



800 North Third Street, Suite 205, Harrisburg, Pennsylvania 17102  
Telephone (717) 901-0600 • Fax (717) 901-0611 • www.energypa.org

November 20, 2019

Rosemary Chiavetta, Esq., Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, Pennsylvania 17120

**Re: Final Policy Statement and Order Re: 2019 Amendments to Policy Statement on  
Customer Assistance Program, 52 Pa. Code §§ 69.261 – 69.267, Docket No. M-2019-  
3012599**

Dear Secretary Chiavetta:

Enclosed for filing please find the Petition of the Energy Association of Pennsylvania for Stay of Ordering Paragraphs Six, Seven, and Eight of Final Policy Statement Order at the above-referenced docket.

Copies have been served per the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Donna M.J. Clark".

Donna M.J. Clark  
Vice President & General Counsel

cc: Joseph Magee, Bureau of Consumer Services (via email)  
Louise Fink Smith, Law Bureau (via email)

Enclosure

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Final Policy Statement and Order Re:                   :                   Docket No. M-2019-3012599**  
**2019 Amendments to Policy Statement on**  
**Customer Assistance Program, 52 Pa. Code**  
**§§ 69.261 – 69.267**

**PETITION OF THE ENERGY ASSOCIATION OF PENNSYLVANIA FOR STAY OF  
ORDERING PARAGRAPHS SIX, SEVEN AND EIGHT OF FINAL POLICY  
STATEMENT ORDER ENTERED ON NOVEMBER 5, 2019**

The Energy Association of Pennsylvania (“EAP” or “Association”), acting on behalf of its electric distribution company (“EDC”) and natural gas distribution company (“NDGC”) members that operate an approved Universal Service and Energy Conservation Plan<sup>1</sup> (“USECP”), files this Petition for Stay pursuant to Section 5.572 of the regulations of the Pennsylvania Public Utility Commission (“PUC” or “Commission”), 52 Pa. Code § 5.572. By this Petition, EAP and its member EDCs and NGDCs respectfully request that the Commission stay the effectiveness of Ordering Paragraphs six (6), seven (7) and eight (8) of the Final Policy Statement and Order Re: *2019 Amendments to Policy Statement on Customer Assistance Program* entered on November 5, 2019 at Docket No. M-2019-3012599 (“Final Policy Statement Order”) pending resolution of the Petition of the Energy Association of Pennsylvania for Reconsideration and Clarification of Final Policy Statement Order filed on November 20, 2019 (“Reconsideration/Clarification Petition”).

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<sup>1</sup> EAP EDC members operating approved USECPs include Duquesne Light Co., Metropolitan Edison Co., PECO Energy Co., Pennsylvania Electric Co., Pennsylvania Power Co., PPL Electric Utilities Inc., and West Penn Power Co. EAP NGDC members operating approved USECPs include Columbia Gas of Pennsylvania, PECO Energy Co., National Fuel Gas Distribution Corp., Peoples Natural Gas Co., Philadelphia Gas Works, and UGI Utilities, Inc.

As set forth below, a stay is warranted to avoid the unnecessary and unlawful initiation of proceedings directed to amend utility USECPs by the filing and service of addendums to those plans on or before January 6, 2020 (“Addendum Requirement”). *See*, Final Policy Statement Order at Ordering Paragraph six (6) which provides, in pertinent part, that addendums to utility existing or proposed (if applicable) USECPs are due “at their respective dockets, in response to this Order, within sixty (60) days of entry date of this Order.” The Addendum Requirement is unlawful in that it creates a compliance requirement, *i.e.* prescribes specific changes to current USECPs “by or before January 1, 2021” in the context of finalizing an order to amend a policy statement. *See, Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977). Issuing the requested stay will provide the Commission the opportunity to consider the relief sought in the Reconsideration/Clarification Petition without substantial harm to other interested parties who participated in the *Energy Affordability and Review* proceedings<sup>2</sup> and will not adversely affect the public interest.

## I. BACKGROUND

On November 5, 2019, the Commission entered the Final Policy Statement Order which contains the following ordering paragraphs:

6. That the Electric Distribution Companies and Natural Gas Distribution Companies listed in Ordering Paragraph No. 5 shall file and serve addendums to their existing or proposed (if applicable) Universal Service and Energy Conservation Plans, at their respective dockets, in response to this Order, within 60 days of entry date of this Order. The addendums are to indicate how the Electric Distribution Companies and Natural Gas Distribution Companies intend to implement the policy changes specified in the amended CAP Policy Statement, numbered as in the discussion herein, by or before January 1, 2021. The Electric Distribution Companies and Natural Gas Distribution Companies

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<sup>2</sup> *See*, Final Policy Statement Order at fn. 1 which identifies the *Energy Affordability and Review* proceedings at Docket No. M-2017-2587711 and Docket No. M-2017-2596907, respectively. These proceedings formed the basis for the order finalizing the recent amendments to the CAP Policy Statement.

should indicate in the cover letter to their addendums any provisions with which they are already compliant.

7. That the addendums to the universal service and energy conservation plans shall be filed in both clean and redline copies and served on the parties at the utilities' respective existing or pending USECP dockets.
8. That the addendums to the universal service and energy conservation plans shall be provided electronically in Word<sup>®</sup>-compatible format to Joseph Magee, Bureau of Consumer Services, [jimagee@pa.gov](mailto:jimagee@pa.gov); Jennifer Johnson, Bureau of Consumer Services, [jennifjohn@pa.gov](mailto:jennifjohn@pa.gov); Christina Chase-Pettis, Office of Communications, [cchasepett@pa.gov](mailto:cchasepett@pa.gov); Shari A. Williams, Office of Communications, [shariwilli@pa.gov](mailto:shariwilli@pa.gov); and Louise Fink Smith, Law Bureau, [finksmith@pa.gov](mailto:finksmith@pa.gov).<sup>3</sup>

These ordering paragraphs, included in an order finalizing amendments to a policy statement, direct EDCs and NGDCs to file addendums that detail how utilities will implement sixteen (16) specific policy changes on or before January 1, 2021 and, as such, create a compliance obligation. *See also*, Final Policy Statement Order at p. 100.

EAP filed a Reconsideration/Clarification Petition simultaneously with the filing of this Petition for Stay challenging the imposition of a compliance obligation via a final policy statement and asking the Commission to rescind Ordering Paragraphs six (6), seven (7) and eight (8) from the Final Policy Statement Order. EAP requested that the Commission replace those directives with a voluntary, informational filing at the amended CAP Policy Statement docket that would detail: (1) whether each utility's current USECP already adhere to the policy changes; (2) the utility's intentions with regard to those policy changes that are not part of the current USECP (including whether such changes could be operational by January 1, 2021); and (3) the utility's enrollment and budgetary projections requested in a corollary proceeding that revised

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<sup>3</sup> Final Policy Statement Order at p. 106.

the filing schedule for USECPs and related independent evaluations.<sup>4</sup> Such a voluntary, informational filing would set the stage for future utility specific USECP filings pursuant to the existing Commission rules and procedures, including the amended CAP Policy Statement.

In support of its Reconsideration/Clarification Petition, EAP contended, *inter alia*, that granting its request would address the significant legal concerns that occur under Pennsylvania law when an agency seeks to establish a binding norm or compliance obligation via a policy statement rather than through a rulemaking or adjudication. EAP argued that the practical implications and complex procedural issues that arise with the imposition of the Addendum Requirement gave further support for its request for reconsideration and/or clarification of these ordering paragraphs in the Final Policy Statement Order.

In support of its Petition for Stay, EAP states as follows:

## **II. APPLICABLE LEGAL STANDARD**

1. In considering a petition for stay, the Commission analyzes the factors identified by the Pennsylvania Supreme Court in *Pa. Public Utility Commission v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (Pa. 1983). A stay must be granted when a petitioner: (i) makes a strong showing that they are likely to prevail on the merits; (ii) shows that without the requested relief, the petitioner will suffer irreparable injury; (iii) shows that the issuance of a stay will not substantially harm other interested parties in the proceedings; and (iv) shows that the issuance of a stay will not adversely affect the public interest. *Id.* 502 Pa. at 552-52, 467 A.2d at 808-809.

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<sup>4</sup> See, *Order Re: Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule*, Docket No. M-2019-3012601 entered on October 3, 2019 at Ordering Paragraph three (3).

2. In *Process Gas*, the Supreme Court held that these criteria require the balancing of the interests of all parties, and the public where applicable and further require the petitioner to demonstrate probability of success on the merits. *Id.*

### III. THE PETITION FOR STAY MEETS THE PROCESS GAS STANDARD

3. EAP and its member EDCs and NGDCs that file USECPs as required by 52 Pa. Code §54.74 and §62.4, respectively, are likely to prevail on the merits.

4. Policy statements, as distinguished from regulations and adjudications, do not establish binding norms and do not have the force of law. The Pennsylvania Supreme Court has likened a policy statement to a press release which announces the course an agency intends to take in the future.<sup>5</sup> The amended CAP Policy Statement provides insight and notice to the public of policy changes that the Commission intends to follow in the future. The Addendum Requirement, however, creates directives and compliance obligations that mandate each utility to proceed “to implement the policy changes specified in the amended CAP Policy Statement...by or before January 1, 2021. *See*, Final Policy Statement Order at Ordering Paragraph six (6).

5. The creation of a general compliance obligation in the order finalizing the amendments to a policy statement is contrary to Pennsylvania law which allows agencies to adopt binding norms in two ways, either by rulemaking or adjudication. *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671, 678-80 (Pa. 1977). Appellate courts in Pennsylvania have struck down agency decisions that rested upon documents that created binding norms outside of a rulemaking or adjudication.<sup>6</sup> These decisions have relied upon the

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<sup>5</sup> *Pa. Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977).

<sup>6</sup> *See*, e.g., *Nw. Youth Svcs., Inc. v. Commw. Dep't of Pub. Welfare*, 66 A.3d 301, 316-17 (Pa. 2013); *Trans. Svcs., Inc. v. Underground Storage Tank Indemnification Bd.*, 67 A.3d 142, 155-56 (Pa. Commw. Ct. 2013).

distinction between regulations, which are binding, and statements of policy, which are not enforceable.

6. Without the requested relief, EDCs and NGDCs ordered to meet the Addendum Requirement will suffer irreparable harm. Ordering Paragraphs six (6), seven (7) and eight (8) of the Final Policy Statement Order mandate action by January 1, 2020 that is not authorized by Pennsylvania law. The Commission cannot create a binding norm via an unlawful process and thus cannot order the initiation of a process by the utility (as opposed to a utility voluntarily seeking to amend its current USECP) that would prescribe the inclusion and implementation of specific policy changes into the utility USECP by a date certain. A violation of law constitutes irreparable harm *per se*. See, *Core Communications, Inc. v. Verizon Pennsylvania Inc., Verizon North LLC*, 2011 Pa. PUC LEXIS 72 at 24 (Pa. PUC 2011) citing *Pa. Public Utility Commission v. Israel*, 52 A.2d 347 (Pa. 1947). Here, if the requested stay is not granted and EDCs and NGDCs comply with the Addendum Requirement, the concerns raised and the relief requested in the Reconsideration/Clarification Petition will be moot.

7. The issuance of the requested stay will not substantially harm other interested parties which participated in the *Energy Affordability and Review* proceedings underlying the Final Policy Statement Order. The Reconsideration/Clarification Petition does not challenge the substantive amendments to the CAP Policy Statement finalized by the Commission in its Final Policy Statement Order. By issuing the requested stay of Ordering Paragraphs six (6), seven (7) and eight (8), the Commission will maintain the status quo. The amendments to the CAP Policy Statement will become effective upon its publication in the *Pennsylvania Bulletin*; those policy changes will provide guidance to the utilities and other interested parties with respect to specific

policy changes that the Commission intends to follow in future utility specific USECP proceedings; and the timing of those utility specific proceedings is known.<sup>7</sup>

8. The issuance of the requested stay will not adversely affect the public interest and will benefit the public interest by providing an opportunity for the Commission to consider the merits of the Reconsideration/Clarification Petition. In so doing, the Commission can address the legal errors and unwarranted procedural complexity embodied in Ordering Paragraphs Six (6), Seven (7) and Eight (8) without delaying the effectiveness of its policy changes. EAP maintains that issuance of its request for stay is consistent with the public interest to: (i) promote an efficient and fair process to update USECPs and (ii) support an orderly and judicious implementation of the amended CAP Policy Statement. Utilizing the proven utility specific process to periodically review and update USECPs will provide an ample opportunity to assess the operational and cost concerns that are likely to arise in the context of implementing the amended CAP Policy Statement. A case by case approach will facilitate the resolution of CAP design elements taking into account the interests of participants and ratepayers unique to each service territory.

#### **IV. CONCLUSION**

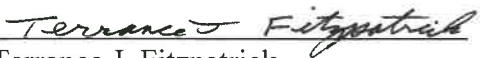
For the reasons set forth above, the Energy Association of Pennsylvania, on behalf of its EDC and NDGC members that operate an approved Universal Service and Energy Conservation Plan, respectfully requests that the Commission grant this Petition and order a stay of Ordering Paragraphs six (6), seven (7) and eight (8) of the Final Policy Statement Order pending

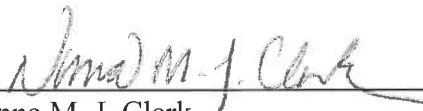
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<sup>7</sup> Currently, there are utility specific USECP proceedings pending at the Commission and the Commission has recently issued an order modifying the regulatory schedule for filing updates to USECPs. *Order Re: Universal Service and Energy Conservation Plan (USECP) Filing Schedule and Independent Evaluation Filing Schedule*, Docket No. M-2019-3012601 entered on October 3, 2019. Moreover, EAP notes that neither the Reconsideration/Clarification Petition nor the Petition for Stay precludes a utility from voluntarily proceeding to amend its current USECP and implement the design changes detailed in the amended CAP Policy Statement.



resolution of Reconsideration/Clarification Petition and for such other relief as the Commission deems necessary and proper under the circumstances presented herein.

  
Terrance J. Fitzpatrick  
President & CEO  
[tfitzpatrick@energypa.org](mailto:tfitzpatrick@energypa.org)  
Atty. ID # 35287

  
Donna M. J. Clark  
Vice President & General Counsel  
[dclark@energypa.org](mailto:dclark@energypa.org)  
Atty. ID # 39866

Energy Association of Pennsylvania  
800 North Third Street, Suite 205  
Harrisburg, PA 17102

Date: November 20, 2019

## Certificate of Service

I hereby certify that I am this day serving, via email, a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

Richard A. Kanaski, Esq.  
Bureau of Investigation & Enforcement  
PA Public Utility Commisison  
400 North Street  
Harrisburg, PA 17120  
[rkanaski@pa.gov](mailto:rkanaski@pa.gov)

Jodi Williams  
Deputy Executive Director  
Blair County Community Action Agency  
2100 Sixth Avenue, Suite 102  
Altoona, Pennsylvania 16602  
[Jodi.williams@blaircap.org](mailto:Jodi.williams@blaircap.org)

Ana Gargia, Office Manager  
Commission on Economic Opportunity of  
Hazleton  
100 W. Broad Street, Suites 11-13  
Hazleton, PA 18201  
[ceonortheastpa@gmail.com](mailto:ceonortheastpa@gmail.com)

Joseph L. Vullo  
Commission on Economic Opportunity of  
Luzerne County  
Burke Vullo Reilly Roberts  
1460 Wyoming Ave.  
Forty Fort, PA 18704  
[jlvullo@bvrrlaw.com](mailto:jlvullo@bvrrlaw.com)

Donna Kletsko, Office Manager  
Commission on Economic Opportunity of  
Wyoming County  
PO Box 74  
Tunkhannock, PA 18657  
[ceonortheastpa@gmail.com](mailto:ceonortheastpa@gmail.com)

Elizabeth R. Marx, Esq.  
Patrick M. Cicero, Esq.  
Joline Price, Esq.  
Pennsylvania Utility Law Project  
On Behalf of CAUSE-PA  
118 Locust Street  
Harrisburg, PA 17101  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)

Robert Ballenger, Esq.  
Josie B.H. Pickens, Esq.  
Community Legal Services  
On Behalf of TURN and Action Alliance  
1424 Chestnut Street  
Philadelphia, PA 19102-2505  
[rballenger@clsphila.org](mailto:rballenger@clsphila.org)  
[jpickens@clsphila.org](mailto:jpickens@clsphila.org)

Amy E. Hirakis, Esq.  
Columbia Gas of Pennsylvania  
800 N 3<sup>rd</sup> Street, Suite 204  
Harrisburg, PA 17102  
[ahirakis@nisource.com](mailto:ahirakis@nisource.com)

Lindsay Baxter  
Audrey Waldock  
Duquesne Light Company  
411 Seventh Avenue, Mail Drop 15-7  
Pittsburgh, PA 15219  
[lbaxter@duqlight.com](mailto:lbaxter@duqlight.com)  
[awaldock@duqlight.com](mailto:awaldock@duqlight.com)

John Oravitz, Weatherization Coordinator  
Housing Authority of the County of Beaver  
300 State Avenue  
Beaver, PA 15009  
[hacbwz@comcast.net](mailto:hacbwz@comcast.net)

Michelle Faught, Executive Director  
Indiana County Community Action Program  
827 Water Street  
Indiana, PA 15701  
[mfaught@iccap.net](mailto:mfaught@iccap.net)

David Hunter  
Housing Alliance of Pennsylvania  
309 Florence Avenue, 914N  
Jenkintown, PA 19046  
[David@housingalliancepa.org](mailto:David@housingalliancepa.org)

Eric Miller, Esq.  
Keystone Energy Efficiency Alliance  
1501 Cherry Street  
Philadelphia, PA 19102  
[emiller@keealliance.org](mailto:emiller@keealliance.org)

Ruth Ann Norton  
Green & Healthy Homes Initiative  
2714 Hudson Street  
Baltimore, MD 21224  
[ranorton@ghhi.org](mailto:ranorton@ghhi.org)

Charles Harak  
National Consumer Law Center  
7 Winthrop Sq.  
Boston, MA 02110  
[charak@nclc.org](mailto:charak@nclc.org)

Todd Nedwick  
National Housing Trust  
1101 30th Street, NW Suite 100A  
Washington DC 20007  
[tnedwick@nhtinc.org](mailto:tnedwick@nhtinc.org)

Deron Lovaas  
Natural Resources Defense Council  
1152 15th Street NW, Suite 300  
Washington, D.C. 20005  
[dlovaas@nrdc.org](mailto:dlovaas@nrdc.org)

Matthew L. Garber, Esq.  
Pamela C. Polacek, Esq.  
On Behalf of Industrial Customers  
McNees Wallace & Nurick LLC  
100 Pine Street  
PO Box 166  
Harrisburg, PA 17108-1166  
[mgarber@mcneeslaw.com](mailto:mgarber@mcneeslaw.com)  
[ppolacek@mcneeslaw.com](mailto:ppolacek@mcneeslaw.com)

Teresa K. Harrold, Esq.  
FirstEnergy  
2800 Pottsville Pike  
PO Box 16001  
Reading, PA 19612-6001  
[tharrold@firstenergycorp.com](mailto:tharrold@firstenergycorp.com)

Nathaniel J. Ehrman, Esq.  
National Fuel Gas Distribution Corp.  
1100 State Street  
Erie, PA 16512  
[ehrmann@natfuel.com](mailto:ehrmann@natfuel.com)

Christy M. Appleby, Esq.  
Office of Consumer Advocate  
5th Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
[CAappleby@paoca.org](mailto:CAappleby@paoca.org)

Sharon E. Webb, Esq.  
Office of Small Business Advocate  
555 Walnut Street, 1<sup>st</sup> Fl.  
Harrisburg, PA 17101  
[Ra-sba@pa.gov](mailto:Ra-sba@pa.gov)

Jennedy S. Johnson, Esq.  
PECO  
2301 Market Street, S 23-1  
Philadelphia, PA 19103  
[Jennedy.johnson@exeloncorp.com](mailto:Jennedy.johnson@exeloncorp.com)

Kevin Sunday, Director, Govt Affairs  
Pa Chamber of Business and Industry  
417 Walnut Street  
Harrisburg, PA 17101  
[ksunday@pachamber.org](mailto:ksunday@pachamber.org)

Robert Torres, Secretary  
Pennsylvania Department of Aging  
555 Walnut Street, 5th Floor  
Harrisburg, PA 17101  
[secretaryofaging@pa.gov](mailto:secretaryofaging@pa.gov)

Dennis M. Davin, Secretary  
Pennsylvania Department of Community  
and Economic Development  
Commonwealth Keystone Building  
400 North Street, 4th Floor  
Harrisburg, PA 17120-0225  
[DCEDSecretary@pa.gov](mailto:DCEDSecretary@pa.gov)

Patrick McDonnell, Secretary  
Pennsylvania Dept of Environmental  
Protection  
Rachel Carson State Office Building  
400 Market Street  
Harrisburg, PA 17101  
[RA-EPDEPSecretary@pa.gov](mailto:RA-EPDEPSecretary@pa.gov)

Teresa D. Miller, Secretary  
Pennsylvania Dept of Human Services  
Health and Welfare Building  
625 Forster St  
Harrisburg, PA 17120  
[RA-secretaryoffice@pa.gov](mailto:RA-secretaryoffice@pa.gov)

Rachel Levine, Secretary  
Pennsylvania Department of Health  
Health and Welfare Building  
8th Floor West  
625 Forster Street  
Harrisburg, PA 17120  
[ra-dhsecofhealth@pa.gov](mailto:ra-dhsecofhealth@pa.gov)

Frank Caliva, Esq.  
On behalf of PA Energy Marketers Coalition  
(PEMC)  
P.R. Quinan Associates Inc.  
1012 14th Street NW, Suite 903  
Washington, DC 20005  
[frankcaliva@prquinlan.com](mailto:frankcaliva@prquinlan.com)

Joline Price, Esq  
On behalf of the Pennsylvania Service  
Providers  
Community Legal Services  
1424 Chestnut St.  
Philadelphia, PA 19102  
[jprice@clsphila.org](mailto:jprice@clsphila.org)

Thomas J. Sniscak, Esq.  
Whitney E. Snyder, Esq.  
On behalf of The Pennsylvania State Univ.  
Hawke McKeon & Sniscak LLP  
100 North Tenth Street  
Harrisburg, PA 17101  
[tjsniscak@hmslegal.com](mailto:tjsniscak@hmslegal.com)  
[wesnyder@hmslegal.com](mailto:wesnnyder@hmslegal.com)

Gene Brady, Chairman  
PA Weatherization Providers Task Force  
P.O. Box 991  
Wilkes-Barre, PA 18703  
[hebegebe@sunlink.net](mailto:hebegebe@sunlink.net)

Barbara Rupert  
Gene Brady  
Housing Development Corp. of NEPA  
163 Amber Lane  
Wilkes-Barre, PA 18702  
[hebegebe@sunlink.net](mailto:hebegebe@sunlink.net)

Jennifer L. Petrisek, Esq.  
Peoples  
375 North Shore Drive  
Pittsburgh, PA 15212  
[Jennifer.petrisek@peoples-gas.com](mailto:Jennifer.petrisek@peoples-gas.com)

Cynthia Figueroa, Commissioner  
Philadelphia Department of Human Services  
1515 Arch Street,  
Philadelphia, PA 19102  
[dhscommunications@phila.gov](mailto:dhscommunications@phila.gov)

Denise Adamucci, Esq.  
Graciela Christlieb, Esq.  
Philadelphia Gas Works  
800 West Montgomery Ave.  
Philadelphia, PA 19122  
[Denise.Adamucci@pgworks.com](mailto:Denise.Adamucci@pgworks.com)  
[Graciela.christlieb@pgworks.com](mailto:Graciela.christlieb@pgworks.com)

Kimberly A. Klock, Esq.  
Michael J. Shafer, Esq.  
PPL Electric Utilities  
2 N 9<sup>th</sup> Street  
Allentown, PA 18101  
[kklock@pplweb.com](mailto:kklock@pplweb.com)  
[mjshafer@pplweb.com](mailto:mjshafer@pplweb.com)

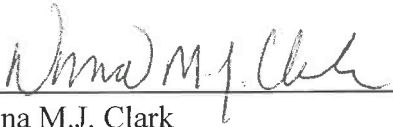
Rachel Blake, WCC Coordinator  
Associate Director  
Regional Housing Legal Services  
2 S Easton Road  
Glenside, PA 19038  
[rblake@rhls.org](mailto:rblake@rhls.org)

Sam Ceccacci, Executive Director  
Scranton-Lackawanna Human Development  
Agency  
321 Spruce Street 1st Floor  
Scranton, PA 18503  
[SFontana@slhda.org](mailto:SFontana@slhda.org)

Danielle Jouenne, Esq.  
UGI Corporation  
460 North Gulph Road  
King of Prussia, PA 19406  
[JouenneD@ugicorp.com](mailto:JouenneD@ugicorp.com)

Kristen Rotz, President  
United Way of Pennsylvania  
909 Green Street  
Harrisburg, PA 17102  
[krotz@uwp.org](mailto:krotz@uwp.org)

DATE: November 20, 2019

  
\_\_\_\_\_  
Donna M.J. Clark  
Vice President & General Counsel  
Energy Association of Pennsylvania  
Atty. ID # 39866