



COMMONWEALTH OF PENNSYLVANIA

May 23, 2019

E-FILED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Energy Affordability for Low-Income Customers / Docket No. M-2017-2587711

Dear Secretary Chiavetta:

Enclosed please find the Reply Comments, on behalf of the Office of Small Business Advocate ("OSBA"), in the above-captioned proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Shelby A. Linton-Keddie".

Shelby A. Linton-Keddie
Assistant Small Business Advocate
Attorney ID No. 206425

Enclosures

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Energy Affordability for Low-Income
Customers**

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Docket No. M-2017-2587711

**REPLY COMMENTS OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

**Shelby A. Linton-Keddie
Assistant Small Business Advocate
Attorney ID No. 206425**

For:

**John R. Evans
Small Business Advocate**

**Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101**

Date: May 23, 2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Energy Affordability for Low-Income Customers :
: **Docket No. M-2017-2587711**
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I. INTRODUCTION

On May 10, 2017, the Pennsylvania Public Utility Commission (“PUC” or “Commission”) issued an Opinion and Order at Docket No. M-2017-2596907 initiating a comprehensive review of the Universal Service and Energy Conservation model.¹ The May 10th Order identified a list of topics for Comments including the following: (1) program design; (2) program implementation; (3) program costs; (4) program cost recovery; (5) program administration; (6) program report; and (7) program evaluation. Order at 3-4. The Order further directed the Law Bureau to prepare and file a Staff Report.

On July 14, 2017, the Commission issued a Secretarial Letter in that proceeding. The Secretarial Letter requested Comments from interested stakeholders and scheduled a two-day stakeholder meeting. Reply Comments were due 30 days after the stakeholder meeting.

Almost concurrently with the May 10, 2017 action, on May 5, 2017, the Commission entered an Opinion and Order at the above-captioned docket initiating a study regarding

¹ The Office of Small Business Advocate (“OSBA”) submitted Reply Comments on October 16, 2017, providing a history of universal service cost recovery and advocating for continued collection of such costs from residential customers (*i.e.*, not expanding collection to Commercial and Industrial customers). *See generally, Reply Comments of the Office of Small Business Advocate, Docket No. M-2017-2596907.*

home energy burdens, as the PUC found that “this study is a necessary first step in evaluating the affordability, cost-effectiveness, and prudence of Universal Service Programs.”²

On January 17, 2019, the Commission released and published a Staff Report (“Report”) prepared by the PUC’s Bureau of Consumer Services (“BCS”) and Law Bureau in compliance with the May 5, 2017 Order. In the Report, Commission staff made several observations based on data provided by utilities.³ Notably, however, the issue of cost recovery, including allocation of universal service costs, was absent from the Report. While there were some cost projections if energy burdens were modified and universal service programs were expanded, there was no contemplation or indication by staff that the Commission would be seeking these costs from anyone other than the residential class. In fact, the only cost projections contained in the Report reflect the impact on non-CAP residential customers.⁴

Even with the January Report, the PUC decided that it still did not have enough information to decide its next steps. Consequently, the Commission requested supplemental information of electric distribution companies (“EDCs”) and natural gas distribution companies (“NGDCs”), as well as Comments and Reply Comments from interested stakeholders on these issues.

² *Energy Affordability for Low Income Customers*, Docket No. M-2017-2587711, at 1 (May 5, 2017).

³ As summarized in the Report, topics of observation and discussion include: Energy Burdens for Gas and Electric Service; Impact of LIHEAP Grants on Energy Burdens; Pre-Program Arrearages and In-Program Arrears; Percentage of CAP Bills Paid In-Full; CAP Default and Termination Rates; Non-CAP Residential and Confirmed Low-Income (CLI) Customer Debt; Review of Other State Programs and Relevant Studies; and CAP Costs and Forecasts.

⁴ *See Report* at 107-108.

II. BACKGROUND OF OSBA'S INTEREST IN UNIVERSAL SERVICE ISSUES

The Small Business Advocate is authorized and directed to represent the interests of small business consumers of utility services in Pennsylvania under the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §§ 399.41 – 399.50.

Historically, the OSBA has not participated in proceedings specifically addressing universal service programs. Consistent with both the Natural Gas and Electricity Choice and Competition Acts, as well as longstanding Commission precedent and policy, non-residential customers are not eligible to participate in universal service programs, and therefore do not pay for them. The sole exception to that rule is Philadelphia Gas Works (“PGW”).⁵

Nevertheless, parties continue to submit proposals that contradict the clear direction of both the Competition Acts and decades of Commission precedent by expanding the collection of universal service costs (which total more than \$330 million a year) beyond the residential class.⁶ The OSBA submits these Reply Comments to protect the interest, survival, and growth of small businesses in Pennsylvania.⁷

⁵ Moreover, the OSBA has a unique economic interest in Philadelphia Gas Works (“PGW”) universal service programs because non-residential firm service customers are required (at this time) to pay the Universal Service and Energy Conservation Surcharge (“USEC”). The funding mechanism for PGW’s universal service programs was in place prior to PGW becoming subject to the Commission’s jurisdiction on July 1, 2000. The issue of whether non-residential firm service customers’ allocation should continue for PGW’s universal service programs was litigated at Docket R-2017-2586783. While the Commission decided, at this point, not to change the historic allocation methodology in this service territory which, the PUC even admits, is an exception to its general policy that only allocates these costs to residential customers, the Commission did adopt the ALJ’s recommendation at that proceeding to “submit data in its next base rate case to adjust the universal service cost allocations **for the removal of all non-residential customer classes.**” (emphasis added). See *PGW Order*, Docket No. R-2017-2586783, at 75 (Order entered Nov. 8, 2017). This decision signals that the Commission will finally consider standardizing the treatment of universal service costs solely to the residential class in PGW, rather than continue to allow this outlier to persist.

⁶ See *OCA Comments* at 14-15; see also *Joint Comments of TURN, CAUSE-PA, and Action Alliance of Seniors Citizens of Greater Philadelphia* (hereinafter “Joint Comments”) at 17-20.

⁷ The lack of discussion or reference to certain parties’ positions or Comments to date do not indicate the OSBA’s support of these proposals. As such, the OSBA continues to reserve its right in future stakeholder groups and other pleadings to express additional positions and opinions both at this Docket and Docket No. M-2017-2596907.

III. REPLY COMMENTS

As noted *supra*, with the exception of PGW, the Commission has specifically declined to allocate universal service costs to non-residential customers and has repeatedly affirmed the policy that the cost of universal service programs should be borne entirely by residential customers of NGDCs and EDCs.⁸ Proponents of cross-class allocation in this proceeding attempt to counter this policy by characterizing Universal Service Programs as “public goods”⁹ (rather than a service, which these programs are), by illustrating indirect effects to low-income households when they cannot afford utility service, and by arguing that the limitation of program eligibility (and thus cost causation) should be ignored.

These arguments overlook several important facts: (1) that these programs are not “public goods” in the economic sense; (2) that both the Natural Gas and Electric Choice and Competition Acts call for the continuation of universal service policies after deregulation; and (3) the reality that the Commission has never endorsed a policy that would result in overall economic harm to benefit a few, which runs counter to the PUC’s mission statement.¹⁰ With more than \$330 million annually being spent on these programs by NGDC and EDC residential ratepayers, the

⁸ The Commission has specifically declined to allocate universal service costs to non-residential customers in numerous gas proceedings, including the following: (a) Valley Energy, Inc. at Docket No. R-00049345; (b) Equitable Gas Company at Docket No. P-00052192; and (c) PPL Gas Utilities Corporation at Docket No. R-00061398. The Commission has also declined to allocate universal service costs to non-residential customers in numerous electric proceedings, including the following: (a) PPL Electric Utilities Corporation at Docket No. R-00049255, and (b) Metropolitan Edison Company and Pennsylvania Electric Company at Docket Nos. R-00061366 and R-00061367.

⁹ See *OCA Comments* at 14-15, citing Colton Whitepaper 72-81, 91-92.

¹⁰ “The Pennsylvania Public Utility Commission balances the needs of consumers and utilities; ensures safe and reliable utility service at reasonable rates; protects the public interest; educates consumers to make independent and informed utility choices; furthers economic development; and fosters new technologies and competitive markets in an environmentally sound manner.”

OSBA contends that these programs are “appropriately funded” and that cost recovery is properly allocated.¹¹

A. Universal Service Programs are Not “Public Goods” in the Economic Sense

In its Comments, the Office of Consumer Advocate (“OCA”) argues that because universal service programs serve a public good, the costs for these programs should be allocated across customer classes as if they are “public goods” in the economic sense. The Joint Commenters, by listing numerous societal benefits of these programs, make a similar argument. As explained below, this position should be rejected in its entirety.

In making this argument, the OCA, and to some extent, the Joint Commenters rely heavily on the reasoning contained in Roger Colton’s Whitepaper (hereinafter “Whitepaper”) to support this position. As explained in the Whitepaper on page 73:

In economic theory, public goods are those products and services that are valuable to society by which are undersupplied when society relies on private markets to provide them. Because they are needed and will not be made sufficiently available through private markets, the government must supply public goods. Classic examples of public goods include streetlights, city roads, and police protection.

The Whitepaper then goes on to suggest that the public good doctrine (which exists for the transmission and distribution systems and explains why all customers pay for the infrastructure of these systems) should be extended to universal service programs because these programs provide a societal benefit and therefore serve a “public good.” However, just because the Legislature mandates that universal service programs must exist does not mean that these costs should be treated as a “public good” for ratemaking and allocated to all classes.

¹¹ See *Comments of the Energy Association of Pennsylvania*, at 18-22, which illustrates the fact that, at current energy burden and funding levels, the Commonwealth annually reaches more people and spends considerably more money than neighboring states’ universal service programs.

The first problem with the Whitepaper is that it is fundamentally inconsistent with an economist's understanding of a "public good." Economics defines a "public good" as follows:

A public good is a good that is both **non-excludable** and non-rivalrous in that individuals cannot be excluded from use or **could be enjoyed without paying for it**, and where use by one individual does not reduce availability to others or the goods can be effectively consumed simultaneously by more than one person.¹²

Non-excludable goods are, as the term implies, those goods or services for which customers cannot be easily excluded. Examples include clean air, national defense, and oceans and lakes for recreation. Non-rivalrous goods are those for which the marginal cost associated with additional consumption is zero. Examples include a bridge, a television signal, and an under-utilized electric or gas utility distribution system.

Regular utility service meets neither criterion. Customers are easily excluded, since their service can be turned off for nonpayment. Moreover, while fixed distribution systems may be non-rivalrous, the actual gas or electricity delivered most certainly has a non-zero marginal cost. Thus, the "public good" argument for government intervention in the general provision of utility services, or for providing universal service, fails.

However, not all government intervention is justified by public goods. Consider the following:

The list of public goods is much smaller than the list of goods that governments provide. Many publicly provided goods are either rival in consumption, exclusive, or both. For example, high school education is rival in consumption. There is a positive marginal cost of providing education to one more child because other children get less attention as class size increases. Likewise, charging tuition can exclude some children from enjoying education. Public education is provided by

¹² See https://en.wikipedia.org/wiki/Public_good (emphasis added). See also, Microeconomics, Fifth Edition, Pindyck, Robert S. and Daniel L. Rubinfeld at 593: "Public good: Non-exclusive, nonrival good that can be made available cheaply, but which, once available, is difficult to prevent others from consuming."

local government **because it entails positive externalities, not because it is a public good.**¹³

Since the Legislature has mandated that Pennsylvania NGDCs and EDCs provide universal service, it can reasonably be concluded that universal service falls into some category of government intervention other than a “public good.”

The OSBA submits that universal service is provided to serve two functions. The first is to effect what economists call “redistribution” or “economic transfer” from higher income utility customers to lower-income utility customers, in order to achieve some perceived social benefit. The second is to provide insurance to customers that, if they should be so unfortunate as to lose much of their income (or fall behind on their bills), that programs exist to help the affordability of gas and electric service, as well as arrearage forgiveness, in an attempt to not lose access to basic utility service.

The broader, and more difficult question to answer, is what do these functions imply for allocating costs for universal service programs? The first function is simply a tax and redistribute function. As such, the issue is one of tax policy, which is generally in the purview of the Legislature. However, the Legislature has not offered any specific guidance or mandate regarding the assignment of universal service costs. Nevertheless, the Legislature has offered more recent guidance regarding a conceptually similar mandated program, the Act 129 Energy Efficiency and Conservation (“EE&C”) programs. These programs are similarly designed to achieve a public benefit, namely the reduction in overall energy consumption and peak demands, again to achieve some perceived social benefit. More specifically, these programs require that the utility provide significant benefits to the limited number of customers who participate in the programs, while collecting money from numerous non-participating customers in the process.

¹³ *Microeconomics, Fifth Edition*, Pindyck, Robert S. and Daniel L. Rubinfeld at 645-46. (emphasis added)

However, for these programs, § 2806.1(a)(11) specifies that, “Cost recovery to ensure that measures approved are financed by the same customer class that will receive the direct energy and conservation benefits.” (emphasis added). Thus, for EE&C programs, the Legislature has indicated that the costs incurred to directly benefit customers in a particular rate class must be borne by other customers within that class. The Legislature most certainly did not specify (and the Commission has not endorsed) that social benefits associated with overall reduced energy consumption should be assigned haphazardly to all rate classes.

Turning to the second function, eligibility and utility, the cost allocation implications are obvious, as it is a simple matter of cost causation. Universal service is a set of four programs, for residential customers, who are either payment troubled or low-income. As even OCA and Joint Commenters seem to recognize, there are no direct benefits of these programs to commercial or industrial customers. As a result, and consistent with decades of Commission precedent, there is no rationale for assigning costs of these programs to non-residential customers. The OSBA requests that the PUC continue that position and policy here.

B. The Competition Acts and Commission Precedent Support the Position that Universal Program Costs Should Be Recovered Solely from Residential Customers

Next, Joint Commenters, in their Comments both here and at Docket No. M-2017-2596907, advocate for cross-class collection of universal service costs, in part because “[t]he Choice Acts require the commission to ensure that electric and natural gas universal service programs are appropriately funded and available in each service territory.”¹⁴ Proponents of cross-class allocation also put much stock in the requirement that universal service charges must be non-bypassable, and argue that this means that non-residential customers should not be

¹⁴ See *Joint Comments* at 18, citing 66 Pa. C.S. §§ 2804(9), 2203(8)-(9).

permitted to bypass universal service charges. The OSBA agrees that EDCs and NGDCs must offer universal service programs with appropriate funding and availability. However, the Choice Acts dictate that the public purpose is promoted by continuation of universal service policies after deregulation, which includes the allocation of universal service costs solely to residential customers.

Specifically, Section 2802(17) of the Electric Competition Act provides:

There are certain public purpose costs, including programs for low-income assistance, energy conservation and others, which have been implemented and supported by public utilities' bundled rates. **The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services, and full recovery of such costs is to be permitted through a non-bypassable rate mechanism.**

(emphasis added).

Similarly, Section 2203(7) of the Natural Gas Competition Act states:

The commission shall, at a minimum, continue the level and nature of the consumers protections, policies and services within its jurisdiction that are in existence as of the effective date of this chapter to assist low-income retail gas customers to afford natural gas services.

(emphasis added).

As recently as 2006, the Commission decided it would continue its longstanding policy of allocating CAP costs only to residential customers. In the *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms Final Investigatory Order*, Docket No. M-00051923 (Order entered December 18, 2006), the Commission stated:

After careful consideration of the comments and the arguments presented, the Commission will continue its current policy of allocating CAP costs to the only customer class whose members are eligible for the program – residential customers. **The Commission believes that we should not initiate a policy change that could have a detrimental impact on economic development and the climate for business and jobs within the Commonwealth.**” (emphasis added).

Further, the Commission's longstanding policy of not allocating universal service costs to non-residential customers was appealed to the Commonwealth Court and affirmed.¹⁵ That proceeding, in fact, explicitly rejected the contention that non-bypassable means that all classes must contribute to universal service cost recovery. Rather, non-bypassable means nothing more than customers cannot avoid the universal service charge by shopping for electric generation. Notably, in 2008, the Commonwealth Court specifically rejected that argument that the "word non-bypassable in these sections means that the rate mechanism may not allow any customer class to bypass a contribution to the cost of universal service programs."¹⁶

In so doing, the Commonwealth Court pointed to both the language of the Electric Choice and Competition Act and prior Commission action when affirming the PUC's approval of the Administrative Law Judges' decision. Specifically, the ALJs stated:

...Rather, in the context of the Competition Act, a nonbypassable charge means that universal service costs that were in the bundled rates for a particular customer class should remain within that class after rate unbundling. Specifically, if universal service costs were recovered only from residential customers prior to unbundling, **as they were**, then all residential customers should continue to pay these costs regardless of whether a residential customer begins shopping or does not shop.

(emphasis in original).¹⁷

This reasoning holds true today.¹⁸ Other than an overarching desire of certain stakeholders to get more money into these programs to support the unarticulated and intangible

¹⁵ *Popowsky v. Pennsylvania Public Utility Commission*, 960 A. 2d 189 (Pa. Cmwlth. 2008).

¹⁶ *See id.* at 202.

¹⁷ *Id.*

¹⁸ The OSBA notes also that the class-specific EE&C charges are also non-bypassable, meaning that customers must pay them whether they shop for electric generation or not. It does not mean that costs for all EE&C programs must be bundled all together and recovered from all rate classes.

“societal costs and benefits,”¹⁹ there has been no adequate justification either that the current universal service programs are not appropriately funded or that the current allocation methodology should be changed.

C. Allocating Universal Service Costs to Small Business Customers Would Economically Harm Small Business Development in the Commonwealth

As set forth above, universal service programs are not “public goods” for purposes of ratemaking, both Competition Acts require the continuation of universal service policies after unbundling (which includes cost recovery only from residential customers), and the Commission has a history of allocating costs of a class-specific program *to* that rate class.

Moreover, the OSBA respectfully submits that the cost projections, lack of gradualism and possible rate shock of shifting these costs to other rate classes (when they are not eligible to directly benefit) would have a detrimental effect on small businesses across the Commonwealth.

The scope of the current review involves, in part, an examination of the adequacy of funding levels for universal service programs. The OSBA respectfully submits that the current review should *not* expand the scope of universal service programs by forcing Commercial and Industrial customers to pay for universal service programs that only directly benefit residential customers.

The OSBA is sensitive to the concerns of any customer that has trouble paying its utility bill. In fact, some of the small business owners OSBA represents are paying for USP in their homes (for both gas and electric), and then a third time for their business in PGW’s service territory. If these costs are allocated across rate classes going forward, all small business owners across the Commonwealth would be paying these charges at least a third time, just like the

¹⁹ See *Joint Comments* at Docket No. M-2017-2596907 at 55; See also *Joint Comments* at 19: “Indeed, poverty is a broad social problem, impacting all customers and requiring a collective solution.”

situation in the PGW service territory. There is no justification for a wholesale policy change that would have detrimental impacts on the economic climate and businesses in the Commonwealth.²⁰

Because the Report did not explore requiring non-residential customers to pay the costs of USPs, the Report did not determine the average increase to bills broken down by service territory. Consequently, it is difficult to say with certainty how much this policy change, if effectuated, will harm Pennsylvania businesses. However, in looking at numbers from PGW, and the fact that the average universal service cost for commercial ratepayers ranges between \$670-\$702 annually²¹ (which could essentially double since Joint Commenters and OCA would allocate these costs for both gas and electric), the OSBA opposes this policy change.

When testifying recently on the effect of HB 11, which was projected to increase small business rates by an average of \$1,300 annually, the OSBA explained:

[An increase of this level] will have a significant impact on both the marginal costs and operations of these businesses. If HB 11 passes in its current form, small business owners may be forced to absorb these increases personally, pass through these increases to their customers, delay pay raises for workers or delay hiring new workers. Any of these results cut into a small business's bottom line, which could cause a stall or decline in small business growth across the Commonwealth. Such a decline would seriously impact the Commonwealth's economy.²²

Although this proceeding does not concern HB 11, the rate impact involved is potentially similar, as are the detrimental effects of these charges if thrust upon small business customers.

²⁰ See also *Comments of the PA Chamber of Business and Industry* in Docket No. M-2017-2596907, which echo these concerns.

²¹ See *PGW Comments* at 16.

²² See *Testimony of the Pennsylvania Small Business Advocate* to the Pennsylvania House of Representatives House Consumer Affairs Committee, Hearing HB 11, May 6, 2019.

III. CONCLUSION

The OSBA respectfully requests that the Commission adopt the position set forth in these Reply Comments, as well as the unambiguous direction of the Natural Gas and Electric Choice and Competition Acts, that the PUC continue its longstanding policy of only allocating universal service costs to residential customers. To do otherwise would circumvent legislative direction and intent, would result in discriminatory rates, and would be harmful to the economic standing, growth, and development of small businesses across the Commonwealth.

Respectfully submitted,



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Date: May 23, 2019

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Energy Affordability for Low-Income Customers :
: **Docket No. M-2017-2587711**
:

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email and/or First-Class mail (*unless otherwise noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).


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