2] The Parties filed Main Briefs and Reply Briefs. The record closed on July 10, 2021. R.D. at 3-5.

In the Initial Decision issued on December 23, 2021, ALJ Buckley dismissed the Complaint because the Joint Complainants failed to meet their burden of proving that NFGD has violated a provision of the Public Utility Code (Code) or a regulation of the Commission. *Id*. at 1, 5, 29.

As noted, *supra*, the Joint Complainants and PIOGA filed Exceptions on January 12, 2022. NFGD filed Replies to Exceptions on January 24, 2022.

II. Background

The issue here is whether the data security provision in NFGD's Tariff Supplement No. 207, Rule 33, requiring that natural gas suppliers carry $5,000,000 cybersecurity insurance coverage, which has already been approved by the Commission and is part of NFGD's filed tariff, is lawful and reasonable. I.D. at 13. The tariff filing, which no party filed a complaint against, and that was approved by the Commission stated as follows:

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[1] PIOGA filed its petition to intervention in this proceeding on January 15, 2021.

[2] *See* R.D. at 3-5 for a complete list of the exhibits admitted into evidence.

> 33. DATA SECURITY AGREEMENT As a condition of access to customer information via publicly available Company business systems, including but not limited to web portals, the Company will require parties requesting such access to sign a Data Security Agreement and require that parties carry and maintain Cybersecurity insurance in an amount no less than $5,000,000 per incident. A standard form Data Security Agreement will be provided in the Company's Operational Procedures Manual.
>
> Such requirement shall not apply to customers with usage less than 5,000 mcf per year that seek to access their own customer account information. Further, the Company may accept Cybersecurity insurance provided under another agreement, provided that such agreement is substantially identical in form and effect as the standard form Data Security Agreement.

NFGD Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9. (Effective August 30, 2019) (Tariff Supplement No. 207).

We refer to the Initial Decision for a detailed description of the Parties' positions regarding the Complaint and which is incorporated herein. *See* R.D. at 10-13. The positions of the Parties are briefly summarized herein.

The Joint Complainants argued that Tariff Supplement No. 207, Rule 33 and the data security requirements are an unreasonable and anti-competitive market barrier implemented by NFGD in order to gain a competitive advantage by imposing certain requirements for natural gas supplier access to its system. The Joint Complainants averred that the tariff provision requires suppliers on NFGD's distribution network to maintain arbitrary and ineffective cybersecurity insurance coverage to the benefit of NFGD but not providing any benefit to any customers or business. The Joint Complainants contended that the tariff provision should be held to be void, *ab initio*, because NFGD misrepresented the basis of its data security tariff to the Joint

Complainants and the Commission, and that the tariff provision grants NFGD illegal authority to supervise and regulate natural gas suppliers in abrogation of the Commission's exclusive authority to do so. I.D. at 10-11; Joint Complainants' M.B. at 1.

The Joint Complainants requested that NFGD's Tariff Supplement No. 207, as it pertains to cybersecurity, be found to be unjust and unreasonable and be suspended pending a statewide proceeding addressing cybersecurity protections, that NFGD be found to have violated Sections 1501 and 1301 of the Code, that NFGD be ordered to cease and desist from efforts to impose cybersecurity requirements upon suppliers pending the outcome of the proceeding requested, and that NFGD be required to implement a "Pennsylvania only" credential for its data systems. I.D. at 11; Joint Complaint at 14.

PIOGA supported the positions and arguments of the Joint Complainants. In addition, PIOGA argued that a $5,000,000 per incident cybersecurity insurance requirement is unjust, unlawful, unreasonable, and unduly burdensome, and that acquiring cybersecurity insurance should not be mandated by a utility because its member natural gas suppliers have acquired cybersecurity insurance and adopted other measures in a cost-effective manner that are narrowly tailored to fit their needs based on each member's particular circumstances. Furthermore, PIOGA contended that NFGD's tariff provisions are prohibitively expensive and a barrier to market entry. I.D. at 11-12; PIOGA M.B. at 2-4.

NFGD argued that the data security requirements in Tariff Supplement No. 207, Rule 33, including the cybersecurity insurance requirements for natural gas suppliers, are reasonable and lawful. NFGD averred that it did not mislead natural gas suppliers or the Commission when it obtained approval of the data security requirements tariff provisions. Furthermore, NFGD contended that the data security requirements are necessary to protect confidential customer information and its information

technology (IT) systems from cyber-attack, as well as ensure that funds are available to reimburse customers if a supplier's IT system is breached and confidential customer information is disclosed. Finally, NFGD stated that cyber-attacks have recently become more prevalent, and NFGD has taken steps to protect confidential customer information and its IT systems, such as implementing the data security requirements tariff provision. I.D. at 12-13; NFGD M.B. at 1-2.

III. Discussion

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Legal Standards

1. Burden of Proof

Section 332(a) of the Code provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). To establish a legally sufficient case and satisfy the burden of proof, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, a complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent

utility. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the complainant shifts to the respondent utility. If the evidence presented by the respondent utility is of co-equal value or "weight," the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of production may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

2. Safe, Adequate and Reasonable Gas Service

A public utility has a duty to maintain safe, adequate and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa. C.S. § 1501. The statute at 66 Pa. C.S. § 1501 governs any allegations of unreasonable or inadequate service. Section 1501 of the Code provides, in pertinent part, as follows:

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

66 Pa. C.S. § 1501.

Pursuant to 66 Pa. C.S. § 1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 420 A.2d 371 (1980); *Behrend v. Bell Tel. Co.*, 431 Pa. 63, 243 A.2d 346 (1968). Section 1501 of the Code does not require a public utility to provide perfect service, but a public utility is obligated to provide service that is reasonable and adequate. *Analytical Lab Servs., Inc. v. Metro. Edison Co.*, Docket No. C-20066608 (Order entered December 21, 2007). The term "service" is defined broadly under Section 102 of the Code to include any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities, used, furnished or supplied by public utilities. *See* 66 Pa. C.S. §102. The statutory definition of "service" is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995). "Inappropriate and unreasonable treatment to customers can be interpreted as inadequate service[.]" *Barbara R. Lolly v. Duquesne Light Co.*, Docket No. C-2010-2167824 (Order entered May 9, 2011) (citing *Edward T.*

O'Toole v. Metropolitan Edison Co., Docket No. C-20030854 (Order entered May 9, 2005)). Quality customer service is expected of all regulated utilities. *Id*.

3. Commission Approved Tariffs

It is well accepted that a tariff is a set of operating rules imposed by the Commission that each public utility must follow in order to provide service to its customers. *PPL Elec. Utils. Corp. v. Pa. PUC*, 912 A.2d 386 (Pa. Cmwlth. 2006). Each public utility must file a copy of its tariff with the Commission setting forth its rates, services, rules, regulations, and practices so that the public may inspect its contents. 66 Pa. C.S. § 1302; 52 Pa. Code § 53.25; *Phila. Suburban Water Co. v. Pa. PUC*, 808 A.2d 1044 (Pa. Cmwlth. 2002) (*Phila. Suburban Water*). "Tariff provisions approved by the Commission are prima facie reasonable." *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979). Public utility tariffs must be applied consistent with their language. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. *Pa. Elec. Co. v. Pa. PUC*, 663 A.2d 281 (Pa. Cmwlth. 1995). The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. *Phila. Suburban Water*. A complainant seeking to avoid the effect of existing tariff provisions carries a very heavy burden to prove that the facts and circumstances have changed so drastically as to render the application of the tariff provisions unreasonable. *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

B. ALJ's Initial Decision

In his Initial Decision, ALJ Buckley made thirty Findings of Fact and reached eleven Conclusions of Law. I.D. at 5-9 and 30-32. The Findings of Fact and

Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ found that the Joint Complainants have not met their burden of proving that NFGD has violated any provision of the Code or the Commission's Regulations, and he dismissed the Complaint. *Id*. at 5, 32. The ALJ explained that the Joint Complainants had notice and did not file a complaint in 2019 when the Commission was considering the proposed requirements of Tariff Supplement No. 207, but instead chose to focus on a proceeding before the New York Public Service Commission (NYPSC) with an expectation that the Commission would modify the requirements in Tariff Supplement No. 207 based on the outcome of the NYPSC proceeding. *Id*. at 28.

Upon consideration of the evidence and arguments presented by the Parties, the ALJ determined that the Joint Complainants failed to meet their burden of proving that NFGD misled the Joint Complainants in such a way that the Joint Complainants rested on their right to initiate a complaint proceeding when NFGD filed and the Commission approved NFGD's Tariff Supplement No. 207, specifically the cybersecurity provision of Rule 33 and the requirement for $5,000,000 insurance coverage by a natural gas supplier. *Id*. at 15. The ALJ found that the Joint Complainants did not present any substantial evidence that they were misled by NFGD so as to persuade them not to take part in the Commission proceeding in 2019 regarding NFGD's Tariff Supplement No. 207. The ALJ further found that the action of the NYPSC is not binding on the Commission and that the Joint Complainants failed to prove that circumstances changed enough to warrant cancellation of the tariff provision. *Id*. at 17-19, 29. Moreover, the ALJ concluded that the Joint Complainants did not satisfy the very heavy burden to void an already filed and approved tariff. *Id*. at 19.

In addition, the ALJ determined that the Joint Complainants and PIOGA failed to meet their burden of proving that the existing tariff provision is unlawful or unreasonable. *Id*. at 15. The ALJ found that neither the Joint Complainants nor PIOGA presented any evidence in the form of a study or factual analysis in support of their claims regarding the costs of obtaining cybersecurity insurance or the impacts of those costs on their members' businesses, and they solely relied on opinion testimony offered by witnesses with no particular experience with respect to cybersecurity insurance and the effectiveness of such insurance. *Id*. at 20, 29. The ALJ also found that there was no evidence presented by the Joint Complainants or PIOGA that substantiates the actual costs that would be incurred to obtain cybersecurity insurance, and without such evidence, there is no basis upon which the Commission could determine that the cybersecurity insurance is too costly to obtain. *Id*. at 24.

Furthermore, the ALJ found that no persuasive evidence was presented to establish that NGDC filed Tariff Supplement No. 207 with the intention of creating a barrier to market entry that is anti-competitive and that will harm the competitive market. The ALJ concluded that Tariff Supplement No. 207 does not grant NFGD illegal authority to supervise and regulate natural gas suppliers in abrogation of the Commission's exclusive authority to do so. Moreover, contrary to the allegations of the Joint Complainants, the ALJ found that 66 Pa. C.S. § 2208(c)(1)(i) and 52 Pa. Code § 62.111, which address bonding requirements for natural gas suppliers, do not preclude, explicitly or by implication, further security requirements that may be imposed on a natural gas supplier. *Id*. at 22-25.

Finally, the ALJ denied NFGD's request that the Commission approve a revised version of the Data Security Agreement at Rule 33 of Tariff Supplement No. 207 as a part of the resolution of this proceeding. Because this is a complaint proceeding, the ALJ determined that there is no legal basis to widen its scope to rule on a revised Data Security Agreement and the proposed revisions are extensive and beyond the scope of

this proceeding. Rather, tariff revisions need to be filed with the Commission with appropriate notice to all potentially affected parties. *Id*. at 28.

C. Exceptions, Replies and Dispositions

1. Joint Complainants Exception Nos. 1 and 5

The Joint Complainants argue, in their Exception No. 1, that the ALJ erred by finding that cybersecurity insurance does not constitute an additional financial security requirement for suppliers which is not authorized by the Code and the Commission's Regulations. The Joint Complainants contend that the insurance requirement in Tariff Supplement No. 207, Rule 33 is unjust and unreasonable and should be removed from NFGD's tariff because NFGD lacks the legal authority to request financial assurances in the form of utility-benefitting insurance coverage. The Joint Complainants argue that neither 66 Pa. C.S. § 2208 nor 52 Pa. Code § 62.111 allow a natural gas distribution company to impose financial requirements in the form of insurance policies benefitting the natural gas distribution company at the expense of a supplier, and the Commission's Regulations allow only certain forms of financial security, none of which include an insurance requirement. The Joint Complainants aver that the ALJ erred by concluding that the cybersecurity insurance requirement is not a financial security, and without statutory and regulatory support under the Commission's Regulations, such financial securities cannot be forced onto suppliers outside of express authority for the utility to do which could only result from an amendment to the Commission's Regulation to address the concept of insurance policies as acceptable financial securities. The Joint Complainants argue that the ALJ's dismissal of the cybersecurity insurance requirement not constituting a financial instrument and not barred under the Commission's Regulations must be overturned. Joint Complainants' Exc. at 3-8.

In their Exception No. 5, the Joint Complainants argue that the ALJ erred by dismissing the arguments that Tariff Supplement No. 207 abrogates the Commission's exclusive authority to regulate natural gas suppliers under 66 Pa. C.S. § 2208, and by dismissing NFGD's concessions to amend the Data Security Agreement to include a third-party audit. The Joint Complainants aver that Tariff Supplement No. 207, which grants NFGD unprecedented auditing and unfettered access to suppliers' highly sensitive, proprietary, and confidential IT systems, and is invasive and anti-competitive, must be overturned. The Joint Complainants argue that 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 IT systems and data, and that such a requirement is contrary to well-established law and must be rejected. The Joint Complainants further contend that giving NFGD the discretion to audit provides a tool for reviewing a supplier's operation without significant boundaries in place, which provides an anticompetitive advantage and opportunity to view sensitive information under the guise of a cybersecurity audit, and is potentially discriminatory if it could lead to the imposition of an unbalanced approach. The Joint Complainants argue that the Commission should find that the cybersecurity requirement, including the audit requirement, in Tariff Supplement No. 207, is a term of service, which will create a discriminatory and insurmountable barrier to entry for doing business as a supplier on the NFGD system because it will create an imbalance between NFGD and suppliers on its system to the detriment of suppliers, in violation of 66 Pa. C.S. § 1502. The Joint Complainants contend that Tariff Supplement No. 207 must be modified to exclude the audit requirement as it stands because it has the potential for discriminatory application and is discriminatory on its face based upon the unequal requirements. Joint Complainants' Exc. at 19-23.

In reply to the Joint Complainants' Exception No. 1, NFGD contends that its authority to require cybersecurity insurance lies under 66 Pa. C.S. § 1501. NFGD avers that it demonstrated in this proceeding that requiring entities that connect with its

IT system to have cybersecurity insurance is reasonable because cyber-attacks are increasing and pose a severe threat to utilities and customers, requiring cybersecurity insurance decrease the risk if a breach of NFGD's systems, companies that are required to obtain insurance have an incentive to increase the security of their systems to achieve a lower-cost policy, and obtaining cybersecurity insurance has become a normal expenditure for prudent businesses. NFGD asserts that the Joint Complainants' argument that cybersecurity insurance is an unlawful form of security under 66 Pa. C.S. § 2208 and 52 Pa. Code § 62.111 fails because those sections of the Code and the Commission's Regulations are designed to provide for financial protection for utilities related to the costs of natural gas suppliers in the event of a supplier default. NFGD avers that the cybersecurity insurance requirements are different because they ensure a source of funds for customers in the event of a system breach, and they ensure the natural gas suppliers interfacing with NFGD's system have adequate cybersecurity protections. NFGD contends that requiring cybersecurity insurance for entities connecting with its system is a reasonable tariff requirement permitted by 66 Pa. C.S. § 1501. R. Exc. at 4-6.

Replying to the Joint Complainants' Exception No. 5, NFGD argues that the audit provisions in Tariff Supplement No. 207 do not abrogate the Commission's authority to regulate natural gas suppliers pursuant to 66 Pa. C.S. § 2208. NFGD states that it proposed to address natural gas suppliers' concerns regarding the audit provisions through a collaborative meeting with interested suppliers, and that it agreed to revise the auditing provision of the Data Security Agreement to be consistent with the audit provision in New York by confirming that a third-party auditor would be selected through a competitive solicitation process at NFGD's expense; however, the Joint Complainants objected to the proposed revisions. R. Exc. at 13-14.

Furthermore, NFGD contends that 66 Pa. C.S. § 1501 allows public utilities to have reasonable rules and regulations governing its relationship with energy suppliers operating on its system, and that allowing a utility to audit a natural gas supplier to ensure

compliance with its tariff rules is reasonable. NFGD avers that the Joint Complainants' arguments that the audit provisions are unreasonable because the natural gas suppliers are competitors with NFGD is not correct because NFGD provides gas supply service to customers at cost and there is no basis for NFGD to compete with natural gas suppliers for customers. Moreover, NFGD argues that the audit provisions will not cause unlawful discrimination in violation of 66 Pa. C.S. §§ 1502 and 2203(4) because NFGD is not a competitor and it is not discriminatory for NFGD to have rules and regulations, applicable to all natural gas suppliers, setting forth requirements to access its IT system for sensitive and private customer information. NFGD avers that there is no discrimination because there is no preferential treatment of certain suppliers because all natural gas suppliers seeking to interconnect to NFGD's system will be treated the same. NFGD asserts that the audit requirement is not an insurmountable barrier to entry to do business on NFGD's system. *Id*. at 14-16.

Upon review of the record and arguments of the Parties, we find that Tariff Supplement No. 207, Rule 33 is not unlawful under 66 Pa. C.S. § 2208 or 52 Pa. Code § 62.111. Section 2208(c)(1)(i) of the Code states:

> (c) Financial fitness.
>
> (1) In order to ensure the safety and reliability of the natural gas supply service in this Commonwealth, no natural gas supplier license shall be issued or remain in force unless the applicant or holder, as the case may be, complies with all of the following:
>
> (i) Furnishes a bond or other security in a form and amount to ensure the financial responsibility of the natural gas supplier. The criteria each natural gas distribution company shall use to determine the amount and form of such bond or other security shall be set forth in the natural gas distribution company's restructuring filing. In approving the criteria, commission

> considerations shall include, but not be limited to, the financial impact on the natural gas distribution company or an alternative supplier of last resort of a default or subsequent bankruptcy of a natural gas supplier. The commission shall periodically review the criteria upon petition by any party. The amount and form of the bond or other security may be mutually agreed to between the natural gas distribution company or the alternate supplier of last resort and the natural gas supplier or, failing that, shall be determined by criteria approved by the commission.

66 Pa. C.S. § 2208(c)(1)(i).

We agree with the ALJ that this section of the Code, in addition to the Commission's Regulation at 52 Pa. Code § 62.111, is a bonding requirement for natural gas suppliers. As the ALJ and NFGD explained, the bond or financial security provided for under these sections of the Code and Commission's Regulations are in place to account for the financial impact on a natural gas distribution company or alternative supplier of last resort in case of a default or bankruptcy of a natural gas supplier. These sections of the Code and Commission's Regulations do not, however, preclude further security requirements for other purposes that may be imposed on a natural gas supplier. The purpose of the cybersecurity insurance requirement in Tariff Supplement No. 207 is different than the purpose of the financial security requirements at 66 Pa. C.S. § 2208 and 52 Pa. Code § 62.111. I.D. at 22-23; NFGD R.B. at 18. Therefore, we conclude that the cybersecurity insurance requirement is reasonable due to the increasing risk faced by utilities and customers of cyber-attacks and their potential impact to utility systems.

In addition, we find that Tariff Supplement No. 207, specifically the audit requirement provision, does not abrogate the Commission's authority to regulate natural gas suppliers under 66 Pa. C.S. § 2208. The ALJ concluded that the Joint Complainants

and PIOGA did not present persuasive evidence in this regard. I.D. at 25. We agree. There is nothing in 66 Pa. C.S. § 2208 that precludes public utilities from having reasonable rules and regulations governing the relationship with energy suppliers operating on their systems, and a tariff providing for a utility to audit a natural gas supplier to ensure compliance with its tariff rules is reasonable.

Furthermore, we agree with the ALJ's conclusion that the Joint Complainants and PIOGA did not present persuasive evidence to establish that the cybersecurity insurance requirement, including the audit requirement, is discriminatory and a barrier to market entry. The Joint Complainants and PIOGA did not prove that the audit provision will cause unlawful discrimination. Rather, we conclude that reasonable rules and regulations that apply to all natural gas suppliers and provide for no preferential treatment of certain suppliers because all suppliers will be treated the same are not discriminatory or a barrier to market entry.

For the reasons set forth above, we conclude that Tariff Supplement No. 207, including the cybersecurity insurance requirement and the audit provision, is not unlawful or unreasonable. Moreover, we note that the above arguments of the Joint Complainants and PIOGA could have been made when the Commission reviewed and subsequently approved Tariff Supplement No. 207. No party filed a complaint with respect to that tariff filing, which was made in June 2019, and following the Commission's approval, is now part of NFGD's filed tariff. Accordingly, we shall deny the Joint Complainants' Exception Nos. 1 and 5.

2. PIOGA Exception No. 1

In its Exception No. 1, PIOGA argues that the ALJ erred by presuming NFGD's Tariff Supplement No. 207 to be *prima facie* reasonable and lawful. While PIOGA agrees that tariff provisions approved by the Commission are *prima facie*

reasonable, it argues that this is not the case here because the Commission, in the Order approving Tariff Supplement No. 207, stated that its approval is not a determination that the filing is lawful, just, or reasonable. PIOGA contends that the Commission thereby rendered inapplicable the legal principle that approved tariff provisions are *prima facie* reasonable. PIOGA argues that this alleged error permeates other mistakes in the ALJ's statement and application of the burden of proof and his analysis of the facts and arguments, rendering the Initial Decision legally incorrect. PIOGA Exc. at 1-2.

In reply, NFGD contends that the ALJ did not err by finding that the Commission-approved Tariff Supplement No. 207 is *prima facie* reasonable and that PIOGA's argument that a correct legal principle cannot be applied when the Commission explicitly renders it inapplicable is contrary to law. NFGD asserts that the Commission, as a creature of statute, cannot render a statute inapplicable. *Id*. at 16, citing *Feingold v. Bell of Pa.*, 383 A.2d 791, 794 (Pa. 1977). NFGD further argues that, under 66 Pa. C.S. § 316, Tariff Supplement No. 207 became *prima facie* reasonable when it approved it, and the Commission cannot void the effects of that section of the Code. *Id*. at 17, citing *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). In addition, NFGD avers that PIOGA admitted in its Main Brief that Tariff Supplement No. 207 was *prima facie* reasonable and waived any right to reverse its position and make this contrary argument in its Exceptions. *Id*. at 17-18.

Upon review, we agree with the ALJ's presumption that Tariff Supplement No. 207 is *prima facie* reasonable and lawful. "Tariff provisions approved by the Commission are *prima facie* reasonable." *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979). As discussed, *supra*, Tariff Supplement No. 207 has already been approved by the

Commission and is part of NFGD's lawfully filed tariff; therefore, it is *prima facie* reasonable.

We do not agree with PIOGA's argument that the Commission, in its approval of Tariff Supplement No. 207, rendered inapplicable the legal principle that approved tariff provisions are *prima facie* reasonable. Following the filing of Tariff Supplement No. 207 in June 2019, and after no party filed a complaint with respect to it, the tariff was reviewed and approved by the Commission. Therefore, Tariff Supplement No. 207 became *prima facie* reasonable when the Commission approved it; the Commission did not render inapplicable the legal principle that approved tariff provisions are *prima facie* reasonable. As a result, we shall deny PIOGA's Exception No. 1.

3. Joint Complainants Exception No. 2; PIOGA Exception No. 4

In their Exception No. 2, the Joint Complainants contend that the ALJ erred and ignored the record evidence when holding that NFGD did not misrepresent the basis for the Commission approving Tariff Supplement No. 207. Specifically, the Joint Complainants argue that the ALJ ignored the evidence that the Joint Complainants and the Commission relied on NFGD's misrepresentation that NFGD's data security agreement would be patterned after the one in use on its systems in New York. The Joint Complainants aver that NFGD's intentional misrepresentation helped to deceive and influence the Commission that the Data Security Agreement was approved in New York and should exist in Pennsylvania as well, and that never informing the Commission regarding the NYPSC's rejection of certain portions of it constitutes a lack of candor in violation of 66 Pa. C.S. § 1501. The Complainants allege that NFGD chose to remain silent and not inform the Commission that the circumstances in New York had changed because doing so would result in NFGD admitting that it had initially misrepresented the status. The Joint Complainants aver that NFGD did the same thing with the suppliers prior to filing Tariff Supplement No. 207 for approval, convincing them not to participate

in that proceeding. The Joint Complainants contend that by failing to engage in honest and complete communications, NFGD provided unreasonable service under 66 Pa. C.S. § 1501. Joint Complainants' Exc. at 8-12.

In addition, the Joint Complainants argue that the ALJ misapplied the burden of proof by holding that the Joint Complainants' arguments of misrepresentation did not need to proceed to further disposition because they failed to prove any procedural misconduct in the notices and filings associated with the approval of Tariff Supplement No. 207. The Joint Complainants aver that the ALJ's Initial Decision erroneously states the scope of the burden of proof and required the Joint Complainants to first prove that procedural misconduct occurred when NFGD filed and provided notice of Tariff Supplement No. 207. Instead, the Joint Complainants argue that they were required and succeeded to prove by a preponderance of the evidence that NFGD and Tariff Supplement No. 207 violated the Code. The Joint Complainants contend that the evidence of record demonstrates the pattern of NFGD's deception, and that the Commission never heard from suppliers regarding Tariff Supplement No. 207 because of NFGDs efforts. *Id*. at 8, 12-14.

PIOGA, in its Exception No. 4, argues that the ALJ erred in stating and applying the burden of proof standard. PIOGA avers it is impossible for the Commission to determine whether the correct standard was applied due to the ALJ's alleged errors of starting from the point that the approved tariff is lawful and reasonable and rejecting the testimonial evidence of PIOGA and the Joint Complainants. Furthermore, PIOGA states that the ALJ conflated the "burden of proof" and "weight of evidence" standards, showing that he misunderstood the difference between "evidence" and "proof." As a result, PIOGA contends that the Commission must conclude that the ALJ improperly applied the correct burden of proof standard. Moreover, PIOGA argues that the Commission must engage in a reasoned analysis that accurately addresses the facts and arguments presented by PIOGA and the Joint Complainants. PIOGA Exc. at 4-6.

In reply to the Joint Complainants' Exception No. 2, NFGD argues that the Joint Complainants' allegations that NFGD intentionally misrepresented facts are improper and not true. NFGD avers that its statement that the Data Security Agreement was patterned after and would follow the same in use in New York was correct at the time it was made. NFGD asserts that it did not state that the Data Security Agreement was approved by the NYPSC or that it would modify the Data Security Agreement in Pennsylvania after it was approved by the Commission. In response to the Joint Complainants' argument that NFGD showed a lack of candor by not informing the Commission when the NYPSC did not adopt the cybersecurity provision, NFGD contends that the NYPSC's action occurred after the Commission approved the Data Security Agreement and that NFGD was under no obligation to inform the Commission that the proposal in New York had been modified or to amend the Data Security Agreement in Pennsylvania. NFGD argues that the action taken in New York has no bearing on the Commission. R. Exc. at 6-8.

In addition, NFGD argues that the Joint Complainants misread the Initial Decision as it relates to their argument that the ALJ erroneously stated the burden of proof. NFGD avers that the Joint Complainants contend that their burden was to prove by a preponderance of the evidence that Tariff Supplement No. 207 violated the Code as an anti-competitive market barrier, and NFGD argues that ALJ directly addressed those issues throughout the Initial Decision and in the Conclusions of Law. *Id*. at 8-9.

Similarly, in reply to PIOGA's Exception No. 4, NFGD argues that the ALJ properly applied the burden of proof. NFGD contends that PIOGA's argument that the ALJ started from an incorrect standpoint that Tariff Supplement No. 207 was just and reasonable because it had already been approved by the Commission is in error because 66 Pa. C.S. § 316 provides that Commission-approved tariffs are *prima facie* reasonable. In addition, NFGD avers that the ALJ properly weighed the evidence presented in the case, and PIOGA's arguments that the ALJ erred by rejecting its evidence should be

denied. In response to PIOGA's argument that the ALJ misunderstood the difference between "evidence" and "proof," NFGD argues that PIOGA's assertion is in error because the ALJ weighed the evidence that was presented and determined that the Joint Complainants and PIOGA did not meet their burden of proof. *Id*. at 20-21.

Upon review of the record, we find that the ALJ did not ignore the record evidence and, after weighing the evidence presented, correctly held that NFGD did not misrepresent the basis for the Commission approving Tariff Supplement No. 207. We agree with the ALJ that natural gas suppliers, including the Joint Complainants, were notified by NFGD of the Tariff Supplement No. 207 filing in June 2019, that they had notice and an opportunity to be heard before the Commission approved Tariff Supplement No. 207, including the cybersecurity insurance requirement, and that no complaints were filed before the tariff was approved and became effective in August 2019. I.D. at 16-17.

Further, we agree with the ALJ that the Joint Complainants' reliance on the NYPSC actions to require a change by the Commission to a previously approved tariff is misplaced. The NYPSC's action occurred after this Commission had already approved Tariff Supplement No. 207. In addition, the outcome of that proceeding in New York is in no way binding nor does it have any bearing on this Commission. See *Id*. at 18.

Moreover, there is nothing in the record to persuade us to overturn the ALJ's conclusion that the Joint Complainants did not present substantial evidence that they were intentionally misled or misrepresented by NFGD to persuade them not to participate in the Tariff Supplement No. 207 proceeding in 2019. The very heavy burden necessary to be satisfied in order to void an already filed and approved tariff provision has not been met here.

Regarding the Joint Complainants' and PIOGA's arguments that the ALJ did not apply the burden of proof correctly, we do not find those arguments persuasive. As we discussed, *supra*, "Tariff provisions approved by the Commission are prima facie reasonable." *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997); *Shenango Twp. Bd. of Supervisors v. Pa. PUC*, 686 A.2d 910, 914 (Pa. Cmwlth. 1996); *Zucker v. Pa. PUC*, 401 A.2d 1377 (Pa. Cmwlth. 1979). Here, Tariff Supplement No. 207 has already been approved by the Commission and is part of NFGD's lawfully filed tariff.

Moreover, the ALJ weighed the evidence that was presented in the case and determined that the Joint Complainants and PIOGA did not meet their burden of proof. We agree. The Joint Complainants have not demonstrated by a preponderance of the evidence that NFGD prevented them from filing a complaint against Tariff Supplement No. 207 in 2019 or misled them with respect to that filing, nor have the Joint Complainants and PIOGA established by a preponderance of the evidence that Tariff Supplement No. 207 is unreasonable or unlawful or that NFGD failed to furnish service in violation of 66 Pa. C.S. § 1501 or a regulation of the Commission. I.D. at 28-29.

For the reasons set forth above, we shall deny the Joint Complainants' Exception No. 2 and PIOGA's Exception No. 4.

4. Joint Complainants Exception No. 4; PIOGA Exception Nos. 2, 5 and 3

In their Exception No. 4, the Joint Complainants argue that the ALJ erred by concluding that expert witness opinion testimony was not sufficient to meet the Joint Complainants' burden of proof and improperly concluded that a study or analysis was needed on whether cybersecurity insurance is ineffective at preventing a cybersecurity related incident. Contrary to the Initial Decision's holdings, the Joint Complainants aver that their expert witness testimony explained how insurance coverage and the underwriting process does not lead to meaningful preventative measures being taken.

The Joint Complainants contend that the Initial Decision conflates the standards for expert testimony and lay opinion testimony, and that expert testimony can form the basis of a finding as it amounts to substantial evidence. Further, the Joint Complainants contend that they met their burden of showing that cybersecurity insurance does not lead to incremental cybersecurity benefits. The Joint Complainants argue that the ALJ erred by refusing to consider the 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 in violation of 66 Pa. C.S. § 1301.

PIOGA, in its Exception No. 2, argues that the ALJ erred in finding PIOGA's testimonial evidence to be mere opinion, bald assertions, personal opinions or perceptions. PIOGA avers that the ALJ erred by accepting NFGD's argument that PIOGA's testimony is not evidence to support PIOGA's and the Joint Complainants' positions, but it is evidence to support NFGD's positions. PIOGA asserts that determining the cost of NFGD's cybersecurity insurance requirements is no different than any other cost determination made by PIOGA members with first-hand knowledge of the information, and does not require studies, analyses, or valuations. PIOGA contends that the ALJ erred in concluding that its testimony is not evidence in the first place, and by not crediting PIOGA's and the Joint Complainants' testimonial evidence. PIOGA Exc. at 2-4.

In its Exception No. 5, PIOGA contends that the ALJ erred in concluding that PIOGA and the Joint Complainants failed to offer substantial evidence establishing that Tariff Supplement No. 207 is unjust, unreasonable, unlawful, unduly burdensome, and discriminatory. PIOGA argues that the ALJ ignored the probative value of certain PIOGA testimonial evidence, including: (1) that PIOGA members have acquired cybersecurity insurance and adopted other tailored and cost-effective measures based on each member's particular needs; (2) that a utility should not mandate a natural gas

supplier's decision to acquire cybersecurity insurance; and (3) that NFGD's requirement of $5 million per incident cybersecurity insurance significantly exceeds the level of coverage acquired by PIOGA members that are not part of a larger corporate family. In addition, with respect to the market barrier issues, PIOGA adds that it submitted a document showing that a specific PIOGA member is unlikely to be able to obtain the required level of cybersecurity insurance because of its low revenues. PIOGA Exc. at 6-8.

PIOGA, in its Exception No. 3, contends that the ALJ erred by not adopting any of PIOGA's proposed Findings of Fact. PIOGA argues that because the ALJ erred by not distinguishing between what is evidence in the first place versus what evidence he credits, he erred in not adopting any of PIOGA's proposed Findings of Fact, which supported the positions and arguments of PIOGA and the Joint Complainants. PIOGA Exc. at 4.

In reply to Joint Complainants' Exception No. 4, NFGD argues that the ALJ gave proper weight to the Joint Complainants' witness testimony. NFGD avers that the ALJ properly weighed the evidence presented and found that NFGD's witness, who had actual experience obtaining cybersecurity insurance, should be accepted over the Joint Complainants' witness, who had never procured cybersecurity insurance and was not a cybersecurity expert, because NFGD's witness was more credible based upon actual experience. Moreover, NFGD contends that, contrary to the Joint Complainants' arguments, the ALJ did not err in concluding that third-party studies or analyses were needed on whether cybersecurity insurance is effective at preventing a cyber incident, because the witness testimony of the Joint Complainants and PIOGA was lay opinion testimony that needed to be supported by something more. NFGD argues that the Joint Complainants' and PIOGA's claims that cybersecurity insurance does not increase cybersecurity protections was refuted by their own witness testimony and documents produced in discovery. R. Exc. at 10-13.

Similarly, in response to PIOGA's Exception No. 2, NFGD contends that the ALJ correctly explained that neither the Joint 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. NFGD avers that the ALJ weighed the expertise and credibility of the witnesses and correctly determined that NFGD's witness was more credible than the witnesses of the Joint Complainants and PIOGA. *Id*. at 18-19.

In reply to PIOGA's Exception No. 5, NFGD argues that the ALJ properly evaluated the credibility of the witnesses and evidence provided and found that the Joint Complainants and PIOGA did not meet their burden of proof in this proceeding and that Tariff Supplement No. 207 was just, reasonable and in the public interest. NFGD states that the ALJ agreed with its witnesses that obtaining cybersecurity insurance is a reasonable and prudent cost of doing business that provides a source of funds for customers and the utility in the event of a cyber-attack and ensures that natural gas suppliers have adequate cybersecurity measures in place. R. Exc. at 21.

Replying to PIOGA's Exception No. 3, NFGD argues that the ALJ is not required to adopt every party's proposed Findings of Fact. Rather, NFGD asserts, it is the ALJ's decision to determine credibility of the evidence and deem which facts are appropriate. NFGD contends that the ALJ weighed the evidence of record and determined that NFGD's witness was more credible because he was the only witness with actual experience with cybersecurity insurance, and the ALJ, therefore, correctly determined that the Joint Complainants and PIOGA did not meet their burden of proof. R. Exc. at 19-20.

Upon review of the record, we agree with the conclusions of the ALJ. The ALJ weighed and evaluated the evidence presented and found that the testimony of NFGD's witness, who had actual experience with obtaining cybersecurity experience,

was more credible and persuasive than that of the Joint Complainants' witness, who did not have commensurate experience. In addition, the Joint Complainants and PIOGA presented no studies or analyses to support their claims regarding the costs to obtain cybersecurity insurance and the impacts on their business, nor did they present evidence of actual costs and effects on their businesses from complying with the cybersecurity insurance requirement. I.D. at 20. Further, the ALJ found, and we agree, that the witness testimony of the Joint Complainants and PIOGA was lay opinion testimony that needed additional support, and without any substantial evidence establishing that Tariff Supplement No. 207 was unreasonable or unlawful, the testimony of NFGD's witness should be accepted because it was more credible and persuasive. *Id*. Accordingly, the Joint Complainants' Exception No. 4 and PIOGA's Exception No. 5 shall be denied.

Additionally, with respect to PIOGA's argument that it was error by the ALJ to not adopt any of PIOGA's proposed Findings of Fact, we find that the ALJ is not required to adopt every party's proposed Findings of Fact. After reviewing and weighing the evidence presented along with the Parties' arguments, the ALJ determined credibility of the evidence and deemed which facts are appropriate. PIOGA's Exception No. 3 will be denied.

5. Joint Complainants Exception No. 3

The Joint Complainants argue in Exception No. 3 that the ALJ erred by not considering that the facts and circumstance surrounding Tariff Supplement No. 207 changed so drastically as to render the cybersecurity insurance provisions unreasonable. The Joint Complainants contend that the timeline of events and NFGD's alleged misrepresentations regarding the NYPSC's disapproval of cybersecurity insurance provisions results in significant impacts on the Joint Complainants in procuring cybersecurity insurance to meet NFGD's Pennsylvania requirements and frustrates the Commission's rationale for approving Tariff Supplement No. 207, and these changed

circumstances allowed the Joint Complainants to meet their burden to overturn Tariff Supplement No. 207. The Joint Complainants aver that the changed circumstance results in them being faced with an unreasonable burden because they must now bear the cost of insuring NFGD's assets in Pennsylvania and New York because they must procure coverage for all of NFGD's assets and systems, and New York does not require cybersecurity insurance. Joint Complainants' Exc. at 14-15.

In reply, NFGD contends that circumstances have not changed to make it unreasonable to require cybersecurity insurance. NFGD avers that the Joint Complainants' arguments that NFGD allegedly misrepresented the status of the Data Security Agreement in New York is not a change in circumstances that warrants elimination of the cybersecurity provision because it did not misrepresent the status of the New York proceeding and the Commission is not bound by any action of the NYPSC. Furthermore, NFGD argues that the Joint Complainants' argument that natural gas suppliers must obtain insurance coverage for Pennsylvania and New York because NFGD has a single IT interface for both states is not supported by any actual evidence, and that the Joint Complainants did not produce evidence on the record regarding the cost of obtaining cybersecurity insurance and how it would be burdensome on their businesses. Furthermore, NFGD contends that the record is clear that cyber-attacks pose a serious threat to utilities and customers, that many companies already have cybersecurity insurance, and the requiring natural gas suppliers that interface with NFGD's IT system to have cybersecurity insurance is a reasonable tariff rule. R. Exc. at 9-10.

Upon review, we agree with the ALJ that the Joint Complainants' argument that the Data Security Agreement in Tariff Supplement No. 207 should be voided depends upon the Joint Complainants proving that NFGD misrepresented the basis of the tariff and that it is unlawful and unreasonable. We concur with the ALJ that neither has been proven. As discussed, *supra*, the Joint Complainants have not established that any

misrepresentation occurred, or that Tariff Supplement No. 207 is unlawful or unreasonable. Furthermore, we agree with the ALJ that the proper time for the Joint Complainants to take action with respect to Tariff Supplement No. 207 was when it was filed with the Commission in 2019, and that doing so now is without merit. Therefore, the Joint Complainants' Exception No. 3 shall be denied.

IV. Conclusion

Based upon our review of the record and the applicable law, we shall deny the Exceptions of the Joint Complainants and PIOGA, and therefore, adopt, the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

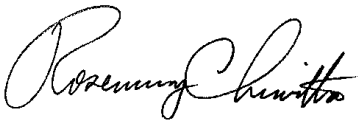
1. That the Exceptions of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC, and the Pennsylvania Independent Oil and Gas Association, filed on January 12, 2022, to the Initial Decision of Administrative Law Judge Dennis J. Buckley issued on December 23, 2021, at this docket, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Dennis J. Buckley, issued on December 23, 2021, at this docket, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint of EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural Resources LLC, and Total Energy Resources LLC, filed on April 27, 2020, at this docket, is denied, consistent with this Opinion and Order.

4. That the proceeding at Docket No. C-2020-3019621 shall be marked closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 14, 2022

ORDER ENTERED: April 14, 2022