THE PENNSYLVANIA UTILITY LAW PROJECT

118 LOCUST STREET
HARRISBURG, PA 17101-1414

PATRICK M. CICERO, ESQUIRE
PCICEROPULP@PALEGALAID.NET

PHONE: (717) 236-9486, EXT. 202
FAX: (717) 233-4088

July 11, 2011

Via E-Filing
Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: PA PUC v. Columbia Gas of Pennsylvania – R-2010-2215623
PCOC et al. v. Columbia Gas of Pennsylvania – C-2011-2232186

Dear Secretary Chiavetta:

Enclosed please accept for filing PCOC et. al.'s Reply Brief and a Certificate of Service in the captioned case.

Should you have any questions or concerns please do not hesitate to contact me.

Very sincerely,

PENNSYLVANIA UTILITY LAW PROJECT
Counsel for ACTION United, Nettie Pelton, and Carol Collington

Patrick M. Cicero, Esq.

CC: Certificate of Service (all parties by U.S. Mail and e-mail)
Hon. Katrina Dunderdale, Administrative Law Judge (by U.S. Mail and e-mail)
Technical Advisors (by U.S. Mail and e-mail)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No.: R-2010-2215623
	:	
Columbia Gas of Pennsylvania, Inc.	:	
Pennsylvania Communities Organizing for Change, Inc., d/b/a ACTION United, Carol Collington, and Nettie Pelton	:	
	:	Docket No.: C-2011-2232186
v.	:	
	:	
Columbia Gas of Pennsylvania, Inc.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the Reply Brief of Pennsylvania Communities Organizing for Change, Inc. d/b/a ACTION United; Carol Collington; and Nettie Pelton, as set forth below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA E-MAIL and FIRST-CLASS MAIL

Hon. Katrina L. Dunderdale
Administrative Law Judge
Piatt Place, Suite 220
301 5th Avenue
Pittsburgh, PA 15222

David Huff
Brent Killian
Ed Berzonsky
Technical Advisors
Bureau of Fixed Utility Services
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Carrie B. Wright, Esquire
Charles Daniel Shields, Esquire
PA Public Utility Commission
Office of Trial Staff
P.O. Box 3265
Harrisburg, PA 17105-3265

Michael W. Gang, Esquire
Michael W. Hassell, Esquire
Andrew S. Tubbs, Esquire
Post & Schell, P.C.
17 North Second Street, 12th Flr.
Harrisburg, PA 17101

Candis A. Tunilo, Esquire
Erin L. Gannon, Esquire
Tanya J. McCloskey, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101

Thomas Sniscak, Esquire
William Lehman, Esquire
Todd Stewart, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17105-1778

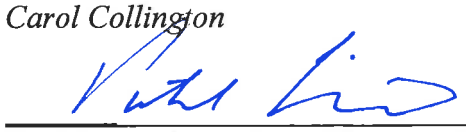
Theodore J. Gallagher, Esquire
Kimberly S. Cuccia, Esquire
Mark Kempic, Esquire
Columbia Gas of Pennsylvania, Inc.
121 Champion Way, Suite 100
Canonsburg, PA 15317

Daniel Asmus, Esquire
Steven C. Gray Esquire
Office of Small Business Advocate
Suite 1102 Commerce Building
300 North Second Street
Harrisburg, PA 17101

Charis Mincavage, Esquire
Shelby A. Linton-Keddie Esquire
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166

Respectfully submitted,

PENNSYLVANIA UTILITY LAW PROJECT
Counsel for ACTION United, Nettie Pelton, and Carol Collington



Patrick M. Cicero, Esq., PA ID: 89039
Harry S. Geller, Esq., PA ID: 22415
Julie George, Esq., PA ID: 208482
118 Locust Street
Harrisburg, PA 17101
Tel.: 717-236-9486
Fax: 717-233-4088
pulp@palegalaid.net

July 11, 2011

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No.: R-2010-2215623
	:	
Columbia Gas of Pennsylvania, Inc.	:	
Pennsylvania Communities Organizing for Change, Inc., d/b/a ACTION United, Carol Collington, and Nettie Pelton	:	
	:	Docket No.: C-2011-2232186
v.	:	
	:	
Columbia Gas of Pennsylvania, Inc.	:	

REPLY BRIEF OF PENNSYLVANIA COMMUNITIES ORGANIZING FOR CHANGE, INC., d/b/a ACTION UNITED, CAROL COLLINGTON, AND NETTIE PELTON

Harry S. Geller, Esq.
PA Attorney I.D. #22415
Patrick M. Cicero, Esq.
PA Attorney I.D. #89039
Julie George, Esq.
PA Attorney I.D. #208482
pulp@palegalaid.net

Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
Tel: 717-236-9486
Fax: 717-233-4088

Dated: July 11, 2011

Table of Contents

Table of Authorities

Cases

Statutes/Regulations

I. Introduction[1]

In their Main Brief filed June 27, 2011, Pennsylvania Communities Organizing for Change, d/b/a ACTION United, Ms. Carol Collington, and Ms. Nettie Pelton, ("PCOC et al."), argue that the evidence in the record requires the Public Utility Commission ("Commission") to reject Columbia Gas of Pennsylvania Inc.'s ("Columbia") continued use of a CAP-Plus plan because such a plan conflicts with federal law and regulations governing the Low-Income Home Energy Assistance Program ("LIHEAP"); because such a plan conflicts with the Pennsylvania Department of Welfare's ("DPW") LIHEAP state plan and policy, and thereby jeopardizes Columbia's LIHEAP vendor status; and because Columbia's continued use of CAP-Plus is inconsistent with appropriate public policy relating to the continued affordability of natural gas service for low-income households.

PCOC et al. also contend that the evidence requires the Commission to reject Columbia's request to implement an alternative residential rate design structure that would impose a fixed, levelized distribution charge on its residential customers regardless of the volume of gas consumed by these customers because Columbia has not demonstrated a need to implement a new rate design structure and because such a plan places significant additional cost burdens on low-income households.

Main briefs were also filed on June 27, 2011 by the Office of Trial Staff ("OTS"), Columbia, and the Office of Consumer Advocate ("OCA").[2] In its main brief, OTS addresses only its alternative rate design proposal; it does not address CAP-Plus. Specifically, OTS urges the Commission to reject Columbia's proposed levelized distribution charge of $36 per month in

---

[1] PCOC et al. incorporate by reference their Main Brief, including the Introduction and History of Proceedings.

[2] None of the other parties to this proceeding filed a Main Brief.

favor of a $13.00 per month fixed customer charge, and a minimum monthly usage allowance of 2 Mcf per month to arrive at a monthly minimum charge of $19.90 per month. The OTS recommendation also includes a volumetric distribution rate to be charged for each Mcf of gas delivered to the customer in excess of the 2 Mcf per month allowance included in the minimum charge.

OCA urges the Commission to reject Columbia's proposed levelized distribution charge and OTS' alternative. OCA argues that Columbia's proposal would reduce customers' incentive to conserve energy, would disproportionately impact the Company's low volume and low-income users, and is inconsistent with widely accepted economic price theory and the Commission's clear direction that fixed customer charges should reflect only the direct costs of hooking up and maintaining a customer's account. OCA also opposes OTS' proposal because it would move gradually toward higher customer charges through the creation of a minimum allowance.

As to CAP-Plus, OCA argues that PCOC et al. have the burden of demonstrating that CAP-Plus is unlawful and that they have failed to do so. Specifically, OCA takes the position that CAP-Plus appropriately integrates LIHEAP with Columbia's CAP program and that it does not treat LIHEAP as a resource nor does it treat CAP customers who receive LIHEAP differently than any other customer of Columbia who receives LIHEAP.

For its part, Columbia asserts that the Commission should adopt its residential rate design because it "most accurately reflects how costs are incurred," as "Columbia's distribution costs to serve residential customers do not vary with customer usage." (Columbia Main Br. at 7-8.) Columbia contends that both OCA's and OTS' rate designs should be rejected by the

Commission because they rely on the "outdated concept of 'direct customer costs' in setting customer charges" as opposed to a rate design that is based on "cost causation." (Id. at 24-25.)

As for CAP-Plus, Columbia echoes OCA's argument that PCOC et al. have the burden of demonstrating that CAP-Plus is unlawful and that they have failed to do so. Furthermore, Columbia argues that CAP-Plus is consistent with federal law and policy. Notwithstanding its legal claims, and recognizing the uncertainty to its vendor status, Columbia urges the Commission to consider alternatives to CAP-Plus, but does not endorse an any specific one.

II. Summary of Argument

For the reasons stated herein, PCOC et al. urge the Commission to reject Columbia's and OCA's attempts to impermissibly shift the ultimate burden of proof as to the justness and reasonableness of Columbia's rates to PCOC et al. However, regardless of which party bears the burden of proof, PCOC et al. have submitted sufficient evidence demonstrating that CAP-Plus is unlawful. As such, the Commission should reject the arguments advanced by Columbia and OCA concerning CAP-Plus because the evidence of record strongly leads to the conclusion that CAP-Plus conflicts with the LIHEAP statute; as well as with the guidance of the U.S. Department of Health and Human Services ("HHS") and the Pennsylvania DPW, the federal and state agencies charged with implementing the LIHEAP statute.

Moreover, none of OCA's and Columbia's hypothetical alternatives to CAP-plus are appropriate to implement in this proceeding because they suffer from the same flaws as CAP-Plus or because there simply is an inadequate record in this proceeding to consider their adoption. Nonetheless, upon the suspension of CAP-Plus, PCOC et al. would support a comprehensive investigation by the Commission, to include DPW, which would seek to resolve

the appropriate method of coordinating the federal LIHEAP program with ratepayer funded assistance programs.

Finally, PCOC et al. urge the Commission to reject Columbia and OTS's arguments concerning their respective residential rate design proposals.

III. Argument

CAP-PLUS

A. The ultimate burden of proof concerning the justness and reasonableness of its rates rests with Columbia not PCOC et al.

In this case, Columbia has proposed to continue to implement its CAP-Plus program through operation of its CAP Rate rider found in its tariff. See Supplement No. 159 to Columbia Gas of Pennsylvania, Inc's Tariff Gas – Pa. P.U.C. No. 9, issued October 26, 2010, Fourth Revised Page No. 140 available at Docket No. P-2010-2195759, attached hereto as Appendix A. In so doing, Columbia asserts that it should be permitted to continue to assess a $17 per month fee only on CAP customers. The effect of this proposal for the CAP customer who receives LIHEAP is to have his/her LIHEAP grant treated as an available resource. The CAP customer who receives LIHEAP is also treated adversely as compared to a non-CAP LIHEAP recipient. PCOC et al. have challenged this provision of Columbia's tariff as neither just nor reasonable. Both Columbia and OCA assert that PCOC et al.'s challenge to CAP-Plus means that they bear the burden of proof in this proceeding. This position is incorrect.

This is a rate case, and it is axiomatic that the burden of proof in demonstrating that the rates sought are just and reasonable lies squarely on the utility proposing the rates rather than a party challenging the implementation of those rates. See 66 Pa. C.S. § 315(a); see also, Lower Frederick Twp. v. Pa. P.U.C., 48 Pa. Commw. 222, 226-27, 409 A.2d 505, 507 (1980);

Brockway Glass v. Pa. P.U.C., 63 Pa. Commw. 238, 437 A.2d 1067 (1981). Moreover, "[p]ursuant to Section 102 of the [Public Utility] Code, a public utility's rates include, *inter alia*, every individual charge that utility demands for any service offered, rendered, or furnished by the utility, whether received directly or indirectly." Metropolitan Edison Co. v. Pa. P.U.C., ___ A.3d ____, 2011 WL 2322173, *4 ((Pa. Commw. Ct., June 14, 2011) (underline added; italics in original) (citing 66 Pa. C.S. § 102)).[3]

Here, both OCA and Columbia attempt to shift the ultimate burden of proof concerning the lawfulness of CAP-Plus onto PCOC et al. Specifically, they assert that because PCOC et al. are proposing a change that Columbia did not include in its filing that will increase the requested rate relief, PCOC et al. have the burden of proving that their proposal is just and reasonable. (OCA Main Br. at 6; Columbia Main Br. at 33, n.22.) In support, both parties cite the Commission's decision in Pa. P.U.C. v. Metropolitan Edison Co. et al., Docket Nos. R-00061366, et al., 2007 WL 496359, 2007 Pa. PUC LEXIS 5 (January 11, 2007) ("Met-Ed 2007".) In Met-Ed 2007, the Commission considered the consolidated proceedings involving the Merger Savings Remand of GPU, Inc. and FirstEnergy Corp., as well as the General Rate Increase and the Rate Transition Plan proposals of Metropolitan Edison Company and Pennsylvania Electric Company (collectively "Met-Ed/Penelec").

In the rate proceeding portion of the case, PennFuture proposed a variety of renewable energy initiatives to be implemented by Met-Ed/Penelec at a total cost of approximately $65.6 million. See Met-Ed 2007, 2007 WL 496359 at * 62. None of these initiatives were proposed by Met-Ed/Penelec in their rate filings, and PennFuture provided no proposal to address the recovery of the costs associated with these programs. In this context, the ALJs assigned to the case determined that PennFuture bore the burden of proof as to its proposals because it was

[3] For the convenience of the ALJ and the Commission, a copy of this case is attached hereto in Appendix B.

proposing to cause Met-Ed/Penelec to incur expenses that they did not include in their filing. Id. The Commission agreed with the ALJs' analysis and found, citing 66 Pa. C.S. § 332(a), that "the burden of proof must be on a party to a general rate increase case who proposes a rate increase beyond that sought by the utility." Id.

Met-Ed 2007 is inapplicable based on the facts at issue in this case. First, PCOC et al. have not proposed that Columbia increase its rates beyond those rates which have already been approved by the Commission in the tariff currently in effect or beyond rates which are being proposed by Columbia. Columbia's tariff provides for a "CAP Rate" for participants in Columbia's CAP program. In connection with its petition to the Commission to implement CAP-Plus, Columbia filed a revised page 140 of its tariff which sets out how monthly CAP payments are to be determined. See Supplement No. 159 to Columbia Gas of Pennsylvania, Inc's Tariff Gas – Pa. P.U.C. No. 9, issued October 26, 2010, Fourth Revised Page No. 140 available at Docket No. P-2010-2195759, attached hereto as Appendix A. This revision embedded into the tariff the funding of CAP-Plus through the "CAP Rate" provision of the tariff. In their pleadings and testimony in this case, PCOC et al. are not proposing that Columbia add or increase any of these provisions in the tariff; to the contrary, they propose that Columbia's CAP program be calculated specifically to *reduce* the amount charged to CAP customers because the addition of the "plus" amount conflicts with applicable federal law.

Furthermore, if the Commission accepts PCOC et al.'s position that CAP-Plus violates federal and state law, no changes to the tariff would be needed in order for Columbia to recover the costs associated with this change. Columbia's tariff already has a Rider USP which indicates that the rate assessed will be calculated to "recover costs for the . . . Customer Assistance Program . . . ." See Supplement No. 155 to Columbia Gas of Pennsylvania, Inc's Tariff Gas –

Pa. P.U.C. No. 9, Seventeenth Revised Page No. 146 through twenty-first revised page 147, attached hereto as Appendix C. The Rider further states that the "CAP costs" will be calculated to include the projected CAP Shortfall. Id. Thus, unlike PennFuture in the Met-Ed 2007 case, PCOC et al. have made no proposals to modify the tariff or that would increase rates already in effect.

OCA also contends that PCOC et al. bear the burden of proof on CAP-Plus because changing the CAP program design and implementing such changes would result in Columbia incurring administrative costs and would increase the cost of the CAP program recovered through the USP Rider. (OCA Main Br. at 7.) Both arguments are flawed. First, all of the parties, including OCA, reached a partial settlement on a number of issues in this case and filed a Joint Petition for Partial Settlement on July 1, 2011. Included in the settlement, *inter alia*, was an agreement that "[a]ny changes in the CAP Plus approach, including programming changes, will be reflected under Columbia's Universal Service Rider." (Joint Pet. for Partial Settlement ¶ 49.) In light of this agreement, it is clear that Columbia would incur no unreimbursed administrative expenses associated with the position advocated by PCOC et al.

Additionally, the fact that the amounts collected through Columbia's Universal Service Rider may increase if the Commission concludes that CAP-Plus is impermissible is not a basis to shift the ultimate burden of proof to PCOC et al. Amounts collected through Columbia's Universal Service Rider are not fixed; rather, they fluctuate greatly due to a variety of factors including the number of customers enrolled in CAP, the usage of the customers enrolled in CAP, the dollar amount of pre-program arrears of the customers enrolled in CAP, the amount of expenditures made through LIURP, as well as the cost of natural gas. If the Commission agrees with PCOC et al.'s position regarding CAP-Plus, universal service rider charges might increase;

however, modifications such as this are built into the provisions already contained within the tariff and, thus, because the universal service rider is fully reconcilable, it cannot be said that PCOC et al. are advocating for a change that was unanticipated by Columbia's filing.

Accordingly, PCOC et al. submit that the burden of proof about the propriety of CAP-Plus remains squarely with Columbia. It is Columbia's burden to justify the propriety and legitimacy of the $17 per month surcharge on its CAP customers which it proposes to collect. PCOC et al. have challenged the continuation of CAP-Plus but have not requested an increase in rates or unrecovered administrative costs.[4] Accordingly, the Commission should reject Columbia's and OCA's attempt to shift the ultimate burden of proof onto PCOC et al.

That having been said, PCOC et al. contend that the evidence against CAP-Plus is indeed substantial. Thus, even if the Commission were to accept Columbia's and OCA's argument that PCOC et al. bear the burden of demonstrating by substantial evidence that CAP-Plus is impermissible, PCOC et al. submit that they have met this burden by the evidence in the record in this proceeding as argued in their Main Brief and in this Reply Brief.

B. OCA's and Columbia's position that CAP-Plus does not treat LIHEAP as a resource is factually and legally incorrect.

Section 2605(f) of the LIHEAP statute states, in relevant part, that ". . . home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household shall not be considered income or resources of such household (or any member thereof) for any purpose under Federal or State law, including any law relating to taxation, food stamps, public assistance, or welfare programs." 42 U.S.C. § 8624(f)(1). This

[4] At the very most, PCOC et al. bear the burden of coming forward with some evidence in support of their position, and they have done so in this proceeding. Thus, while the burden of production may shift, the burden of proof remains on the utility to establish the justness and reasonableness of every component of its rate request, and this burden is an affirmative one. See Berner v. Pennsylvania Public Utility Commission, 382 Pa. 622, 631, 116 A.2d 738, 744 (1955).

section of the statute prohibits utilities from treating LIHEAP as a resource available to the household when it determines the amount that the household will be required to pay for service. The evidence in this case demonstrates that CAP-Plus does this very thing.

In its Main Brief, OCA asserts that this provision of the LIHEAP statute is inapplicable to CAP-Plus because CAP programs are "not a public assistance or welfare program," and because the amount of assistance that a specific household receives is not considered in the determination of the asked-to-pay amount. (OCA Main Br. at 59.) As to its first argument, it is immaterial whether CAP programs are public assistance or welfare programs; the LIHEAP statute prohibits the consideration of LIHEAP funds as a resource "*for any purpose* under Federal or State law. . . ." 42 U.S.C. § 8624(f)(1) (emphasis added). The fact that the statute lists, by way of example, welfare and other public assistance programs does not mean that this provision's prohibition of considering LIHEAP to be a resource available to the recipient household is limited to only those programs listed. Reading the statute in this way would produce absurd results because it would have the effect of eliminating the phrase "for any purpose" from the provision.

CAP programs are creatures of state statutory and regulatory law. Natural gas distribution companies, like Columbia, have CAPs to satisfy universal service requirements set forth in the Natural Gas Competition Act, see, e.g., 66 Pa. C.S. § 2203(8), and these CAPs are governed by Policy Statements issued by the Commission, see, e.g., 52 Pa. Code §§ 69.265 et seq. Thus, the provision of the LIHEAP statute that prohibits LIHEAP from being counted as resource for "any purpose" under State law clearly applies to the counting of LIHEAP as a resource available to a household when setting that household's CAP amount.

OCA also argues that the CAP-Plus design does not treat LIHEAP as a resource because "the amount of assistance that a *specific* household receives is not considered in the

determination of the asked to pay amount," (OCA Main Br. at 59 (emphasis in original)), "nor does the Plus amount change based on whether or not the customer receives a LIHEAP grant," (id.) For its part, Columbia argues that because it charges the "plus" amount to all CAP customers that it cannot be said that LIHEAP is being counted as an available resource. (Columbia Main Br. at 32.) Both arguments miss the mark.

The fact that the CAP-Plus design does not individually tailor the "plus" amount to each LIHEAP recipient does not negate the fact that CAP-Plus treats LIHEAP as an available resource for LIHEAP households. For each CAP participant who receives LIHEAP, the adding of a $204 per year ($17 per month) "plus" amount to his CAP payment *after* the CAP payment is calculated has the effect of treating his LIHEAP grant as an available resource. The explanation articulated by Columbia and OCA for adding the "plus" amount is to nullify the impact that DPW's policy clarification has on non-CAP ratepayers who would otherwise have to pay these additional universal service costs. Moreover, Columbia has determined the amount of the increase that it will charge its CAP customers based solely on the amount of LIHEAP funds that it estimates that it will no longer be able to apply as a subsidy to other ratepayers. (See Petition of Columbia Gas of Pennsylvania, Inc. to Modify its Universal Services and Energy Conservation Plan, Docket No. P-2010-2195759, Appendix A, Testimony of Deborah A. Davis at 4:23-5:3.) Thus, the entire design of CAP-Plus anticipates that CAP/LIHEAP recipient will use their LIHEAP grant to offset the additional "plus" amount they would be charged.

Furthermore, the fact that Columbia imposes the "plus" amount on all CAP participants, and therefore raises all of their rates does not cure the problem. For those CAP customers who do receive LIHEAP, their LIHEAP grant is still treated as a resource. Again, the premise of CAP-Plus is that CAP customers should not get the full benefit of their federally funded

LIHEAP grant because they are already receiving a discounted rate through rate-payer provided subsidies. This is incorrect. When DPW unequivocally stated that the prior Columbia CAP policy of accumulating LIHEAP grants for the benefit of non-CAP ratepayers was impermissible, Columbia and OCA designed a structure in order to capture that same amount of LIHEAP revenue that was lost as a result of DPW's policy clarification. In so doing, they anticipated that all of their CAP customers could mitigate the effect of CAP-Plus simply by applying for LIHEAP and having their LIHEAP grant cover the "plus" amount.

Columbia admitted as much in discovery where it produced an internal document that discussed the implementation of what it called the "CAP flat fee." (See PCOC et al. Statement No. 1, Exhibit PCOC-PAB-9, Discovery Response PCOC I-021 at 3.) In this document, Columbia provides talking points to its employees. One of those talking points emphasizes that customer service representatives should "[c]ompare the total flat fee for the year ($17 x 12 = $204) to the total energy grant the customer received last year. If the customer received $300 in grant money last year, they are still $96 ahead this year ($300-$204 = $96)." (Id.)

This evidence demonstrates that in structuring CAP-Plus, OCA and Columbia were counting on the fact that CAP customers who receive LIHEAP would have at their disposal a minimum $300 in LIHEAP funds to offset the "plus" amount that was added to each customer's CAP bill because of the DPW policy clarification. The fact that all CAP customers are charged this "plus" amount regardless of whether or not they receive LIHEAP or whether or not they assign their LIHEAP grant to Columbia does not negate the fact that, for those customers who do assign their LIHEAP grants to Columbia, the "plus" amount added to their bill is based on their receipt of -- and the anticipated receipt of – LIHEAP. In this manner, CAP-Plus violates section 2605(f) of the LIHEAP statute. 42 U.S.C. § 8624(f). OCA's and Columbia's argument to the

contrary should be rejected.

C. OCA and Columbia both err in their determination that CAP-Plus does not treat their CAP customers who receive LIHEAP "adversely" within the meaning of federal law.

Section 2605(b)(7) of the LIHEAP statute requires DPW's vendor agreement with "a home energy supplier," such as Columbia, to "contain provisions to assure that no household receiving assistance under this title will be treated adversely because of such assistance under applicable provisions of State law or public regulatory requirements. . . ." 42 U.S.C. § 8624(b)(7)(C). In its Main Brief, PCOC et al. contend that CAP-Plus violates this assurance. (See PCOC et al. Main Br. at 10-11.) The argument is that the "plus" amount added to each CAP customer's asked-to-pay amount bears a direct relationship to the aggregate amount of LIHEAP that Columbia seeks to recover as a result of the DPW policy clarification, and CAP customers are the only ones burdened by this additional payment. Thus, CAP customers who receive LIHEAP are treated adversely compared to non-CAP LIHEAP recipients because the former are asked to pay an additional "plus" amount on top of their tariffed CAP bill, and the latter are not subjected to a "plus" amount added to their tariffed bill. As a result of this increase in CAP customers' payments that is proportional to LIHEAP revenue "lost" to Columbia, the CAP customer who is a LIHEAP recipient is caused to bear a monetary burden due to his/her LIHEAP status whereas a non-CAP LIHEAP recipient is not so burdened. The LIHEAP/CAP recipient has his/her LIHEAP grant partially nullified by the "plus" charge and is thus treated "adversely" in violation of the LIHEAP statute.

In their briefs, Columbia and OCA argue that this comparison is not relevant because CAP customers, unlike non-CAP customers, are not required to pay their "full bill," and thus are not treated adversely. (See OCA Main Br. at 63; Columbia Main Br. at 34-35.) This argument is

based on continued application of the faulty premise that existed prior to DPW's policy clarification. OCA's and Columbia's position that CAP customers pay only a "portion" of their bill ignores the fact that both CAP customers and non-CAP customers do pay the full energy bill that each is required to pay under the provisions of Columbia's applicable tariff. For CAP customers the full energy bill is reflected by their CAP bill amount; it does not consist of pre-CAP arrears, the cost of LIURP services, or any other amounts that may be paid by non-CAP ratepayers.

In its tariff, Columbia has established a CAP Rate which is the amount that customers enrolled in Columbia's CAP must pay. See Supplement No. 159 to Columbia Gas of Pennsylvania, Inc's Tariff Gas – Pa. P.U.C. No. 9, issued October 26, 2010, Fourth Revised Page No. 140 available at Docket No. P-2010-2195759, attached hereto as Appendix A. Once enrolled, these customers, so long as they are current on their CAP payments and meet all other CAP eligibility requirements, will only have to pay their CAP bill. There is no "other portion" of their bill that these customers are required to pay. Non-CAP customers also are responsible for their entire bill calculated on a combination of Columbia's fixed customer charge, an amount per Mcf of gas that they consume, and applicable rider charges. The fact that the CAP bill does not fully cover the costs of all gas service consumed by these customers does not negate the fact that, for CAP customers, the CAP bill is the entire bill. To be sure, Columbia is reimbursed for the CAP shortfall of its CAP customers through assessment of the Universal Service charge, but this CAP shortfall is not the obligation of the CAP customer as it is not included in the customer's CAP bill.

Thus, both CAP customers who receive LIHEAP and non-CAP customers who receive LIHEAP are similarly situated for purposes of comparison as to whether CAP customers who

receive LIHEAP are adversely treated because of CAP-Plus. CAP-Plus adds a "plus" amount to the CAP bill of the CAP customer, and not to anyone else, and thus has the effect of treating those CAP customers who receive LIHEAP adversely in comparison with those non-CAP customers who receive LIHEAP. In saying this, contrary to OCA's claims, (see OCA Main Br. at 62), PCOC et al. are in no way implying that this adverse treatment can be cured simply by assessing a plus amount on non-CAP/LIHEAP recipients. Such an arbitrary addition would not be just or reasonable, and would only further exacerbate the problem. However, the comparison as between CAP/LIHEAP recipients and non-CAP/LIHEAP recipients crystallizes the insidious manner in which CAP customers charged a "plus" amount do not receive the full benefit of their LIHEAP grant as contrasted with non-CAP recipients who do receive the full benefit of their LIHEAP grants. This is the case because prior to the implementation of CAP-Plus, Columbia, in setting the structure for determining a CAP customer's bill, did not take into consideration whether LIHEAP would be received.

This is evidenced by the tariff provision concerning CAP that was in place prior to the implementation of CAP-Plus, which did not add a "plus" amount to the CAP customer's bill to reflect the loss of LIHEAP funds to Columbia's other ratepayers. See Supplement No. 122 to Columbia Gas of Pennsylvania, Inc's Tariff Gas – Pa. P.U.C. No. 9, issued October 28, 2008, Third Revised Page No. 140, attached hereto as Appendix D. In contrast, after implementing CAP-Plus, Columbia filed a supplemental tariff which embeds into the CAP bill this "plus" amount. See Supplement No. 159 to Columbia Gas of Pennsylvania, Inc's Tariff Gas – Pa. P.U.C. No. 9, issued October 26, 2010, Fourth Revised Page No. 140 available at Docket No. P-2010-2195759, attached hereto as Appendix A.

For those CAP customers who receive LIHEAP post-CAP-Plus, a portion of their

LIHEAP grant that otherwise should have gone to pay their bill has been diverted to pay the "plus" amount that was added to their bill as a result of Columbia's and OCA's desire to maintain a revenue neutral funding structure for Columbia's non-CAP customers. This "plus" amount was not added to any non-CAP customers' bills, and, thus, a non-CAP customer who receives LIHEAP has his/her LIHEAP grant applied to the entire bill that he/she is responsible for paying whereas a CAP customer who receives LIHEAP has a portion of the grant – in this case $204 annually – siphoned off the top before any of his grant goes to the bill that he would otherwise be responsible for paying. In this way, CAP customers who receive LIHEAP are treated adversely, in violation of 42 U.S.C. § 8624(b)(7)(C), in comparison with non-CAP customers who receive LIHEAP. Accordingly, the Commission should reject the arguments of Columbia and OCA that CAP-Plus does not result in adverse treatment.

D. The Commission should not ignore the guidance by the United States Department of Health and Human Services or the DPW concerning CAP-Plus and CAP-Plus-like programs.

Both Columbia and OCA largely ignore the guidance that has been provided by HHS in its LIHEAP Information Memorandum 2010-13 (LIHEAP IM 2010-13), as well as by DPW in its letter to the Commission in response to the Application for Issuance of a Subpoena filed by PCOC et al. It is understandable why both parties would want to minimize the import of this guidance because it squarely addresses the most problematic aspects of Columbia's CAP-Plus program. PCOC et al.'s Main Brief describes the significance of these documents and the applicable analysis to the facts at issue in this proceeding. (See PCOC et al. Main Br. at 17-23.) These arguments are incorporated by reference and need not be repeated here.

However, there are a few point made by both Columbia and OCA that merit attention. First, Columbia makes several factual assertions to support the inference that DPW has approved

CAP-Plus. In light of the June 3, 2011 DPW letter, it is uncertain whether these claims are even relevant. Regardless, they are not supported by the record. Columbia states in its Main Brief:

> Pursuant to the 2010 Columbia Rate Case Settlement, on August 25, 2010, Columbia filed a Petition to amend its USECP to include CAP-Plus. The Commission approved Columbia's proposed CAP Plus by Order dated October 19, 2010 at Docket No. P-2010-2195759, *and served the Order on DPW.* DPW did not file any objections to the Order with Columbia or the Commission. To the contrary, DPW officials informally advised Columbia that the CAP Plus plan was permissible.

(Columbia Main Br. at 30 (citing Columbia Statement No. 117-R at 9-10.) (emphasis added).) There is no evidence in the record that DPW was served a copy of Columbia's Petition to modify its CAP program or the Commission's Order dated October 19, 2010. While that Order states that a copy of the Order should be served upon DPW, the Certificate of Service that is on file with the Commission does not indicate that a copy was ever served upon DPW. (See October 19, 2010 Certificate of Service of Order at Docket No. P-2010-2195759, on file with the Commission.)[5] Moreover, in its June 3, 2011 letter to the Commission in response to the Application for Issuance of a Subpoena filed by PCOC et al. DPW, through its Acting Deputy Secretary for the Office of Income Maintenance, indicates that DPW has never reviewed Columbia's CAP-Plus plan. (DPW Ltr. at 2.) Thus, Columbia's assertion that DPW did not file an objection to the Commission's October 19, 2010 order and did not at that time alert Columbia that it objected to CAP-Plus is specious because there is nothing in the record to suggest that it has ever seen the Commission's Order or Columbia's CAP-Plus plan.

Second, Columbia asserts that DPW "informally advised Columbia that the CAP plus Plan was permissible." (Columbia Br. at 30.) In support of this proposition, Columbia cites to the testimony of Deborah Davis concerning a statement allegedly made by someone from DPW

---

[5] For the convenience of the ALJ and the parties, a copy of the Certificate of Service, obtained from the Commission's files, is attached hereto as Appendix E.

to another employee of Columbia that was later passed along to Ms. Davis. (See Statement No. 117-R at 9:19-10:2.) This statement however, was not admitted into the record for the truth of the matter. Counsel for PCOC et al. and Counsel for Columbia stipulated that whatever evidentiary value this portion of the testimony had, it was not to be considered by the ALJ or the Commission as true. This is reflected in the Hearing Transcript from the June 10, 2011 Hearing. (Tr. of Proceedings at 110:9-11; 111:2-18, June 10, 2011.) Yet, astoundingly, Columbia cites to this testimony in support of its argument that DPW "informally advised" Columbia that CAP Plus was permissible. Since this is the only thing to which Columbia points to support its statement that DPW advised Columbia that CAP-Plus was permissible, the Commission must give the statement no weight.

As for LIHEAP IM 2010-13, both Columbia and OCA also argue that it has no applicability to CAP-Plus. (See OCA Main Br. at 64; Columbia Main Br. at 32-33.) This argument is totally without merit. LIHEAP is a federal block grant program under which the federal government gives annual grants to states to operate multi-component home energy assistance programs for low-income households. See 42 U.S.C. § 8621. The LIHEAP statute charges HHS to create administrative rules for LIHEAP state grantees and delegates to HHS the duty to investigate compliance with LIHEAP laws. See 42 U.S.C. § 8627(b). As guidance to its block grant recipients, HHS issues regular Information Memoranda. The LIHEAP IM 2010-13 clearly speaks to the issues at play in this case.

In their Main Brief, PCOC et al. detail in great length the ways in which CAP-Plus violates the guidance provided in LIHEAP IM 2010-13. (See PCOC et al. Main Br. at 18-20.) Specifically, it is apparent from the structure of CAP-Plus that LIHEAP funds meant for the benefit of the individual LIHEAP recipient who is also enrolled in the CAP program are being

used for the benefit of other non-LIHEAP recipients. The CAP-Plus model circumvents the guidance provided in this IM by increasing the CAP/LIHEAP recipient's asked-to-pay amount to which the LIHEAP grant is applied. For those CAP participants who do in fact receive LIHEAP, the adding of a $204 per year ($17 per month) plus amount to his or her CAP payment *after* the CAP payment is calculated is functionally equivalent to the "subtraction" prohibition outlined by HHS in LIHEAP IM 2010-13. It acts to reduce or "subtract" the benefit of LIHEAP to the individual recipient. Due to the $204 added to the yearly bill, the CAP customer who receives the minimum LIHEAP grant of $300 only receives a net benefit of $96 ($300-$204 = $96). The mere fact that LIHEAP IM 2010-13 was not written to specifically address Columbia's CAP-Plus plan or any other company's specific CAP or PIPP does not render meaningless those provisions that are squarely on-point.

Both Columbia and OCA attempt to similarly dismiss the significance of DPW's June 3, 2011 response to PCOC et al.'s Application for Issuance of a Subpoena. The crux of OCA's claims is that DPW's June 3, 2011 letter is inapposite because: (1) the ALJ only admitted the letter conditionally and that it was not admitted for the truth of the matters asserted therein; (2) the author of the letter did not review Columbia's CAP-Plus program and is not familiar with that model; and, (3) the letter relies on incorrect assumptions about the Columbia CAP-Plus program. As explained in PCOC et al.'s main brief, each of these arguments is without merit.

First, the Hearing Transcript reflects that the DPW letter was admitted into evidence pursuant to 52 Pa. Code § 5.408, and that the ALJ took judicial notice of the fact that the letter was filed. ALJ Dunderdale also indicated that the letter was in the record "so that the parties can discuss it . . . so that you are all free to discuss the logic and rationale that is contained in the response." (Tr. of Proceedings at 131:2-5, June 10, 2011.) In their Main Brief, PCOC et al.

pointed out that the facts in evidence independent of the DPW letter support the conclusions reached in that letter. (See PCOC et al. Main Br. at 20-23.) Thus, the fact that the letter was not admitted for the conclusion that CAP-Plus violates federal law does not negate the significance of the letter when viewed in combination with the facts in evidence independent of the letter.

Second, both Columbia and OCA argue that the fact that DPW did not review the CAP-Plus plan prior to reaching its conclusions, and that the letter makes incorrect assumptions about the Columbia CAP-Plus plan, considerably weaken DPW's authority to speak on the issues addressed. These issues were dealt with at length in PCOC et al.'s Main Brief. (See PCOC et al. Main Br. at 22-23.) Briefly, it should be noted that DPW states its understanding of CAP-Plus came from its review of the testimony filed. (DPW Letter at 3.) The manner in which Columbia calculates the "plus" amount is relatively simple and was described in the testimony in this case. (See e.g. PCOC et al. Statement No. 1 at 6:20-7:19; 8:17-21.) Moreover, the method has never been disputed by the parties. The mere fact that the letter contains some conditional statements that are inapplicable to the structure of Columbia's CAP-Plus plan does not negate the critical significance of DPW's view that the CAP-Plus program jeopardizes Columbia's vendor status. Furthermore, when DPW's conclusions are viewed in light of the facts in evidence, the Commission can readily conclude that DPW is correct about its ultimate conclusions concerning CAP-Plus.

Thus, both the LIHEAP IM 2010-13 as well as the June 3, 2011 DPW letter confirm that CAP-Plus violates the LIHEAP statute due to the fact that CAP-Plus treats CAP participants who receive LIHEAP adversely from other Columbia customers, as well as the fact that CAP-Plus treats as an available resource the LIHEAP grants that these customers receive. In reaching its conclusion in this case, the Commission should not ignore this guidance from the agencies

charged with implementing LIHEAP because doing so would unnecessarily jeopardize Columbia's status as a LIHEAP vendor.

E. This case concerns the appropriate integration of ratepayer funded assistance programs with federally funded heating assistance programs; it does not implicate the generally wide latitude that the Commission has in structuring ratepayer funded assistance programs.

In their briefs, Columbia and OCA attempt to create the impression that this case is a challenge to the authority of the Commission to structure utility ratepayer funded customer assistance programs. It is no such thing. Throughout these proceedings, PCOC et al. have not questioned the authority or role of the Commission in appropriately structuring CAP programs, and they have agreed that the Commission has the authority, and in fact the obligation, to develop and regulate CAP programs and balance the relative costs and benefits of those programs between those who benefit from the programs and those who pay for them. (See PCOC et al. Statement No. 1-SR at 11-12.) Nor have PCOC et al. ever questioned the ability of the Commission to coordinate Customer Assistance Programs with LIHEAP. This case, however, is much narrower than both Columbia and OCA present. It is, at its core, a case about the appropriate integration of ratepayer funded assistance programs, which are regulated and structured by the PUC, with federally funded heating assistance programs, which are administered in Pennsylvania by DPW.

Structuring the appropriate level of integration requires an acknowledgement of the singular role and responsibility of each agency. Clearly there are certain policy decisions about CAP that are not within the purview of DPW. However, the issue at hand, when DPW provides a LIHEAP cash grant directly to a vendor on behalf of a LIHEAP recipient, concerns how a LIHEAP recipient's LIHEAP grant is applied to that customer's CAP account. This is ultimately a matter of federal law and falls within the purview of HHS and DPW. Under its current policy,

DPW requires that LIHEAP grants be applied to an individual's asked-to-pay amount. In so doing, DPW has attempted to ensure that when a customer applies for LIHEAP, whether that customer is a CAP participant or not a CAP participant, the customer, as opposed to other ratepayers, gets the full benefit of his or her LIHEAP grant. The purpose of the grant is to assist the eligible customer more readily afford his or her home heating bill over the winter heating season. By ensuring that the grant is applied to that amount which the customer is asked to pay, DPW promotes home energy affordability for the LIHEAP recipient household. What LIHEAP is not intended to do is to bolster home energy affordability for non-LIHEAP customers by diminishing the impact of a LIHEAP recipient's cash grant on his/her energy payment responsibility.

Certainly, DPW has the authority to determine that one of its LIHEAP vendors has inappropriately structured a payment obligation for a LIHEAP recipient in a manner that adversely affects all or some LIHEAP recipients of that utility. This is precisely the issue with CAP-Plus. In fact, the Commission has recognized this authority in its Order suspending 52 Pa. Code §§69.265(9)(ii)-(iii), which had required, among other things, that LIHEAP grants be applied to reduce the amount of CAP credits. In that Order, the Commission recognized the fact that DPW is the state agency charged with administration of LIHEAP, and that it has the sole authority to determine how LIHEAP funds are to be used in Pennsylvania.[6]

Thus, the goals of DPW do not infringe upon or detract from the responsibilities of the Commission. The Commission has an obligation to develop CAP programs that are affordable for low-income customers in a manner that is cost-effective, but in so doing, it must set affordability standards without taking into account resources that may be available from

[6] In re Customer Assistance Program Policy Statement Suspension and Revision, Docket No. M-00920345, Order entered on April 9, 2010, published in the *Pennsylvania Bulletin* on May 8, 2010 at 40 Pa. B. 2443.

LIHEAP grants. Put another way, LIHEAP cash grants do not substitute for the discounts which the PUC must require in furtherance of statutory universal service obligations contained in the Natural Gas Choice Act. Thus, it is true that DPW cannot dictate to the Commission how it structures its CAP programs. However, in making its determination of an appropriate CAP structure, the Commission may not reasonably implement a structure which authorizes the use of LIHEAP grants by utilities with vendor status in ways which are prohibited by the federal LIHEAP Act.

Thus, contrary to the arguments presented by OCA and Columbia, rather than facilitate the coordination and integration of LIHEAP and CAP, CAP-Plus significantly weakens the fabric of existing and successful coordination efforts. As DPW/HHS have pointed out, the implementation of a program which treats the individual LIHEAP recipient's Cash Grant in a manner impermissible under federal law jeopardizes a utility's LIHEAP vendor status, thereby reducing that company's ability to effectively and efficiently receive the direct payment of LIHEAP grants.

F. The hypothetical alternatives to CAP-Plus raised in Columbia's and OCA's briefs suffer the same flaws as CAP-Plus or are unworkable in the context of this proceeding.

In their briefs, both OCA and Columbia suggest that the Commission has latitude in devising alternatives to CAP-Plus that would comply with DPW's policy and be consistent with federal LIHEAP law. At this point it merits mentioning that nowhere in the record do any of the parties, including OCA and Columbia, endorse alternatives to CAP-Plus. In fact, OCA witness Colton specifically pointed out that he did not endorse the alternatives to CAP-Plus listed in his testimony. (See OCA Statement 3-R at 19:1-3.) Bearing this in mind, it is true that the Commission has this latitude, but some of the hypothetical alternatives suggested by the parties

would not cure the deficiencies of CAP-Plus, and some would require a much broader investigation than this proceeding allowed.

First, both OCA and Columbia assert that the Commission could cure the problems of CAP-Plus by simply increasing required CAP payments for Columbia's CAP customers without regard to LIHEAP receivables. (OCA Main Br. at 56; Columbia Main Br. at 38.) OCA even goes so far as to say that PCOC et al.'s "greatest complaint" is that the CAP-Plus model "uses the total LIHEAP receipts by Columbia for its CAP customers from the prior year." (OCA Main Br. at 56.) OCA's characterization is incorrect. The problem with CAP-Plus is that by adding a "plus" amount to the CAP bill that a CAP customer would otherwise be required to pay in anticipation of the fact that the CAP customer will receive LIHEAP has the effect, for those customers who do in fact receive LIHEAP, of treating LIHEAP as an available resource justifying the increase. It also has the effect of adversely treating those CAP customers who receive LIHEAP as compared to those non-CAP customers who receive LIHEAP. Thus, any amount added to a CAP bill that is not made within the context of a Commission established affordability standard, regardless of how that amount is determined, would be suspect and would likely suffer the same fatal flaws as Columbia's current CAP-Plus design.

Second, Columbia suggests that the Commission could no longer exempt CAP customers from the USP Rider charge paid by all other customers. (Columbia Main Br. at 38.) Late in this case, immediately prior to the June 10, 2011 hearing, OCA sent certain discovery requests to Columbia inquiring about the impact of removing the USP rider exemption from Columbia's CAP customers. The overall effect would be to raise CAP customers' bills because they would then be responsible for payment of the USP rider in addition to their CAP bill. This change would have the corresponding effect of lowering the bills of non-CAP participants, because

when more customers pay USP costs the cost per customer per Mcf for these charges decreases.

Such a change would have the effect of treating all residential customers equally and would, at least theoretically, not unduly prejudice CAP/LIHEAP recipients more than it would other LIHEAP recipients. However, there simply is insufficient information in the record for the Commission to appropriately determine whether this change is appropriate. For example, there is no evidence in the record concerning how such a change would affect the relative energy burdens of low-income households, and thus affect over affordability. Since the USP rider is assessed volumetrically, CAP customers who have high use would pay markedly more than the average estimated by Columbia. Whether natural gas service would remain affordable for low-income customers because of such a structure change is an essential consideration for the Commission. Pursuant to the Natural Gas Competition Act, the Commission must ensure that Columbia's universal service programs are structured in a manner to "assist low-income retail gas customers to afford natural gas service." 66 Pa. C. S. § 2203(8). Thus, through a process which includes balancing utility-specific factors, the Commission has an obligation to develop CAP programs that are *affordable for low-income customers*. There is simply insufficient evidence in the record for the Commission to determine that making a change such as is suggested by Columbia would appropriately maintain the correct level of affordability for Columbia's low-income customers.

Third, both Columbia and OCA suggest that the Commission could simply revise upward the range of affordability under its CAP Policy Statement and thereby increase CAP payments in order to recover the lost LIHEAP revenue previously used to subsidize non-CAP ratepayers. PCOC et al. respectfully suggest that this proceeding would be an inappropriate forum for such a change to occur. A change of this magnitude would affect not only Columbia and its customers

but also the low-income customers of all utilities throughout the state. The rate proceeding of one utility does not provide the Commission with the appropriate information to reach a balanced decision on an issue this far-reaching.

Nonetheless, if the Commission was to revoke its authorization of CAP-Plus, PCOC et al. would support the Commission undertaking a statewide investigation, in conjunction with DPW, concerning the appropriate method of coordinating the federal LIHEAP program with utility ratepayer funded customer assistance programs. Such an investigation would allow the Commission and DPW to engage all of the relevant stakeholders in this process and would afford the opportunity for a global evaluation of the appropriate means of coordinating LIHEAP and CAP programs in a manner that does not jeopardize the vendor status of any utility.

RESIDENTIAL RATE DESIGN

G. Both Columbia's and OTS' residential rate design proposals are flawed.

Rather than reiterate what has been argued at length in the parties' Main Briefs, through this Reply Brief, PCOC et al. incorporate by reference the arguments set forth in their Main Brief. (See PCOC et al. Main Br. at 25-27.) PCOC et al. also adopt OCA's arguments and reasons set forth in its Main Brief as to why Columbia's proposed rate design and OTS' alternative rate design should not be adopted by the Commission. (See OCA Main Br. at 10-42.)

The evidence in the record through the testimony of PCOC et al witness Irv Ackelsberg (PCOC et al. Statement No. 2), OCA witness Roger Colton (OCA Statements No. 3 and 3-S) and OCA witness Glenn Watkins (OCA Statements No. 5 and No. 5-R) amply demonstrates that Columbia's proposed levelized distribution charge disproportionately affects low-volume and low-income residential customers and would significantly reduce customer incentive to conserve natural gas. Columbia has failed to demonstrate that there is any basis to depart from traditional

volumetric ratemaking, and the Commission should reject Columbia's proposal to move to a levelized distribution charge.

IV. Conclusion

The evidence presented in this case demonstrates that Columbia's CAP-Plus program violates the federal LIHEAP statute and guidance of HHS and DPW. Moreover, through its June 3, 2011 letter to the Commission, DPW indicated that the continuation of CAP-Plus would seriously jeopardize Columbia's eligibility to participate with DPW as a LIHEAP vendor. Columbia has acknowledged as much in its Main Brief in stating that "resolution of whether the CAP Plus program violates HHS requirements is not a matter that can be resolved by a decision of the Commission." (Columbia Main Br. at 38.)

CAP-Plus is based on the unsupported assumption that DPW's policy clarification requiring LIHEAP Cash Grants to be applied to a customer's "asked-to-pay" amount must not result in any readjustments of the universal service responsibilities of non-CAP customers. PCOC et al. submit that other alternatives must be explored which, unlike CAP-Plus, do not violate federal and state law, regulations, and policy, and which do not derail the beneficial coordination that is obtained through Columbia's continued participation as a LIHEAP vendor. In the past, the Commission has recognized the importance of maintaining a utility's vendor status, which provides many benefits, such as ensuring the prompt and efficient delivery of LIHEAP grants to LIHEAP recipients' accounts. The Commission has also acknowledged the authority of DPW to revoke a company's vendor status. In so doing, the Commission has acted in accordance with the principle that an administrative agency is to give deference to the conclusions reached by another administrative agency in interpreting the statute and regulations

of the program which the second agency administers. See e.g. Riverwalk Casino v. Pa. Gaming Control Bd., 926 A.2d 926, 940 (Pa. 2007) ("It is well settled that an administrative agency's interpretation of a statute is given controlling weight unless it is clearly erroneous.") In this regard, the Commission suspended the payment application section of its LIHEAP Coordination Policy Statement as being inconsistent with DPW policy, specifically to avert the possibility of any company jeopardizing its vendor status. See In re Customer Assistance Program Policy Statement Suspension and Revision, Docket No. M-00920345, Order entered on April 9, 2010, published in the Pennsylvania Bulletin on May 8, 2010 at 40 Pa. B. 2443. The Commission should take similarly prophylactic steps here and revoke its authorization of CAP-Plus.

For all of the foregoing reasons, PCOC et al. urge the Commission to reject Columbia's continued use of CAP-Plus as well as Columbia's request to recover its distribution service revenue through a levelized distribution charge.

Respectfully submitted,

PENNSYLVANIA UTILITY LAW PROJECT
Counsel for ACTION United, Carol Collington, and Nettie Pelton

Patrick M. Cicero, Esq., PA ID: 89039
Harry S. Geller, Esq., PA ID: 22415
Julie George, Esq., PA ID: 208482
118 Locust Street
Harrisburg, PA 17101
Tel.: 717-236-9486
Fax: 717-233-4088
pulp@palegalaid.net

July 11, 2011

APPENDIX A:

Supplement No. 159 to Columbia Gas of Pennsylvania, Inc's

Tariff Gas – Pa. P.U.C. No. 9, issued October 26, 2010,

Fourth Revised Page No. 140

Rate CAP – CUSTOMER ASSISTANCE PROGRAM (Continued)

8. Agree not to use any non-essential gas appliance, such as a pool heater.

9. Allow the Company to purchase gas on the customer's behalf.

10. In the case of a CAP applicant who is currently without service, and who has a balance from a prior account, make an upfront payment in satisfaction of the prior balance up to, but no more than, $150.

MONTHLY PAYMENT OPTIONS

The most affordable payment option for the eligible CAP customer shall be selected from the Options below. The monthly payment will not be less than the average payment received from the customer in the previous twelve (12) months. A minimum payment amount of twenty-five dollars ($25.00) is required.

Option #1: Percentage of Income.
0 – 110% of Poverty = 7%
110 – 150% of Poverty = 9%

Option #2: Average of last 12 months of customer payments. (Available for customers with at least six months of uninterrupted service.)

Option #3: Flat rate of 50% of budget billing (adjusted annually)

Senior CAP Option: Flat rate of 75% of budget billing for all customers over 60 years of age with no arrears or payment plan default.

In addition to the monthly payment established under either Option #1, #2, #3, or Senior CAP Option, the CAP customer is required to pay a five-dollar ($5.00) co-payment towards pre-program arrears, as well as an additional amount calculated each year based on the previous year's LIHEAP grants applied to CAP accounts. (C)

A CAP customer's monthly payment shall not exceed the non-CAP budget payment applicable to the customer's account, exclusive of the $5.00 co-payment towards pre-program arrears. In the event that a CAP customer's monthly payment is determined to exceed the non-CAP budget payment applicable to the customer's account, the applicable information is reviewed to determine if the CAP payment should be lowered or if the customer should be removed from CAP.

SECURITY DEPOSITS

CAP customers will not be charged security deposits.

Any paid security deposits on accounts with an approved CAP application will be credited to the arrears prior to CAP enrollment.

Unpaid security deposits for customers entering into the CAP will be waived after income verification is complete.

(C) Indicates Change

APPENDIX B:

Metropolitan Edison Co. v. Pa. P.U.C., ___ A.3d ____,

2011 WL 2322173 (Pa. Commw. Ct., June 14, 2011)

--- A.3d ----, 2011 WL 2322173 (Pa.Cmwlth.)
(Cite as: 2011 WL 2322173 (Pa.Cmwlth.))

H
Only the Westlaw citation is currently available.

Commonwealth Court of Pennsylvania.
METROPOLITAN EDISON COMPANY and Pennsylvania Electric Company, Petitioners
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent
William R. Lloyd, Jr., Small Business Advocate, Petitioner
v.
Public Utility Commission, Respondent.

Nos. 532 C.D.2010, 632 C.D.2010.
Argued Dec. 8, 2010.
Decided June 14, 2011.

Background: Electric companies sought review of decision by the Public Utility Commission denying the companies' request to classify marginal transmission losses or line losses as transmission costs under companies' Transmission Service Charge (TSC) Riders so that companies could recover those costs from ratepayers under the TSC Riders. Customers cross-petitioned for review of the Commission's Order to the extent it adopted the administrative law judge's recommendation allowing companies to recover the interest on previously incurred transmission costs related to the unwinding of hypothetical generation contracts.

Holdings: The Commonwealth Court, Cohn Jubelirer, J., held that:
(1) Commission's finding that electric companies' line loss costs were being recovered in companies' generation rates was supported by substantial evidence;
(2) companies' line loss costs were not transmission costs pursuant to the Competition Act;
(3) Commission's order denying electric companies' request to classify line losses as transmission costs was not inconsistent with Federal Energy Regulatory Commission precedent;
(4) Commission did not violate electric companies' due process rights by failing to directly respond to dissenting statement in its order; and
(5) Commission's order allowing carrying charges on the shortfall resulting from electric companies' unwound generation contracts was insufficiently specific to allow judicial review.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Electricity 145 ⚿0

145 Electricity

Public Utility Commission's finding in rate proceeding that electric companies' line loss costs were being recovered in companies' generation rates was supported by substantial evidence; expert testified that companies traditionally included line loss costs in their generation rates and were therefore subject to the generation rate cap. 66 Pa.C.S.A. § 102.

[2] Public Utilities 317A ⚿0

317A Public Utilities

The burden of proof remains on the utility to establish the justness and reasonableness of every component of its rate request, and this burden is an affirmative one. 66 Pa.C.S.A. § 315.

[3] Administrative Law and Procedure 15A ⚿0

15A Administrative Law and Procedure

When reviewing an agency's findings of fact, court will defer to those factual findings if they are supported by substantial evidence.

[4] Public Utilities 317A ⚿0

317A Public Utilities

Where the Public Utility Commission is presented with a choice of actions, each fully developed in the record, its decision is an implicit acceptance of one and a rejection of the other.

--- A.3d ----, 2011 WL 2322173 (Pa.Cmwlth.)
(Cite as: 2011 WL 2322173 (Pa.Cmwlth.))

[5] Electricity 145 0

145 Electricity

Electric companies' line loss costs were not transmission costs pursuant to the Competition Act; such costs were not incurred directly or indirectly to provide transmission service, but rather, line loss costs represented the generation-related costs associated with losses of energy as opposed to congestion costs, which represented the higher costs associated with providing reliable transmission service during times of peak usage. 66 Pa.C.S.A. § 2803.

[6] Public Utilities 317A 0

317A Public Utilities

The Public Utility Commission is charged with enforcing the Competition Act; therefore, the Commission's interpretation of the Competition Act and its own regulations are entitled to great deference and should not be reversed unless clearly erroneous. 66 Pa.C.S.A. § 2803.

[7] Public Utilities 317A 0

317A Public Utilities

Interpreting tariffs is within the Public Utility Commission's administrative expertise and should be given deference.

[8] Electricity 145 0

145 Electricity

Public Utility Commission's order denying the electric companies' request to classify line losses as transmission costs under companies' Transmission Service Charge (TSC) Riders was not inconsistent with Federal Energy Regulatory Commission (FERC) precedent, did not violate the filed rate doctrine, and did not improperly prevent companies from recovering trapped costs; because FERC's opinions did not expressly state that line loss costs were transmission costs, there was no direct conflict between the Commission's order and FERC.

[9] Appeal and Error 30 0

30 Appeal and Error

Any error on the part of Public Utility Commission in referring to electric companies' Default Service Programs (DSP) Filings, which were not made part of the record before the administrative law judge in rate proceeding, was harmless; although the Commission included references to the DSP Filings in its order, the Commission did not rely on those facts to determine that line loss costs were generation-related and not recoverable under the Transmission Service Charge (TSC) Riders. 52 Pa.Code § 5.408(c)-(d).

[10] Electricity 145 0

145 Electricity

Public Utility Commission did not violate electric companies' due process rights by failing to directly respond to dissenting statement in its order denying the companies' request to classify line losses as transmission costs under companies' Transmission Service Charge (TSC) Riders; in rejecting companies' arguments in the order, the majority of the Commission essentially did address the issues raised by the dissenting statement. U.S.C.A. Const.Amend. 14.

[11] Electricity 145 0

145 Electricity

Public Utility Commission's order allowing carrying charges on the shortfall resulting from electric companies' unwound generation contracts was insufficiently specific to allow Commonwealth Court to engage in meaningful judicial review; because the administrative law judge's recommended decision, adopted by the Commission, neither offered an explanation or consideration of the objecting customer's arguments and evidence nor did it address the two types of carrying charges at issue, remand was necessary so that the Commission could expressly consider the customer's exception. 66 Pa.C.S.A. § 703(e).

[12] Public Utilities 317A 0

--- A.3d ----, 2011 WL 2322173 (Pa.Cmwlth.)
(Cite as: 2011 WL 2322173 (Pa.Cmwlth.))

317A Public Utilities

The Public Utility Commission is not required to expressly consider all of the arguments set forth by the parties in its order.

Anthony C. DeCusatis, Philadelphia, for petitioner Metropolitan Edison Company.Michael L. Swindler, Harrisburg, for respondent.

Vasiliki Karandrikis, Harrisburg, for intervenor Penelec Industrial Customer Alliance.

William R. Lloyd, Jr., Harrisburg, for intervenor Office of Small Business Advocate.

BEFORE: LEADBETTER, President Judge, McGINLEY, Judge, JUBELIRER, Judge, SIMPSON, Judge, BROBSON, Judge, McCULLOUGH, Judge, and J. BUTLER, Judge.

OPINION BY Judge COHN JUBELIRER.

***1** Before this Court are two consolidated cases involving a March 3, 2010, order (Order) of the Public Utility Commission (Commission). In the first case, (532 C.D.2010), Metropolitan Edison Company (MetEd) and Pennsylvania Electric Company (Penelec) (together, Companies) petition for review of the Order which rejected the Recommended Decision (RD) of an administrative law judge (ALJ) and denied the Companies' request to classify "marginal transmission losses" or "line losses" [FN1] as transmission costs under Companies' Transmission Service Charge (TSC) Riders so that Companies could recover those costs from ratepayers under the TSC Riders. The Commission, instead, found such costs to be generation-related costs, subject to rate caps until December 31, 2010, and not recoverable from ratepayers. In the second case, (632 C.D.2010), William R. Lloyd, Jr., Small Business Advocate (OSBA) cross-petitions for review of the Commission's Order to the extent it adopted the ALJ's recommendation allowing Companies to recover the interest, i.e., carrying charges, on previously incurred transmission costs related to the "unwinding" of hypothetical generation contracts. The OSBA intervened in Companies' Petition for Review, and Companies have intervened in the OSBA's Cross–Petition for Review.[FN2] The Met–Ed Industrial Users Group and the Penelec Industrial Customer Alliance (Customers) have intervened in both Companies' and the OSBA's petitions for review.[FN3]

I. 532 C.D.2010—Line Losses

On April 10, 2006, Companies filed with the Commission a Rate Transition Plan (RTP) seeking to establish TSC Riders through which Companies sought to recover the following costs: (1) network integration transmission service (NITS) costs and Federal Energy Regulatory Commission (FERC)-approved PJM Interconnection, LLC (PJM) [FN4] transmission congestion charges; (2) FERC-approved transmission-related ancillary and administrative costs incurred and administered by PJM; (3) "other" FERC-approved costs similar to those in (1) and (2) that may arise in the future and charged under PJM's Open Access Transmission Tariff (OATT); and (4) transmission risk management costs incurred to mitigate risks associated with transmission-related costs. Companies' 2006 RTP filings included the recovery of congestion costs, but not line losses, despite the fact that PJM was assessing Companies for average line losses. On January 11, 2007, the Commission approved the TSC Riders, including the congestion costs, but with no reference to recovering average line losses (2007 Order). The Commission's 2007 Order was appealed to this Court, which affirmed, *inter alia,* the Commission's determination that congestion costs may be deemed a part of transmission costs and, thus, not subject to Companies' generation rate cap in effect at that time. *Met–Ed Industrial Users Group, et al. v. Pennsylvania Public Utility Commission,* 960 A.2d 189 (Pa.Cmwlth.2008) (MetEd I). Citing Section 2803 of the Electricity Generation Customer Choice and Competition Act (Competition Act), 66 Pa.C.S. § 2803, which defines "transmission costs" as all costs "directly or indirectly incurred to provide transmission and distribution services to retail electric customers," we concluded that the Commission did not err in determining that the congestion costs could be recovered as transmission costs. *Id.* at 198.

***2** On March 30, 2007, Companies submitted their first quarterly report of the TSC Riders, which did not attempt to collect line losses. On June 1, 2007, PJM changed how it sought payment for line losses from calculating them based on system average losses to marginal losses, with Companies receiving a bill for marginal losses in July 2007. On July 13, 2007, Companies filed their second quarterly report, which included marginal line losses as a line item in the amount of zero, but did not seek to recover line losses

--- A.3d ----, 2011 WL 2322173 (Pa.Cmwlth.)
(Cite as: 2011 WL 2322173 (Pa.Cmwlth.))

for January 2007 through May 2007. In their third (revised) quarterly report, filed on October 31, 2007, Companies included, for the first time, line losses in their cost worksheets for the period between June 2007 and August 2007. Companies have not sought approval to amend their tariffs to include line losses in the definition of transmission service charges to be collected under the TSC Riders. On April 14, 2008, Companies filed their initial annual TSC Reconciliation Filings for the 2008–2009 TSC period, which proposed significant increases in Companies' TSC rates through proposed tariff supplements. The Reconciliation Filings essentially indicate the estimated amount of under-collection of transmission-related costs resulting from the billing of the TSC during the relevant period, which included the recovery of line losses for the first time. MetEd's proposed Tariff Supplement No. 5 (Supplement 5M) indicated that it sought to recover: (1) $421.6 million in transmission-related costs, including $144.8 million in under-recovered transmission costs, $10.7 million of which represented carrying charges, i.e., interest, between January 11, 2007, and March 31, 2008; and (2) $277.1 million in projected transmission cost increases. MetEd also presented, alternatively, Tariff Supplement No. 6 (Supplement 6M), which would amortize the under-collected transmission costs over a longer period of time. Penelec experienced under-collection and projected increased TSC costs of $3.8 million and $16.2 million, respectively and proposed Tariff Supplement No. 5 (Supplement 5P). Companies' "under-collected" costs included the line losses assessed by PJM beginning June 1, 2007.[FN5]

Customers, the OSBA, and the Office of Consumer Advocate (OCA) filed complaints against Companies' Annual TSC Reconciliation Filings. The Commission initiated an investigation into Companies' Reconciliation Filings, consolidated the complaints, and assigned the matters to the ALJ. Following an evidentiary hearing and briefing period, the ALJ agreed in his RD with Companies that they were entitled to recover line loss costs as transmission-related costs. Customers requested the ALJ to reopen the record to introduce the Companies' Default Service Programs (DSP) Filings. Customers contended the DSP Filings established that line loss costs were generation-related costs and not recoverable through the TSC Riders.[FN6] The ALJ rejected Customers' request by interim order and the DSP Filings were not introduced into the record. Customers, the OSBA, and OCA filed exceptions to the RD with the Commission.

*3 After considering the exceptions, the RD, and the record made before the ALJ, the Commission entered the Order holding that, unlike congestion costs, line loss costs were generation-related and, therefore, not recoverable as transmission charges under Companies' TSC Riders. The Commission noted that, unlike the proceedings on Companies' 2006 RTP filings' inclusion of congestion costs as transmission costs, the Companies failed to present testimony supporting its current contention that line loss costs should also be collected under the TSC Riders. (Order at 2.) The Commission rejected as overly simplistic Companies' argument that because line losses occur during "transmission" those losses must be transmission costs. Instead, the Commission held that these losses are "energy" and that the price of such losses is related to the generation of that energy. (Order at 13.) The Commission likewise rejected Companies' arguments that the Commission is bound by how PJM and the FERC characterizes these costs in PJM's bills or in the OATT, holding that the fact that PJM changed how it billed these losses bears no relationship to whether the item is transmission- or generation-related and that the OATT clearly includes both transmission and generation charges. (Order at 13–14.) Rather, the Commission held that its determination was based on the nature of the service provided to the consumer and how they have been historically charged to the consumers. (Order at 13.) The Commission agreed with Customers that, historically, these types of losses have been included in generation costs and not transmission or distribution costs. (Order at 19–20.) The Commission noted that energy is lost both during transmission from the generator to the distribution point and in the distribution of the energy to the end-use consumers, but Companies do not argue, and Customers' witness testified, that no utility has argued, to his knowledge, that distribution system losses of energy should be collected in distribution rates. The Commission further held that it is within its discretion to allocate costs through a TSC Rider and that it is unreasonable for Companies to suggest that it is required to "rubber stamp" the recovery of such costs simply because they are imposed by PJM. (Order at 17.)

Additionally, the Commission held that, even if the line loss costs were considered to be transmission-related, Companies would not be entitled to re-

troactive recovery because they did not seek recovery at the first reasonable opportunity. *See* MetEd I, 960 A.2d at 201; *Popowsky v. Pennsylvania Public Utility Commission,* 868 A.2d 606, 611 (Pa.Cmwlth.2004) (*Popowsky II*). Finally, the Commission determined that, because line loss costs are generation-related, the Companies cannot recover them until Companies' generation rate caps expire at the end of 2010. (Order at 18.) Accordingly, the Commission directed Companies to, *inter alia,* submit new Tariffs or Tariff Supplements consistent with its Order, removing completely line loss costs from the TSC.[FN7] In his Dissenting Statement, Commissioner Robert F. Powelson agreed with the position of Companies and the ALJ that line loss costs were transmission-related because: they were not included in the generation rates in the 1998 Restructuring Agreement; the result is consistent with FERC's treatment of line loss costs; and the result is consistent with *MetEd I* because each of the four factors considered in that case were met here. Furthermore, the Dissenting Statement questioned the majority's more restrictive interpretation of the definition of transmission costs. Companies now petition this Court for review.[FN8]

A. Whether the Commission's findings of fact are supported by substantial evidence.

***4** [1] Companies first argue that the Commission's Order should be reversed because the Commission's findings of fact, including the Commission's finding that line loss costs were and are being recovered in Companies' generation rates, are not supported by substantial evidence. Essentially, Companies assert that, in rejecting the ALJ's recommendation that line loss costs were transmission costs recoverable through the TSC Riders, the Commission ignored, disregarded, misstated, or misinterpreted the evidence in the record. According to Companies, the Commission, *inter alia:* (1) disregarded the Companies' witness's characterization of line losses as transmission costs, (MetEd Statement No. 3–R at 3, R.R. at 335a; Penelec Statement No. 3–R at 3, R.R. at 646a); (2) improperly relied on Companies' proposed, but never implemented, restructuring plans from Companies' 2006 RTP Proceeding and 1998 Restructuring Proceeding, rather than the approved 1998 Restructuring Agreement, to determine that Companies intended line losses to be included in generation costs; (3) mischaracterized the evidence submitted by Customers' witness to support its finding that average line loss costs imposed by PJM prior to June 1, 2007, were included in generation costs; and (4) misinterpreted the inclusion of line loss costs in the Locational Marginal Price (LMP), because this provides the appropriate price for power **delivered** to a specific location and, therefore, is related to the transmission of energy. Companies further assert that the Commission's finding that line losses were not included in the TSC Riders is improper because the TSC Riders expressly include "all other future costs" imposed by PJM, and these costs were "future costs" imposed by PJM.

[2] In rate case proceedings, such as this case, Section 315 of the Public Utility Code (Code), 66 Pa.C.S. § 315, places the burden of proof on the utility to establish the reasonableness of its rates. Pursuant to Section 102 of the Code, 66 Pa.C.S. § 102, a public utility's rates include, *inter alia,* every individual charge of that utility demands for any service offered, rendered, or furnished by the utility, whether received directly or indirectly. This Court has interpreted Section 315 as placing "the burden of proving the justness and reasonableness of a proposed rate hike squarely on the utility. It is well-established that the evidence adduced by a utility to meet this burden must be substantial." *Lower Frederick Township Water Company v. Pennsylvania Public Utility Commission,* 48 Pa.Cmwlth. 222, 409 A.2d 505, 507 (Pa.Cmwlth.1980). While the burden of production may shift, the burden of proof remains on the utility to establish the justness and reasonableness of every component of its rate request, and this burden is an affirmative one. *Berner v. Pennsylvania Public Utility Commission,* 382 Pa. 622, 631, 116 A.2d 738, 744 (1955). Thus, Companies bear a substantial burden of proving that the line loss costs involved in this case are transmission-related costs that can be properly recovered by increasing the TSC Rider.

***5** [3][4] When reviewing an agency's findings of fact, this Court will defer to those factual findings if they are supported by substantial evidence. *W.C. McQuaide, Inc. v. Pennsylvania Public Utility Commission,* 137 Pa.Cmwlth. 282, 585 A.2d 1151 (Pa.Cmwlth.1991). The Commission is the ultimate fact finder. *See* Section 335(a) of the Code, 66 Pa.C.S. § 335(a) (stating that, after reviewing an administrative law judge's initial decision, the Commission has all the powers which it would have in making the initial decision); *Pennsylvania Power Company v. Pennsylvania Public Utility Commission,* 155 Pa.Cmwlth. 477, 625 A.2d 719, 726 (Pa.Cmwlth.1993) (holding that "an ALJ's decision

may always be overruled based upon contrary findings by the [Commission] if the [Commission's] findings are based on substantial evidence"). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985). "[I]n a substantial evidence analysis where both parties present evidence, it does not matter that there is evidence in the record which supports a factual finding contrary to that made by the fact[ ]finder, rather, the pertinent inquiry is whether there is any evidence which supports the fact[ ]finder's factual finding." *Mulberry Market, Inc. v. City of Philadelphia, Board of License and Inspection Review*, 735 A.2d 761, 767 (Pa.Cmwlth.1999). "A capricious disregard of evidence occurs when there is a 'willful, deliberate disbelief of an apparently trustworthy witness, whose testimony one has no basis to challenge.' " *Cerasaro v. Workers' Compensation Appeal Board (Pocono Mountain Medical, Ltd.)*, 717 A.2d 1111, 1113 (Pa.Cmwlth.1998) (quoting *Gallo v. Workmen's Compensation Appeal Board (United Parcel Service)*, 95 Pa.Cmwlth.158, 504 A.2d 985, 988 n.2 (Pa.Cmwlth.1986)). However, there is no capricious disregard of record evidence merely because the Commission reaches a different conclusion than that argued by the proponent of the evidence. *Popowsky v. Pennsylvania Public Utility Commission*, 853 A.2d 1097, 1110 (Pa.Cmwlth.2004). Where the Commission is presented with a choice of actions, each fully developed in the record, its decision is an implicit acceptance of one and a rejection of the other. *Barasch v. Pennsylvania Public Utility Commission*, 101 Pa.Cmwlth. 76, 515 A.2d 651 (Pa.Cmwlth.1986). We note that, where Companies refer to their own evidence and the Commission did not rely on that evidence, but on Customers' evidence, we conclude that the Commission implicitly rejected that evidence, which the Commission may do in its role as fact finder.

The Commission and Customers assert that the Commission's findings of fact, including its findings that line loss costs are generation-related and that Companies included line loss costs in their generation-related costs, are supported by substantial evidence. This evidence included the testimony of Stephen Baron, Customers' expert witness, that Companies traditionally included line loss costs in their generation rates, stating that "[l]osses have always been recognized as a part of energy cost, whether computed on an average ... or marginal ... basis," and that "[line] losses are a part of the cost of generation and are therefore subject to the generation rate cap." (Customers' Statement No. 1 at 16–17, R.R. at 672a–73a.) Mr. Baron examined how Companies unbundled their rates during Companies first Restructuring Proceeding, and noted that the evidence in that proceeding indicated that average line loss costs were "previously collected in generation rates and/or the Companies' Energy Cost Rate." (Customers' Statement No. 1 at 16, R.R. at 672a.) He did not believe the fact that PJM changed its method of how it collected these costs, from average to marginal, warranted a change to the unbundling method applied during the Restructuring Proceeding or that PJM's billing process makes line loss costs "a legitimate transmission cost, especially in light of the history of ratemaking in Pennsylvania and the Companies' own unbundled cost analyses." (Customers' Statement No. 1 at 17, R.R. at 673a; Customers' Statement No. 1–S at 4–5, R.R. at 763a–64a.) Mr. Baron compared line losses with distribution line losses, i.e., the loss of energy at the distribution point, and noted that, to his knowledge, no utility, including Companies, recovers distribution line loss costs as a distribution charge, but recovers those losses as part of the generation rate. (Customers' Statement No. 1 at 17, R.R. at 673a.) He further testified that, based on his review of the testimony of one of Companies' witnesses in the 2006 RTP Proceedings and an exhibit submitted by that witness, line loss costs were included in the Companies' generation rates. (Customers' Statement No. 1 at 17–18, R.R. at 673a–74a; Ex. SJB–6, R.R. at 757a.) In its brief to the ALJ, the OCA agreed with Mr. Baron's interpretation of Exhibit, SJB–6, which shows that MetEd's generation supply price was adjusted for line loss costs. (OCA's Main Br. at 4, R.R. at 1191a.) Mr. Baron also reviewed Companies' work papers from the 1998 Restructuring Agreement, Exhibits SJB–1S and SJB–2S, and indicated that these papers demonstrated that Companies' proposed unbundled rates included energy-related costs in the production, i.e., generation, component. (Customers' Statement No. 1–R at 4–5, R.R. at 763a–64a; Exs. SJB–1S and SJB–2S, R.R. at 773a–74a.)

***6** Additionally, Mr. Baron testified that, "[n]otwithstanding the fact that the level of marginal losses are influenced by the structure and design of the physical transmission network, *losses are energy costs* and should be recovered in the generation charge, not the TSC." (Customers' Statement No. 1 at 16, R.R. at

672a (emphasis in the original).) Mr. Baron explained that line loss costs are a component of the LMP and are computed **based on the marginal cost of increased power injections** at each generator bus. (Customers' Statement No. 1 at 10, R.R. at 666a.) He further testified that, because Companies participated in the proceedings before the FERC that resulted in PJM changing how it charged for line loss costs from average to marginal, Companies were aware in 2005 that the switch to calculating line loss costs on a marginal basis would increase their line loss costs but, despite this knowledge, they did not request approval to recover those costs as a part of their initial TSC calculations. (Customers' Statement No. 1 at 12–14, R.R. at 668a–70a.) Mr. Baron opined that the "future other costs" provision relied upon by Companies does not permit the recovery of line loss costs in the TSC Riders because increased line loss costs were not "unknown" costs since the Companies were aware that PJM was going to charge for line loss costs on a marginal basis, a result Companies supported. (Customers' Statement No. 1 at 15–16, R.R. at 671a–72a.)

In addition to Mr. Baron's testimony, the Commission found that Customers provided persuasive evidence that, during the 2006 RTP Proceedings, line loss costs were included in Companies' generation costs. That evidence consisted of statements and exhibits associated with the questioning of William D. Byrd during the 2006 RTP Proceedings, which indicated, *inter alia,* that Companies' generation rate caps included costs for "line losses." (Customers' Exs. WDB–5 and FERC Financial Report, R.R. at 905a–09a.) Moreover, Companies' witness, Frank Graves, testified that line losses are dissipated energy and that "dissipated energy has to be replaced by increased generation." (MetEd Statement No. 3 at 20, R.R. at 285a; Penelec Statement No. 3 at 19, R.R. at 523a.) Finally, the TSC Riders did not specifically include "line losses" as one of the cost elements sought to be collected through those Riders. (Order at 2–3.)

The above-referenced testimony and evidence constitutes substantial evidence to support the Commission's findings. The fact that the Commission chose to credit or give more weight to Customers' evidence and expert witness's testimony and opinions than Companies' witnesses and evidence is not grounds for reversal; rather, those determinations are for the Commission as fact finder and cannot be reviewed on appeal. *Peak,* 509 Pa. at 276–77, 501 A.2d at 1388. Additionally, to the extent that Companies assert that the Commission mischaracterized the evidence in this matter, the record does not support this contention. To the extent the Commission relied on Mr. Baron's testimony regarding the work papers from the 1998 Restructuring Proceeding and 2006 RTP Proceeding, such reliance was not reversible error. Companies did not present evidence to rebut Mr. Baron's exhibits or evidence that line loss costs were excluded from generation charges, and these exhibits supported the Commission's determination because they were "illustrative of the intent of the parties." (Order at 20.) Had Companies not believed the line loss costs were transmission-related costs, as they now assert, there would have been no reason to include those costs in their generation-related costs in the prior proceedings. Finally, there was conflicting testimony regarding whether the inclusion of line loss costs in the LMP and PJM's OATT established those costs as being transmission-related or generation-related. The Commission chose to accept the opinions and evidence that the LMP was related to the energy price and that the OATT includes both generation and transmission costs. Because this was a matter of credibility and evidentiary weight for the Commission to determine, it cannot be reconsidered on appeal. Thus, the Commission's findings of fact are supported by substantial evidence.

B. Whether the Commission erred as a matter of law in concluding that line loss costs are generation-related.

***7** [5] Companies next argue that the Order should be reversed because the Commission's determination that line loss costs are not transmission-related costs recoverable under the TSC Riders: (1) is inconsistent with the Commission's rationale and this Court's holding in *MetEd I;* (2) violates the Filed Rate Doctrine and is inconsistent with the FERC's characterization of line losses; and (3) is based on the Commission's improper reliance on Companies' treatment of distribution line loss costs.

1. Section 2803 of the Competition Act and MetEd I

Section 2803 of the Competition Act provides the following:

> [6][7] Transmission and distribution costs—**All costs directly or indirectly incurred to provide transmission and distribution services to retail customers.** This includes the return of and return on facilities and other capital investments necessary to

provide transmission and distribution services and associated operating expenses, including applicable taxes.

66 Pa.C.S. § 2803 (emphasis added). Neither the Code nor the Competition Act defines generation costs. The Commission is charged with enforcing the Code, including the Competition Act; therefore, the Commission's interpretation of the Code, the Competition Act, and its own regulations are entitled to great deference and should not be reversed unless clearly erroneous. *Popowsky v. Pennsylvania Public Utility Commission,* 550 Pa. 449, 462, 706 A.2d 1197, 1203 (1997); *Energy Conservation Council v. Pennsylvania Public Utility Commission,* 995 A.2d 465 (Pa.Cmwlth.2010). "Judicial deference is even more necessary when the statutory scheme is technically complex, as it is in this case." *Popowsky,* 550 Pa. at 462, 706 A.2d at 1203. Interpreting tariffs is within the Commission's administrative expertise and should be given deference. *Aronson v. Pennsylvania Public Utility Commission,* 740 A.2d 1208, 1211 (Pa.Cmwlth.1999).

In *MetEd I,* this Court was asked to consider, *inter alia,* whether the Commission properly included "congestion costs" [FN9] in Companies' TSC Riders as transmission costs under Section 2803. Customers argued that, because there is a generation cost associated with congestion, those costs should be considered generation costs and be subject to the generation rate cap; however, this Court held otherwise. *Id.,* 960 A.2d at 198. Citing the definition of transmission costs found in Section 2803, this Court concluded that the cost of switching electric generators and the cost of upgrading the transmission facilities, in the amount of $1.3 billion, were costs directly or indirectly incurred to provide transmission services to consumers. *Id.* Additionally, we explained that the Commission found that congestion costs should be classified as transmission costs because:

(1) the [Companies] pay PJM for transmission services pursuant to the OATT, a transmission tariff; (2) the OATT includes a specific charge for transmission congestion, and the OATT bill that the [Companies] receive from PJM contains a separate charge for transmission congestion; (3) there would be no costs associated with PJM's switching of electric generators but for the congestion on the transmission grid; and (4) congestion costs are reduced by transmission upgrades, not generation upgrades.

***8** *Id.*

Companies argue that the PJM-imposed line loss costs at issue in this case are indistinguishable from the PJM-imposed congestion charges involved in *MetEd I* and satisfy the four-pronged test set forth by the Commission in *MetEd I* and adopted by this Court in that case. Companies contend that, like congestion charges: PJM identifies line loss costs as transmission services and bills them as such; the OATT contains a separate charge for line losses; and their expert testified that, like congestion charges, it is the transmission system that causes line losses, which can be reduced by upgrading the transmission systems. (MetEd's Statement No. 3–R at 2–3, R.R. at 334a–35a; Penelec's Statement No. 3–R at 3, R.R. at 646a.) Thus, according to Companies, because they satisfied the four prongs set forth in *MetEd I,* line losses must be considered transmission costs recoverable under the TSC Riders and the Commission's contrary determination is erroneous.

The Commission did not err in holding that line losses are not transmission costs pursuant to Section 2803 of the Competition Act and *MetEd I.* The Commission interpreted the definition of transmission costs in Section 2803 of the Competition Act to exclude line loss costs because such costs are not incurred directly or indirectly to **provide transmission service.** Rather, line loss costs represent the generation-related costs associated with losses of energy as opposed to, for example, congestion costs, which represent the higher costs associated with **providing reliable transmission service** during times of peak usage. Additionally, OATT's definition of "transmission line losses" is "the loss of energy in the transmission of electricity," (Order at 14 (emphasis omitted)), and the Commission, in its interpretation of this term, chose to focus on the "loss of energy" factor of this definition rather than on the "transmission" factor, as Companies wanted. The Commission's interpretation of the definition of "transmission costs" in Section 2803 as excluding line loss costs is not clearly erroneous and, thus, that interpretation is entitled to great deference. *Popowsky,* 550 Pa. at 462, 706 A.2d at 1203. This Court cannot, therefore, substitute its judgment for the Commission's findings with regard to this issue, which is within the Commission's expertise. *Id.,* 550 Pa. at 457, 706 A.2d at 1201.

Companies contend that congestion costs and line loss costs are indistinguishable and, therefore, must be treated alike for the purposes of recovery under the TSC Riders. However, the Commission's determinations in *MetEd I* and the case before us reveal that these costs are not indistinguishable. In *MetEd I,* the Commission found that congestion costs, which included the cost of upgrading the transmission facilities, were transmission-related costs under the facts and circumstances in that case and allowed Companies to recover such costs under the TSC Riders. We affirmed that determination because the costs were "directly or indirectly incurred to provide transmission services to customers." *MetEd I,* 960 A.2d at 198. Here, in contrast, the Commission found that line loss costs are costs associated with the loss or dissipation of **energy** and are generation-related costs, findings that are supported by substantial evidence as discussed above. This cost is different from the costs associated with providing reliable transmission service during times of peak usage, i.e., congestion costs. In essence, the Commission chose to believe Companies' evidence in *MetEd I* that congestion costs are transmission-related costs and Customers' evidence that line loss costs are generation-related costs in the present matter. Because the Commission is the ultimate fact finder and arbiter of credibility and evidentiary weight, Section 335(a) of the Code, 66 Pa.C.S. § 335(a), we are bound by the Commission's determination of those matters, Peak, 509 Pa. at 276–77, 501 A.2d at 1388. Moreover, line loss costs historically have been and are being collected as part of Companies' generation rates, subject to their generation rate caps,[FN10] thus, the Commission did not err in holding that such costs were not transmission-related. Finally, we note, as we did in response to Companies' substantial evidence challenge, that the inclusion of line loss costs in the OATT is not determinative, given the facts of this case, because the OATT includes both generation and transmission charges. Accordingly, the Commission did not err when it did not apply *MetEd I* to line loss costs.

2. The Filed Rate Doctrine and FERC Precedent

***9** [8] Companies next argue that the Commission's Order violates the Filed Rate Doctrine and is inconsistent with FERC's determinations that line loss costs are transmission-related costs. According to Companies, FERC identifies line loss costs as transmission charges, *see* *Atlantic City Electric Company v. PJM Interconnection, LLC,* 115 FERC ¶ 61,132 (2006) (*Atlantic City I*); *Pennsylvania–New Jersey–Maryland Interconnection, et al.,* 92 FERC ¶ 61,282 at 61,960 (2000), and because electricity transmission is within FERC's jurisdiction, FERC has the authority to determine just and reasonable wholesale rates for transmission service in interstate commerce and this authority preempts state regulations. *Mississippi Power and Light Company v. Mississippi ex rel. Moore,* 487 U.S. 354, 371, 374, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988). Companies assert that, pursuant to *Mississippi Power and Light Company,* a state may not prevent a utility from recovering FERC-approved costs from its retail customers. *Id.,* 487 U.S. at 370–71. Companies contend that, by finding that line loss costs are generation-related, the Commission essentially second-guessed FERC's prior rate determinations, which it may not disregard.

The Filed Rate Doctrine precludes, *inter alia,* state utility commissions from reviewing FERC-approved rates, such as the rates to be charged to a utility's wholesale customers. *Nantahala Power and Light Company v. Thornburg,* 476 U.S. 953, 965–66, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable ." *Id.* at 966. Companies' argument relies on the premise that, factually, line loss costs are transmission-related costs that are "directly or indirectly incurred to **provide transmission ... services,**" 66 Pa.C.S. § 2803 (emphasis added); however, the Commission did not find this as fact. It reviewed the evidence presented and, accepting Customers' evidence, the Commission found that these costs were generation-related and had been and are being recovered in Companies' generation rates. Moreover, our review of the FERC decisions relied upon by Companies, when read together and in their entirety, do not unambiguously state that such costs are transmission-related. Companies are correct that FERC stated that "marginal losses are part of the payment for transmission service," *Atlantic City Electric Company v. PJM Interconnection, LLC,* 117 FERC ¶ 61,169, 61,863 (2006) (*Atlantic City II*); however, in that same decision, FERC stated "locational marginal prices [(how line losses are calculated)] are at the core of the PJM pricing methodology, because marginal prices send the proper price signals about the **cost of obtaining generation.**" *Id.* at ¶ 61,862 (emphasis added). FERC then explained how line loss costs impact a utility's decision regarding

from **which generator** to purchase energy. *Id.* Similarly, in *Atlantic City I,* FERC noted that requiring PJM to charge for line loss costs on a locational marginal basis "ensures that each customer pays the proper marginal cost price for the **power it is purchasing**" and that, in using marginal pricing, "PJM would change the way that it dispatches **generators** by considering the effects of losses." *Id.,* 115 FERC at ¶ 61,478 (emphasis added). Finally, in *Pennsylvania–New Jersey–Maryland Interconnection,* FERC did refer to the amount of line losses as being related to transmission; however, it also indicated that "the price of line losses is related to generation, and the cost of generation is determined by LMP." *Id.,* 92 FERC at ¶ 61,960. Our review of this precedent shows that the FERC cases relied upon by Companies does not contain express language stating that line loss costs are transmission costs and, therefore, the Commission's Order is not inconsistent with this precedent.

***10** Because FERC's opinions have not expressly stated that line loss costs are transmission costs, there is no direct conflict between the Commission's Order and FERC, unlike in *Nantahala Power & Light Company.* In *Nantahala,* FERC concluded that two electric utilities, Nantahala Power and Light Company (Nantahala) and Tapoco, Inc., subsidiaries of the Aluminum Company of America (Alcoa), were separate entities, but the state public utility commission decided that the two were "a single, integrated electric system." *Id.,* 476 U.S. at 958–59. FERC also determined that Nantahala was entitled to 22.5%, not 20% as provided for by an agreement between Tapoco and Nantahala, of the entitlement power allocated by the Tennessee Valley Authority (TVA), which represented the amount of power Nantahala contributed to the TVA grid. [FN11] *Id.* at 958. Entitlement power was less expensive than purchased power and, therefore, the more entitlement power allocated to a utility, the lower that utility's rates would be for its customers. *Id.* FERC required Nantahala to revise its rates to reflect the increase in "entitlement power" from 20% to 22.5% and to refund any excess amounts collected. *Id.* In contrast, the Tennessee state public utility commission determined that Nantahala was entitled to 24.5% of the entitlement power; therefore, the state agency "not only expressly rejected the fairness of [certain contracts relied upon by FERC], but employed an allocation of entitlement power that nowhere takes into account FERC's allocation of that same power." *Id.* at 961. These determinations directly affected Nantahala's costs and wholesale rates and, thus, constituted a violation of the Filed Rate Doctrine. *Id.* at 970–71. As stated above, FERC's opinions with regard to line loss costs are unclear regarding whether such costs are generation-related or transmission-related. Thus, the direct conflict between the state commission's determination and FERC's determination in *Nantahala* is not present in the matter currently before this Court.

Companies also argue that the Commission's Order prevents them from recovering "trapped" transmission costs in contravention of *Nantahala,* in which the United States Supreme Court stated that "[w]hen FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.... Such a 'trapping' of costs is prohibited." *Id.* at 970. Once again, this argument is premised on the assumption that line loss costs are transmission-related, which the Commission rejected. Moreover, as Customers point out, the fact that the generation rate caps prevented Companies from fully recovering line loss costs does not result in an unlawful trapping of costs because Companies voluntarily extended that rate cap through December 31, 2010. In *Lloyd v. Pennsylvania Public Utility Commission,* 904 A.2d 1010 (Pa.Cmwlth.2006), this Court explained that:

> ***11** the "deal" the utilities made for receiving billions of dollars in stranded costs [FN12] was that rates were frozen for 54 months and that the utility was going to bear the risk of any increased costs in providing service unless the increased costs fell within one of the Competition Act's exceptions that allowed the utility to seek relief. The net effect of the Commission order [in *Lloyd*] is to breach that regulatory bargain by impermissibly allowing [the utility] to recover expenses incurred during the rate cap period that it agreed to bear by receiving stranded costs.

Id. at 1023. Thus, in exchange for recovering stranded costs, Companies made a deal in which they would bear the risk of any increased costs that occurred before the expiration of the generation rate cap.

Accordingly, we conclude that the Order was not inconsistent with FERC precedent, did not violate the Filed Rate Doctrine, and did not improperly prevent

Companies from recovering trapped costs.

3. Whether the Commission erred by improperly relying upon the treatment of distribution line loss costs.

Companies also argue that the Order must be reversed because the Commission erroneously based its determination that line loss costs were generation-related on the inclusion of distribution line loss costs in Companies' retail generation credit. In addition to challenging the merits of this position, Companies also assert that this argument was not made by any of the parties below and should not have been advanced by the Commission. However, this issue was presented to the Commission. Mr. Baron, Customers' expert witness, clearly testified regarding the treatment of distribution line loss costs and stated that no utility, including Companies, recover distribution line loss costs in their unbundled distribution charge, but these costs are recovered as part of the utility's generation rates. (Customers' Statement No. 1 at 17–18, R.R. at 673a–74a.) In elucidating this testimony, Customers focused on the fact that Companies treat a similar cost item, distribution line loss costs, as generation-related despite the fact that those losses occur during the distribution process.

On the merits of this issue, the Commission considered the treatment of distribution line loss costs to support its position that energy, i.e., what is lost through line losses, is not created by transmission but by generation and that energy losses, whether occurring through transmission or distribution, result in generation-related costs. The Commission noted the energy is also lost during its distribution to the end-use consumers and that such distribution line loss costs are recovered by the retail generation credit and not in distribution rates. (Order at 14–15.) The Commission held that this was MetEd's position, which the Commission adopted, in *Application of Metropolitan Edison Company for Approval of Restructuring Plan,* 1998 Pa. PUC LEXIS 160 (June 30, 1998). We note that in *Application of Metropolitan Edison,* MetEd's position was that the cost of distribution line losses, i.e., energy lost during distribution, "should be arranged for and paid for **by the supplier**" and that "**line losses are generation related** and should be recovered as a separate charge to enable suppliers to competitively procure this service if they wish to do so." *Id.* at 168 (emphasis added). As the Commission points out in its Order, none of the parties in *Application of Metropolitan Edison* took exception to this position. The Commission relied upon this to support its parallel conclusions in the present matter that line losses, which occur during the transmission of energy, represent the amount of energy lost and that such losses result in generation-related costs not recoverable under the TSC Riders. We discern no error in the Commission's reliance.[FN13]

C. Whether the Commission committed other errors of law that require the Order's reversal?

***12** [9] Companies next assert that the Commission's Order should be reversed because the Commission violated Companies' due process rights by considering evidence—the Companies' DSP Filings—that was not made part of the record before the ALJ. According to Companies, the ALJ denied Customers' request to reopen the evidentiary proceedings to allow Customers to submit those documents and, therefore, the Commission erred in rendering a decision based on facts not in the record. *Equitable Gas Company v. Pennsylvania Public Utility Commission,* 45 Pa.Cmwlth. 610, 405 A.2d 1055, 1059 (Pa.Cmwlth.1979) (holding that it is an error of law to consider evidence outside the record). Moreover, Companies argue that the Commission could not take judicial notice of those filings because, pursuant to the Commission's regulations, to do so, Companies would have been entitled to notice of those facts so that it could provide "additional facts" of which the Commission could take notice. 52 Pa.Code § 5.408(c)-(d). Additionally, Companies assert that they were denied a fair hearing because the Commission pre-determined the outcome of this case, as evidenced by the facts that the Commission did not address or acknowledge the Dissenting Statement or require Companies to refund their improperly collected line loss charges, but ordered those amounts to be placed in a segregated account for the benefit of mitigating future rate increases starting in 2011.

The Commission responds that Companies presented no evidence to support their claims that they were denied a fair hearing, and Customers assert that Companies' due process arguments are disingenuous given that the line loss argument was one of the few issues on which Companies did not prevail. Both the Commission and Customers contend that the Commission's direction for Companies to place monies improperly collected as transmission costs in an account to mitigate future generation rate increases was within the Commission's remedial discretion, consis-

tent with its obligation to serve the best interests of the Commonwealth's retail ratepayers, and was not evidence of a pre-determined outcome.

Our review of the Order pertaining to whether line loss costs were generation-related or transmission-related reveals that the Commission did not consider the DSP Filings in making its determination that such costs were generation-related and not recoverable under the TSC Riders. (Order at 13–17.) The Commission did include the DSP Filings when describing the history of all the Companies' filings with the Commission for this, as well as other proceedings before the Commission. (Order at 5.) The Commission also included Customers' arguments pertaining to the effect of the DSP Filings. (Order at 12.) However, although the Commission included references to the DSP Filings in its Order, we conclude that the Commission did not rely on these facts, which were not included in the record before the ALJ, to determine that line loss costs were generation-related and not recoverable under the TSC Riders.[FN14] Thus, any error in referring to the DSP Filings was harmless.

***13** [10] We also discern no violation of Companies' due process rights in the Commission's failure to directly respond to the Dissenting Statement in the Order. Companies rely on *American Gas Association v. FERC*, 593 F.3d 14, 20 (D.C.Cir.2010), for the proposition that the Commission had an obligation to acknowledge the Dissenting Statement's position in the Order. However, we are unaware of any case law holding that a majority opinion violates a party's right to due process if the majority opinion does not specifically respond to the arguments made in a dissenting opinion. Moreover, a review of the Dissenting Statement indicates that it, in essence, agrees with Companies' analysis of this issue, i.e., that line loss costs are transmission-related, as well as the ALJ's initial determination allowing recovery. Thus, in rejecting those arguments in the Order, the majority of the Commission essentially did address the issues raised by the Dissenting Statement. Finally, the Companies' due process rights were not infringed upon by the Commission's Order directing Companies to place the monies it collected for line loss costs, which the Commission determined were **generation**-related costs, in an account to mitigate future **generation** rate increases resulting from the expiration of the generation rate caps. There is no evidence to support Companies' argument that this resolution demonstrated that the Commission's disposition in this matter was somehow pre-determined.

For the foregoing reasons, we conclude that the Commission's findings of fact are supported by substantial evidence and that the Commission did not abuse its discretion or commit an error of law in holding that line loss costs are generation-related costs and, therefore, not recoverable under Companies' TSC Riders.

II. 632 C.D.2010—Carrying Charges

The OSBA's Cross–Petition for Review relates to a different aspect of the Order, which purported to accept the ALJ's RD approving the Companies' request to collect carrying charges, i.e., interest, on the Companies' net under-collection of transmission costs. In 2006, as a part of the Companies' 2006 RTP filings, the Companies presented the Commission with a proposed plan to gradually increase their generation rates before the rate caps ended so as to ease the transition between the capped and uncapped period. Their plan was to obtain electricity from different generation companies, which would then assume responsibility for a portion of the Companies' transmission costs. This would result in the Companies charging Pennsylvania customers higher generation rates, but lower transmission rates. To implement this plan, the Companies had to request the elimination of the existing generation rate caps from the Commission. The Companies included this request in their proposed TSC Riders filed in 2006, which sought, *inter alia,* to eliminate their existing generation rate caps and to move certain transmission-related costs, including congestion costs, from base rates into reconcilable TSC Riders. However, because the Companies were anticipating that the generators would pay part of the Companies' transmission costs, the Companies did not include those transmission costs in the transmission rates for which they sought approval. In its January 2007 Order, the Commission approved the TSC Riders, but did **not** approve the elimination of the existing generation rate caps.

***14** The Companies, therefore, had to "unwind" the hypothetical generation contracts upon which they had based their lower transmission costs. Thereafter, the Companies filed with the Commission a compliance filing indicating that they had "unwound" the proposed generation contracts, but they did not simultaneously increase their anticipated transmission

costs, which had been lowered in the proposed filings in the expectation that the generation companies would pay transmission costs. In other words, even though the lower transmission costs included in the 2006 RTP filings were no longer accurate since the Companies, not the new generators, remained responsible for those costs, the Companies did not adjust their estimated transmission costs upward. This resulted in a shortfall of collected transmission costs, which the Companies sought to recover, with carrying charges, in their April 2008 TSC Rider reconciliation filings. The OSBA and Customers filed complaints, objecting to, *inter alia,* the Companies' collection of carrying charges on the transmission costs related to the unwinding of the generation contracts and line loss costs.

After an investigation and an evidentiary hearing, the ALJ recommended in the RD that the Companies be permitted to collect the carrying charges on the net amount of under-collected transmission costs. (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.) Although the OSBA and Customers challenged the carrying charges associated with the under-collection of transmission costs based on line loss costs and those based on the unwinding of the generation contracts separately, the ALJ did not discuss each type of carrying charge separately. The ALJ initially concluded that the OSBA had waived its arguments regarding the carrying charges associated with the line loss costs because the OSBA raised this issue for the first time in its brief. (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.) The ALJ did not address the OSBA's arguments regarding the carrying charges associated with the unwinding of the generation costs. Rather, the ALJ indicated that, after considering Customers' arguments, there were no legal impediments to allowing the Companies to collect the carrying charges on the net under-collected transmission charges and that the question was whether the inclusion of these carrying charges was unjust, unlawful, and unreasonable. (RD at 21, 45–46, R .R. at 1340a, 1364a–65a.) The ALJ rejected the Customers' argument that the Companies should not be allowed carrying charges because of their failure to more accurately forecast their transmission costs as being "punitive in nature." (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.) The ALJ concluded that the Companies presented evidence that adequately explained the circumstances surrounding the under-collection of the transmission costs, and noted that the claim for carrying charges is on the total net under-collection, and not on any specific under-collection of a specific cost element of the TSC. (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.)

***15** The OSBA and Customers filed exceptions, which the Commission "granted consistent with this Opinion and Order." (Order at 23.) The Commission also adopted the ALJ's RD, as modified, "consistent with this Opinion and Order." (Order at 23.) The Commission's Order neither makes any specific reference to the OSBA's exceptions to the ALJ's allowance of carrying charges nor to the ALJ's RD regarding the allowance of the carrying charges on the shortfall due to the unwinding of generation contracts, except to say that "[a]ny argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion." (Order at 11.) The OSBA now petitions this Court for review on this issue.

[11] The OSBA asserts that the Commission violated Section 703(e) of the Code, 66 Pa.C.S. § 703(e) (requiring that the Commission's findings be sufficient to enable a court on appeal to determine questions at issue and whether the Commission gave proper weight to the evidence), when it did not specifically address the OSBA's Exception No. 2 [FN15] and denied that Exception implicitly by stating "[a]ny argument that it is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion." (Order at 11.) Additionally, the OSBA asserts, *inter alia,* that, to the extent that the Commission simply adopted the ALJ's RD, the RD on this issue is likewise insufficiently detailed to satisfy the requirements of Section 703(e) and this Court's decision in *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission,* 677 A.2d 861 (Pa.Cmwlth.1996) (*NFG*). Finally, the OSBA asserts that allowing the Companies to collect carrying charges on the shortfall in transmission costs that derived from the unwinding of the generation contracts abandons the Commission's position, set forth in *Demand Side Management,* 1991 Pa. PUC Lexis 207(*DSM*), that carrying charges should be allowed only where the Commission wants to encourage the particular activity that caused the carrying charges. The OSBA argues that, pursuant to Section 703(e) and *NFG,* if the Commission is going to reject its precedent, it must provide an explanation for doing so and did not do so here. Thus, according to the OSBA, the failure of the Commission to comply with Section 703(e) and *NFG* prevents the Court from performing

its judicial review, determining whether the ALJ gave proper weight to the evidence presented or had substantial evidence to support the rejection of the OSBA's evidence and arguments, and requires this Court to remand this issue to the Commission to provide proper consideration of the OSBA's Exception No. 2.

[12] In response, both the Commission and the Companies argue that the Commission's Order complies with Section 703(e) because this issue was fully addressed during the evidentiary and briefing stage of the proceeding, the RD was issued, the RD complied with Section 703(e), and the Commission adopted the RD on this issue in its entirety. The Commission and the Companies acknowledge that the RD may not have expressly rejected the OSBA's specific arguments, but the RD did expressly reject similar arguments made by Customers. The Commission is not required to expressly consider all of the arguments set forth by the parties in its Order. *Wheeling & Lake Erie Railway Company v. Pennsylvania Public Utility Commission,* 778 A.2d 785, 794 (Pa.Cmwlth.2001). Here, the Order indicates that it considered the OSBA's arguments and denied them, as evidenced by the Commission's lack of discussion of that Exception in the Order, and adopted the ALJ's RD on this issue because that result was not inconsistent with the Order. (Order at 11, 23.) Moreover, the OSBA's reliance on *NFG* on *DSM* is misplaced as NFG is distinguishable, and the ALJ's determination is not contrary to *DSM.*

***16** Section 703(e) of the Code provides, in pertinent part:

> (e) Decisions by commission.—After the conclusion of the hearing, the commission shall make and file its findings and order with its opinion, if any. **Its findings shall be in sufficient detail to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence.**

Id. (emphasis added). In *NFG,* we held that the Commission's failure to provide any analysis to support its decision on a particular issue or a sufficient explanation for changing its position from a prior, factually similar situation prevented this Court from performing judicial review. *NFG,* 677 A.2d at 864–65. Accordingly, we remanded the matter to the Commission to provide the analysis and rationale for its determinations. *Id.*

In *DSM,* the Commission was asked to consider whether to allow utilities to amortize certain capital investments and collect interest on the unamortized balance for amortized expenses. *Id.* at *31–32. The Commission concluded that, in unusual cases, the amortization of certain costs is appropriate for an extraordinarily large investment. *Id.* The Commission noted that, "[a]lthough we have often refused to allow interest or a return on the unamortized balance for amortized expenses (*Butler Township Water Company v. Pennsylvania Public Utility Commission, ...* 81 Pa.Cmwlth.40, 473 A.2d 219 ([Pa.Cmwlth.] 1984)), such a decision is discretionary." *DSM* at *32. It then concluded that, "[i]n circumstances where [the Commission] mean[s] to encourage the investment, and where the utility will not recoup its investment in one rate-collection period, interest or a return may be appropriate." *Id.* Accordingly, the Commission allowed the collection of interest in those cases where it expressly approved the amortization. *Id.*

Section 1301 of the Code, 66 Pa.C.S. § 1301, requires that every rate made or demanded by a public utility shall be just, reasonable, and in conformity with the regulations or orders of the Commission. *Id.* Thus, as recognized by the ALJ in the RD, the main question to be answered regarding the Companies' collection of carrying charges on the shortfall that resulted from the unwound generation contracts is whether those carrying charges are just, reasonable, and in conformity with the regulations and orders of the Commission, i.e., lawful. (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.)

The OSBA asserts that the ALJ could not properly make a determination regarding the justness, reasonableness, and lawfulness of the Companies' request without considering its evidence and arguments, particularly its argument that allowing the Companies to charge current customers carrying charges created an inter-generational mismatch,[FN16] (*see* OSBA Statement No. 2 at 1–3, R.R. at 784a–86a), as this argument was different from those made by Customers. Because the ALJ's RD, adopted by the Commission on this issue, neither offers an explanation or consideration of the OSBA's arguments and evidence nor does it address the two types of carrying charges separately, we agree with the OSBA that the part of the Order that relies on the RD's rationale for

allowing carrying charges on the shortfall resulting from the unwound generation contracts is insufficiently specific to allow this Court to engage in meaningful judicial review. Therefore, in this regard, the Order does not comply with Section 703(e).

***17** We first note that there are two types of shortfalls involved in this matter: (1) the shortfalls associated with line loss costs; and (2) the shortfalls resulting from the unwound generation contracts. Although the ALJ found that the OSBA waived its arguments regarding the carrying charges associated with line loss costs because it raised the issue for the first time in its main brief, i.e., after the close of evidence, the ALJ did not state that OSBA waived its arguments pertaining to the carrying charges associated with the unwound generation contracts. Indeed, had the ALJ done so, we would have had to reject such finding because the OSBA's expert witness, Brian Kalcic, specifically testified about this issue in his sur-rebuttal statement. (OSBA Statement No. 2 at 1–3, R.R. at 784a–86a.)

Notwithstanding the OSBA's evidence and repeated arguments on why allowing carrying charges on the shortfalls related to the unwound generation contracts would result an inter-generational mismatch, the ALJ made no reference to the OSBA's position in the RD. The position arguably raises legitimate questions about the reasonableness and justness of the proposed collection of carrying charges. The OSBA reiterated this position in its main brief to the ALJ after the close of the record. (OSBA's Main Br. at 5, 12, R.R. at 1201a, 1208a.) Nevertheless, the ALJ addressed only Customers' arguments in the RD, stating that he "considered those arguments," which focused on the Companies' failure to properly estimate and/or anticipate the increased transmission costs associated with marginal line losses and the unwound generation contracts, and rejected those arguments as "punitive in nature." (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.) The ALJ held that these arguments did not legally preclude the collection of carrying charges where the Companies provided a reasonable explanation for its shortfall and, therefore, the ALJ authorized carrying charges on the net under-collected transmission costs. (RD at 21, 45–46, R.R. at 1340a, 1364a–65a.)

Although we agree with the Commission that it is not required to expressly consider each and every argument a party raises, *Wheeling & Lake Erie Railway Company*, 778 A.2d at 794, it should expressly consider evidence and arguments that raise legitimate and significant questions regarding whether these proposed collection of carrying charges is just, reasonable, and lawful. The Commission points to this Court's decision in *University of Pennsylvania v. Pennsylvania Public Utility Commission*, 86 Pa.Cmwlth. 410, 485 A.2d 1217 (Pa.Cmwlth.1984), in which we stated that "[w]e have held and we here repeat that it has never been the law of this Commonwealth 'that an administrative agency must set forth findings specifically noting the rejection, and reasons for such rejection, of each and every *minor* allegation of a party.' " *Id.* at 1222–23 (quoting *Application of Midwestern Fidelity Corporation*, 26 Pa.Cmwlth. 211, 363 A.2d 892, 902 n. 6 (Pa.Cmwlth.1976)) (emphasis added). However, this was not a minor allegation, but was one of two arguments the OSBA asserted against allowing the Companies to recover carrying charges based on the unwound generation contracts in the amount of more than $32 million for MetEd and $14 million for Penelec.[FN17] Here, the ALJ and, subsequently, the Commission failed to address or consider the OSBA's legitimate argument and evidence on this issue in sufficient detail so as "to enable the court on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence." 66 Pa.C.S. § 703(e). Thus, pursuant to Section 703(e) and *NFG*, we must remand this particular issue to the Commission for it to provide analysis and explanation for its determination regarding the OSBA's Exception No. 2.

***18** Moreover, the ALJ did not separately address the two types of shortfalls involved in this matter by cause, i.e., the shortfalls associated with line loss costs versus those resulting from the unwound generation contracts. Given our holding affirming the Commission's determination that the line loss costs are not transmission costs and, therefore, are not recoverable in the TSC Riders, the carrying charges associated with the line loss costs likewise may not be recovered. However, because the ALJ combined its analysis on both types of the carrying charges, we have no way of determining whether that analysis supports the Commission's determination on the remaining issue, whether the Companies' request for carrying charges associated with the unwinding of the generation contracts is just, reasonable, and lawful. We note that, if the Commission determines that the Companies are

allowed to collect carrying charges, those amounts should reflect only those under-collected transmission costs associated with the unwinding of the generation contracts, not the line loss amounts.

The Commission and Companies argue that *NFG* does not require remand. Although *NFG* is factually distinguishable from this case, the import of *NFG* is not its facts, but its holding that the Commission must provide this Court with sufficient analysis to engage in appellate review. As in *NFG,* here, we "simply cannot tell as a matter of law whether the [Commission] abused its discretion or not." NFG, 677 A.2d at 864 (quoting *Peoples Natural Gas Company v. Pennsylvania Public Utility Commission,* 47 Pa.Cmwlth. 512, 409 A.2d 446, 453 (Pa.Cmwlth.1979)). The Commission also asserts that the authorization of carrying charges here is not inconsistent with the standard set forth in *DSM* and, therefore, it did not abandon its precedent so as to require it to provide specific analysis on this issue as required by *NFG.* However, because the ALJ's RD, adopted by the Commission, does not provide this Court with sufficient information about the rationale in allowing the Companies to collect carrying charges on the shortfall due to the unwinding of the generation contracts, we cannot address the reasons why or why not *DSM* would require a different result. We do note that, in its main brief to the ALJ and in its exceptions to the Commission, the OSBA raised its assertions that the grant of carrying charges in this matter would conflict with *DSM.* (OSBA's Main Br. at 10–13, R.R. at 1206a–09a; OSBA's Exceptions at 21–23, R.R. at 1502a–04a.) The ALJ never addressed the OSBA's contentions regarding *DSM* in the RD and the Commission offers, for the first time in its brief to this Court, many reasons why *DSM* does not require a different result. However, the more appropriate place for the Commission to have addressed this issue would have been in its Order. Because we are remanding this issue to the Commission to address the OSBA's Exception No. 2, the Commission should also address the OSBA's contention that *DSM* requires the denial of the request for carrying charges based on the unwinding of the generation contracts.

***19** Accordingly, the Order is hereby: (1) affirmed to the extent that it holds that line loss costs are not transmission costs and, therefore, not recoverable under the TSC Riders and that the carrying charges associated with line loss costs are likewise not recoverable; and (2) vacated to the extent that it allows the Companies to collect carrying charges on the under-collected transmission costs associated with the unwinding of the generation contracts. We remand the matter to the Commission to expressly consider the OSBA's Exception No. 2 in a manner consistent with this opinion.

ORDER

NOW, June 14, 2011, the Order of the Pennsylvania Public Utility Commission (Commission) is hereby: (1) affirmed to the extent that it holds that line loss costs are not transmission costs and, therefore, not recoverable under Metropolitan Edison Company's and Pennsylvania Electric Company's (Companies) TSC Riders and that the carrying charges associated with line loss costs are likewise not recoverable; and (2) vacated to the extent that it allows the Companies to collect carrying charges on the under-collected transmission costs associated with the unwinding of the generation contracts. We remand the matter to the Commission to expressly consider William R. Lloyd, Jr., Small Business Advocate's Exception No. 2 in a manner consistent with this opinion.

Jurisdiction relinquished.

FN1. Line losses represent the amount of energy that is lost between the generation facility and the delivery of that energy at its end point.

FN2. The OSBA asserts that, should this Court reverse the Commission's determination as to line losses, we should remand the matter to the Commission to consider whether Companies should be permitted to collect carrying charges on these costs.

FN3. Customers take no position with regard to the OSBA's Cross–Petition for Review at 632 C.D.2010. (Customers' Br. at 4 n. 1.)

FN4. PJM is a regional transmission organization (RTO) that coordinates the movement of wholesale electricity in 13 states (including Pennsylvania) and the District of Columbia.

FN5. The line losses sought to be recovered

are: $38,655,803 in past line losses, plus $2,548,445 in carrying charges for MetEd customers; and $7,210,687 in past line losses, plus $413,673 in carrying charges for Penelec customers.

FN6. On February 20, 2009, Companies filed the DSP Filing proposing to modify the way transmission costs were collected from consumers, eliminating the TSC Rider, and replacing it with a NITS Rider. Under this plan, the costs that were recovered using the TSC Rider, congestion, line losses, and risk management costs, would be recovered through Companies' default generation rates.

FN7. Companies requested, and received, a stay from the Commission's suspension of the tariff modification requirement and the Commission allowed Companies to continue collecting marginal losses, with interest, through the end of 2010 and to commence giving refunds on January 1, 2011 or a decision is issued from this Court, whichever was sooner. (Commission Order, March 25, 2010.)

FN8. This Court's review of Commission's orders is limited; "[w]e must determine whether constitutional rights were violated, an error of law was committed or whether the findings, determinations or order are supported by substantial evidence." *Popowsky II,* 868 A.2d at 608 n. 3.

FN9. Congestion occurs when there is not enough transmission capability to support all requests for transmission services and, in order to ensure reliability, transmission system operators re-dispatch generation to prevent transmission lines from being overloaded. *Pennsylvania Public Utility Commission v. Metropolitan Edison Company,* 2006 Pa. PUC Lexis 116 *133–35. In the PJM, the cost of congestion is defined as the net cost of replacement power that must be supplied by other means to make up for the deliveries that cannot be executed as requested. *Id.*

FN10. Companies cannot recover generation-related costs through their transmission rates in order to circumvent the mandated generation rate cap. *ARIPPA v. Pennsylvania Public Utility Commission,* 792 A.2d 636, 668 (Pa.Cmwlth.2002). Pursuant to *ARIPPA,* Section 2804 of the Competition Act, 66 Pa.C.S. § 2804, does not permit a shifting of costs among the unbundled rate elements because such action would violate the integrity of rate caps. *Id.*

FN11. Unlike Nantahala, Tapoco, whose only customer was Alcoa, did not purchase additional power from the TVA. *Nantahala,* 476 U.S. at 956. Tapoco and Nantahala were allocated 1.8 billion kilowatt hours of "entitlement power" from the TVA, of which Tapoco received 1.44 billion or 80% of that power. *Id.* The result of FERC's decision also decreased Tapoco's allocation to 77.5%. *Id.* at 972. Other than to reduce Tapoco's allocation, there was little discussion of Tapoco in *Nantahala.*

FN12. Stranded costs essentially represent "the difference between the amount of revenue that could have been recovered in a regulated market and those recoverable under" deregulation. *Lloyd,* 904 A.2d at 1014.

FN13. Because we conclude that the Commission did not err or abuse its discretion in determining that the line loss costs at issue here are generation-related, we will not address Companies' assertion that the Commission erred in holding that, even if the line loss costs were transmission-related, Companies would not be entitled to retroactive recovery.

FN14. To the extent that the Commission mentioned the DSP Filings in its analysis on retroactive recovery, it did so only to point out that the Companies' filings are just "one data point that acknowledges Commission precedent with regard to these Companies and this issue." (Order at 18.) We do not believe that this brief mention constitutes the Commission rendering a decision based on facts outside the record, *Equitable Gas Company,* 405 A.2d at 1059, such that any

error was harmless, particularly where the Commission relied upon a number of other factors which were supported by the record evidence.

FN15. In Exception No. 2, the OSBA asserted, *inter alia:*

> Exception No. 2: The ALJ erred in recommending that the Companies be permitted to recover interest on the claimed transmission costs resulting from the unwinding of generation contracts.
>
> ....
>
> The ALJ did not explicitly recommend that the Companies be permitted to collect carrying charges on the under-recovery of the Companies' transmission costs that resulted from the unwinding of generation contracts after the Commission rejected an attempt by the Companies to break the generation rate caps. However, he made an implicit recommendation to that effect when he rejected [Customers'] proposed disallowance of carrying charges, in general.
>
> (OSBA's Exceptions at 19, R.R. at 1500a.)

In Exception No. 1, the OSBA challenged the allowance of carrying charges associated with the line losses. Because the Commission concluded that line losses were not transmission costs recoverable under the TSC Rider, a conclusion that we affirm, the carrying charges associated with the line losses are likewise not recoverable under the TSC Rider.

FN16. Brian Kalcic, the OSBA's expert, testified in his sur-rebuttal statement regarding inter-generational mismatch. He stated:

> Cost shifting across time periods may result in inter-generational cost shifting among ratepayers, depending on the time period over which costs are recovered.
>
> For example, it is likely that some of the ratepayers on whose behalf such transmission costs were incurred are no longer customers of either [of the Companies] and those customers will, therefore, avoid having to pay any of those costs. On the other hand, it is likely that some of the current ratepayers [of the Companies] will be required to pay such transmission costs even though they were not ratepayers of either Company at the time costs were incurred.
>
> ....
>
> [The Companies' expert] argues that the actual time period over which costs are recovered is immaterial to ratepayers as long as the present value of the alternative payment streams is the same. That conclusion may be true in the case where the population of the ratepayers remains unchanged over time. However, as previously discussed, shifting cost recovery across time periods may result in inter-generational cost shifting among ratepayers. Such an outcome would not be "fair" to *all* ratepayers.
>
> (OSBA Statement No. 2 at 1–3, R.R. at 784a–86a (emphasis in the original).)

FN17. These are the amounts Mr. Baron testified were the amounts of carrying charges at the time he testified in November 2008. (Customers' Statement No. 1 at 24–25, R.R. at 680a–81a.) Thus, these numbers likely have only increased since Mr. Baron testified.

Pa.Cmwlth.,2011.
Metropolitan Edison Co. v. Pennsylvania Public Utility Com'n
--- A.3d ----, 2011 WL 2322173 (Pa.Cmwlth.)

END OF DOCUMENT

APPENDIX C:

Supplement No. 155 to Columbia Gas of Pennsylvania, Inc's

Tariff Gas – Pa. P.U.C. No. 9, Seventeenth Revised Page No. 146

through twenty-first revised page 147

RIDER USP – UNIVERSAL SERVICE PLAN

APPLICABILITY

Throughout the territory served under this Tariff.

AVAILABILITY

This Rider shall be applicable to all residential customers except customers in the Company's Customer Assistance Program ("CAP").

CHARACTER OF RATE

This Rider has been established to recover costs related to the Company's Universal Service and Conservation Programs.

RATE

In addition to the charges provided in this tariff, an amount shall be added to the otherwise applicable charge for each Mcf of sales volumes or distribution volumes distributed by the Company to customers receiving service under Rate Schedules RSS, RDS, PPS, RDGSS, RDGDS or successor rate schedules.

The rate information is detailed in the Rate Summary pages of this tariff.

No charge shall be applicable to Customers enrolled in the Company's CAP.

CALCULATION OF RATE

The Rider USP rate shall be calculated to recover costs for the following programs: Low Income Usage Reduction Program (LIURP); Customer Assistance Program (CAP); and Income Qualified Energy Efficiency Program (IQEEP). (C)

LIURP costs will be calculated based on the projected number of Level 1 income homes to be weatherized. Energy Efficiency program costs will be calculated on the projected number of Level 2 income homes provided with an energy audit and programmable thermostat.

CAP costs will be calculated to include the projected CAP Shortfall (the difference between the total calculated RSS bill excluding Rider CC and Rider USP and the CAP bill) based upon the current discounts at normalized annual volumes of the then-current CAP participants, the projected CAP Shortfall for projected customer additions to CAP during the period that the CAP Rider rate will be in effect at the average discount of current CAP participants at normalized annual volumes, the projected CAP customer application costs and the projected CAP pre-program arrearages to be forgiven and written off during the next 12 months. (C)

If the Company is successful in obtaining a CAP gas supply aggregator as provided in Rate CAP-Customer Assistance Program, then the shortfall will be adjusted to reflect the RDS rate plus the gas costs resulting from the aggregation service.

The costs shall be divided by the total annual projected throughput volumes of all residential non-CAP customers as established in the Company's most recent Purchased Gas Cost proceeding to determine the volumetric rate for this Rider.
(C) Indicates Change

RIDER USP – UNIVERSAL SERVICE PLAN – Continued

QUARTERLY ADJUSTMENT

Each quarter, and at any time that the Company makes a change in base rates or Purchased Gas Cost rates affecting residential customers, the Company shall recalculate the Rider USP rate pursuant to the calculation described above to reflect the Company's current data for the components used in the USP rate calculation. The Company shall file the updated rate with the Commission to be effective one (1) day after filing.

ANNUAL RECONCILIATION

On or before April 1 each year, the Company shall file with the Commission data showing the reconciliation of actual revenues received under this Rider and actual recoverable costs incurred for the preceding twelve months ended December. The resulting over/undercollection (plus interest calculated at 6% annually) will be reflected in the CAP quarterly rate adjustment to be effective April 1. Actual recoverable costs shall reflect actual application costs, actual LIURP costs, and actual Income Qualified Energy Efficieny Program costs. . Actual recoverable costs shall also reflect actual shortfall costs and actual pre-program arrearages, provided that CAP participation on an average annual basis for the preceding year did not exceed 25,300 participants. In the event that CAP participation in the preceding year exceeded 25,300 on an average annual basis, actual recoverable costs shall reflect actual shortfall cost and actual pre-program arrearages for all customers up to the 25,300 participation level. For any and all CAP customers exceeding the 25,300 participation level on an average annual basis, Columbia shall offset the actual shortfall and actual pre-program arrearages by 7.5%. Except for the offset that is applied when CAP participation exceeds 25,300 on an average annual basis, actual CAP shortfall costs shall be based upon actual numbers of CAP customers, actual CAP throughput volumes, actual CAP payments received. (C)

(C) Indicates Change

APPENDIX D:

Supplement No. 122 to Columbia Gas of Pennsylvania, Inc's

Tariff Gas – Pa. P.U.C. No. 9, issued October 28, 2008,

Third Revised Page No. 140

Rate CAP – CUSTOMER ASSISTANCE PROGRAM (Continued) (C)

8. Agree not to use any non-essential gas appliance, such as a pool heater.

9. Allow the Company to purchase gas on the customer's behalf.

10. In the case of a CAP applicant who is currently without service, and who has a balance from a prior account, make an upfront payment in satisfaction of the prior balance up to, but no more than, $150.

MONTHLY PAYMENT OPTIONS

The most affordable payment option for the eligible CAP customer shall be selected from the Options below. The monthly payment will not be less than the average payment received from the customer in the previous twelve (12) months. A minimum payment amount of twenty-five dollars ($25.00) is required.

Option #1: Percentage of Income.
0 – 110% of Poverty = 7%
110 – 150% of Poverty = 9%

Option #2: Average of last 12 months of customer payments. (Available for customers with at least six months of uninterrupted service.)

Option #3: Flat rate of 50% of budget billing (adjusted annually)

Senior CAP Option: Flat rate of 75% of budget billing for all customers over 60 years of age with no arrears or payment plan default.

In addition to the monthly payment established under either Option #1, #2, #3, or Senior CAP Option, the CAP customer is required to pay a five-dollar ($5.00) co-payment towards pre-program arrears.

A CAP customer's monthly payment shall not exceed the non-CAP budget payment applicable to the customer's account, exclusive of the $5.00 co-payment towards pre-program arrears. In the event that a CAP customer's monthly payment is determined to exceed the non-CAP budget payment applicable to the customer's account, the applicable information is reviewed to determine if the CAP payment should be lowered or if the customer should be removed from CAP.

SECURITY DEPOSITS

CAP customers will not be charged security deposits.

Any paid security deposits on accounts with an approved CAP application will be credited to the arrears prior to CAP enrollment.

Unpaid security deposits for customers entering into the CAP will be waived after income verification is complete.

(C) Indicates Change

APPENDIX E:

October 19, 2010 Certificate of Service for

Commission Order issued October 14, 2010

at Docket No. P-2010-2195759 and

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

October 19, 2010

P-2010-2195759

DOCUMENT
FOLDER

TO ALL PARTIES:

Petition of Columbia Gas of Pennsylvania, Inc. to Modify its Universal Service and Energy Conservation Plan for the 2010-2011 Heating Season.

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on October 14, 2010 adopted an Order in the above entitled proceeding.

An Order has been enclosed for your records.

Very truly yours,

Rosemary Chiavetta
Secretary

Encls.
MH

See attached list for additional parties of record.

R-2009-2149262 - E-SERVE
ADMINISTRATIVE ASSISTANT JESSICA HORNER
OCA
PA OFFICE OF CONSUMER ADVOCATE
555 WALNUT STREET 5TH FLOOR
FORUM PLACE
HARRISBURG PA 17101

R-2009-2149262
ATTORNEY SHELBY A LINTON-KEDDIE
COLUMBIA INDUSTRIAL INTERVENORS
MCNEES WALLACE & NURICK LLC
100 PINE STREET
P O BOX 1166
HARRISBURG PA 17108-1166

R-2009-2149262 - E-SERVE
ATTORNEY ANDREW S TUBBS
COLUMBIA GAS OF PA INC
POST & SCHELL, P.C.
17 NORTH SECOND STREET
12TH FLOOR
HARRISBURG PA 17101-1601

R-2009-2149262 - E-SERVE
ATTORNEY STEVEN K HAAS
PSU
HAWKE MCKEON & SNISCAK LLP
100 N. TENTH STREET
HARRISBURG PA 17101

R-2009-2149262
ATTORNEY CANDIS A TUNILO
OCA
OFFICE OF CONSUMER ADVOCATE
555 WALNUT STREET 5TH FLOOR FORUM PLACE
HARRISBURG PA 17101-1923

R-2009-2149262
ATTORNEY THOMAS J SNISCAK
PA STATE UNIVERSITY
HAWKE MCKEON & SNISCAK LLP
100 NORTH TENTH STREET
HARRISBURG PA 17101

R-2009-2149262
ATTORNEY CHARIS MINCAVAGE
COLUMBIA INDUSTRIAL INTERVENORS
MCNEES WALLACE & NURICK LLC
100 PINE STREET
PO BOX 1166
HARRISBURG PA 17108

R-2009-2149262 - E-SERVE
ATTORNEY TODD S STEWART
NATURAL GAS SUPPLIER PARTIES
HAWKE MCKEON & SNISCAK LLP
100 NORTH TENTH STREET
HARRISBURG
PA PA 17101

R-2009-2149262
ATTORNEY ERIN L GANNON
OCA
OFFICE OF CONSUMER ADVOCATE
555 WALNUT STREET 5TH FLOOR FORUM PLACE
HARRISBURG PA 17101-1923

R-2009-2149262
BAN BAZZOUI
SELF
708 CHAMBERS RIDGE
YORK PA 17402-8821

R-2009-2149262
ATTORNEY JOHN F POVILAITIS MATTHEW A TOTINO
YORK GENERATION CO
RYAN RUSSELL OGDEN & SELTZER PC

800 NORTH THIRD STREET SUITE 101
HARRISBURG PA 17102-2025

R-2009-2149262
BETTY M ROGERS
PO BOX 65
EMIGSVILLE PA 17318

R-2009-2149262 - E-SERVE
ATTORNEY MICHAEL W HASSELL
COLUMBIA GAS OF PA INC
POST & SCHELL, P.C.
17 NORTH SECOND STREET
12TH FLOOR
HARRISBURG PA 17101-1601

R-2009-2149262
CHRISTY M APPLEBY ESQUIRE
OCA
555 WALNUT STREET
FIFTH FLOOR FORUM PLACE
HARRISBURG PA 17101-1923

R-2009-2149262
DANIEL G ASMUS
OSBA
THOMAS THOMAS ARMSTRONG & NIESEN
SUITE 500 212 LOCUST STREET PO BOX 9500
HARRISBURG PA 17108-9500

R-2009-2149262
JOHN H. ISOM MICHAEL W. GANG ESQS
COLUMBIA GAS
POST & SCHELL, P.C.
17 NORTH SECOND STREET 12TH FLOOR
HARRISBURG PA 17101-1601

R-2009-2149262
DANIEL G ASMUS, WILLIAM R LLOYD JR
OSBA
OFFICE OF SMALL BUSINESS ADVOCATE
300 N 2ND ST SUITE 1102 COMMERCE BLDG
HARRISBURG PA 17101

R-2009-2149262
MANAGER LAWRENCE NOWICKI
COLUMBIA GAS OF PA INC
COLUMBIA GAS OF PA INC
1020 NORTH HARTLEY STREET
YORK PA 17404

R-2009-2149262
DAVID A BUKOVICH
SELF
302 MUMPER LANE
DILLSBURG PA 17019

R-2009-2149262 - E-SERVE
SENIOR COUNSEL THEODORE J GALLAGHER
COLUMBIA GAS
COLUMBIA GAS OF PENNSYLVANIA
121 CHAMPION WAY SUTIE 100
CANONSBURG PA 15317

R-2009-2149262 - E-SERVE
DIR OF REGULATORY AFFAIRS MARK KEMPIC
COLUMBIA GAS
COLUMBIA GAS OF PENNSYLVANIA
121 CHAMPION WAY, SUITE 100
CANONSBURG PA 15317

R-2009-2149262
W EDWIN OGDEN
YORK GENERATION COMPANY LLC
RYAN RUSSELL OGDEN & SELTZER
SUITE 101
800 NORTH THIRD STREET
HARRISBURG PA 17102-2025

R-2009-2149262
ESQUIRE CHARLES DANIEL SHIELDS
OTS
PENNSYLVANIA PUBLIC UTILITY COMMISSION
PA PUC OFFICE OF TRIAL STAFF
PO BOX 3265
HARRISBURG PA 17105-3265

R-2009-2149262
W. EDWIN OGDEN
YORK GENERATION CO
RYAN, RUSSELL, OGDEN & SELTZER
1100 BERSHIRE BLVD., P.O. BOX 6219
READING PA 19610-0219

R-2009-2149262
ESQUIRE TANYA J MCCLOSKEY
OCA
OFFICE OF CONSUMER ADVOCATE
555 WALNUT STREET 5TH FLOOR FORUM PLACE
HARRISBURG PA 17101-1923

R-2009-2149262
GLORIA J WOODCOCK
229 LOCUST DRIVE
CORAOPOLIS PA 15108