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Sent: Friday, April 18, 2008 1:37 PM
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Subject: Proposed Rulemaking, Universal Service, L-00070186

Attached please find the Comments of the Office of Consumer Advocate in the above-captioned rulemaking docket. A hard copy is being filed with Secretary McNulty.

If you need a Word version of this document, please feel free to contact me. Also, if you have any problems with this document, you can contact me at any time.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Universal Service and Energy Conservation Reporting Requirements and Customer Assistance Programs	:	Docket No. L-00070186

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

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Dated: April 17, 2008

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I. INTRODUCTION

On February 9, 2008, the Commission's Proposed Rulemaking Order in the above-captioned docket was published in the Pennsylvania Bulletin. Through this Proposed Rulemaking Order, the Commission is seeking to establish a unified process by which the level of funding for each natural gas distribution company (NGDC) and electric distribution company (EDC) could be determined in conjunction with the Commission's review of the company's universal service and energy conservation plan. Proposed rulemaking Order at 1. This Proposed Rulemaking follows the Commission's Final Investigatory Order in Customer Assistance Programs: Funding Levels and Cost Recovery, Docket No. M-00051923 (Order entered December 18, 2006) and is a companion Order to the Commission's Proposed Revisions to its Customer Assistance Program (CAP) Policy Statement, Docket No. M-00072036 (Order entered September 5, 2007). The OCA has actively participated in all phases of the Commission's consideration of the design, funding, and cost recovery for universal service programs, including the Customer Assistance Programs.

In its Final Investigatory Order, the Commission directed that a rulemaking proceeding be initiated to amend various Commission regulations and to address certain additional issues. The Final Investigatory Order, in part relevant to this rulemaking, directed that a rulemaking proceeding be initiated to amend:

> [Commission] regulations at 52 Pa. Code § 54.74 and § 62.4 to establish a triennial review process that takes the form of a tariff filing and addresses CAP program funding, design criteria and cost recovery on a case-by-case basis. This proposed rulemaking will address surcharge adjustments, the type of costs to be included in the surcharge as well as the recognition of CAP savings, if any, as offsetting some of these costs. This proposed rulemaking will also address how utilities will provide for the application of LIHEAP cash grants.

> Additionally, the proposed rulemaking will address the issues of Default Provisions for Failure to Comply with Program Rules and Timely Collections as discussed within the body of this order.

Final Investigatory Order at 68-69.

The OCA supports the Commission's initiative to establish regulations regarding review, design, cost recovery, and funding of the universal service programs. As the Commission is aware, increases in energy prices have imposed significant burdens on all consumers and these burdens are likely to increase in the future. Recent natural gas prices have trended upward, now reaching approximately $10/Mcf. Electric price increases that are expected at the end of the generation rate caps for the major utilities are likely to be significant for most Pennsylvania consumers. For electric companies that have already exited their generation rate cap, customers have seen increases in their total bills ranging from about 30% to 40% in the Pennsylvania Power Company and UGI-Electric Company service territories to 75% in the Pike County Light & Power Company service territory.

Participation in universal service programs has grown dramatically since the restructuring of the electric industry occasioned by the Electricity Generation Customer Choice and Competition Act and the restructuring of the natural gas industry through the Natural Gas Choice and Competition Act. By the end of 2006, programs operated by the natural gas distribution companies (NGDCs) had 184,833 customers enrolled, while programs operated by the electric distribution companies (EDCs) had 225,691 customers enrolled. 2007 Universal Service Report, p. 38. Total CAP program costs for the programs operated by the NGDCs and EDCs exceeded $290 million annually at the end of 2006, almost all of which is paid for by the utilities' residential customers. 2007 Universal Service Report, pp. 43-44.

The Commission has now proposed regulations that are to govern certain aspects of universal service program review, design, program funding, and cost recovery. In most regards, the Commission's proposed regulations will allow for the Commission to effectively review the adequacy of each distribution company's universal service programs, funding levels and cost recovery proposals. As noted in the Commission's Final Investigatory Order, as energy prices continue to rise and the cost of universal service programs continues to increase, consideration of CAP design and cost recovery in the same proceeding will assist the Commission in balancing the interests of all customers, both participating and non-participating. Final Investigatory Order at 19-20. The OCA fully supports this approach.

In addition to the overall Commission effort to establish a comprehensive triennial review process, the OCA supports many of the specific recommendations in the Proposed Regulations that will provide for improved universal service programs. These recommendations include:

- clarification that gross household income does not include the value of food stamps or other noncash income (Section 54.72—Definitions)
- establishment of specific goals of the universal service and energy conservation programs to include the goal of maintaining affordable electric service (Section 54.73(b)(1))
- inclusion of a requirement that the EDC and NGDC consult with BCS regarding the design and implementation of the plan (Section 54.74(a)(4); Section 62.4(a)(4))
- specification of the tariff components and information necessary to support the filing (Section 54.74(b); Section 62.4(b))
- inclusion of a case-by-case determination regarding the coordination of LIHEAP benefits so that the benefits can be most effectively used within the particular program design (Section 54.74(b)(2)(iv), Section 62.4(b)(2)(iv))

- addition of the requirement that the Commission consider timely collection efforts when evaluating the reasonableness of universal service cost recovery (Section 76.4(d))

- addition of reporting requirements on collection activities (Section 54.75; Section 62.5)

- specification of the categories of cost and the cost savings that should be considered for recovery (Section 76.4)

The OCA submits that these recommendations, and others proposed by the Commission, should serve to enhance Commission oversight and review of the universal service programs and cost recovery for such programs.

The OCA does have some concerns with the proposed regulations, however. Those concerns are discussed in more detail below in reference to the specific sections. While the OCA provides comments on several sections of the proposed regulations and includes proposed language to clarify or modify the proposed regulations, the OCA has identified three major areas of concern with this rulemaking.

First, in establishing the components for cost recovery through the universal service charge, while the Commission has correctly recognized that cost savings must be accounted for when establishing the reasonable costs to be recovered from ratepayers, the Commission has not specifically identified a component for cost offsets. That is, the Commission has not identified those costs that are embedded in base rates that have been redirected to the CAP. Accounting for costs already embedded in base rates that are redirected to the CAP or otherwise recovered through the surcharge is necessary in order to avoid double recovery of costs. The OCA has provided some additional language in several sections to reflect the need for consideration of cost offsets so that there is no double recovery of expenses.

The OCA is also concerned with the proposed regulatory provisions that specify that cost recovery should only be from the residential customer class. While the OCA recognizes that the Commission has stated its current policy to limit universal service cost recovery to residential customers in most instances—a policy with which the OCA respectfully disagrees on both legal and public policy grounds—the OCA submits that it is not appropriate to embed such a policy in regulations. The OCA currently has an issue pending on appeal as to whether Section 2802(17), 2804(9) and Lloyd v. Pa. Pub. Util. Comm'n, 904 A.2d 1010, 1026-1027 (Pa. Commw. Ct. 2006) interpreting those sections requires that all customer classes share in the cost responsibility for universal service program costs. Popowsky v. Pa. Pub. Util. Comm'n, 701 C.D. 2007 (pending oral argument). Even assuming, however, that the Commission's allocation of universal service costs to residential customers is permissible, the OCA submits that such an allocation should not be made mandatory through regulation. Indeed, the proposed regulation fails to reflect the Commission's Orders that have found that assignment of cost responsibility to all customer classes should be continued in certain circumstances. See, *e.g.*, Pa. PUC v. Philadelphia Gas Works, Docket No. R-00061931, slip op. at 88 (Order entered September 28, 2007).

The third area of concern is with the proposed regulations regarding dismissal of customers from CAP for failure to comply with program rules. See, Proposed Section 76.5. In this section, the Commission has included "failure to apply for LIHEAP" and "failure to accept usage reduction services" as reasons for dismissal from CAP. The OCA submits that neither of these reasons should result in an automatic dismissal from CAP. As to LIHEAP, the OCA submits that the proposed regulation fails to recognize the many reasons that a CAP customer may not be able to apply for LIHEAP. One of the primary barriers to participation in LIHEAP is

the lack of effective knowledge about the program, not a matter of choice as the proposed regulation presumes. OCA Comments of January 30, 2006 at Docket No. M-00051923 at 54-55, Appendix C (Colton White Paper at 45). Penalizing customers through removal from CAP based on the assumption that they are making a choice not to apply, when they may lack effective knowledge of the program, the program may be closed, or their LIHEAP grant may have been directed to another fuel provider, is unreasonable. The OCA fully supports encouraging all eligible customers to apply for LIHEAP and providing customers with the knowledge, tools and assistance to complete the application process when the program is open, but penalizing customers with automatic dismissal from CAP is not reasonable.

Similarly, penalizing customers by removal from CAP for failure to accept usage reduction service, without any recognition that the CAP participant may not own the home or be able to accept such services due to other home repair issues, is unreasonable. CAP participants may not have ownership of their homes which would allow them to accept usage reduction services. Even if they are homeowners, CAP participants may not have the financial wherewithal to make other needed repairs that would be identified or occasioned by the delivery of usage reduction services. A regulation that requires dismissal from CAP based only on non-acceptance of these services fails to recognize these situations facing many CAP participants. The regulation should be removed, or modified substantially to reflect the fact that many low income customers are not in a position to "accept" usage reduction services.

In the sections below, the OCA details its proposed modifications to the regulations and the reasons for those modifications. The OCA again appreciates this opportunity to comment and looks forward to continuing to work with the Commission and interested parties on these issues.

II. COMMENTS ON SPECIFIC SECTIONS

A. Introduction

In this Section, the OCA will identify the proposed regulations that the OCA believes require modification or additional clarification. Since the relevant provisions Section 54.71, *et seq.* regarding Electric Distribution Company (EDC) universal service programs and Section 62.1, *et seq.* regarding Natural Gas Distribution Company (NGDC) universal service programs that the OCA will be addressing are identical, the OCA will treat the proposed regulation sections together.

B. Section 54.72 and 62.2—Definitions

The Commission's proposed regulations do not contain a definition of the term LIHEAP grant, a term which is used in the regulations. See, *e.g.*, Section 54.74(b)(2)(iv); 62.4(b)(2)(iv). The OCA recommends that the Commission include a specific definition of LIHEAP grant. As the Commission uses the term in the regulations, the OCA understands that the Commission is referring to the LIHEAP *cash* grant. The definition should make clear that the LIHEAP grant refers to the basic annual cash grant and not to the LIHEAP Crisis grant. The LIHEAP Crisis grant is generally provided to resolve a pending disconnection of service or other arrearage problem and is applied to the customer's account to resolve that crisis. The LIHEAP cash grant is treated differently, however, depending on the CAP program design. So that there is no confusion, the OCA recommends the following definition be added to the regulations:

> LIHEAP grant: A cash grant from the Low Income Home Energy Assistance Program provided to a customer pursuant to Section 638.1 of the Department of Public Welfare's LIHEAP Handbook. For purposes of these regulations, LIHEAP grants do not include LIHEAP crisis payments.

This definition will clarify the use of the term in the Commission's regulations.

C. Sections 54.74(a)(5) and 62.4(a)(5)—Review of universal service and energy conservation plans, funding and cost recovery.

In these sections, the Commission includes language regarding the funding of universal service and energy conservation programs in an EDC's or NGDC's service territory. In the proposed regulations, the Commission language provides that the EDC or NGDC is to recover the costs related to universal service and energy conservation from "residential customers." While the Commission stated in its Final Investigatory Order that it would continue its policy of assigning all costs of universal service and energy conservation programs as it had in past cases, which was in most instances to residential customers, the Commission recognized that for some utilities, specifically Philadelphia Gas Works, the policy has been to share the cost responsibility for these programs among all firm service customers. Final Investigatory Order at 31, fn. 25. See also, Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-00061931, slip op. at 88 (Order entered September 28, 2007).

The OCA submits that the Commission should not include a provision in its regulations that cost responsibility for universal service programs is to be assigned only to residential customers. Cost responsibility is a matter that is determined by Commission Orders, statutes, and the Courts.[1] Even under the prior Commission Orders, however, the Commission has indicated that it views the determination of cost responsibility as a policy decision, which would make it particularly unsuitable to be included in a regulation. Final Investigatory Order at 31-32.

[1] The Office of Consumer Advocate has appealed the Commission's determination that the costs of universal service and energy conservation programs should only be assigned to the residential class as being inconsistent with Section 2802(17) and 2804(9) of the Public Utility Code and the Commonwealth Court's holding in Lloyd v. Pa. Pub. Util. Comm'n, 904 A.2d 1010, 1026-1027 (Pa. Commw. Ct. 2006). Popowsky v. Pa. P.U.C., 701 C.D. 2007 (Pending Oral Argument).

The OCA submits that the regulation as written would be inconsistent with the Commission's Final Investigatory Order, inconsistent with various Commission Orders, and unsound public policy. As such, the OCA submits that the regulation must be changed as follows:

> 54.74(a)(5) In the proceeding on the plan, the Commission will establish a funding level that balances efforts to ensure the availability of universal service and energy conservation programs throughout an EDC's service territory with the cost of the programs and the rate impact on ~~residential~~ customers that are not enrolled in the programs, and will permit an EDC to recover costs related to universal service and energy conservation ~~from residential customers~~.
>
> 64.4(a)(5) In the proceeding on the plan, the Commission will establish a funding level that balances efforts to ensure the availability of universal service and energy conservation programs throughout an EDC's service territory with the cost of the programs and the rate impact on ~~residential~~ customers that are not enrolled in the programs, and will permit an EDC to recover costs related to universal service and energy conservation ~~from residential customers~~.

This change will allow for the Commission Orders determining assignment of cost responsibility in various cases to remain in effect, and will allow for any necessary adjustments in the future if the law or policy is changed.

D. Sections 54.74(b) and 62.4(b)—Tariff Contents

1. Sections 54.74(b)(1) and 62.4(b)(1)—General Requirements

In these sections, the Commission sets forth the information that must be included in the tariff filing that the EDC or NGDC makes to establish its universal service plan. The OCA recommends two modifications to this section. In subsection 54.74(b)(1) and 62.4(b)(1), the Commission proposes to modify the first sentence setting forth the general plan components in several respects. The OCA is concerned that, when listing the program types, the Commission changes the phrase "a CAP, LIURP, CARES, Hardship Funds *and* other programs, policies and protections..." to "or other programs, policies and protections...". Although the change from

"and" to "or" may appear insignificant on first review, the possibility arises that the list may be read to suggest a selection among the programs rather than the inclusion of all such programs. All of the programs listed are part of a comprehensive universal service and energy conservation plan. The OCA recommends that the "and" remain to avoid any misinterpretation. In the alternative, the phrase "and/or" could be added so that it is clear that more than one of the listed programs is to be included in the plan.

2. Sections 54.74(b)(1)(iii)(A) and (C) and 62.4(b)(1)(iii)(A) and (C)—Needs Assessment

The second modification concerns subsections 54.74(b)(1)(iii)(A) and (C) and 62.4(b)(1)(iii)(A) and (C). In these sections involving the needs assessment, the proposed regulations request that that the number of "identified low income customers" and "identified payment troubled, low income customers" be provided. Elsewhere in the regulations, however, the term "confirmed low income" is used. See, *e.g.*, Section 54.72--definitions. The OCA believes that it is the intent of these subsections to refer to "confirmed" low income customers and recommends that this phrase be used in the subsections for clarity. If the Commission is seeking different information, it should define the term "identified low income customer" so that it is clear what information is to be provided.

3. Sections 54.74(b)(3) and 62.4(b)(3)—Documentation in support of funding and cost recovery for universal service and energy conservation.

In these subsections, the proposed regulations set forth the requirement that the tariff filing must include documentation of the costs for the universal service and energy conservation programs. The proposed regulations properly recognize that the tariff filing must contain documentation of cost savings that result from customer participation in these programs.

The OCA submits, however, that cost savings are not the only item that should be accounted for when determining the funding of universal service and energy conservation programs. In addition to expenses that might be reduced in an absolute sense, there are expense items that are already embedded in base rates that may be redirected to support the universal service programs. These items must also be accounted for in order to avoid any double recovery of expenses.

The proper treatment of cost savings and cost offsets related to universal service and energy conservation programs takes on greater importance as the cost recovery mechanism for these programs is moved out of base rates and into a separately stated, reconcilable surcharge mechanism. Through the surcharge mechanism, the utility is recovering the full cost of the program even though some of those costs related to the program are embedded in base rates. Calculating these cost savings and cost offsets when a surcharge mechanism is used is necessary to avoid over-recovery of costs.

It is important to note that the term "cost savings" that is used in the proposed regulations may not encompass all adjustments that are necessary when universal service costs are recovered through a separately stated and fully reconcilable surcharge mechanism. In general, it is the OCA's understanding that cost savings represent those utility expenses that have been reduced or avoided in an absolute sense as a result of the universal service program. An example would be reductions in collection and termination costs, or reductions in working capital expense associated with carrying bad debt.

Cost offsets, though, include costs that are already embedded in base rates, a portion of which will now be included in the automatic surcharge recovery mechanism. Such cost offsets could include a portion of labor expense when existing staff positions included in base rates are redirected to universal service issues, the cost of fleet vehicles that may be used for

outreach purposes, administrative overhead, and supervisory staff expense. The most significant cost offset that needs to be accounted for is the uncollectible expense that is embedded in base rates.

Uncollectible expense in base rates represents the amount of the bill that a delinquent customer does not pay. When a customer is in the CAP, however, the amount of the bill that a customer does not pay is called the CAP credit and is recovered from other customers through the reconcilable surcharge. The level of uncollectible expense established in the base rate case is affected by the number of customers in the CAP since the amount the CAP customer is not able to pay is no longer considered an uncollectible expense for base rate purposes. Rather, it is considered a CAP expense and it is recovered through the reconcilable universal service charge. The problem arises when more customers move into the CAP after the level of uncollectible expense is set in the base rate case. As more customers move into the CAP, more of what was the uncollectible expense amount for those customers that had been reflected in base rates becomes the CAP credit which is recovered through the reconcilable surcharge. This creates the possibility of a double recovery of the uncollectible expense in base rates that must be accounted for in the surcharge mechanism.

The Commission recently recognized this potential in the base rate case involving the Philadelphia Gas Works. There, the Commission stated:

> We find the ALJs recommendation to be supported by the record as well as Section 1408 of the Code. Accordingly, we find OCA's argument to be convincing. *Double recovery of uncollectible accounts expense is a possibility and can be alleviated by implementing a mechanism for reconciliation.*

Pa. PUC v. Philadelphia Gas Works, Docket No. R-00061931, slip op. at 42-43 (Order entered September 28, 2007) (emphasis added)(PGW Order).

Given the need to recognize both cost savings and cost offsets when determining appropriate universal service cost recovery through the surcharge mechanism, the OCA recommends the following modifications to Sections 54.74(b)(3) and 62. 4(b)(3):

> 54.74(b)(3) *Documentation in support of funding and cost recovery for universal service and energy conservation.* The tariff filing must contain documentation of costs for the EDC's existing universal service and energy conservation program and a projection of costs for the next 3 years. The cost projection must take into account changes proposed to be made to the programs and the impact of their implementation on costs. The tariff filing must contain documentation of cost savings and offsets that result from customer participation in these programs~~, to the extent that savings exist~~.
>
> 62.4(b)(3) *Documentation in support of funding and cost recovery for universal service and energy conservation.* The tariff filing must contain documentation of costs for the EDC's existing universal service and energy conservation program and a projection of costs for the next 3 years. The cost projection must take into account changes proposed to be made to the programs and the impact of their implementation on costs. The tariff filing must contain documentation of cost savings and offsets that result from customer participation in these programs~~, to the extent that savings exist~~.

These changes will assist the Commission in collecting all necessary information to assess the appropriate costs associated with the universal service and energy conservation programs.

4. Sections 54.74(b)(4)(iv) and 62.4(b)(4)(iv)--Surcharge

In 54.74(b)(4)(iv) and 62.4(b)(4)(iv), the Commission requires a statement with the utility tariff filing that the surcharge mechanism proposed by the tariff filing is "applicable only to residential customers." As discussed in Section II.C, above, such a provision is not fully reflective of Commission Orders on this subject matter nor is it sound public policy. In the most recent base rate case for the Philadelphia Gas Works, the Commission directed a continuation of PGW's practice of having its universal service surcharge applicable to all firm customers. PGW Order at 88. The OCA urges the Commission to remove subsections 54.74(b)(4)(iv) and 62.4(b)(4)(iv). The OCA modification is shown as follows:

~~54.74(b)(4)(iv) A statement that the surcharge is applicable only to residential customers.~~

~~§62.4(b)(4)(iv) A statement that the surcharge is applicable only to residential customers.~~

As noted in Section II.C, above, this change will allow Commission Orders to remain effective and will allow for any changes in the law or policy to be accommodated in the future.

E. Section 76.4—Recovery of costs of customer assistance programs.

1. Section 76.4(a)(1)—Recovery from residential customers.

In Section 76.4, the Proposed Regulations set forth considerations that are to apply to the recovery of CAP costs by a distribution company.[2] The first consideration listed in subsection 76.4 (1) is that the CAP costs "shall be recoverable only from residential customers." As set forth in Section II.C above, this reference should be removed as it is not consistent with existing Commission Orders, has been challenged on appeal, and is not sound public policy. To allow the Commission the ability to respond to changes in law or policy, the subsection should be removed in its entirety. The OCA recommends the following:

> The following considerations apply to the recovery of CAP costs by a distribution company:
>
> ~~(1) CAP costs shall be recoverable only from residential customers.~~

The OCA submits that this provision is not necessary, is inconsistent with existing Commission case law and is not sound public policy. As such, it must be removed.

2. Section 76.4(2)—Eligible Costs

Proposed Section 76.4(2) sets forth the CAP costs that are eligible for recovery if found to be prudently incurred and reasonable in amount. The OCA has two recommended

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[2] The OCA would note that the numbering in Section 76.4 differs between the Commission's slip opinion and the *Pennsylvania Bulletin* version. The OCA has followed the numbering included in the *Pennsylvania Bulletin* version of the proposed regulations.

changes to Section 76.4(2). The first change is substantive and concerns the inclusion of costs related to collection activities in subsection 76.4(2)(ii). The second change is structural in nature and attempts to capture the notion that all of the listed cost recovery categories must be prudent, reasonable, incremental expenses attributable to CAP, and will not result in double recovery. The OCA will discuss each issue below.

a. Subsection 76.4(2)(ii)—Administrative Expenses Including Collection Related Expenses

In subsection 76.4(2)(ii), the Commission includes in the amounts recoverable through the universal service surcharge the "costs related to collection activities." The OCA submits that costs related to collection activities should not be recovered through the universal service surcharge. This language should be removed from the proposed regulation.

There are several reasons why it is improper to included "costs related to collection activities" in the universal service surcharge. First, collection activities are activities that each utility must pursue in the normal course of its business operations for all customers. There is nothing unusual about these expenses that would warrant single item rate treatment as is proposed in the regulations. Moreover, it is critically important that the expenses associated with any collection activities be matched to the revenues generated by the collection activities. For example, the costs of disconnection and reconnection of service are offset in part by the revenues generated by disconnection and reconnection fees, late fees, and the like that are charged to customers. In a base rate case, this matching of the expense and revenues occurs, providing for appropriate cost recovery for collection-related costs. There is no basis to isolate one item of collection costs and provide dollar for dollar recovery of that cost through the universal service surcharge when there are corresponding revenues that must also be addressed.

Second, the language of the regulation does not identify what constitutes "collection activity" or whether the "collection activity" is to be limited solely to collection efforts directed toward CAP customers with CAP arrearages. If the "collection activity" is intended to permit the recovery of collection costs incurred for non-CAP customers, the OCA submits that it is wholly improper to include those costs in the universal service surcharge mechanism which is only intended to recover costs associated with specific universal service programs.

Even if the Commission intends to limit collection costs to those associated with collection activities for CAP customers and CAP arrearages only, the language fails to define what constitutes "collection activity" for a CAP customer and when that activity becomes a non-CAP "collection activity." For example, once a CAP customer is disconnected from service, and thus no longer a CAP customer, are any further collection activities eligible for recovery through the universal service surcharge? Similarly, should any revenues obtained from the collection activity either before or after the customer is in CAP be credited to the universal service surcharge? These issues and others would have to be determined to properly analyze any claim for collection related expenses.

The use of the term "related to" collection activities also presents substantive questions about what costs satisfy the "related to" test. Would the allocated depreciation expense associated with vehicles used in field visits be considered "related to" collection activities? Other costs, such as customer information system costs, raise the same question.

Furthermore, the regulation would raise a significant concern about double recovery of collection activity costs that may be almost impossible to solve. By definition, eligibility for CAP programs is limited to those utility customers that are "payment-troubled."

The expenses associated with trying to collect from those payment troubled customers would be embedded in base rates prior to the customer entering the CAP. If the cost of those collection activities before the customer enters the CAP are then allowed to "follow" the customer into the CAP program and be recovered through the surcharge mechanism, base rates would have to be reduced to avoid double recovery.

All of these problems are exacerbated by the fact that collections expenses are rarely directly assignable expenses. Instead, these are expenses that are allocated both jurisdictionally and between customer classes in the fully allocated cost of service study. If some of these costs are now directly assigned through the universal service charge, the cost of service allocators will have to be adjusted to reflect this direct assignment of collection related costs to avoid the residential class overpaying their share of customer service expenses.

The OCA submits that costs related to collection activities should not be recovered in the universal surcharge mechanism. Such cost recovery improperly provides single issue ratemaking treatment for an ordinary expense of doing business, ignores the need to match revenues from collection activities with costs, and will result in complex reconciliation proceedings as issues regarding the types of costs, allocation and double recovery are litigated in each case. The OCA recommends the following modification:

76.4(2)(ii) Administrative costs~~, including costs related to collection activities~~;

There is no basis for inclusion of these costs in the universal service surcharge.

b. Subsection 76.4(2)—Costs Eligible For Recovery

Subsection 76.4(2) identifies the CAP costs that are eligible for recovery through the surcharge and establishes the standards for recovery. The standards set forth in subsection 76.4(2) include requirements that the costs are prudently incurred, reasonable in amount,

attributable to CAP and do not result in double recovery. As drafted, however, the language does not make clear that the standards for recovery apply to each of the enumerated expenses. The OCA recommends the following structural changes to Subsection 76.4(2) to make clear that the section does not create an entitlement to recovery of any particular expense without meeting the standards:

(2)(a) To the extent not otherwise excluded by another regulation, the following CAP costs are eligible for recovery~~, if prudently incurred and reasonable in amount~~:

(i) CAP credits;
(ii) Administrative costs, including costs related to collection activities;
(iii) Preprogram arrearage forgiveness~~ to the extent that a distribution company can prove that recovery of these costs will not result in double recovery~~.
(iv) Taxes~~ that a distribution company is able to prove are attributable to CAP~~.
(v) Other costs~~ that a distribution company is able to provide are attributable to CAP~~.

(b) To be eligible for recovery, any claimed expense must:

(i) be prudently incurred; and
(ii) be reasonable in amount; and
(iii)be incremental expenses attributable to CAP; and
(iv)not result in double recovery.

These modifications will ensure that the standards for recovery are applied to all expenses claimed for recovery in the universal service surcharge.

3. Section 76.4(3)—Recovery of costs of customer assistance programs.

This proposed regulation identifies cost savings in certain areas expense areas that need to be reflected in the surcharge recovery mechanism. For the reasons discussed in Section II.D.3 above, in order to avoid double recovery of any expenses, the reference in the regulations should be to both costs savings and "cost offsets." The OCA recommends the following modification:

(3) The Company shall include, as an offset to cost recovery, cost savings it incurred in the following areas and any cost offsets to base rate expenses that it realizes in these areas:

This language will capture the fact that base rate expenses cannot be double recovered through the surcharge mechanism.

F. Section 76.5—Default Provisions for failure to comply with program rules

As the Commission set forth in its Final Investigatory Order, it intended to establish through the regulations the default provisions for failure by a customer to follow CAP rules. Final Investigatory Order at 51-52. Section 76.5 identifies five circumstances that will result in the dismissal of a customer from the CAP. Among the five circumstances is the failure of the CAP customer to apply for LIHEAP and the failure of the CAP customer to accept usage reduction services. The OCA submits that these provisions are inappropriate bases to dismiss a customer from CAP participation and should be eliminated or substantially modified.

1. Section 76.5(a)(1)—Failure to Apply for LIHEAP

In Section 76.5(a)(1), the proposed regulations establish the failure of a CAP customer to apply for LIHEAP as a grounds for dismissal from the CAP. The OCA submits that failure to apply for LIHEAP is not a proper ground for dismissing a customer from the CAP for several reasons. Initially, the OCA would note that in 1999, the Commission deleted a provision in its CAP Policy Statement regarding dismissal from CAP for failure to apply for LIHEAP. In its 1999 CAP Design Order the Commission stated:

> We are deleting the provisions that failure to apply for LIHEAP should result in dismissal. Because of changes to LIHEAP eligibility and funding, CAP participants have difficulty meeting this provision.

Re: Revisions to the Customer Assistance Policy Statement made Pursuant to 52 Pa. Code Chapter 69, Docket No. M-00991232, slip op. at 6 (April 9, 1999).

Difficulties in obtaining LIHEAP continue today. It is important to recognize that LIHEAP only operates for a limited number of months each year. So, for many months, generally from April through October, there is no LIHEAP program to which the CAP customer can apply. Additionally, the "closing date" for LIHEAP changes from year to year, often depending on available funding, the price of fuel, or winter weather patterns. In a particularly difficult year, LIHEAP may see a spike in applications resulting in the program closing early because it ran out of funds. CAP participants should not be penalized for such circumstances if they were unable to get their LIHEAP application filed prior to an early closing.

Additionally, the eligibility guidelines for CAP can change from year to year and are not always consistent with CAP eligibility guidelines. For example, for many years, LIHEAP eligibility was set at 135% of the federal poverty level while CAP eligibility was set at 150% of the federal poverty level. Requiring a CAP participant to apply for a program that they are not eligible for just to avoid dismissal from CAP would be a waste of resources.

The OCA would also note that it may not always be possible or practical for the utility to determine whether a customer has applied for LIHEAP. A customer could have applied for LIHEAP and assigned the LIHEAP grant to another energy service provider. For example, if a customer assigns their LIHEAP grant to the gas company, or to the oil delivery company, the electric company may not be able to determine that the customer "applied for LIHEAP" as required to avoid program dismissal.

Finally, and significantly, as the OCA detailed in its Comments filed January 30, 2006 at Docket No. M-00051923, most households that do not apply for LIHEAP fail to make such an application due to lack of effective knowledge about the program, not out of choice as the proposed regulation presumes. OCA Comments of January 30, 2006 at Docket No.

M-00051923 at 54-55, Appendix C (Colton White Paper at 45). An early study of LIHEAP participation in Pennsylvania, concluded that lack of effective knowledge was the primary barrier to participation.[3] In the White Paper attached to the OCA's January 30, 2006 Comments, Mr. Colton discussed this Pennsylvania specific study and other studies on this issue as follows:

> In a study of LIHEAP participation in Pennsylvania, Penn State University's Drew Hyman found that "while most consumers indicate awareness of energy assistance, in general, their knowledge is not sufficient to allow them to act. Almost half of those who say they 'know about' energy assistance cannot name a single program."
>
> In addition, it is not simply knowledge of the program, but knowledge of the requirements of the program that is important. Study after study of public assistance programs (of all types: food, energy, health insurance, medical care) conclude that one of the primary reasons why eligible households do not participate in assistance programs is because those households had misperceptions regarding their eligibility for the program. Of households who think they are ineligible, some mistakenly believe that their income or assets are too high or that some other program requirement precludes their participation.

OCA Comments of January 30, 2006, Appendix C (Colton White Paper at 45-46).

The well documented fact that it is not a choice on the part of customers, but the lack of effective knowledge, and resources, that limit participation in LIHEAP raises serious concerns regarding "failure to apply for LIHEAP" being used as a reason for dismissal from CAP. The use of such a criterion is even more troubling as there is no corresponding requirement on the utility to take all steps necessary to enable the customer to apply for LIHEAP. Before such a reason for dismissal should even be considered, the utility's actions in

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[3] Drew Hyman, ***Consumer Budget Priorities and Utility Payment Problems in Pennsylvania***, prepared by Consumer Services Information System Project (Penn State University) for the Pennsylvania Public Utility Commission (1988).

educating ***and assisting*** the CAP participant in applying for benefits (when available) must be taken into consideration.[4]

The OCA certainly supports program designs that encourage customers to apply for LIHEAP and provide education and assistance to customers in making such application. The OCA is opposed, however, to penalizing customers through removal from the program for failure to apply for LIHEAP. The OCA submits that this default provision should be removed.[5] The OCA recommends the following:

> (a) The failure of a CAP customer to comply with the following shall result in dismissal from CAP participation:
>
> ~~(1) The failure to apply for LIHEAP.~~

The OCA submits that this change is necessary and appropriate.

2. Section 76.5(a)(5)—Failure to Accept Usage Reduction Services

Section 76.5(a)(5) also proposes to dismiss a customer from CAP for failure to accept usage reduction services. The OCA submits that failure to accept usage reduction services should not be grounds for dismissal from CAP for several critical reasons. As an initial matter, it must be recognized that many CAP customers may not have sufficient dominion over the dwelling to "accept" usage reduction services. As U.S. Census statistics show, as household income decreases, the percentage of households that rent their residence increases. A low

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[4] It is not enough to just tell a customer about LIHEAP or include information in a brochure about LIHEAP when failure to apply is grounds for dismissal. Active assistance, including the provision of applications, assistance in completing applications, and assistance in completing other necessary steps would have to be part of every CAP program.

[5] The OCA also questions whether such a penalty is contrary to the federal LIHEAP statute. The federal LIHEAP statute and the Food Stamp statute are nearly identical. *Cf.* 42 U.S.C.A. §8624(f)(1)(2002) and 7 U.S.C. §2017(b)(1995). The Courts have held that receipt of food stamps cannot be taken into account when computing or considering other benefits. See, Dupler v. City of Portland, 421 F. Supp. 1314 (D. Maine 1976). Treating LIHEAP as an applicant asset to which the utility is owed by requiring an application for LIHEAP without which the CAP benefit is denied may be inconsistent with the LIHEAP statute.

income renter is not likely to be able to make decisions over heating systems or building shell improvements. Similarly, a low income renter may not have the ability to make decisions regarding the replacement of refrigerators or other major appliances in the residence. Given these circumstances, a low income renter may not be able to accept usage reduction services if the landlord will not permit such services.

Additionally, certain usage reduction measures might require a landlord or home owner to undertake other significant repairs to the infrastructure within the home. The landlord or homeowner might conclude that the financial cost of accepting the usage reduction services exceeds any possible benefit that the investment might generate due to other needed improvements or repairs in the home. It is also possible that the homeowner or landlord does not have the capital available to make these other necessary repairs.

The OCA submits that while acceptance of usage reduction services should be encouraged and facilitated, failure to accept usage reduction services should not be a cause for dismissal from CAP. The OCA recommends the following modification:

> (a) The failure of a CAP customer to comply with the following shall result in dismissal from CAP participation:
>
> ~~(5) failure to accept usage reduction services.~~

If this provision is retained, it must be modified to clarify that a customer that does not have ownership of the residence, or a homeowner that does not have sufficient income to make other required repairs, will be exempt from dismissal. The OCA offers the following suggested language:

> (a) The failure of a CAP customer to comply with the following shall result in dismissal from CAP participation:

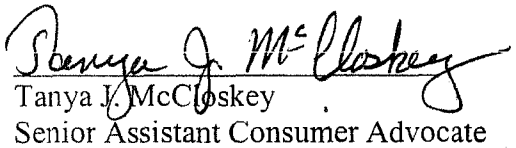
(5) failure to accept usage reduction services unless the customer is unable to accept such services for the residence due to ownership status or financial condition.

The OCA submits that this modification would at least acknowledge that many low income customers are not able to "accept" usage reduction services for a variety of reasons.

III. CONCLUSION

The Office of Consumer Advocate thanks the Commission for this opportunity to comment on the proposed regulations. Universal service programs play a critical role in protecting the health and safety of all Pennsylvanians and in ensuring affordable utility service for all customers. The regulations proposed by the Commission, along with the modifications recommended by the OCA, should assist in developing effective universal service programs in Pennsylvania.

Respectfully Submitted,



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Dated: April 17, 2008
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