

**BEFORE
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural
Resources LLC, and Total Energy Resources LLC**

v.

National Fuel Gas Distribution,

Docket No. C-2020-3019621

Direct Testimony

of

Frank Lacey

March 5, 2021

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1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is Frank Lacey. My business address is 3 Traylor Drive, West Chester,
4 PA 19382.

5 **Q. WHAT IS YOUR CURRENT POSITION?**

6 A. I am the founding principal of Electric Advisors Consulting, LLC, which is a
7 consulting firm focused on providing market and policy advisory services to
8 participants in competitive energy markets including energy companies and end-
9 use customers.

10 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING?**

11 A. I am an independent consultant submitting this testimony on behalf of
12 EnergyMark LLC, Vineyard Oil and Gas Company, Mid American Natural
13 Resources LLC, and Total Energy Resources LLC (collectively, the “Gas
14 Supplier Companies”). The Gas Supplier Companies provide competitive retail
15 gas services to residential and commercial & industrial (“C&I”) customers in
16 Pennsylvania, including in the National Fuel Gas Distribution (“NFGD” or
17 “Utility”) service territory.

18 **Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND**
19 **PROFESSIONAL EXPERIENCE.**

20 A. As a consultant, I provide policy- and market-related consulting services to
21 advanced energy management companies and end-use customers. I have worked
22 in the energy industry for approximately 28 years, beginning immediately after

1 earning my graduate degree. I have focused almost exclusively on competitive
2 market issues. Early in my career, I was employed as a consultant to industry
3 participants, first by Putnam, Hayes & Bartlett, Inc. and then by Arthur Andersen
4 Business Consulting. Within the industry, I have worked for Strategic Energy, a
5 retail electricity and natural gas services company, and Direct Energy, a retail
6 electric and gas supplier that acquired Strategic Energy in 2008. I created Electric
7 Advisors Consulting LLC in 2015. I hold a Bachelor of Science degree in
8 Transportation and Logistics from the University of Maryland and a Master of
9 Science in Industrial Administration with concentrations in finance and
10 environmental management from the Tepper School of Business at Carnegie
11 Mellon University. My resume is provided as Exhibit FPL-1.

12 **Q. HAVE YOU EVER TESTIFIED BEFORE THE PENNSYLVANIA PUBLIC**
13 **UTILITY COMMISSION OR ANY OTHER UTILITY REGULATORY**
14 **AGENCY?**

15 A. Yes. I have testified before the Pennsylvania Public Utility Commission
16 (“Commission” or “PUC”) on numerous occasions. I have also testified
17 numerous times before other state regulatory agencies, legislatures, and twice as a
18 technical conference witness at the Federal Energy Regulatory Commission
19 (“FERC”). I have also filed expert reports in judicial proceedings in the Superior
20 Court of New Jersey in Bergen County and in the Supreme Court of the State of
21 New York in New York County. In addition to Pennsylvania, I have provided
22 expert testimony before the utility commissions in New York, Ohio, Maryland,
23 New Jersey, Massachusetts, Illinois, Delaware, Rhode Island, Virginia, Utah and

1 California. I have presented oral testimony in less formal proceedings before the
2 Commissions in Pennsylvania, Maryland, Delaware and Texas. I have presented
3 legislative testimony in New York, Maryland, Pennsylvania, Delaware,
4 Connecticut, Michigan, California and Texas. I have also spoken at numerous
5 trade shows, conferences and other industry and corporate events as an expert on
6 energy market issues. A detailed listing of my prior testimony is contained in
7 Exhibit FPL-2.

8 **Q. WHAT ARE GAS SUPPLIER COMPANIES' INTERESTS IN THIS**
9 **PROCEEDING?**

10 The Gas Supplier Companies operate competitive retail gas supply businesses in
11 The NFGD service territory. As such, they are bound to certain tariff provisions
12 implemented by NFGD. In NFGD's Supplement No. 207 to Tariff Gas PA PUC
13 No. 9, NFGD submitted a requirement that all energy service entities ("ESE"),
14 which is a group that includes, among others, natural gas suppliers ("NGS"), be
15 required to enter into a Data Security Agreement ("DSA"), which includes many
16 one-sided and onerous business terms. Most notably, however, the DSA requires
17 each ESE to purchase and carry a cybersecurity insurance policy with coverage of
18 no less than \$5 million. This requirement is unjust, unreasonable and unduly
19 burdensome. Additionally, the tariff and the DSA grant NFGD authority to
20 supervise and regulate NGS business practices. NFGD has no authority to exercise
21 these practices, which are the sole authority of the PUC.

22 **II. SUMMARY AND CONCLUSIONS**

1 **Q. HAVE YOU READ THE COMPLAINT AND OTHER RELEVANT**
2 **DOCUMENTS IN THIS PROCEEDING?**

3 A. I have read the relevant documents in this proceeding. I have reviewed NFGD's
4 June 14, 2019 submission to the Commission in the underlying tariff proceeding
5 and several of the documents entered in that docket. I have also reviewed several
6 documents in New York PSC Case No. 18-M-0376. NFGD used its positions in
7 that New York proceeding (which were ultimately rejected by the New York
8 Commission) to justify some of the requirements it imposed in its Pennsylvania
9 Tariff.

10 **Q. COULD YOU PLEASE SUMMARIZE THE MATERIALS THAT YOU**
11 **HAVE REVIEWED?**

12 A. Yes. On June 14, 2019, NFGD filed with the Commission, its Tariff Supplement
13 No. 207, proposing updates in five general areas of the tariff: 1) Minimum
14 Storage inventory level requirements; 2) System access for Renewable Natural
15 Gas ("RNG"); 3) Cybersecurity issues; 4) Gas emergency plan; and 5)
16 Operational Flow Order non-performance penalty rates. The scope of my
17 testimony is limited to item 3, the cybersecurity issues.

18 Based on a review of the docket entries on the PUC website¹, there were no
19 market stakeholders participating in the tariff docket. Gas Supplier Company
20 witness Mr. Wright is providing testimony in this proceeding that explains the

¹ <https://www.puc.pa.gov/search/document-search>, then enter docket No. R-2019-3010744

1 circumstances why the Gas Supplier Companies did not participate in the
2 regulatory process related to the NFGD tariff filing.

3 As the tariff filing was uncontested at the time, the Commission approved the
4 tariff changes “without prejudice to any issues that may be raised by any party with
5 respect to the tariff changes implemented by Supplement No. 207 to Tariff Gas Pa.
6 P.U.C. No. 9 in future proceedings.”² This approval included the provisions
7 discussed, including the requirement of a cybersecurity insurance policy with a
8 minimum of \$5 million in coverage and the authority that NFGD has provided itself
9 to investigate and audit some of the internal operations of ESEs.

10 **Q. WHAT ARE YOUR CONCLUSIONS WITH RESPECT TO THE**
11 **DOCUMENTS YOU HAVE READ?**

12 A. I conclude that NFGD’s requirements for ESEs to maintain \$5 million in
13 cybersecurity insurance is unreasonable and will not provide any incremental
14 cybersecurity benefit to any consumer or business entity in the Commonwealth. I
15 also conclude that NFGD’s requirement that they be allowed to “audit and inspect
16 . . . the facilities of an ESE [NGS] and third-party representatives . . . and any
17 equipment used to process confidential information, the ESE’s security practices,
18 facilities, books and records, etc” is significantly beyond any utility’s authority.
19 Such authority could have tremendously negative ramifications on the gas
20 markets in Pennsylvania.

² Commission Order, *National Fuel Gas Distribution Corporation Supplement No. 207 to Tariff Gas Pa. P.U.C. No. 9*, Docket Number R-2019-3010744, Issued August 29, 2019.

1 **III. THE INSURANCE REQUIREMENT**

2 **Q. COULD YOU PLEASE EXPLAIN THE INSURANCE REQUIREMENT**
3 **PROPOSED BY NFGD?**

4 A. Yes. NFGD added a Section 33 to its tariff in this filing. The section is entitled
5 “Data Security Agreement”. The tariff now states, “As a condition of access to
6 customer information ... [NFGD] will require parties requesting such access to
7 sign a Data Security Agreement and require that parties carry and maintain
8 cybersecurity insurance in an amount no less than \$5,000,000 per incident.” Of
9 course, access to customer information is a requirement of operating a NGS
10 business as that information is required for enrolling and billing a customer.

11 **Q. DO YOU UNDERSTAND WHY NFGD IS SEEKING THAT KIND OF**
12 **COVERAGE?**

13 A. I understand that cybersecurity is an issue that is causing strain on computer
14 systems, data and networked infrastructure nationwide. The threat of
15 cybersecurity events is very real, and they range from identity theft to terrorist
16 attacks on technology facilities. With that knowledge, it is very understandable
17 that NFGD has cause to be concerned about cybersecurity and related risks.
18 However, those concerns are better managed with other tools than with an
19 insurance policy. An insurance policy is a tool to pay for damages after the fact if
20 they occur. Insurance policies do not in any way prevent damages from occurring
21 in the first place.

22 **Q. CAN NFGD IMPOSE SYSTEMS REQUIREMENTS ON THE**
23 **COMPANIES THAT INTERFACE WITH ITS SYSTEMS?**

1 A. NFGD is well within its rights to impose reasonable data security standards on
2 any company with which it interfaces and shares data, if those standards are
3 established in good faith to protect the data of NFGD and its customers. Those
4 standards should require that the systems be designed to minimize opportunities
5 for malicious actors to penetrate NFGD’s systems and data. However, NFGD is
6 not in a position to dictate to suppliers how they manage their businesses and their
7 exposure to outside risks.

8 **Q. HAS NFGD IDENTIFIED ANY STANDARDS THAT IT BELIEVES ITS**
9 **BUSINESS PEERS SHOULD BE FOLLOWING?**

10 A. Yes. As part of the DSA, NFGD includes a self-attestation (that presumably
11 applies to NGSs) that outlines a series of 15 different policies, procedures and
12 practices that it identifies as “Information Security Control Requirements
13 (‘Requirements’).” Presumably, this list of Requirements is a list that NFGD
14 deems to be sufficient practices to protect confidential information of it and its
15 customers.

16 **Q. HOW CAN NFGD ENSURE THAT AN ESE IS MEETING THE**
17 **REQUIREMENTS IT NEEDS FOR DATA SECURITY.**

18 A. First, it should be noted that the Gas Supplier Companies themselves have
19 thousands of customer relationships and they, too, have data security concerns
20 and have implemented data security practices of their own. Nothing in this
21 testimony should be interpreted as anything other than a commitment to data
22 security from the Gas Supplier Companies. Notably, the Gas Supplier Companies
23 are not contesting the Requirements outlined by NFGD in the self-attestation.

1 While the self-attestation provided in the DSA is not clear that it applies to NGSs,
2 I believe that to be the intent and the Gas Supplier Companies support these types
3 of Requirements.

4 **Q. CAN YOU EXPLAIN WHY YOU BELIEVE THE SELF-ATTESTATION**
5 **IS VAGUE?**

6 A. Yes. While I am not trained as an attorney, I am often expected to read complex
7 tariff requirements and assist my clients in understanding them and implementing
8 and complying with them. I find this set of requirements confusing for a few
9 different reasons. At first glance, the DSA, to which the self-attestation is an
10 exhibit, defines “Third Party Representatives” and “Representatives”. It never
11 defines “Third Parties”. The Third Party Representatives are defined as agents
12 acting on behalf of ESEs. Exhibit A of the DSA, entitled “Self-attestation of
13 Information Security Controls” is a document between NFGD and a “Third Party”
14 and not an ESE or NGS.

15 Additionally, the document contradicts itself in that it allows “Third Parties” to
16 not meet all of the requirements on the self-attestation. Discussing the checklist
17 of Requirements, the attestation states that ESEs can “leave blank all that do not
18 apply to Third Party’s computing environment” and further stating “comments
19 regarding plans for compliance are encouraged.” However, the following
20 paragraph says, “Third party acknowledges that non-compliance with any of the
21 Requirements may result in the termination of Company data access as per the
22 discretion of Company.” In addition to the confusion about whom the document

1 is intended to bind, on one hand, the document shows flexibility, but on the other,
2 there is not flexibility in adhering to the Requirements.

3 **Q. IF THE SELF-ATTESTATION WAS CLEARER, DO YOU BELIEVE**
4 **THAT IS COMPELLING ENOUGH TO ENSURE NFGD THAT THE**
5 **DATA TRANSFERRED BETWEEN ESES AND NFGD WOULD BE**
6 **SECURE?**

7 The DSA states that the ESEs “shall have in place appropriate and reasonable
8 processes and systems, including an Information Security Program...” NFGD
9 identifies completion of the Attestation as meeting the requirement to have those
10 processes and systems in place. I have no basis for which to suggest that further
11 and more rigorous standards are needed or possible.

12 **Q. DOES THE ADDITION OF A \$5 MILLION INSURANCE POLICY**
13 **SUPPLEMENT THE SECURITY OF DATA TRANSFERRED BETWEEN**
14 **NFGD AND AN ESE?**

15 A. No. Cybersecurity insurance does not enhance cybersecurity protections.
16 Insurance is a mechanism for the insured to recoup losses in the event the losses
17 were incurred. The requirement for an ESE to have insurance provides no
18 incremental security protections to NFGD.

19 **Q. CAN YOU EXPLAIN WHAT A CYBERSECURITY INSURANCE**
20 **POLICY COVERS?**

21 A. Yes. The National Association of Insurance Commissioners (“NAIC”), along
22 with the US Federal Trade Commission (“FTC”) have put together a short
23 educational document about cybersecurity insurance (“NAIC/FTC Document”).
24 The NAIC/FTC Document identifies coverages called “First-Party Coverage” and
25 “Third-Party” coverage. Third-Party Coverage does not cover the

1 actions/inactions by Third Parties, as that term is being used in this proceeding.

2 According to the NAIC/FTC Document, First-Party Coverage:

3 “protects your data, including employee and customer information. This
4 coverage typically includes your business’s costs related to:

- 5 • Legal counsel to determine your notification and regulatory
- 6 obligations
- 7 • Recovery and replacement of lost or stolen data
- 8 • Customer notification and call center services
- 9 • Lost income due to business interruption
- 10 • Crisis management and public relations
- 11 • Cyber extortion and fraud
- 12 • Forensic services to investigate the breach
- 13 • Fees, fines, and penalties related to the cyber incident”

14

15 According to the same document, Third-Party coverage “protects you from
16 liability if a third party brings claims against you.” In other words, if NFGD’s
17 systems were breached and a consumer was harmed, if that consumer brought a
18 claim against NFGD, its insurance would cover its costs related to that claim.

19 Nothing is noted in the NAIC/FTC Document that would suggest that NFGD
20 could access an ESE’s insurance coverage in the event of a cyber incident.

21 Based on these descriptions, if NFGD was to purchase this insurance, the policy
22 would cover the costs it incurs to recover from the incident (although it does not
23 appear to cover any systems improvements or other similar types of costs). It
24 would also cover NFGD if customers or other Third Parties brought a claim
25 against NFGD.

26 If a Gas Supplier Company or other ESE purchased the insurance, it would
27 provide the ESE with the same benefits, but there is nothing to suggest that an

1 ESE's policy would cover any of NFGD's costs. It is reasonable for NFGD to set
2 technology standards on the companies with which it shares data. It is not,
3 however, within NFGD's authority to dictate to those businesses how they
4 manage their own potential business exposures.

5 **Q. WOULD IT BE PRUDENT FOR ESES TO OWN CYBERSECURITY**
6 **INSURANCE?**

7 A. Risk management is one of the areas that energy supply companies have some
8 level of expertise. Insurance is one of many risk management tools available in
9 the market. However, the Requirements presented in the Self-attestation form are
10 also, individually and collectively, risk management tools protecting against
11 cybersecurity risks. In this tariff, NFGD has proposed a classic "belt and
12 suspenders" approach. In the competitive markets, the ESEs including the Gas
13 Supplier Companies should be able to identify and utilize risk management tools
14 of their choosing, managing risks as they choose. Compelled insurance will do
15 nothing to prevent a cybersecurity incident. Similarly, if an incident occurs, an
16 ESE's insurance coverage may do nothing to protect NFGD.

17 **Q. WILL THE PURCHASE OF INSURANCE IN ANY WAY IMPROVE THE**
18 **DATA PROTECTIONS IMPLEMENTED WITHIN AN ESE'S BUSINESS**
19 **OPERATIONS?**

20 There is nothing inherent in an insurance policy that will improve the protections
21 implemented. For example, those with car insurance still get into accidents.
22 Those with homeowner's insurance still suffer thefts, fires and other losses.
23 Insurance companies may offer benefits like a premium discount to customers

1 that implement certain protections. For example, I am aware that insurance
2 companies will provide discounts on homeowner's policies for active protections
3 like monitored smoke detectors or burglar alarms. While the insurance companies
4 might offer the discount, they are not in the practice of inspecting the homes they
5 insure. Similarly, insurance companies are not going to monitor data
6 communications tools and data security tools of the customers they insure.

7 **Q. ARE THERE ANY VALID POLICY REASONS FOR REQUIRING**
8 **CYBERSECURITY INSURANCE?**

9 A. No. In fact, just the opposite. It would be bad policy to allow the insurance
10 requirement to stay in the tariff. As an initial matter, it is not in anyone's interest
11 to allow a utility to compel risk management practices of any of the companies it
12 interfaces with. NFGD states that it will carry a similar, albeit larger insurance
13 policy. This is a false equivalent, however. NFGD will likely recover the cost of
14 the insurance in its base distribution rates, from all customers, including its
15 customers taking gas supply from NGSs including the Gas Supplier Companies'
16 customers. The Gas Supplier Companies are operating in a competitive market
17 and may or may not be able to add the incremental cost of insurance to its
18 customer's costs in order to recover the premiums paid. Even if allowed by
19 contract, or policy, the customers might not accept that outcome and might move
20 to another supplier or to NFGD for supply. The requirement is not a bilateral
21 requirement. It will increase costs of competitive gas supply and not increase the
22 costs of NFGD gas supply.

1 Incumbent utilities already have tremendous unearned advantages³ in the
2 competitive energy markets. Imposition of the \$5 million insurance requirement
3 will allow NFGD to pad its unearned market advantage – allowing the utility to
4 collect insurance premiums in non-competitive rates while compelling ESEs to
5 collect the same costs, if they are able to collect them at all, in the price of
6 competitive products. This requirement creates one more barrier to effective gas
7 competition in the Commonwealth, disincentivizing market entry of competitors
8 and potentially creating incentives for supplier exit from the market.

9 Further, as shown above, the coverage does not necessarily protect NFGD. The
10 policies do not flow from an ESE to NFGD.

11 **IV. THE NEW YORK PROCESS**

12 **Q. WHAT WAS NFGD’S JUSTIFICATION FOR INCLUDING THE DSA**
13 **AND CYBERSECURITY INSURANCE REQUIREMENTS IN ITS**
14 **PENNSYLVANIA TARIFF?**

15 A. According to NFGD’s Supplement No. 207 tariff filing, “The proposed DSA
16 (which includes the Self-Attestation form) is patterned after the DSA [NFGD] is
17 currently using in its New York service territory but is modified to reflect
18 Pennsylvania rules and regulations.”⁴

³ Hempling, Scott, *No Anticompetitive Conduct, No Unearned Advantage: Effective Competition Depends on Merit*, (Effective Regulation of Public Utilities) January 2021.

⁴ Statement of National Fuel Gas Distribution Corporation in Support of tariff Supplement No. 207 to Tariff Gas – PA. P.U.C. No. 9, p. 3.

1 **Q. WAS NFGD USING THE DSA IN NEW YORK AT THE TIME IT**
2 **SUBMITTED IT'S PENNSYLVANIA FILING?**

3 A. As discussed below, the New York utilities had received some signed DSAs and
4 were attempting to enforce the DSA requirements on the ESEs serving in New
5 York, even though the form and its requirements were being contested at the New
6 York Commission and had not been approved for use at the time NFGD made its
7 Pennsylvania filing.

8 **Q. HAS THE NEW YORK COMMISSION RULED ON THAT CASE YET?**

9 A. Yes. It has issued a ruling on the DSA and cybersecurity insurance requirements.

10 **Q. DOES NFGD REQUIRE A SIGNED DSA IN ITS NEW YORK SERVICE**
11 **TERRITORY?**

12 A. NFGD of New York includes a DSA as a Standard Form Agreement in its Gas
13 Transportation Operations Procedures ("GTOP").

14 **Q. DOES THAT DSA INCLUDE A REQUIREMENT FOR ESES OR NGSS**
15 **TO PURCHASE AND MAINTAIN CYBERSECURITY INSURANCE IN**
16 **AN AMOUNT OF NO LESS THAN \$5 MILLION?**

17 A. It does not.

18 **Q. DOES THAT DSA INCLUDE ANY CYBERSECURITY INSURANCE**
19 **REQUIREMENT?**

20 A. It does not. The New York Commission rejected the utilities' proposal for
21 imposing a cybersecurity insurance requirement on ESEs.

22 **Q. CAN YOU EXPLAIN WHY YOU BELIEVE THE NFGD'S**
23 **PENNSYLVANIA AND NEW YORK DSAS ARE DIFFERENT ON THIS**
24 **ISSUE?**

25 A. Yes. This issue was contested in New York as it is being contested here. The
26 New York Commission declined the New York utilities' (including NFG) request

1 to impose the same burden on suppliers in that market. The relevant New York
2 Order stated that the utilities “have not established that cybersecurity insurance
3 would be an efficient and effective means of mitigating cybersecurity risks and
4 financial costs associated with security breaches.” They opined that “the
5 insurance requirement would serve to act as little more than a market barrier to
6 entry.” The New York Commission understood the need for cybersecurity
7 protection, but recognized that “a cybersecurity insurance requirement, which is
8 mainly intended to address damages after an incident occurs” was not the
9 “appropriate means” of providing those protections.⁵

10 **Q. IS IT REASONABLE FOR NFGD TO ASSUME THAT THE NEW YORK**
11 **COMMISSION WAS GOING TO ALLOW THE INSURANCE**
12 **REQUIREMENT WHEN IT FILED ITS PENNSYLVANIA TARIFF**
13 **CHANGES?**

14 A. No. For the reasons stated above and as was eventually reasoned by the New
15 York Commission, cybersecurity insurance does not aid in preventing
16 cybersecurity incidents. Additionally, NFGD should have been aware that this
17 issue was extremely contentious in the New York proceeding. The New York
18 proceeding had at least 14 non-utility intervenors and several of those intervenors
19 were groups or trade organizations that represented dozens, if not hundreds of
20 individual companies opposed to the insurance requirement, among other issues.

⁵ New York Public Service Commission, Order Establishing Minimum Cybersecurity and Privacy Protections and Making Other Findings, NYPSC Case Nos. 18-M-0376, 15-M-0180, and 98-M-1343, p. 58, October 17, 2019.

1 The New York Commission issued an Order opening the relevant New York
2 proceeding on June 14, 2018, exactly one year before NFGD filed its tariff
3 petition in Pennsylvania. In the order, the New York Commission noted that
4 parties had been working on the issue of cybersecurity concerns for several
5 months. The New York Commission noted its goals for the proceeding were “to
6 ensure that adequate cyber security protections are in place to protect utility
7 systems and confidential and sensitive customer information, and to explore
8 whether insurance is an efficient and effective vehicle for mitigating any potential
9 financial risks.”⁶ From the outset of that proceeding, the New York Commission
10 had made it clear that it had not pre-determined any conclusions regarding the
11 imposition of a cybersecurity insurance requirement.

12 **Q. DID THE CYBERSECURITY INSURANCE ISSUE EVER BECOME AN**
13 **IMMATERIAL ISSUE DURING THE COURSE OF THE NEW YORK**
14 **PROCEEDING?**

15 A. No. It remained a heavily contested issue for the entire proceeding. The New
16 York Commission Staff (“NY Staff”) filed a status report updating the New York
17 Commission on the progress of the stakeholder negotiations in August 2018. The
18 NY Staff report noted that by the time of the report, most of the parties in New
19 York had signed the Self-Attestation and/or the DSA, but many had signed under
20 protest. Some others had not signed the documents. The staff report

⁶ New York Public Service Commission, Order Instituting Proceeding, NYPSC Case No. 18-M-0376, p. 3, June 14, 2018.

1 hypothesized that the reasons that companies that signed under protest or did not
2 sign at all were because: “1) absence of PSC review and approval of the terms,
3 and 2) inadequate justification for cyber insurance.”⁷

4 **Q. WHY DID SOME COMPANIES SIGN THE DSA AND SELF-**
5 **ATTESTATION IN ADVANCE OF THE PROCEEDING BEING**
6 **CONCLUDED?**

7 A. According to the NY Staff Report, after a couple of rounds of red-lining and
8 negotiations, “[t]he revised DSA was circulated to ESEs on August 16, 2018 with
9 a submission deadline of August 31, 2018.”⁸ Similarly, “[t]he Self-Attestation
10 was circulated to ESEs on August 3, 2018, with a submission deadline of August
11 20, 2018.”⁹

12 **Q. WHY WOULD THE NEW YORK ESES SIGN THE DOCUMENTS IN**
13 **ADVANCE OF A COMMISSION ORDER APPROVING THEM?**

14 A. I believe it was under a threat of being kicked out of the market by the utilities.

15 The NY Staff Report stated:

16 “To that end, the Joint Utilities have asked that all energy services
17 entities (ESEs): (1) complete a Self-Attestation of information
18 security controls; and (2) execute a Data Security Agreement
19 (DSA) with the utility (or utilities) with whom the ESE does
20 business. The Joint Utilities assert authority under the Uniform
21 Business Practices (UBP) to require these basic level cyber
22 security requirements of ESEs that interface with the utilities’
23 systems. Under the UBP, the utility may discontinue an ESCO’s
24 participation in its retail access program for a number of reasons
25 including ‘[f]ailure to act that is likely to cause, or has caused, a

⁷ Department of Public Service Staff Report on the Status of the Busines-to-Busines Collaborative to Address Cyber Security in the Retail Access Industry, NYPSC Case No. 18-M-0376, September 24, 2018, pp. 5-6 (emphasis added) (footnotes omitted).

⁸ *Id.*, p. 4.

⁹ *Id.*

1 significant risk or condition that compromises the safety, system
2 security, or operational reliability of the distribution utility's
3 system...' The utilities claim that the failure to maintain adequate
4 cyber controls constitutes such a failure.”¹⁰

5 **Q. DO YOU BELIEVE THAT THE NEW YORK UTILITIES WOULD HAVE**
6 **DISALLOWED MARKET PARTICIPANTS FROM PARTICIPATING IN**
7 **THEIR RETAIL PROGRAMS FOR NOT SIGNING AN AGREEMENT**
8 **THAT WAS BEING ACTIVELY NEGOTIATED IN A COMMISSION-**
9 **ENDORSED PROCESS AND THAT HAD NOT YET BEEN APPROVED**
10 **BY THE COMMISSION?**

11 A. I am confident that the New York utilities wanted to do exactly that. In February
12 2019, the New York utilities filed a petition in that same docket that would allow
13 them to enforce execution of the DSA. The petition stated “the Joint Utilities
14 request that the Commission affirm their authority to require the ESEs to execute
15 a DSA and to prohibit ESEs that fail to do so from obtaining data from or access
16 to the applicable utility’s IT systems. Pursuant to the UBP and UBP DERS, the
17 Joint Utilities have authority to require ESEs to execute a DSA and have the right
18 to prohibit non-compliant ESEs from accessing customer data and utility IT
19 systems.”¹¹

20 **Q. WAS THE CYBERSECURITY INSURANCE REQUIREMENT**
21 **ADDRESSED AS AN ISSUE IN THE NEW YORK UTILITIES’ PETITION**
22 **TO ENFORCE THE DSA?**

¹⁰ *Id.*, p. 2.

¹¹ Joint Utilities’ Petition for Approval of the Business-to-Business Process used to Formulate a Data Security Agreement and for Affirming the Joint Utilities’ Authority to Require and Enforce Execution of the Data Security Agreements by Entities Seeking Access to Utility Customer Data or Utility Systems, NYPS Case No. 18-M-0376, p. 3, February 4, 2019.

1 A. Yes, it was. The New York utilities acknowledged in their petition that “many
2 commenters objected to the cyber security proposed in the DSA and to the
3 provision of cyber security insurance.”¹²

4 **Q. WHAT WAS THE STATUS OF THE NEW YORK UTILITIES’ PETITION**
5 **ON JUNE 14, 2019, THE DAY THAT NFGD FILED ITS PROPOSED**
6 **TARIFF CHANGES IN PENNSYLVANIA?**

7 On May 17, 2019, less than one month before NFGD made its Pennsylvania
8 filing, the New York utilities filed a reply brief in support of their original petition
9 to enforce the DSA. In that reply brief, the insurance issue was still front of mind
10 for the utilities, who stated that during the stakeholder process that they “also
11 agreed to reduce the necessary cyber insurance requirement by half, from \$10
12 million to \$5 million.”¹³ By virtue of this statement and by their action of
13 reducing the insurance requirement, I surmise that the New York utilities had a
14 low degree of certainty that the New York Commission would approve the
15 cybersecurity insurance requirement. This reply brief was the last item docketed
16 in the DSA proceeding before NFGD filed its tariff in Pennsylvania. Nothing
17 tangible was presented in the New York Docket prior to NFGD’s Pennsylvania

¹² *Id.*, p. 11.

¹³ Joint Utilities Reply to Comments from Parties on Petition for Approval of the Business-to-Business Process Used to Formulate a Data Security Agreement and Self-Attestation and for Declaratory Ruling Affirming the Joint Utilities Authority to Require Certain Entities to Execute the Data Security Agreement and Self-Attestation or be Prohibited from Transacting with the Applicable Utility, NYPSC Case No 18-M-0376, p. 13, May 17, 2019.

1 filing to indicate that the parties opposing the requirement, or the New York
2 Commission were inclined to accept the insurance requirement.

3 **Q. IN ITS REPLY BRIEF, THE NEW YORK UTILITIES CITED TO A**
4 **NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY**
5 **(“NIST”) FRAMEWORK AND USED IT TO SUPPORT THE**
6 **INSURANCE REQUIRMENT SAYING THAT THE FRAMEWORK**
7 **SUGGESTS THAT CYBER INSURANCE IS APPROPRIATE. DO YOU**
8 **AGREE WITH THE UTILITIES’ INTERPRETATION OF THE NIST**
9 **REQUIREMENT?**

10 No. The New York utilities cite to the NIST language which is quite clear:

11 “[w]here a sufficient level of trust cannot be established in the
12 external services and/or providers, organizations can: (i) mitigate
13 the risk by employing compensating controls; (ii) accept the risk
14 within the level of organizational risk tolerance; (iii) *transfer risk*
15 *by obtaining insurance to cover potential losses*; or (iv) avoid risk
16 by choosing not to obtain the services from certain providers
17 (resulting in performance of missions/business operations with
18 reduced levels of functionality or possibly no functionality at
19 all).”¹⁴

20
21 The New York utilities point to number (iii), the transfer of risk clause, as support
22 to impose an insurance requirement on ESEs. That is not at all what this
23 Framework says. This Framework suggests that an organization (a utility, for
24 example), can mitigate the risk, accept the risk, insure the risk, or avoid it
25 altogether by not utilizing others’ services. This Framework, cited by the New
26 York utilities, suggests that NFGD could transfer its risk by the purchase of its

¹⁴ *Id.*, at 5, fn. 11, citing NIST Special Publication 800-53 Revision 4 at 20 (April 2013) (emphasis in Reply Brief).

1 own insurance policy. It does not remotely suggest that NFGD should require its
2 counterparties to purchase insurance.

3 **Q. ARE YOU AWARE OF ANY ELECTRICITY OR GAS RETAIL CHOICE**
4 **PROGRAM IN THE US THAT REQUIRES A CYBERSECURITY**
5 **INSURANCE POLICY AS A CONDITION OF PARTICIPATION?**

6 A. I am not.

7 **Q. WHAT WAS THE FINAL RESOLUTION OF THE PROCEEDING IN**
8 **NEW YORK?**

9 A. The New York Commission has allowed the DSA and the Self-Attestation, but it
10 rejected the cybersecurity insurance requirement that was proposed by NFG and
11 the other New York utilities.

12 **Q. WHEN WAS THAT ORDER ENTERED?**

13 A. October 17, 2019.

14 **Q. DID NFGD EVER FORMALLY COMMUNICATE THE RESULTS OF**
15 **THAT ORDER TO THE PENNSYLVANIA COMMISSION?**

16 A. It did not file any notice or other documents in the tariff Docket. The last entry in
17 the Pennsylvania Tariff docket is the Commission Order approving the tariff
18 changes, entered on August 29, 2019.

19 **V. NFGD OVERSIGHT OF ESE BUSINESSES.**

20 **Q. COULD YOU PLEASE EXPLAIN THE BASIS FOR YOUR BELIEF**
21 **THAT NFGD IS ATTEMPTING TO EXERCISE MANAGEMENT**
22 **OVERSIGHT OVER THE OPERATIONS OF ESES?**

23 A. Yes. The DSA states that “Upon thirty (30) days notice to ESE, ESE shall, and
24 shall require its Third-Party Representatives to permit [NFGD], its auditors,
25 designated representatives, to audit and inspect, at [NFGD’s] sole expense (except

1 as otherwise provided in this Agreement), and provided that the audit may occur
2 no more often than once per twelve (12) month period (unless otherwise required
3 by [NFGD's] regulators)."¹⁵ While this sentence is very vague about the scope of
4 the audit, it is at the same time very broad in its authority to "audit" the ESE and
5 go beyond the ESE and into the ESE's Third-Party Representatives' businesses.

6 **Q. ARE YOU AWARE OF ANY PARTICULAR AUDITING SKILLS THAT**
7 **ARE INHERENT TO A GAS UTILITY SUCH AS NFGD?**

8 A. No. To my knowledge, they have no particular auditing experience or expertise.

9 **Q. DOES NFGD INDICATE THE SCOPE OF A POTENTIAL AUDIT?**

10 A. The DSA says that the scope "shall be limited to verifying ESE's compliance" with
11 the DSA, "including all applicable Data Protection Requirements."¹⁶ "Data
12 Protection Requirements" are defined as

13 "(A) all national, state, and local laws, regulations, or other
14 government standards relating to the protection of information that
15 identifies or can be used to identify an individual that apply with
16 respect to ESE or its Representative's Processing of Confidential
17 Company Information;

18 (B) industry best practices or frameworks to secure information,
19 computer systems, network, and devices using a defense-in-depth
20 approach, such as and including, but not limited to, NIST SP 800-
21 53, ISO 27001 / 27002, COBIT, CIS Security Benchmarks, Top 20
22 Critical Controls as best industry practices and frameworks may
23 evolve over time; and

24 (C) the Commission rules, regulations, and guidelines relating to
25 confidential data, including the Commission-approved UBP and
26 UBP DERS."¹⁷

¹⁵ DSA, Paragraph 9, p. 8.

¹⁶ *Id.*

¹⁷ DSA, Para 1.d., pp. 2-3

1 Generally, the scope of the audit is very broad. Some ESEs operate in multiple
2 localities, states and even nationally (even internationally). I am not aware of any
3 statute, regulation or business precedent that would give NFGD the audit
4 authority it seeks, nor am I aware of any skill set embedded within NFGD that
5 would allow them to fulfil an audit of national, state and local laws and
6 regulations related to the protection of data, industry best practices for data
7 security or Commission rules and regulations regarding confidential information.

8 **Q. HAS NFGD STATED ANY STANDARDS AGAINST WHICH IT WILL**
9 **AUDIT THE ESES' PRACTICES?**

10 A. Not explicitly. As described above, the DSA references best practices,
11 commission rules, and other legal standards under the definition of Data
12 Protection Requirements, it has not however, defined a set of standards against
13 which it will audit a company's "compliance" with the DSA. Similarly, NFGD
14 has not disclosed how it would audit against state standards if the standards across
15 states conflicted with one another.

16 **Q. DOES NFGD HAVE THE AUTHORITY TO AUDIT A COMPANY'S**
17 **COMPLIANCE WITH THE "COMMISSION RULES, REGULATIONS,**
18 **AND GUIDELINES RELATING TO CONFIDENTIAL DATA,**
19 **INCLUDING THE COMMISSION-APPROVED UBP AND UBP DERS?"**

20 A. I understand that NFGD has modified its DSA from what it filed in its tariff
21 docket to remove all references to New York-specific terms.¹⁸ The important

¹⁸ NFGD Responses to Gas Supplier Companies' Interrogatories 1-2, 1-3, 1-13, 1-14, 1-15 and 1-16.

1 aspect is whether or not NFGD has the authority to audit another company's
2 compliance with Commission rules. The clear answer is no.

3 **Q. WHY WOULD ALLOWING NFGD TO AUDIT THE DATA SECURITY**
4 **PRACTICES BE BAD POLICY.**

5 A. First, it usurps the authority of the Commission to do exactly that – monitor the
6 practices of the companies it regulates. Perhaps more importantly, it would
7 provide NFGD access to the operations of its competitors into areas that are in
8 many instances extremely sensitive, proprietary and potentially, a source of
9 competitive advantage.

10 **Q. DOES THE DSA INCLUDE PROVISIONS THAT WOULD GOVERN AN**
11 **ESE'S DATA MANAGEMENT PRACTICES?**

12 A. Yes. The DSA obligates ESE's: to "comply with all applicable privacy and
13 security laws;"¹⁹ to "have in place appropriate processes and systems" to protect
14 Confidential Information;²⁰ to use data encryption during storage and
15 transmission of data;²¹ to limit the geographic transmission of data;²² and to sign a
16 Self-Attestation outlining 15 separate Information Security Control
17 Requirements.²³

18 **Q. ARE THESE PROVISIONS SUFFICIENT TO SAFEGUARD**
19 **CONFIDENTIAL INFORMATION?**

¹⁹ DSA Section 14.b, p. 10.

²⁰ DSA Section 14.c, p. 10.

²¹ DSA Section 14.d, p. 10.

²² DSA Section 14.g, p. 11

²³ DSA Exhibit A.

1 A. NFGD has presumably established standards that it believes are sufficient to
2 safeguard confidential information and has included those standards in its DSA.
3 While I am not in a position to testify about NFGD’s definition of sufficient data
4 protection practices, I can only conclude that they believe that the standards are
5 sufficient since they proffered the DSA and supported it at the Commission.

6 **Q. SHOULD THE PENNSYLVANIA COMMISSION GRANT TO NFGD A**
7 **RIGHT TO AUDIT THE GAS SUPPLIERS SERVING CUSTOMERS IN**
8 **ITS SERVICE TERRITORY.**

9 A. No. NFGD has not in any way justified their need or desire to audit the ESEs
10 serving customers behind their distribution network. It has not shown an audit to
11 be a reasonable requirement. It has not elaborated any standards against which it
12 will audit an ESE data management practices. Finally, NFGD has not proven that
13 it has any audit capabilities.

14

15 **VI. SUMMARY**

16 **Q. COULD YOU PLEASE SUMMARIZE YOUR TESTIMONY?**

17 A. Yes. NFGD’s requirements for ESEs to maintain \$5 million in cybersecurity
18 insurance is neither just nor reasonable. The requirement will not provide any
19 incremental benefit to any consumer or business entity in the Commonwealth.
20 Additionally, it will result in a less competitive market for gas services in the
21 Commonwealth. Similarly, NFGD’s requirement that they be allowed to “audit
22 and inspect . . . the facilities of an ESE [NGS] and third-party representatives . . .
23 and any equipment used to process confidential information, the ESE’s security

1 practices, facilities, books and records, etc” is significantly beyond any utility’s
2 authority. Such authority could have negative ramifications on the gas markets in
3 Pennsylvania.

4

5 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

6 A. Yes.