

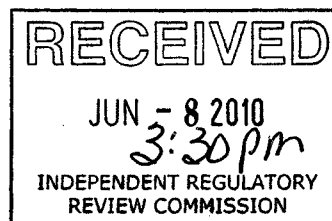
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

2674

Proposed Rulemaking: Universal Service
and Energy Conservation Reporting
Requirements and Customer Assistance
Programs

:
:
:
:

Docket No. L-00070186



COMMENTS OF
ACTION ALLIANCE OF SENIOR CITIZENS
OF GREATER PHILADELPHIA

Thu B. Tran, Esq.
Philip A. Bertocci, Esq.
Energy Unit
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3777

Maripat Pileggi, Esq.
Law Center North Central
Community Legal Services, Inc.
3638 N. Broad Street
Philadelphia, PA 19140
(215) 227-2400

June 2, 2010

TABLE OF CONTENTS

I. INTRODUCTION 1

II. COMMENTS ON PROPOSED RULEMAKING 3

1. The impact of the Department of Public Welfare's proposed policy change regarding the use of Low-Income Home Energy Assistance Program (LIHEAP) funds on a distribution company's Customer Assistance Program (CAP) design. 4

 a. Utility companies that do not use LIHEAP grants to reduce the energy expenditures of LIHEAP recipients are treating LIHEAP recipients adversely in a manner inconsistent with the Low Income Home Energy Assistance Act. 6

 b. Using LIHEAP grants in any way that does not work to reduce the energy expenditures of those with the lowest incomes is not consistent with the Act. 7

 c. Utilities shall not consider LIHEAP payments as income or resources of a household. 10

 d. Allowing utility companies to determine how to be apply all or part of a customer's LIHEAP grant raises substantial due process issues 12

2. Factors that may impact CAP costs and affordability of bills, such as increased CAP enrollment levels, the recent economic decline, the expiration of electric generation rate caps, the impact on residential rates from the initiation of energy efficiency and conservation programs under Act 129 of 2008, and the potential impact on residential bills from smart metering initiatives. 15

3. Whether cost recovery mechanisms, which have been implemented by some distribution companies, have produced savings from an improved timeliness of collection activities and whether these savings should be considered in evaluating costs claimed for rate recovery..... 15

4. Proposed rules in 52 Pa. Code §§ 54.74 and 62.4 (relating to review of universal service and energy conservation plans, funding and cost recovery), which create a triennial review process that takes the form of a tariff filing and addresses CAP program funding 15

5. Commissioner Kim Pizzigrilli's statement on *Dominion Peoples Universal Service and Energy Conservation Plan for 2009-2011*, Docket No. M-2008-2044646 (January 15, 2009), which discusses a Commission reporting requirement that directs all distribution companies to fully document the rate effect of program modifications in future universal service plans (USP). Under the requirement, distribution companies would include a table showing annual costs for each program, total cost for all USPs and the monthly cost of the programs on a per residential customer basis. 16

6. The Commission's USP approval process, specifically, whether the Commission should issue tentative orders to provide an opportunity for comments and reply comments before approving a distribution company's USP, and whether the companies' USPs should be served on the statutory advocates. 18

III. CONCLUSION 18

I. INTRODUCTION

These Comments are submitted, through counsel Community Legal Services, Inc., on behalf of the community based organization Action Alliance of Senior Citizens of Greater Philadelphia (“Action Alliance”). Action Alliance is a not-for-profit corporation and membership organization whose mission is to advocate on behalf of senior citizens on a wide range of consumer matters vital to seniors, including utility service. These Comments are in support of protecting, making more accessible and expanding the programs that help low income public utility customers to obtain utility service, to maintain that service, and to obtain restoration of service in the event that service is terminated.

This Proposed Rulemaking was originally published at 38 Pa.B. 776 (February 9, 2008). These Comments respond to the Pennsylvania Public Utility Commission’s (hereinafter “Commission”) Proposed Rulemaking Order, published in the *Pennsylvania Bulletin* on April 13, 2010, 40 Pa.B. 1764. Under the instant notice, the Commission reopens the comment period to accept additional public comments until June 2, 2010, and invites comments and suggestions on six topics.

Action Alliance incorporates herein by reference its prior comments of April 17, 2008, and respectfully submits the instant set of comments for consideration. These Comments focus on the first and fifth topics regarding CAP design and cost reporting requirements. Action Alliance also specifically supports the comments on all six topics concurrently submitted by the Pennsylvania Utility Law Project.

As the Commission considers policy changes in this rulemaking process, Action Alliance urges the Commission to bear in mind how the utility consumer protection landscape has changed for low income customers. In November, 2004, SB 677 or Act 201, was enacted and

amended Title 66 by adding Chapter 14 (66 Pa.C.S. §§ 1401-1418), Responsible Utility Customer Protection. “Act 201 is intended to protect responsible bill paying customers from rate increases attributable to the uncollectible accounts of *customers that can afford to pay their bills, but choose not to pay.*” 66 Pa.C.S. § 1402(2) (emphasis added). Every two years after the effective date of December 14, 2004, the Commission must report to the General Assembly and the Governor, pursuant to § 1415, regarding the implementation and application of Chapter 14. The report must address, *inter alia*, the level of access to utility services by residential customers including low-income customers and Chapter 14’s effect upon the level of consumer complaints processed by the Commission. On December 14, 2008, the Commission issued the *Second Biennial Report to the General Assembly and the Governor pursuant to Section 1415* (hereinafter “Second Biennial Report”).¹ The Commission has so far noted the following concerns relating to low and lower income utility consumers:

- “Terminations increased by 60% for the electric industry and by 21% for the gas industry from 2004-07. This pattern has continued into 2008.” Second Biennial Report, at 38.
- “Section 1405(d) of Chapter 14 prohibits the Commission from establishing a second payment agreement if the customer has defaulted on a previous payment agreement;” through October 10, 2008, 47,372 “customers [were] turned away by the Commission because it was determined that the customer was not eligible for a payment arrangement” per Section 1405(d). *Id.*, at 35 (emphasis added).
- “Section 1405(c) forbids the Commission from establishing a payment agreement for customers who participate in a utility’s CAP [customer assistance program];” through October 10, 2008, 24,144 “customers [were] turned away by the Commission because it was determined the customer was not eligible for a payment arrangement because they were a participant in the utility’s CAP.” *Id.*, at 35 (emphasis added).
- “Since the passage of Chapter 14, the Commission has turned away 71,516 customers seeking PARs [payment agreement requests]. Consumer complaint volume has declined

¹ Second Biennial Report to the General Assembly and the Governor Pursuant to Section 1415 (December 14, 2008) (accessed April 14, 2009 at http://www.puc.state.pa.us/General/publications_reports/pdf/Chapter14-Biennial121408.pdf).

by 12% from 2004-07 while PARs declined by 46% over this time.” *Id.*, at 39 (emphasis added).

- “Low-income households who are placed into a CAP program and successfully manage to pay their CAP bills represent the success of the safety net that is in place for our poorest households. However, there are low-income households who are payment-troubled and have not yet been placed into a CAP program. In fairness to the companies, this is a diminishing, but still significant, number of such households since the passage of Chapter 14. Consequently, there is still room for CAP programs to grow.” *Id.*, at 39.
- “For CAP customers who fail to meet their obligations under CAP, there is no recourse other than to pay their arrearages and current balances in order to maintain utility service. This is arguably a losing proposition for them. In the Commission’s opinion, these customers are at the greatest risk because they are out of options.” *Id.*, at 39 (emphasis added).

Within this context, any CAP policy changes should work to decrease this risk that has befallen low income customers enrolled in CAP programs. Caution should be taken to avoid adoption of proposals that make CAP bills even less affordable. Modifications that enhance availability and funding of actual utility affordability for vulnerable low income household should be adopted. The Department of Public Welfare’s LIHEAP policy that expands the ability of energy assistance grants to reduce CAP customer bills, should be supported and enforced. Further, Action Alliance urges the Commission to move forward with its proposed Policy Statement of CAP, and in particular with its proposal to reduce the CAP targeted energy burden.

II. COMMENTS ON PROPOSED RULEMAKING

Of the six topics listed by the Commission, Action Alliance’s Comments focus on the first and fifth topics regarding CAP design and cost reporting requirements. Action Alliance is in specific support of the set of comments on all six topics concurrently submitted by the Pennsylvania Utility Law Project.

1. The impact of the Department of Public Welfare's proposed policy change regarding the use of Low-Income Home Energy Assistance Program (LIHEAP) funds on a distribution company's Customer Assistance Program (CAP) design.

During the 2009-2010 LIHEAP season, DPW adopted a policy of requiring that LIHEAP funds be used to pay down customers' "Asked to pay" amounts, whether CAP bills or non-CAP bills, and not to CAP credits or pre-CAP arrears that are subject to forgiveness. DPW disallowed the ability of utilities to pool the LIHEAP grants of its CAP customers to offset the CAP subsidy. Customers of those utilities that pooled grants, prior to DPW's new policy, saw no impact on their bills as a result of applying for and being approved for a LIHEAP cash grant. Additionally, CAP customers had no financial incentive to apply for LIHEAP grants. We understand that DPW proposes to adopt the same policy for the 2010-2011 LIHEAP season.

Utility vendors that do not comply with this policy will not be granted the privilege of LIHEAP vendor status. Eligible customers of such utilities that do not have vendor status, who applied for LIHEAP would receive direct payments that they could apply to their accounts.

In contrast, the Commission's Policy Statement on CAP had generally barred application of LIHEAP grants to current bills and encouraged pooling practices. The Commission recently issued an Order suspending relevant portions of the Policy Statement in order to allow regulated utilities to modify how they apply LIHEAP grants and to obtain LIHEAP vendor status.²

Action Alliance submits that LIHEAP grants should not be applied any differently than grants from hardship funds, *ad hoc* utility funds for seniors, church grants or the more recently available stimulus/recovery money for housing and utility assistance. Such non-LIHEAP funds are applied to the account much like any other out-of-pocket payment of the customer, while

² *Customer Assistance Program Policy Statement Suspension and Revision*, Docket No. M-00920345, Order entered April 9, 2010.

LIHEAP grants that are pooled are not applied to the account to pay down the customer's out of pocket obligations. The different treatment of LIHEAP grants should be discontinued.

At the present time, the Commission's energy burden standards, set forth in the Commission's Policy Statement on CAPs, 52 Pa. Code § 69.265, do not come close to delivering actual affordability for most low income customers. Action Alliance urges the Commission to focus at this time on completing the proposed revisions to the CAP Policy Statement which contemplates a reduction in targeted energy burdens.³ The level of funds available to low income customers through LIHEAP varies significantly from year to year. There is no state supplement to LIHEAP. Under such circumstances, the Commission should not take LIHEAP funding into account in setting its energy burden standards. Companies may nonetheless start to propose modifications to their CAP programs and will seek Commission approval for these modifications. The utilities should be encouraged to consult with DPW in the development of their CAP design. Utilities with CAP programs that do not comply with DPW policy and relevant federal law risk inability to obtain vendor status.

While all possible proposed models cannot be predicted and discussed here, there are certain basic principles within the relevant federal law that should be considered in CAP design. The federal Low Income Home Energy Assistance Act (LIHEAA) provides the rules that must be followed in the use of LIHEAP funds. 42 U.S.C. §§ 8621 *et seq.* Three major provisions of the LIHEAA are discussed here. First, no household receiving LIHEAP can be treated adversely because of such assistance. Second, LIHEAP funds must work to reduce the energy expenditures of those with the lowest incomes among eligible households. And third, the LIHEAA specifically prohibits the deeming of LIHEAP payments as income or resources of a

³ Proposed Revision to Policy Statement on Customer Assistance Programs, 52 Pa. Code §§ 69.261-69.267, Docket No. M-00072036.

household. Additionally, under this topic, Action Alliance raises due process concerns that would be associated with delegation to utilities of authority to allocate all or part of a LIHEAP cash grant to balances not directly related to immediate energy needs.

- a. Utility companies that do not use LIHEAP grants to reduce the energy expenditures of LIHEAP recipients are treating LIHEAP recipients adversely in a manner inconsistent with the Low Income Home Energy Assistance Act.

Under the Low Income Home Energy Assistance Act, Pennsylvania may opt to pay a LIHEAP grant directly to the utility company that provides the LIHEAP grant recipient's home heating energy. Pennsylvania's choice to pay utility companies rather than paying LIHEAP recipients directly cannot result in any adverse treatment of LIHEAP recipients who are also utility company customers.

The Act requires states that choose to pay LIHEAP grants directly to home energy suppliers to assure that "any agreement entered into with a home energy supplier . . . will contain provisions to assure that no household receiving assistance under this subchapter will be treated adversely because of such assistance under applicable provisions of State law or public regulatory requirements." 42 U.S.C. § 8624(b)(7)(C) (emphasis added). Section 8624(b)(7)(C) prohibits adverse treatment of LIHEAP recipients who receive their LIHEAP grants via the vendor pay method in comparison to the treatment of LIHEAP recipients whose LIHEAP grants are paid to them directly. Also, Section 8624(b)(7)(C) explicitly makes clear that adverse treatment of LIHEAP recipients by utility companies is prohibited, even where that adverse treatment is sanctioned by state law or regulation.

LIHEAP recipients who receive their LIHEAP grants directly have the full amount of the LIHEAP grant to apply directly and in full to their accounts. The full amount of the LIHEAP grant is available to reduce the actual amount they are responsible for paying to their energy

vendor, thus directly reducing their energy expenses. These “direct pay” LIHEAP grants provide a dollar for dollar benefit to the recipient. A \$300 LIHEAP grant will mean a \$300 reduction in the household’s out of the pocket expenses—making their energy bills more affordable, which will, in turn, give these recipients a better chance of avoiding falling behind on their bills and suffering service termination.

In comparison, LIHEAP grants paid to utility companies are used by utility companies in a variety of ways, very few of which directly result in a reduction of a CAP customer’s out of pocket expenses. Many utilities use LIHEAP grants to pay for the cost of the CAP program, not to reduce the amount the CAP customer is actually asked to pay. Examples of these uses of LIHEAP grants include applying LIHEAP grants to CAP credits, the difference between the cost of the energy the CAP customer used and the amount the CAP customer is asked to pay, or to the pre-CAP arrears of CAP customers, which the CAP customer is not asked to pay while a current CAP customer. Using LIHEAP grants in these ways, which result in no reduction in the amount the CAP customer is asked to pay, clearly places the CAP customer LIHEAP recipient at a disadvantage. Unlike their directly paid counterparts, their out of pocket expenses are not reduced, they receive no additional help to make their energy bills affordable, and remain at risk of termination of service.

- b. Using LIHEAP grants in any way that does not work to reduce the energy expenditures of those with the lowest incomes is not consistent with the Act.

The Low Income Home Energy Assistance Act very clearly requires states to ensure that the highest level of LIHEAP assistance goes to help those with the highest energy burdens and lowest household income to afford home energy. Any use of LIHEAP that will result in low

income households experiencing an increase in their energy expenditures will contradict the language and purpose of the Act.

The Act requires states to “provide, in a timely manner, that the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs or needs in relation to income . . .” 42 U.S.C. § 8624(b)(5). This Section of the Act, along with several other sections of the Act, was changed in 1994 to specify that LIHEAP benefits should be used to decrease the energy expenditures of those with the lowest incomes.

The legislative history of the 1994 amendments includes the following:

This section also adds the concept of “highest home energy needs” to the current provision of the LIHEAP Act that **requires States to target their assistance in a way that provides varying levels of assistance for households depending on their incomes and energy burden (energy expenditures in relation to income)**. For example, according to HHS, over 7 million eligible households have energy bills that exceed 15 percent of their annual income. **There is a need to focus on those households with the lowest incomes which are most drastically burdened** and on those at highest health risk.

To assure that LIHEAP assistance is targeted to those households which truly have the highest energy burdens, **level of income and energy burden must be considered together**. The Committee believes that States need to reassess their benefit structures designed as a result of this long-standing provision to ensure that they are actually targeting their various assistance levels based on both of these factors.

Looking at energy burden alone may not assure that LIHEAP assistance is truly targeted to households most in need. For example, two households may have energy burdens of 10 percent, but one household has an income of \$2,000 and the other has an income of \$10,000. **Clearly the household with the lowest income, as well as the 10 percent energy burden, will have the harder time meeting its immediate energy needs.**

S. Rep. No. 103-251, at 67 (1994) (emphasis added).

The language and the legislative history of the Act clearly requires LIHEAP to be used to aid those that have both low incomes and high energy burdens—which is a measure, according to the legislative history, of a household’s actual “energy expenditures” in relation to the household’s income. Reducing the energy expenditures of those with the lowest incomes should be a priority. Pennsylvania CAP customers have very low incomes and extremely high energy

burdens. Following the Act's instruction, Pennsylvania CAP customers should receive LIHEAP assistance that will reduce their energy expenditures and those customers with the lowest incomes should be prioritized.

Customer Assistance Programs run by utility companies provide some payment assistance to low-income utility customers, but often fail to provide actual affordability. Low income CAP customers in Pennsylvania can be required to pay up to 17% or more of their monthly income on energy costs, according to state public utility policy.⁴ This is more than the 15% energy burden the 1994 U.S. Senate recognized as "drastic," and more than three times the 5% energy burden of the average Pennsylvania household.⁵ National experts recommend a maximum energy burden of 6%, which is the energy burden standard of our neighboring state of New Jersey.⁶ CAP customers are low-income customers struggling to keep up with drastic energy burdens. According to the Act, Pennsylvania's CAP customers should be receiving a maximum level of LIHEAP benefits that will work to reduce their energy expenses.

Far from reducing the energy expenses of CAP customers, some utility companies are using LIHEAP in ways that result in no reduction of costs to low-income households (as described in section A.1. above), and are now proposing new ways to use imputed LIHEAP grants to even *raise* the amounts the low-income households are asked to pay for home energy.

Every other program DPW administers—SNAP, Medical Assistance, Special Allowances, Emergency Shelter Assistance, etc.— supports these households as they work to move out of deep poverty and gain self-sufficiency. LIHEAP should be part of this network of

⁴ Pennsylvania Public Utility Commission's *Policy Statement on Customer Assistance Programs*, 52 Pa. Code §§ 69.261-69.267. A CAP that provides a discount rate may provide bills that exceed the 17% target if the customer's usage is beyond a certain level.

⁵ 2008 Report on Universal Service Programs and Collection Performance of the Pennsylvania Electric Distribution and Natural Gas Distribution Companies, Pennsylvania Public Utility Commission Bureau of Consumer Services, page 30.

⁶ State of New Jersey, Board of Public Utilities, Universal Service Fund, low income payments for gas are capped at 3% and payments for electric are capped at 3%.

support that DPW provides to low-income households; it certainly should not be used to impose additional financial burdens on low-income households who, for one reason or another, do not obtain a LIHEAP cash grant. A LIHEAP customer should experience the full, direct and complete benefit of the grant.

Any proposal to use LIHEAP in a way that will not result in a reduction of low-income energy expenditures is inconsistent with the federal Act, will do nothing to ease the drastic energy burdens of Pennsylvania's low-income utility customers, and should be rejected.

- c. Utilities shall not consider LIHEAP payments as income or resources of a household.

Specifically, the LIHEAA provides as follows:

(f) Payments or assistance not to be deemed income or resources for any purpose under Federal or State law; determination of excess shelter expense deduction

(1) Notwithstanding any other provision of law unless enacted in express limitation of this paragraph, the amount of any home energy assistance payments or allowances provided directly to, or indirectly for the benefit of, an eligible household under this subchapter shall not be considered income or resources of such household (or any member thereof) for any purpose under any Federal or State law, including any law relating to taxation, supplemental nutrition assistance program benefits, public assistance, or welfare programs.

42 U.S.C. § 8624(f) (emphasis added). Under this statute, utilities should not even count the LIHEAP grant as part of the customer's income in order to calculate the household's targeted energy burden as a percentage of income.

Caselaw confirms that other programs, such as state regulated CAP programs, cannot count LIHEAP as income or resources of a household.⁷ In 1986, Idaho's method of considering LIHEAP grants to diminish the amount of food stamp benefits was found in violation of the

⁷ *Idaho v. Block*, 784 F.2d 895 (9th Cir. 1986)

federal statute. Giving weight to the legislative history, the court cited the conference committee report's discussion on this specific provision:

6. The conference agreement requires that fuel assistance payments or allowances provided under this title will not be considered income or resources of an eligible household for any purpose under a Federal or State law. The conferees wish to emphasize that this provision applies regardless of whether the fuel assistance is paid directly to the household or to the supplier of energy to the household. Thus, under any law, such as the Food Stamp Act of 1977, which provides that benefits may depend on the expenditures of the household for fuel, any portion of these expenditures which may be paid by the fuel assistance program authorized in this conference agreement will not be considered a resource available to the household, even if the payment is made directly to the energy supplier. Thus, under such a law, benefits will be computed as if the total cost of the fuel, including the amount of assistance provided, had been paid by the household.

H.R.Conf.Rep. No. 817, 96th Cong., 2d Sess. 154, reprinted in 1980 U.S.Code Cong. & Ad.News 642, 705-06.

Until such time as Congress may legislate "in express limitation of" § 8624(f), it is Congress' prevailing intent, as expressed in the Conference Report, that benefits "under any law, such as the Food Stamp Act ... will be computed as if the total cost of the fuel, including the amount of assistance provided, had been paid by the household."⁸ Therefore, it follows that the CAP design (as provided in PUC policy at 52 Pa. Code § 69.265) for a percentage of income payment plan must not incorporate a LIHEAP cash grant into the formula to increase the customer's payment obligation to reflect an imputed grant.

Under the LIHEAA, the LIHEAP cash grant cannot be considered to reduce the CAP benefit to the customer. In Indiana, the federal court specifically provided that "[t]he wording of § 8624(f) evidences Congressional intent to ensure that LIHEAA benefits would not decrease a recipient's benefits under any other law."⁹ That federal court warned as follows:

⁸ *Id.* at 901.

⁹ *Seban v. Block*, 626 F.Supp. 545, 550 (SD Ind. 1985).

The defendants plausibly argue that “income or resources” are distinct and separate from “deductions.” In so arguing, the defendants are using mathematical sleight of hand to create the illusion of abiding by § 8624(f). It is only an illusion, though, because “the bottom line controlling the amount of benefits is the same whether income is increased or deductions decreased.”¹⁰

The Commission and DPW should not allow utilities to add projected LIHEAP grants into CAP bills. Considering projected or average LIHEAP grants for groups of CAP customers is no less harmful than considering the actual grant against the individual’s CAP benefits.

Opponents of the DPW policy cite to the examples of other states where LIHEAP grants are used in the calculation of the targeted energy burden. These examples generally involve programs that are statewide and programs that have targeted energy burdens that are significantly lower than Pennsylvania’s targeted energy burden of up to 17% as provided in the Policy Statement for CAP. Even the Commission’s proposed lower targeted energy burden of 10% is still significantly higher than the 6% in New Jersey and Illinois, the 5% in Colorado, and the 2.46% in Nevada.

With the ultimate goal of achieving actual affordability of life-essential utility service to low income households, we urge the Commission to focus its attention on the redesign of the targeted energy burdens. At the current time in Pennsylvania, it is urgent that the principles underlying the DPW policy and supported by federal law be strictly observed.

- d. Allowing utility companies to determine how to be apply all or part of a customer’s LIHEAP grant raises substantial due process issues .

Pennsylvania recipients of LIHEAP benefits possess property interests in the energy assistance provided by LIHEAP that is protected by the due process clause of the 14th Amendment of the U.S. Constitution. The due process clause requires the implementation of

¹⁰ *Id.* at 552 (citing *Schmiege v. Sec. of Ag.*, 693 F.2d 55, 56 (8th Cir.1982)).

procedural safeguards that will work to protect LIHEAP recipients against erroneous deprivation of LIHEAP benefits.¹¹ When utility companies act as the gatekeepers between those deemed eligible to receive LIHEAP and their actual receipt of energy assistance payments, they must implement processes to prevent the erroneous deprivation of all or part of these constitutionally protected benefits.

The process due to energy assistance recipients is determined through the test outlined by the United States Supreme Court in *Matthews v. Eldridge*, which considers the following elements: “the private interest that will be affected . . . the risk of an erroneous deprivation . . . the probable value, if any, of additional or substitute procedural safeguards; and finally, . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” 424 U.S. 319, 335 (1976). LIHEAP recipients who do not receive the full benefit of their grant are at serious risk of losing life-essential utility service. For this reason, the process due to LIHEAP recipients and utility customers is significant.¹² LIHEAP recipients, like recipients of other public benefits,¹³ are due a detailed notice of how their benefit was calculated, notice of the availability of an appeals process, and an opportunity to receive a fair hearing.¹⁴

State agencies and private entities that engage in “state action” which affects the administration and provision of LIHEAP benefits must implement these procedural safeguards to protect recipients against erroneous deprivation. Whether a private entity is engaging in state action depends on a number of factors, including: whether the action is an “exercise of a right or privilege having its source in state authority, . . . the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental

¹¹ *Kapps v. Wing*, 404 F.3d 105, 118 (2d Cir. 2005); *Boylard v. Wing*, No. 487 F.Supp.2d 161, 171 (E.D.N.Y. 2007); *Meeker v. Manning*, 540 F.Supp. 131, 139 (D.C. Conn. 1982).

¹² *Kapps v. Wing*, 283 F.Supp.2d 866, 875 (E.D.N.Y. 2003), *affirmed* 404 F.3d. 105 (2nd Cir. 2005).

¹³ *See, e.g., Goldberg v. Kelly*, 390 U.S. 254 (1970); *Ortiz v. Eichler* 794 F.2d 889 (3d Cir. 1986)

¹⁴ *Kapps v. Wing*, 283 F.Supp.2d 866, 875-76 (E.D.N.Y. 2003), *affirmed* 404 F.3d. 105 (2nd Cir. 2005).

function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”¹⁵ The federal Low Income Home Energy Assistance Act requires states to “make [energy assistance] payments” to low income households. 42 U.S.C. § 8624(b)(2). Utility companies are performing a function specifically defined by federal law as a state-governmental function when they deliver LIHEAP benefits to a recipient in the form of a reduced utility bill. They perform that function under the authority of Pennsylvania regulation governing the payment of LIHEAP grants¹⁶ and under specific contractual obligations they have entered into with the Commonwealth of Pennsylvania.¹⁷ It is clear that utility companies are “state actors” when they are determining how to deliver LIHEAP benefits to LIHEAP recipients.

Utility companies use calculations based on a customer’s income, the customer’s projected LIHEAP grant amount, and/or a customer’s actual LIHEAP grant amount to determine how the LIHEAP grant will be applied to a customer’s account. Utility companies that are performing these types of calculations are subjecting LIHEAP recipients to a host of risks from calculation errors, data entry errors, typos, etc., that could result in recipients getting less than they were determined eligible to receive. Utility companies that are manipulating LIHEAP grants in these ways must provide LIHEAP recipients with notice that details the calculations made when determining the amount of the LIHEAP grant that is applied to a customer’s bill and how the grant will be applied to the bill, and must provide customers with an opportunity to

¹⁵ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620-22 (1991).

¹⁶ 55 Pa. Code §§ 601.44 & 601.45; 2010 Pennsylvania LIHEAP State Plan §§ 601.44 & 601.45.

¹⁷ LIHEAP Vendor Agreement, available at

[http://www.dpw.state.pa.us/oimpolicymanuals/manuals/bop/le/699/PWEA%2034%20\(7-09\).pdf](http://www.dpw.state.pa.us/oimpolicymanuals/manuals/bop/le/699/PWEA%2034%20(7-09).pdf). Utility companies that sign this agreement must complete all of the tasks which will result in delivery of the LIHEAP benefit to the utility customer, including: “To apply the full payment amount of each LIHEAP benefit approved by DPW to the respective account of each LIHEAP recipient whom the vendor serves. . . . To charge a LIHEAP household according to the requirements below: a) the cash price normally charged for energy delivered, not a credit price; b) the same amount a non-LIHEAP household would be billed for an identical delivery, except for additional discounts that may be required by established DPW policies and procedures. . . . To apply all payments paid by DPW (for both Cash Component and Crisis Component benefits) on behalf of the customer against that customer’s heating costs . . . and to not use any such funds for security deposits or late payments or other finance charges.”

appeal and receive a fair hearing to dispute these calculations. Without these procedural safeguards in place, LIHEAP recipients who are also utility customers will be subject to an unreasonable risk of loss of the energy assistance benefits they have been determined eligible to receive.

2. Factors that may impact CAP costs and affordability of bills, such as increased CAP enrollment levels, the recent economic decline, the expiration of electric generation rate caps, the impact on residential rates from the initiation of energy efficiency and conservation programs under Act 129 of 2008, and the potential impact on residential bills from smart metering initiatives.

Action Alliance supports the comments on this topic of the Public Utility Law Project and incorporates them herein by reference.

3. Whether cost recovery mechanisms, which have been implemented by some distribution companies, have produced savings from an improved timeliness of collection activities and whether these savings should be considered in evaluating costs claimed for rate recovery.

Action Alliance supports the comments on this topic of the Public Utility Law Project and incorporates them herein by reference.

4. Proposed rules in 52 Pa. Code §§ 54.74 and 62.4 (relating to review of universal service and energy conservation plans, funding and cost recovery), which create a triennial review process that takes the form of a tariff filing and addresses CAP program funding.

Action Alliance supports the comments on this topic of the Public Utility Law Project and incorporates them herein by reference. Further, Action Alliance's comments of April 17, 2008 address the proposed rules in 52 Pa. Code §§ 54.74 and 62.4, and are incorporated herein by reference. Specifically, Action Alliance highlights its comments at pages 9-11, 20-22, and 35-41, regarding the due process customer protections that must be considered in adopting proposed regulations for the dismissal from CAP for failure to apply for LIHEAP.

5. Commissioner Kim Pizzingrilli's statement on Dominion Peoples Universal Service and Energy Conservation Plan for 2009-2011, Docket No. M-2008-2044646 (January 15, 2009), which discusses a Commission reporting requirement that directs all distribution companies to fully document the rate effect of program modifications in future universal service plans (USP). Under the requirement, distribution companies would include a table showing annual costs for each program, total cost for all USPs and the monthly cost of the programs on a per residential customer basis.

The Commission has solicited comments on a proposal that would specifically create a Universal Service Plan filing requirement comprised of a “table showing annual costs for each program, total cost for all USPs and the monthly cost of the programs on a per residential customer basis.” Proposed Rulemaking Order, Paragraph 5. This proposal would thus require that rate information be displayed in an isolated context giving the appearance of pitting in strictly financial terms the interests of non-CAP customers against those of CAP customers.

The implication of such a filing requirement is that CAP customers are the sole “cause” of the overall often high level of rates that are to be paid by non-CAP customers. In fact, the overall rates that residential customers pay is a function of many factors of which universal service costs are only one. Action Alliance opposes this provision as it is formulated here, because it oversimplifies the task which the Commission must perform in achieving its ultimate objective. That objective is to ensure that universal service plans are not only available, but are funded at levels which accomplish the goal of making life essential utility service actually affordable for low income households.

The Commission’s proposal makes reference to a Statement of Commissioner Pizzingrilli on January 15, 2009 in conjunction with the Commission’s review of Dominion Peoples Universal Service Energy Conservation Plan for 2009-2011. In that statement, Commissioner Pizzingrilli repeated the Commission’s general view that USP programs should

be evaluated based on a number of factors, including consideration of interests of all customers, not those just enrolled in CAPs. All utilities should fully document the rate effect of modifications in future universal service plans filed with the Commission. This information is essential to the Commission's ability to make an informed decision on the merits of these proposals.¹⁸

The Pizzingrilli statement makes reference to the general "rate effect" of universal service plans as they exist and as they are proposed to be modified, but recognizes that this rate effect is only *one* of a number of factors; other factors presumably include the cumulative "rate effects" of many other costs that a utility chooses to incur, including but not limited to rate of return and programs to pay down accumulated debt, in the evaluation of USPs and their modifications.

In contrast, the proposal under consideration here is much more narrow. It appears to reduce the consideration to measuring the amounts that non-CAP participants must pay on a monthly basis in order to fund USPs. This focus would totally ignore all the quantifiable savings in collections costs, bad debt expense and general customer service costs which can be directly attributed to providing affordable bills to low income customers. In addition, this focus would ignore the less easily quantifiable savings that may be attributed to homelessness prevention, child welfare costs and overall public health and safety which flow from implementation of universal service. In short, the "table" that would be required under this proposal would detach universal service costs from their overall context and accentuate USP costs to non-CAP customers without providing any understanding of the overall benefits to be achieved.

For these reasons, Action Alliance recommends that the Commission reject this proposed filing requirement for Universal Service Plans.

¹⁸ *Re: Dominion Peoples Universal Service and Energy Conservation Plan for 2009-2011*, Docket No. M-2008-2044646 (Public Meeting Date January 15, 2009).

6. The Commission's USP approval process, specifically, whether the Commission should issue tentative orders to provide an opportunity for comments and reply comments before approving a distribution company's USP, and whether the companies' USPs should be served on the statutory advocates.

Action Alliance supports the comments on this topic of the Public Utility Law Project and incorporates them herein by reference.

III. CONCLUSION

Action Alliance of Senior Citizens of Greater Philadelphia appreciates this opportunity to provide comments, respectfully submits these Comments to the Commission for consideration, and requests that Final Regulations and Policy Statements be adopted consistent with the Comments submitted herein.

Respectfully submitted,

/s/ Thu Tran
Thu B. Tran, Esq.
Philip A. Bertocci, Esq.
Energy Unit
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3777

Maripat Pileggi, Esq.
Law Center North Central
Community Legal Services, Inc.
3638 N. Broad Street
Philadelphia, PA 19140
(215) 227-2400

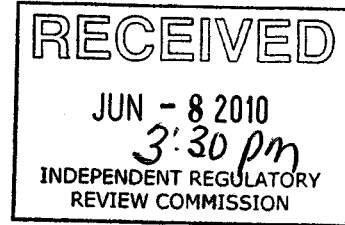
June 2, 2010



COMMUNITY LEGAL SERVICES
OF PHILADELPHIA

2674

June 2, 2010



Be eFiling and Overnight Mail

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, Pennsylvania 17120

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

Dear Secretary Chiavetta:

Enclosed please find for filing the original and fifteen (15) copies of the Comments of Action Alliance of Senior Citizens of Greater Philadelphia in the above captioned proceeding. Electronic copies of these Comments have been e-mailed to the "cc" list below.

Sincerely,

/s/ Thu Tran

Thu B. Tran, Esquire
Philip A. Bertocci, Esquire
Maripat Pileggi, Esquire

Attorneys for Action Alliance

Enclosure

cc: Stephanie Wimer, Law Bureau, stwimer@state.pa.us
Grace McGovern, Bureau of Consumer Services, gmcgovern@state.pa.us