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INDEPENDENT REGULATORY REVIEW COMMISSION

From: ward.smith@exeloncorp.com
Sent: Friday, April 18, 2008 2:41 PM
To: Smith, Michael; Burket, Patricia; Page, Cyndi
Subject: PECO Energy Comments in Docket No. L-00070186 (CAP Rulemaking)

Dear Mike, Pat, and Cyndi:

Attached is a Word version of PECO's comments in the above-noted docket. I will forward a PDF version, with signature and cover letter, shortly.

Please let me know if you have any questions.

Ward Smith

<<CAP Rulemaking Comments_v1.DOC>>

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Proposed Rulemaking Relating To Universal Service and Conservation Reporting Requirements, 52 Pa. Code §§ 54.71 – 54.78 (electric), §§62.1-62.8 (natural gas) and Customer Assistance Programs, §§ 76.1 – 76.6	:	Docket No. L-00070186

COMMENTS OF PECO ENERGY COMPANY ON PROPOSED RULEMAKING RELATED TO UNIVERSAL SERVICE AND ENERGY CONSERVATION REPORTING REQUIREMENTS AND CUSTOMER ASSISTANCE PROGRAMS

PECO Energy Company ("PECO") appreciates this opportunity to provide comments on the Commission's proposed revisions to its Regulations Related to Universal Service and Energy Reporting Requirements and Customer Assistance Programs.

A. Introduction and Background

On December 18, 2006, the Commission entered its *Final Investigatory Order* in *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (the "Final Investigatory Order"). In the Final Investigatory Order, the Commission directed two subsequent dockets to be opened: (1) On August 30, 2007, the Commission initiated the instant proceeding, in which the Commission proposes certain changes to its regulations related to Universal Service and Energy Conservation Reporting Requirements, as well as to its regulations regarding Customer Assistance Programs, and (2) also on August 30,

2007, the Commission initiated a companion docket (M-00072036) in which the Commission has proposed changes to its Policy Statement related to Customer Assistance Programs.[1]

The primary objective of the instant rulemaking is to establish a unified process by which the level of funding of universal service and energy conservation programs offered by electric distribution companies and natural gas distribution companies could be determined in conjunction with the Commission's triennial review of utilities' low-income programs. In addition, the Commission proposed promulgating new regulations at 52 Pa. Code §§ 76.1-76.6 relating to customer assistance programs ("CAP").

PECO's comments in this docket are addressed to the proposed changes to the Commission's regulations. PECO addresses the issues raised in the proposed Regulations in the same order as those issues are addressed in the Commission's Order.

B. Specific Issues As Set Forth In the Commission's August 30, 2007 Order

1. Establishment of a Triennial Review Process for Review of CAP Design, and Tariff Filings Relating To Funding and Cost Recovery

In its August 30, 2007 Order, (p. 3-5; Annex A, pp. 4-8, 15-18), the Commission establishes a new review process for CAP programs and funding. The new regulations expand the existing triennial filing, which focuses on program issues, to include cost recovery issues and

[1] PECO filed comments on the proposed changes to the Policy Statement on January 9, 2008.

mechanisms. The new regulations also "require that triennial filings, including CAP rules and proposals for cost recovery, be submitted *as a tariff filing* . . . ."[2] (emphasis added.)

PECO supports the Commission's initiative to evaluate CAP program and cost issues as part of a single filing and review process. It also seems quite obvious that some provisions, such as cost recovery mechanisms, should be incorporated into utilities' tariffs.

PECO respectfully submits, however, that the Commission should make a small alteration to its proposed regulations in this area, as discussed in the remainder of this section of its comments. Typically, when a utility makes a "tariff filing," such a filing includes both proposed changes to the tariff itself, and supporting materials and data that facilitate the evaluation of whether the Commission should adopt the tariff. The most obvious example of this procedure is a base rate filing, in which a utility may file thousands of pages of data and testimony in support of a proposed tariff of 100 pages or so. It appears that the Commission intends to follow this same approach in the future filings of triennial plans. Thus, the general requirement will be that triennial plans be made "in the form of a tariff filing" consistent with 52 Pa. Code §§ 53.1 *et seq.* -- that is, a filing that includes proposed tariff provisions, as well as explanatory and supporting data and rationale for those tariff provisions. *See* 52 Pa. Code § 54.74(a)(3), Annex A, p. 5.

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[2] The new regulations also "require that the tariff contain a method for applying LIHEAP grants." Commission Order, p. 5. PECO addresses this issue in Section 4 of its Comments.

PECO's concern is that some of the items that, under the new regulations, appear to be required to be included *in the tariff itself* are, by their nature, better suited to be included in the supporting data and materials, rather than in the tariff itself.[3] PECO will give several examples of this in the next paragraphs of these comments. The general change that it requests, however, is that the Commission should alter the proposed regulations so that utilities are given greater flexibility in determining which portions of its triennial plan are included in the tariff itself, and which portions are included only as supporting data for the tariff.

One primary area in which this concern is apparent is proposed new 52 Pa. Code § 54.74(b) "Tariff contents." Because of its title – "Tariff contents" – this subsection appears to list items that must be included *in the tariff* itself, as opposed to being included in the broader tariff filing as supporting materials. The listed materials, however, are often of a sort that should clearly be included in the supporting materials, as opposed to being included in the tariff itself.

For example, triennial plans have historically included a "needs assessment," in which the utility analyzes the potential population of low-income customers in its service territory.

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[3] The term "tariff" is a statutorily defined term that is limited to rates, rules, regulations, practices and contracts:

> Tariff: All schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service . . . ."

66 Pa. C.S. § 102. The Commission's regulations on filing of tariffs also notes that tariffs normally consist of the utility's rules and regulations, and its rate schedules. *See generally*, 52 Pa. Code §§ 53.25 and 53.26.

This is valuable information in determining the appropriate scope and potential cost of low-income programs. The proposed new 52 Pa Code § 54.74(b)(1)(iii) would require that the supporting information from the needs assessment be included in "the tariff." PECO respectfully suggests that the needs assessment is not the sort of item that is typically included in utility tariffs – rules, regulations, practices, etc. – but instead is much more in the nature of supporting material that should be included in the tariff filing, but not in the tariff itself.

Similarly, the new rules seem to require that the tariff itself, rather than the supporting materials made with the tariff filing, must contain explanatory materials. For example, the regulations require that the tariff itself include "an explanation of the manner and the extent to which the universal service or energy conservation component operates in an integrated manner with other components of the plan to accomplish the goals stated at section 54.73." 52 Pa. Code § 54.74(b)(1)(i). It seems obvious that the better course of action would be to include such explanations in the supporting materials of the tariff filing, with the tariff itself limited to the rules, regulations and procedures that actually implement the "integrated operation."

One of the most interesting examples is found at proposed new 52 Pa. Code § 54.74(b)(1)(viii). This new regulation, which falls under the general heading of "Tariff contents," will require that the "tariff contents" include the following:

> An explanation of differences between the EDC's approved plan and the implementation of that plan. The plan must include a proposal to address the identified differences. When an EDC has not implemented all of the provisions of an approved plan, the EDC shall provide a justification for that failure and plans for corrective action. When an EDC is requesting approval of a revised plan, the EDC shall provide a justification of the revisions in its request for approval.

It will be very easy to include this explanation and related discussion in the supporting materials – that is, as part of the tariff filing, but not as part of the tariff itself. On the other hand, if the requirement is that this material be included *in the tariff itself*, it is difficult to even conceptualize what the tariff would look like or say. Instead of the normal tariff approach of setting forth the rules, regulations and practices of the utility, such information – if incorporated in the tariff itself – would seem to require that the tariff set forth the rules, regulations and practices of the utility (which, because they are part of a tariff, would have the force of law), a description of the areas in which the utility is *not meeting those rules* (and that description would *also* have the force of law), a justification for its failure to meet the provisions of the tariff (and that justification, because it is in the tariff itself, would *also* have the force of law), plus a plan of corrective action (and that plan of action, which by definition would be different than the endstate rules described earlier in the same tariff provision, would *also* have the force of law). The tariff would thus include four different statements regarding the same issue, each of would have the force of law, and each of which would, almost by definition, by contradictory of the other three descriptions. This confusion can be completely avoided if utilities are allowed to put some of the material in the tariff itself, and some in the supporting materials.

Yet another example of material that is suitable to place in the supporting data, but not in the tariff itself, would be the program budget (52 Pa. Code § 54.74(b)(1)(v)) and the organizational structure of the utility's low-income staff. (52 Pa. Code § 54.74 (b)(1)(vi)). PECO is not aware of any instance in which a program budget is included in a tariff provision. If program budgets are included in a tariff, the risk is that someone will inappropriately believe that

the utility is thenceforth required to maintain its budget at that precise level, neither increasing nor decreasing it, until such time as a future tariff filing is made. This kind of budget constraint is not only problematic policy, it arguably falls into the category of inappropriately intruding on managerial discretion. Simply, providing information about one's current and proposed budget is one thing; putting that information into a tariff that has the force of law is quite another thing. Information on staff organization is quite similar. Providing information on staff organization is one thing. Requiring a binding tariff filing on organizational structure risks means that the utility could not change organizational structure without making a new tariff filing, an approach that would result in Commission micro-management of areas, such as personnel and organizational structure, that are normally viewed as being within the utilities' managerial prerogatives.

Collectively, these examples strongly suggest that the Commission needs to change the regulations so that certain matters are allowed to be included in the supporting filing, rather than in the tariff itself.

This entire issue can be resolved with three minor changes to the proposed regulations. PECO proposes that (1) the title of 52 Pa. Code § 54.74 (b) be changed from "Tariff contents" to "Tariff filing contents; (2) the text of 52.74(b) be changed from "The tariff shall include the following information:" to "The tariff filing shall include the following information:"; and (3) the text of 52.74(b)(2) be changed from "The tariff shall contain rules that apply . . . ." to "The tariff filing shall contain rules that apply . . . . "

Under this approach, each utility will determine which matters need to be addressed in its tariff filing and which matters need only to be addressed in supporting materials, and make its filing accordingly. If after reviewing that filing the Commission concludes that additional matters or detail is needed in the tariff itself, it can so order on a company-specific basis.

2. Prior Commission Approval

In its August 30, 2007 Order, (pp. 5; Annex A, p. 24), the Commission sets forth new rules requiring that "prior Commission approval is required before the distribution company can implement a CAP plan, or a revision or modification of an existing CAP program."

PECO respectfully recommends that the Commission should leave utilities greater managerial flexibility to make changes in their CAP programs without the necessity of seeking prior Commission approval. PECO is continually re-examining its CAP program and makes numerous business process improvements within that program every year. It often makes those changes after consultation with its Universal Services Advisory Group and Commission staff, but may also simply seek to improve operation or outcome of the program on its own initiative.

Some of those changes are of significant scope. For example, PECO's decision to accept LIHEAP data for purposes of income verification was a significant step that allowed nearly 25,000 new customers to be quickly enrolled or recertified in its CAP Rate program. On the other hand, many of the changes are relatively small in scope. For these smaller changes, PECO is continually fine-tuning its program to accomplish the multiple goals of low-income customer

access and affordability, cost containment, and administrative efficiency. The changes are the sort of normal program changes that are made in all areas of utility practice in the normal course of business.

PECO strongly believes that it is the best interests of all stakeholders that it continue to have this flexibility to manage its own programs. The Commission and other stakeholders have sufficient control features to allow the Commission to exercise jurisdiction over the results and outcomes of PECO's low-income programs, including reporting protocols, informal and formal complaints, and communications with the Commission staff and PECO's Universal Services Advisory Committee. Those control features will be significantly increased by the new requirement that portions of the triennial plan be incorporated into the utilities' tariffs, which by definition cannot be changed without prior Commission approval.

If the Commission extends the requirement for prior Commission approval to situations in which utilities are seeking to make business process improvements to their programs on matters that are not specified in the tariff, it will make it very difficult for utilities to implement those business process improvements. Even with an accelerated Commission review process, the requirement of prior approval will, by its nature, act as a barrier to change. As a result, under such a regime utilities' low-income programs are likely to be implemented in one triennial filing and then not changed until the next triennial filing. Business process improvements in the interim will simply be delayed, and then proposed at the time of the triennial filing.

Moreover, PECO is not aware of any aspect of its business in which such prior Commission approval is required in order to make a change in non-tariffed business practices. If prior Commission approval is need to "revise or modify" any aspect of a CAP program, then the Commission will essentially have a new role in regulation – it will effectively be a co-manager of CAP programs. Its staffing and resources will need to reflect that new level of responsibility.

PECO respectfully suggests that such a significant change in the Commission's role is not needed. The new regulations already impose significant new control features on utilities' low-income programs because the new regulations will require portions of the low-income programs to be included in the utilities tariff for the first time.[4] Rather than create an unprecedented co-managerial role for the Commission in the low-income area, PECO respectfully recommends that the Commission treat this area similar to other areas in which it exercises active oversight. Where the utility seeks a revision or modification to its program that requires a tariff change, prior Commission approval will be required. Where the utility seeks to make a revision or modification that does not involve a change to a tariffed item, it will make that change in its managerial discretion without prior Commission approval, but with the knowledge that the Commission will review its success or failure in managing its low-income programs.

PECO therefore requests that the requirement that utilities seek prior Commission

[4] This is true even if the Commission accepts PECO's comments on the first issue addressed in these comments, with respect to the scope of the tariff filing. Even under PECO's approach, its tariff will contain significant new control features as to the rules, regulations, and practices associated with its low-income programs.

approval before implementing a revision or modification to a CAP program be limited to those items that are incorporated into the utilities' tariffs.

3. Default Provisions for Failure to Comply With Program Rules

In its August 30, 2007 Order, (p. 6; Annex A, p. 25-26), the Commission sets forth new regulations that would establish rules for dismissal of customers from Customer Assistance Programs. The new regulations list five situations that will result in dismissal from CAP participation, and one additional situation (failure to make payments) that will result in dismissal from CAP participation and also may result in termination of service.

Generally, PECO agrees with the Commission's decision to include default provisions in its regulations. There are, however, two issues that PECO would like to address with respect to the final form of the default regulations: (1) Potential difficulties in enforcing the provision that a customer will be dismissed from CAP for "failure to apply for LIHEAP;" and (2) the need to allow tariff proposals for additional default conditions.

Failure to apply for LIHEAP as a default provision: PECO supports the goal of incenting or persuading all CAP customers to apply for LIHEAP grants. It may be extremely difficult, however, to properly implement this default provision. Simply, even when a customer applies for a LIHEAP grant, a utility does not always have access to information about the customer's activities. This will primarily occur in two situations.

First, if a customer applies for, but does not receive, a LIHEAP grant, then the utility typically will have no knowledge that the customer has made the LIHEAP application.[5] In that situation, a utility attempting to apply this default rule would conclude that a customer had not applied for LIHEAP, when the customer in fact did apply for LIHEAP. The utility would thus remove the customer from CAP even though the customer had applied for LIHEAP.

This unintended outcome could be avoided through a number of different approaches, but each of those approaches has barriers to implementation and would be unlikely to protect all customers who had applied for LIHEAP. Thus, for example, this issue could be resolved by having the Department of Public Welfare ("DPW") provide utilities with a list of all LIHEAP applicants in their service territory – but to date DPW has not agreed to provide such information, and it is beyond the Commission's jurisdiction to order it to do so. Utilities could also require a certification program in which customers would, as a condition of remaining on CAP, self-certify that they had applied for LIHEAP each year. This would suffer the risks of all self-certification programs. Moreover, in PECO's case, with approximately 120,000 CAP participants, this would be quite costly to administer. Just as importantly, in PECO's experience there would likely be low-income customers who would successfully complete part, but not all, of the administrative steps. This, for example, the Commission should expect that some

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[5] A customer could apply for, but fail to receive, a LIHEAP grant for a variety of reasons. As the Commission is aware, the Department of Public Welfare sometimes does not broadly distribute LIHEAP applications at the beginning of the LIHEAP season. The LIHEAP season also may end at a different end date each year, depending upon the program extensions that DPW authorizes. And, if every customer in a CAP program actually does apply, the LIHEAP program may run short of funds and be unable to provide grants to all applicants. In any of these cases, the customer could apply for, or at least make a good faith effort to apply for, LIHEAP, but received no grant.

customers would properly apply for a LIHEAP grant, and then do nothing more with that information – that is, they would not send a separate certification to the utility stating that they had applied for a LIHEP grant (and that they had not received such a grant or had received it, but paid the money to a different utility or fuel source). Such customers would be removed from the CAP program, notwithstanding their need and notwithstanding that they would actually have engaged in the desired behavior of applying for LIHEAP.

The second situation in which a utility will have no information about a customer's LIHEAP application is when a customer obtains a LIHEAP grant but applies that grant to another heating source supplier. These other suppliers may be PUC jurisdictional (electric, natural gas) or not (heating oil). If some suppliers are not PUC jurisdictional, then the Commission cannot establish a data exchange protocol for those suppliers. Even if all suppliers involved are PUC jurisdictional, there are no established data interchange protocols to allow this information to be easily exchanged and processed.

This is not a minor issue. In Philadelphia, tens of thousands of PECO CAP customers obtain LIHEAP grants and apply those LIHEAP grants to either PGW or to heating oil suppliers. PECO has no information as to the LIHEAP application status of these customers.

Ultimately, PECO believes that, if the Commission requires it and other utilities to remove customers from their CAP programs for failure to apply for LIHEAP, lack of information about a given customer's LIHEAP application activity will cause customers to be

removed from CAP even though they are income-eligible and actually applied for LIHEAP. Although the goal of having all customers apply for LIHEAP is laudable, caution must be exercised in this area. Otherwise, the Commission and utilities may inadvertently end up providing less benefits to the very customers they are aiming to assist.

Additional default provisions: As noted previously in PECO's comments, it is appropriate to have tariff provisions that address rules, regulations, and practices of the CAP program. (While, as PECO notes, it is not appropriate to include explanatory material, supporting data, etc., in the tariff itself.) PECO believes that it is appropriate to include in its tariff the default provisions that will result in a customer being removed from the CAP program.

These default provisions, however, should not be limited to those presented in the Commission's proposed regulations. Instead, utilities should be allowed, in their tariff filings, to propose additional default provisions as a reason for dismissing a customer from CAP. For example, PECO's Three-Year Plan provides for removal from its CAP Rate for fraud, theft, or misappropriation of service.[6] It is also foreseeable that, in order to implement other Commission or utility initiatives with respect to low-income programs, customers will need to give permission for utilities to verify their income (or LIHEAP status, or other information) with state agencies. Although the exact need for such information is not known at this time, a utility should be allowed to propose in its tariff filing that failure to give that permission, as defined by program needs at the time, is a basis for dismissal from the CAP program.

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[6] The Commission may wish to consider adding these factors to the list of default provisions in its regulations.

4. Coordination of Energy Assistance Benefits; Application of LIHEAP Cash Benefits

In its August 30, 2007 Order, (p. 7; Annex A, pp. 7,17), the Commission addresses the application of LIHEAP grants to customer accounts, requiring that a utility propose a tariff rule dealing with the application of LIHEAP grants.

PECO's current triennial filing was made prior to issuance of the instant order and is currently before the Office of Administrative Law Judge for evidentiary hearings. PECO will therefore make a tariff filing on this issue as part of its next triennial filing. For the Commission's information in the interim, PECO applies LIHEAP grants directly to customer accounts, where they are used to reduce the customer's outstanding balance.

5. Timely Collection Efforts

In its August 30, 2007 Order, (pp. 7-9; Annex A, pp. 25), the Commission sets forth new regulations stating that the Commission shall "consider the timeliness of a distribution company's collection activities [for its CAP customers] in evaluating the reasonableness of costs claimed for recovery." 52 Pa. Code § 76.4(d).

PECO is a strong advocate of the use of timely collection efforts, and is heartened by the Commission's support for this concept. PECO is concerned, however, that the open-ended and

subjective nature of this regulatory language could contradict the strong policy directive of the Commission in other proceedings, and would otherwise be difficult to implement. In particular, the Commission has, in other proceedings, been supportive when utilities handle delinquencies on a case-by-case basis, providing customers with an opportunity to correct a default or apply for assistance or negotiate a payment agreement prior to instituting termination proceedings. This approach balances timeliness of collections against maintaining utility service for at-risk low-income households.

"Timeliness of collection activities" is singled out in the new regulations and is the only factor that is explicitly listed that the Commission will consider in evaluating the reasonableness of a utility's claimed low-income costs. Faced with that language, utilities might reasonably conclude that their cost recovery will be put at risk unless they also single out timeliness of collection activities for special attention, even if that comes at the detriment of pursuing other goals. Moreover, because there are no measurement metrics or other objection methods that a utility can use ahead of time to determine whether it will be found to have been "timely," utilities will likely need to protect their cost recovery by erring in the direction of aggressive collection activities. PECO respectfully suggests that, while this is not the intended consequence of including this language, it is still an inevitable consequence. Thus, while PECO appreciates the Commission's public statement of support for timely collection activities, it recommends removing this section of the regulations.

C. Conclusion

PECO respectfully requests that the Commission adopt its Comments as set forth above.

Respectfully submitted,

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