

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265**

**Pennsylvania Public Utility Commission
Law Bureau Prosecutory Staff**

**PUBLIC MEETING
November 19, 2010
2120601-OSA
Docket No. C-2009-2120601**

v.

UGI Utilities, Inc.

STATEMENT OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Commission is a Settlement Agreement in the above-captioned proceeding filed by the Commission's Law Bureau Prosecutory Staff and UGI Utilities, Inc. I find that the settlement represents a reasonable resolution of this matter and agree with the staff recommendation that it be approved without modification.

One provision of the settlement requires the payment of a \$10,000 civil penalty, which, by law, will be forwarded to the General Fund of the Commonwealth. The payment of civil penalties in the context of settlements of prosecutions and investigations has recently been an issue of interest at the Commission. Specifically, it has been suggested by some that the public interest would be better served if the Commission modified these settlement by "converting" civil penalties agreed to by the parties to financial contributions to universal service programs. On multiple occasions, interested stakeholders have had the opportunity to file comments on the merits of this practice. Of late, the Commission has declined to modify these settlements. I would like to take this opportunity to explain in greater detail the legal and policy reasons for this position.

The Pennsylvania General Assembly has enacted a specific regulatory scheme for the assessment of civil penalties against public utilities, and their disposition.¹ Relevantly, the law provides that a public utility shall pay a civil penalty of \$1,000 per day for each violation of the Public Utility Code ("Code"), Commission orders, regulations, etc. For gas safety matters, a fine of \$10,000 is owed for each violation per day. Code Section 3315 provides for the disposition of these amounts as follows: "All fines imposed, and all penalties recovered, under the provisions of this part, shall be paid to the commission, and by it paid into the State Treasury, through the Department of Revenue, to the credit of the General Fund." The word "shall" has a mandatory connotation under the principles of statutory construction.² Therefore, the Commission is required to forward all fines and penalties recovered to the State Treasury.

¹ 66 Pa.C.S. §§ 3301-3316.

² *Oberneder v. Link Computer Corp.*, 696 A.2d 148 (Pa. 1997).

The Commission cannot evade this statutory mandate by changing, via a Commission order, a fine negotiated by the Law Bureau Prosecutory Staff with a utility, to a financial contribution to another entity. Such a practice is contrary to the following principles of statutory construction:

- The Commission only has such authority as expressly delegated to it by the General Assembly.³ In addition to Section 3315, the Code separately provides that all assessments and fees collected from utilities and others shall be paid into the General Fund.⁴ There is no express authority within the Public Utility Code giving the Commission authority to depart from this requirement.
- The General Assembly considers Section 3315 to be sufficiently broad that it adopted a specific exception to it in the context of compliance with the Alternative Energy Portfolio Standards Act of 2004. Electric distribution companies must pay an “alternative compliance payment” for not meeting their annual obligation under this law. The General Assembly expressly waived Section 3315 to allow alternative compliance payments to be paid into a special fund for the support alternative energy projects.⁵ However, no such waiver exists for penalties issued for Code violations found as part of a Commission investigation.
- The rules of statutory construction provide that the General Assembly intends all provisions of a statute to be effective,⁶ and the rules of statutory construction require that all penal provisions of a statute be strictly construed.⁷

Thus, the argument that a civil penalty can be converted to a “contribution” by a Commission Order to avoid the requirements of Section 3315 is without merit. The General Assembly plainly intended for the Commission to impose civil penalties for violations of the Code. These civil penalties must be paid into the General Fund. Under the rules of construction, these provisions must be given full effect by the Commission, and as they are penal in nature, must be strictly construed. To routinely convert fines to contributions is contrary to both rules.

Renaming a civil penalty a “contribution” is therefore an exercise in semantics. The Commission’s jurisdiction for review and approval of these settlements exists because the Law Bureau Prosecutory Staff has alleged a violation of the Code. Even if the Commission issues an Order converting the fine to a financial contribution to a third party, these monies remain a *de facto* fine or penalty and, unlike the costs of universal service programs for low-income customers, are not recoverable as an expense for providing public utility service.

³ *Feingold v. Bell of Pennsylvania*, 383 A.2d 791 (Pa. 1978).

⁴ 66 Pa.C.S. §511.

⁵ 73 P.S. §1648.3(g)(1).

⁶ 1 Pa.C.S. §1922.

⁷ 1 Pa.C.S. §1928.

This practice of converting a fine to a contribution is also contrary to several Commission policies codified in its regulations. The Commission has a long standing policy to encourage settlements.⁸ The routine modification, via an Order, of a negotiated settlement between a public utility and LBPS reduces the parties' confidence that negotiated settlements will be approved by the Commission, and thereby increases the likelihood that additional time and resources will be spent in the litigation of these matters.

More importantly, it would be contrary to the Commission's statement of policy on the evaluation of settlements of proceeding involving violations of the Code.⁹ This policy statement identifies standards that the Commission will utilize in determining if a fine for a violation of a Commission regulation, order or statute is appropriate, as well as if the proposed settlement is in the public interest. The provisions of the policy statement demonstrate an expectation that fines are a normal and expected component of settlements, and that they are imposed in part to punish the public utility and deter future violations. For example, bad faith, a history of non-compliance, etc. should result in a higher penalty according to the policy statement.¹⁰ To adopt a practice of not imposing civil penalties would be contrary to this statement of policy.

It should be acknowledged that the legal and policy issues discussed above would not apply in situations that do not involve violations of the Code. For example, in late 2009 the Federal Energy Regulatory Commission ("FERC") approved the refund of about \$3.6 million to the Columbia Gas Company and Peoples Gas Company from the Tennessee Gas Pipeline Company ("TGPC"). The TGPC had been allowed to charge these two Pennsylvania gas utilities certain amounts over a period of time for its environmental remediation costs. A review of these charges showed that TGPC had over-collected these monies, and FERC approved the refund of the excess amounts. These two utilities filed Petitions with the Commission requesting approval to use residential customers' share of these proceeds to fund certain low-income assistance programs. The Commission for the most part approved these requests.¹¹ As these cases did not involve violations of the Code by a public utility, Section 3315 did not apply, and the Commission had the discretion to approve the contribution of these refunds to universal service programs. More generally, it is not uncommon for a public utility to contribute profits to charitable causes or special interests as part of the resolution of a large or complex proceeding. So long as recovery from ratepayers is not expected, and the amounts do not jeopardize the safe and reliable provision of public utility service, such contributions are within utility management prerogative.¹²

⁸ 52 Pa. Code §5.231(a).

⁹ 52 Pa. Code §69.1201.

¹⁰ 52 Pa. Code §69.1201 (c)(6) and (7).

¹¹ *Petition of Columbia Gas Company*, P-2010-2157040 (Order entered April 19, 2010); *Petition of Dominion Peoples Company*, Docket No. P-2010-2152149 (Order entered May 24, 2010).

¹² *Borough of Moosic v. Pa. Public Utility Commission*, 429 A.2d 1237 (Pa. Cmwlth. 1981).

Finally, it should be recognized the Commission and ratepayers remain very supportive of universal service in Pennsylvania. These programs receive substantial funding through customer rates, and their budgets have grown significantly in recent years. In 2009, the combined universal service program budget of the tracked electric and gas utilities was about \$440,000,000.¹³ Conversely, the Commission usually recovers less than \$1,000,000 in fines for violations of the Code in any given year. The redirection of these penalties would not materially expand the scope of universal service programs in Pennsylvania. If there is a concern that a particular company's program funding is inadequate, that issue can be examined in the context of other, more appropriate proceedings.



November 19, 2010
Date

JOHN F. COLEMAN, JR., COMMISSIONER

¹³ See Appendix 8, Pennsylvania Public Utility Commission's 2009 Report on Universal Service Programs & Collections Performance.