BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

2743

Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 56 to Comply with the Provisions of 66 PA.C.S., Chapter 14; General Review of Regulations	:	Docket No. L-00060182

Comments of

The Energy Association of Pennsylvania

J. Michael Love
President and CEO
E-Mail: mlove@energypa.org

Donna M. J. Clark
Vice President and General Counsel
E-Mail: dclark@energypa.org

ENERGY ASSOCIATION OF PENNSYLVANIA
800 North Third Street, Suite 301 APC Building
Harrisburg, PA 17102
Phone: (717) 901-0600
Facsimile: (717) 901-0611

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COMMENTS OF

THE ENERGY ASSOCIATION OF PENNSYLVANIA

I. EXECUTIVE SUMMARY

Chapter 14 of the Public Utility Code or Act 201 was enacted to provide regulated utilities with reasonable tools to combat the rising level of customers not paying their utility bills, which at this point places the Commonwealth in the unenviable position of being well above the national average in terms of the proportion of customers in debt to their utility. In furtherance of that goal, Chapter 14 provides utilities an opportunity to implement reasonable payment arrangements, to terminate nonpaying customers promptly, and to refuse service to customers who cannot meet reasonable creditworthiness criteria. In the legislation, the Pennsylvania Public Utility Commission ("Commission") was instructed to promulgate regulations that, consistent with the provisions of Chapter 14, would reduce uncollectible accounts expense.

The Commission has issued it proposed rules, but they do not fulfill the express purpose of Chapter 14 and in fact, create additional unnecessary and costly barriers to reasonable collection and termination practices permitted under the law. Specifically, the Commission's proposed regulations are estimated to add millions of dollars to the cost of collections, by levying unreasonable requirements in the following 6 areas: 1) additional winter surveys; 2) medical certificates; 3) informal complaints; 4) the requiring of paper receipts for electronic payments; 5) payment arrangements for terminated customers and; 6) the amortization of payments over 3-12 months, which together will increase utility costs in the Commonwealth by an estimated combined $50 million dollars, annually.

In addition to being costly, the proposed regulations are contrary to Chapter 14, various provisions of Title 18, Crimes and Offenses, the Fair Credit and Reporting Act, and the directives and mandates of the Federal Trade Commission. The proposed regulations, instead of complying with Chapter 14, fail to meet its provisions in multiple ways. It is difficult for the industry to conceive of why increasing costs, needlessly, instead of responding to the legislative mandate to reduce costs, is in the public interest.

The provisions in Act 201 use the words "shall" and "shall not" throughout the legislation. When these words are used in statutes, contracts or the like, the word is generally imperative or mandatory. The word in ordinary use means MUST and is inconsistent with the concept of discretion. The proposed regulations have the unlawful effect of filtering or watering down clear mandates in Chapter 14. Needless to say, these proposed regulations must be struck where they are inconsistent with the mandate of Chapter 14, as an enabling statute would trump any, and indeed all, conflicting provisions promulgated thereunder.

Certain of the regulations also require the utilities to include in tariffs comprehensive policies on creditworthiness, collection practices and other issues requiring the application of informed business judgment. Such a requirement is inimical to the requirements of a utility that needs to flexibly and reasonably serve the requirements of its paying and nonpaying customers. Policies and procedures must be readily adaptive to changing requirements of business and customer needs. Simply stated, limiting management discretion over such complex areas as collections and creditworthiness by requiring insertion of language in company tariffs is unreasonable and unnecessary interference in a company's management of its business.

The Commission has over 6,000 pending cases for gas and electric utilities dealing with collection issues and over 2,200 of those cases are over a year old. The magnitude of dollars related to these pending cases exceeds $10 million. The cost of delaying those collections impacts other residential ratepayers who are paying increased rates. This in itself is a direct violation of 66 Pa. C.S. §1402. The practice of holding open multiple collection matters , in some cases for years, does not provide help to assist utilities in collecting debt and overly complicates collection practices.

This Commission has determined that the public interest would be served by examining all available means to mitigate the size and effect of electric price increases.[1] Yet this mandate is being ignored. The proposed regulations would increase costs by requiring multiple languages to be printed on termination notices and by adding additional costs to the medical certificate process different from what the Commission requires from telecommunications utilities. The proposed regulations also permit sums as low as $25 to be amortized over lengthy periods of time and ignore the mandates of the Fair Credit Reporting Act, all to the detriment of utilities and their good paying residential customers.

[1] Policies to Mitigate Potential Electricity Price Increases, Docket No. M-00061957, Tentative Order Page 1

The Commission has an opportunity to allow electric and gas utilities to manage their cost of collections and reduce their uncollectible accounts expense by properly enforcing and implementing the provisions of Act 201. The Commission also has an opportunity to permit PGW to once again be able to issue revenue bonds by honoring the Act 201 directive to provide PGW additional collection tools.

Finally and most importantly, this Commission's staff has not performed a cost benefit analysis on the proposed regulations. Nor has it conducted a review of how its proposals would conflict with other state and federal laws, or answered: Why increasing the collection costs of utilities is in the public interest when the legislature has mandated a reduction.

On the other hand, EAPA believes that if the Commissions regulations were modified to permit utilities to adopt the reasonable credit and collection criteria enacted in Chapter 14, the utilities would be able to reduce their costs of collection and rival the national average. Indeed, the EAPA estimates that if Pennsylvania utilities could attain the national average level of customer indebtedness to utilities, Pennsylvania utilities would be able to reduce their collection costs by more than an estimated $165 Million. This would have a positive impact on future rate increases.

II. INTRODUCTION

The EAPA, on behalf of its regulated electric and natural gas distribution member companies[2], submits comments to the Notice of Proposed Rulemaking Order adopted September 25, 2008 to Amend the Provisions of 52 Pa. Code, Chapter 56 to Comply with the Provisions of 66 Pa. C.S., Chapter 14; General Review of Regulations at Docket No. L-00060182.

On November 30, 2004, the Governor signed Act 201 into law with an effective date of December 14, 2004. The new law added Chapter 14 to the Public Utility Code and is entitled the Responsible Utility Customer Protection Act. 66 Pa.C.S.A. §§1401-1418.

The General Assembly enacted Chapter 14, stating that residential customer service rules originally adopted by the Public Utility Commission ("PUC" or "Commission") in 1978 and

[2] Electric and gas distribution company members supporting these comments include: Allegheny Power, Citizens' Electric Company, Columbia Gas of Pa, Dominion Peoples, Duquesne Light Company, Equitable Gas Company, Metropolitan Edison Company, *A FirstEnergy Company*, National Fuel Gas Distribution Corp., PECO Energy Company, Pennsylvania Electric Company, *A FirstEnergy Company*, Pennsylvania Power Company, *A FirstEnergy Company*, Philadelphia Gas Works, Pike County Light & Power Company, PPL Electric Utilities, UGI Central Penn Gas, UGI Penn Natural Gas, UGI Utilities, Inc., Valley Energy, Inc. and Wellsboro Electric Company

found in Chapter 56 of the Pennsylvania Code had impeded the ability of utilities to collect bills from certain residential customers. As set forth in the Legislative Declaration of Policy:

> The rules have not successfully managed the issue of bill payment. Increasing amounts of unpaid bills now threaten paying customers with higher rates due to other customers' delinquencies....it is now time to revisit these rules and provide protections against rate increases for timely paying customers resulting from other customers delinquencies. The General Assembly seeks to achieve greater equity by eliminating opportunities for customers capable of paying to avoid the timely payment of public utility bills. 66 Pa.C.S. §1402. (Emphasis supplied.)

The General Assembly clearly provided that the rules governing eligibility criteria, credit and deposit practices, account billing, termination and restoration of service procedures and customer complaint procedures needed to be revised to provide the utilities greater means to collect bills from utility customers who are capable of paying these bills.

Finally, the legislature required the Commission to provide additional collection tools to city natural gas distribution operations "to recognize the financial circumstances of the operations and protect their stability to provide natural gas for the benefit of the residents of the city." 66 Pa.C.S. §1402(4). Thus, a clogged docket of informal PGW cases does not reflect this mandate.

The Association respectfully suggests that the current proposed rulemaking order does not fully meet these legislative mandates. Instead, the proposed amendments add numerous new requirements that do not promote the timely collection of utility bills, do not adhere to the plain language of the statute, do not provide additional collection tools for city natural gas operations, do not provide reasonable and balanced termination and restoration procedures or customer complaint processes and would likely increase costs for the majority of utility customers who pay their bills timely and regularly. The Association believes that many of the proposed changes create increased burdens in the collection process and/or impose reporting requirements that do not benefit utility customers but result in significant additional costs.

The Association and its members recognize the balance that must be maintained between collection of revenue and service to those customers who struggle to pay for utility service. Every regulated electric and natural gas distribution company in Pennsylvania provides multiple

programs to low-income customers to assure service on reasonable terms and conditions. Pennsylvania's electric and gas utilities spend an excess of $400 million annually to address the needs of low-income customers. The General Assembly recognized that assistance was needed in assuring the full and timely payment of bills from those able to pay. The Association asks the Commission to reconsider this rulemaking in the light of that clearly expressed legislative intent.

Chapter 14 supersedes certain Chapter 56 (Standards and Billing Practices for Residential Utility Service, 52 Pa. Code §§56.1-56.231) regulations and all other regulations that are inconsistent with the statute. Historical and Statutory Notes at 66 Pa.C.S.A. §§1401-1418. Chapter 56 must be amended by the Pennsylvania Public Utility Commission (hereinafter "the Commission") to eliminate any inconsistencies with Chapter 14, and the Commission must promulgate regulations to administer and enforce Chapter 14.

On February 3, 2005, the Commission held a "Roundtable Forum" to address the implementation and application of Chapter 14, subsequent to which the Commission issued its first Implementation Order dated March 3, 2005. A second Implementation Order was issued on September 12, 2005. Thereafter, the Commission adopted a Reconsideration of the Initial Implementation Order on October 31, 2005 and a Declaratory Order on November 21, 2005. None of those Orders achieved the revision of Chapter 56 contemplated by the General Assembly.

III. SUMMARY OF LEGAL ARGUMENT

Under the Statutory Construction Act, "the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa.C.S. §1921. In interpreting a statute, the words of the statute must be construed according to their plain meaning and technical words and phrases which have acquired a peculiar and appropriate meaning shall be construed accordingly. Id at §1903(a).

When a statute is free from ambiguity, any further deliberation as to its meaning is unwarranted. 1 Pa.C.S. §1921(b). *Meier v. Maleski*, 670 A.2d 755 (Pa. Commw. 1996) affirmed 549 PA. 171, 700 A.2d 1262 (1997).

An agency's failure to interpret statutes, regulations or orders, consistent with their clear and plain meaning, constitutes an abuse of discretion. *Peoples Natural Gas Co. v. Pennsylvania PUC*, 116 PA. Commw. Ct. 512, 542 A.2d 606 (1988).

This docket is governed by the declaration of policy set forth by the General Assembly in 66 Pa.C.S.A. §1402.

A. The Chapter 56 rules adopted in 1978 "have not successfully managed the issue of bill payment."

B. "Increasing amounts of unpaid bills now threaten paying customers with higher rates due to other customers' delinquencies."

C. "Through Act 201, the General Assembly seeks to provide public utilities with an equitable means to reduce their uncollectible amounts by modifying the procedures for delinquent account collections and by increasingly timely collections. At the same time, the General Assembly seeks to ensure that service remains available to all customers on reasonable terms and conditions."

D. "The General Assembly believes that it is appropriate to provide additional collection tools to city natural gas distribution operations to recognize the financial circumstances of the operations and protect their ability to provide natural gas for the benefit of the residents of the city."

This law has not been reflected in the proposed rules. There is no attempt to quantify either the cost or the benefit of any of these proposals. In addition, the proposed rules may violate other state and federal laws without clear authority for such Commission action.

The Association has quantified the cost of the proposed rules and regulations. If the Commission adopts the proposed rules, electric and gas rates could increase by an estimated $50 million. The proposed rules and regulations would eliminate the opportunity to remove $165 million in current collection costs. In an energy world already stressed with multiple new directives, allowing a utility to manage its costs is clearly in the public interest.

IV. QUANTIFICATION OF THE PROPOSED RULES

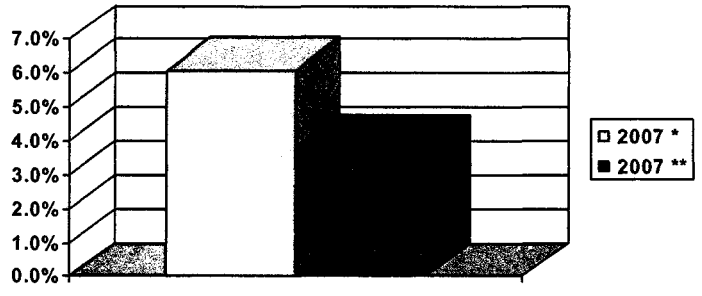
In reviewing these comments, the Commission should keep in mind the conclusions that led to the enactment of Chapter 14. Pennsylvania utilities were lagging behind utilities in other

states in terms of recovering past due accounts, in part, because of the regulatory regime prior to Chapter 14. While progress has been made since 2004, Pennsylvania still lags behind in collection rates. Indeed, for 2007, the difference between Pennsylvania's electric dollars in debt of 6.1% and the national electric average of 3.8% is the equivalent to a reduction of $141.3 million in collections.

Similarly, the difference between Pennsylvania's gas dollars in debt of 6.9% and the national gas average of 6.0% is the equivalent to a reduction of $24.3 million in collections.

Total Excess due to Chapter 56 = $104 million.

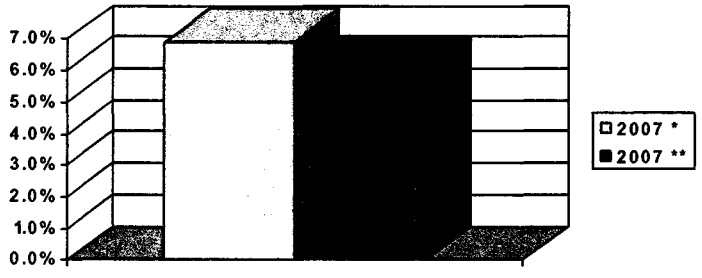
Percentage of customers in debt – electric



* Pennsylvania as reported to NARUC for 2007-2008 National Summary Report on Utility Collections Data prepared by BCS.

** National average for electric entities nationwide.

Percentage of customers in debt – gas

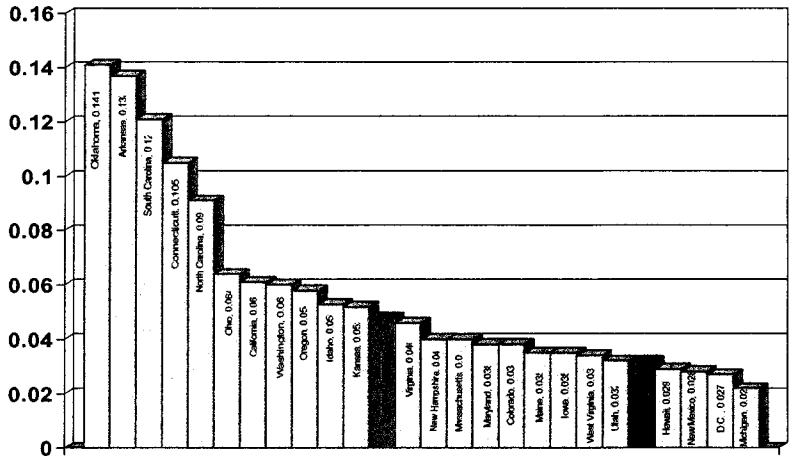


* Pennsylvania as reported to NARUC for 2007-2008 National Summary Report on Utility Collections Data prepared by BCS.

** National average for gas entities nationwide.

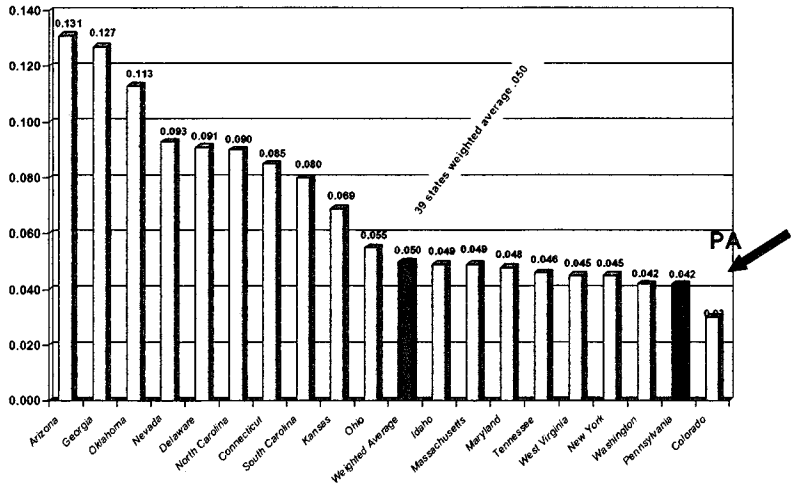
In other respects, the detractors from Chapter 14 have expressed their belief that the Act would result in unprecedented levels of termination. Yet the most recent NARUC study shows that Pennsylvania remains below the national average on terminations and well above the national average in returning customers to service, post termination.

Terminations as a Proportion of Total Residential Accounts – Electric Utilities - 2007



Source: 2008 Individual State Report by the NARUC Consumer Affairs Subcommittee on Collections Gathering 3/3/2009

Terminations as a Proportion of Total Residential Accounts - Gas Utilities - 2007



Source: 2008 Individual State Report by the NARUC Consumer Affairs Subcommittee on Collections Gathering 2/10/2009

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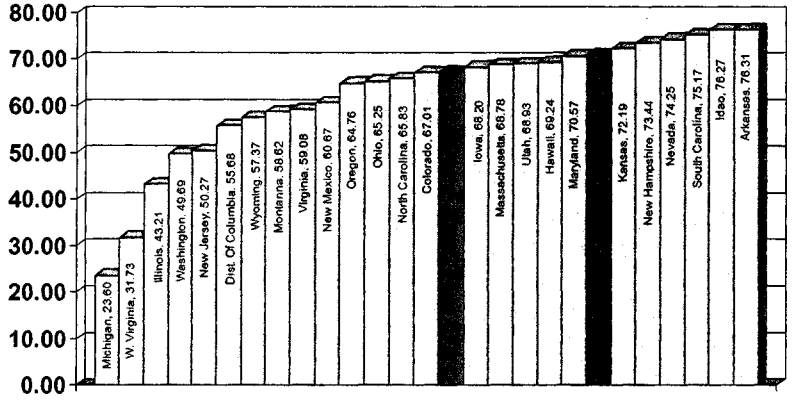
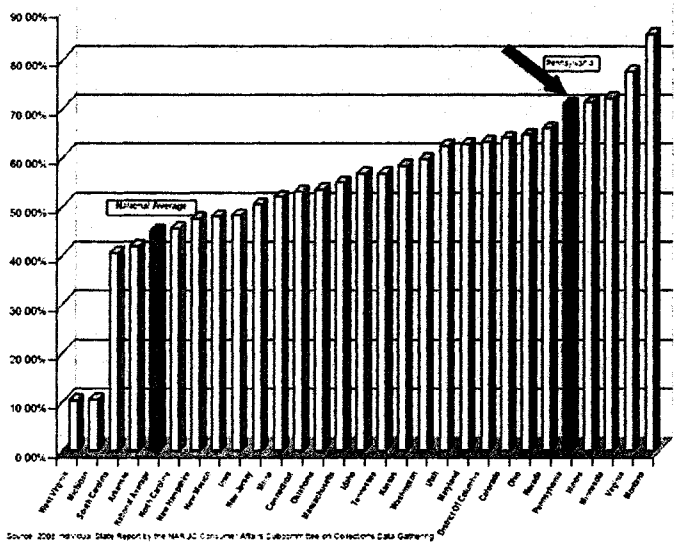
Reconnections as a Percentage of Terminations - Electric



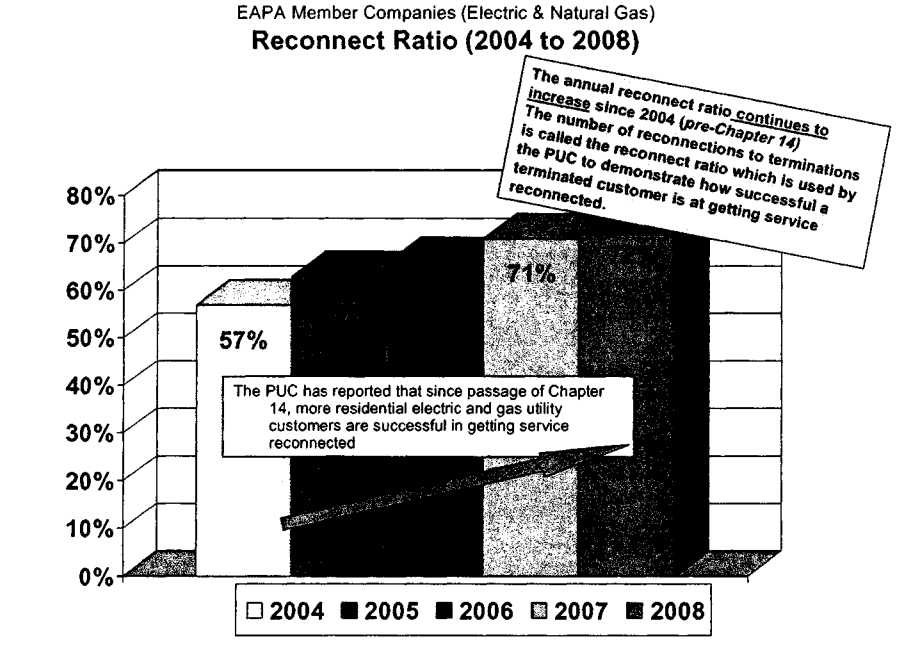
Source: 2008 Individual State Report by the NARUC Consumer Affairs Subcommittee on Collections Gathering 3/3/2009

Reconnections as a Percentage of Terminations - Gas



The energy utilities today are reconnecting customers more effectively than they did prior to Act 201.

Furthermore, the ease by which service is restored after termination has increased every year since the passage of Act 201.



The portrayals by other commentators of the problems with Act 201 do not hold up to statistical analysis.

V. THE COMMISSION'S PROPOSED REGULATIONS FAIL TO PROVIDE PGW WITH ADDITIONAL COLLECTION TOOLS MANDATED IN ACT 201 AND ALSO ERODE OR DENY USE OF PROVISIONS IN THE ACT.

The statutory Act 201 language requires the Commission to provide additional collection tools for PGW, so as to protect its ability to provide natural gas for the residents of Philadelphia. The Commission is acutely aware of the difficult demographics of the PGW service territory and the challenge presented to PGW's ability to collect sufficient revenue to sustain the Company. The commission is also aware that the current financial markets related to this recession compound PGW's problem. PGW needs the stability of effective collections to meet its needs.

Yet, regardless of these factors, there is no Commission discussion or provision of additional PGW collection tools contained in the regulations offered for comment. For example, PGW must have the ability to utilize a credit scoring service easily and with limited

administrative burden and indeed has been permitted to do so by statutory authorization. However, the proposed regulations effectively eliminate credit scoring for PGW. While Act 201 permits, and indeed encourages, use of a national credit score procedure for all Pennsylvania utilities, the Commission's proposal to contain the specifics of those national credit scores in "tariffs" clearly violates the protected aspects of licenses with these vendors. The Commission, by attempting to intrude into the arena of national credit scoring, has entered an area governed by the Fair Credit Reporting Act. The Commission's jurisdictional reach does not go that far.

Because of the absence of cost/benefit analysis, the Commission has no real comprehension of the costs related to the proposed regulations and further, there is no financial analysis of the effect of these proposals on PGW. In fact, for the past four years there have been no new regulations proposed which would assist PGW with its collections. The legislature mandated that this Commission provide more collection tools for PGW. The proposed regulations in this docket clearly do not fully support that legislative mandate and in fact may increase the burden on PGW's timely paying customers since some of the proposals may increase PGW's uncollectible expenses.

Given Act 201's mandates, the current state of the economy and PGW's magnitude of debt, the Commission must, at a minimum, (a) provide PGW use of credit reporting, (b) eliminate Chapter 56 requirements that allow payment avoidance, and (c) honor the provisions of Act 201.

Because of the legislature's concern regarding the financial health of PGW, and its mandate that PGW be given additional collection tools, the Association chose to conduct a survey of municipal gas utilities across the United States.

The Association survey reveals exactly why other municipal gas utilities are not experiencing the same financial stress as PGW. They all have much tighter time frames between billing, termination notice and if necessary, shut off. They also require security deposits more frequently.

Citizens of Indianapolis utility has a billing practice of 17 days, plus an additional 4 days for mail and cash processing. At the end of this 21 days, Citizens charges a late payment fee. At the next billing cycle, Citizens issues a new bill accompanied by a disconnect notice. The disconnect notice contains the amount and the date by which payment must be made to avoid

being disconnected. The disconnect date is 14 days from the bill date for residential services and 8 days for commercial services.

Colorado Springs Municipal Gas Utility requires a customer deposit for all commercial customers, which is held for a minimum of 36 consecutive billing periods which is only refunded if all billing statements have been paid promptly. All residential customers which have had a delinquent payment over the previous 12 months are also required to pay a security deposit. Service may be discontinued upon giving ten (10) days prior to written notice of discontinuance.

In Tennessee, Memphis Light, Gas and Water may charge a $125 initial security deposit based on credit scoring. Customers requesting extensions must pay 25% of the balance. Customers requesting second payment arrangements must pay 50% of the extended balance. Remaining balances must be paid over a five month timeframe.

In Nebraska, the Metropolitan Utilities District requires all of its customers to provide a security deposit. They have a reconnect fee of $70.50.

These are examples of additional steps that could be undertaken on behalf of PGW.

VI. PAYMENT PERIOD FOR DEPOSITS NEEDS TO BE REVISITED (SECTION 56.38).

Proposed Section 56.38 prohibits a utility from requiring full and immediate up-front—payments of an entire deposit amount, except in the case of PGW. This reflects the view of the Commission that had the General Assembly intended to impose the same requirements on all utilities, they would not have made the distinction for PGW. The Commission reads Section 1404 as merely specifying that deposit amounts must ultimately be paid in full by the established time frames and that the failure to do so is grounds for termination of service. Towards this end, the Commission proposes establishing a payment period that is inappropriately grounded in the security deposit rules applicable to service reconnection which require 50% payment upon determination by the public utility that a deposit is required, 25% payment 30 days after the determination and 25% payment 60 days after the determination. See 52 Pa.Code §56.38 and 66 Pa.C.S. §1404(h).

The EAPA submits that Section 1404(h) applies to "applicants" required to pay reconnection security deposits only and therefore paying the deposit in installments would be limited to that instance.

Additionally, Section 1404(a) (General rule) provides:

In addition to the right to collect a deposit under any commission regulation or order, the commission shall not prohibit a public utility, prior to or as a condition of providing utility service, from requiring a cash deposit in an amount that is equal to one-sixth of the applicant's estimated annual bill, at the time the public utility determines a deposit is required from the following:

(1) An applicant who previously received utility distribution services and was a customer of the public utility and who service was terminated for any of the following reasons:

(i) Nonpayment of an undisputed delinquent account.

(ii) Failure to complete payment of a deposit, provide a guarantee or establish credit.

(iii) Failure to permit access to meters, service connections or other property of the public utility for the purpose of replacement, maintenance, repair or meter reading.

(iv) Unauthorized use of the utility service delivered on or about the affected dwelling.

(v) Failure to comply with the material terms of a settlement or payment agreement.

(vi) Fraud or material misrepresentation of identity for the purpose of obtaining utility service.

(vii) Tampering with meters, including, but not limited to, bypassing a meter or removal of an automatic meter reading device or other public utility equipment.

(viii) Violating tariff provisions on file with the Commission so as to endanger the safety of a person or the integrity of the delivery system of the public utility.

66 Pa.C.S.A. §1404(a).

As a matter of statutory construction, [w]here a specific provision follows a general provision in the same statute, the specific prevails and is construed as an exception to the general provision. 1 Pa.C.S. §1933; *Zuppo v. Commw. of Pennsylvania Department of Transportation*, 739 A.2d 1148 (Pa.Commw.1999). The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the legislature. 1 Pa.C.S.A. §1921(a); *Commonwealth v. Drummond*, 775 A.2d 849 (Pa.Super 2001) (en banc). In construing a statute to determine its meaning, courts must first determine whether the issue may be resolved by reference to the express language of the statute, which is to be read according to the plain meaning of the words. In re *Jacobs*, 936 A. 2d 1156 (Pa.Super 2007). When analyzing particular words or phrases, the court will construe them "according to rules of grammar and according to their common and approved usage." 1 Pa.C.S.A. §1903(a). Words of a statute are to be considered in their grammatical context. *Drummond* at 856.

Chapter 14 at Section 1404(e) provides: [a] *public utility shall not be required to provide service if the applicant fails to pay the full amount of the cash deposit. 66 Pa.C.S.A. §1404(e).* Section 1404(h) clearly indicates the legislature's intent to cull out an exception with regard to deposits for applicants seeking reconnection of their utility service. That situation is being treated separately and distinctly from other instances where a deposit is required.

The EAPA's position is that under 1404(a) and (e), a public utility shall not be required to provide service to an applicant without them paying the <u>full</u> amount of the cash deposit if the applicant fails to pass the creditworthiness test of the utility. The language of the statute is clear. The utility has "*the right to collect a deposit...prior to or as a condition of providing utility service" and "a public utility shall not be required to provide service if the applicant fails to pay the <u>full</u> amount of cash deposit.*" 66 Pa.C.S.A. §1404(a) and (e). Where there is a conflict between the statute and a regulation purporting to implement the provisions of the statute, the regulation gives way. *Department of Transportation v. Colonial Nissan, Inc.*, 691 A.2d 1005 (Pa. Commw. 1997); *Dauphin County Social Services for Children and Youth v. Department of*

Public Welfare, 2631 C.D. 2003 (Pa. Commw. 2004). If the deposit was paid in installments as the Commission proposes, then service would be provided prior to receipt of the full deposit. This is contrary to the statutory language and contrary to legislative intent. Accordingly, the proposed regulation is in conflict with the statute and should fail.[3]

VII. CREDIT STANDARDS ARE A TOOL TO REDUCE RATES, NOT INCREASE THEM (SECTIONS 56.31, 56.32, 56.35, 56.36, 56.38, 56.191).

Chapter 14 at Section 1404(a)(2) provides in connection with allowing cash deposits that a deposit is permitted when, inter alia,

> Any applicant or customer...is unable to establish creditworthiness to the satisfaction of the public utility through the use of a generally accepted credit scoring methodology which employs standards for using the methodology that fall within the range of general industry practice.

66 Pa.C.S.A §1404(a)(2).

In order to insure that the credit standards being used by the utilities comply with Section 1404(a)(2), the Commission proposes requiring utilities to include their credit scoring methodologies and standards in their Commission approved tariffs. The Commission maintains that requiring tariff approval will allow the Commission to review and ensure that a utility's application and credit policies and procedures are appropriately evaluating the risk of nonpayment for utility service and are in keeping with the intent of the statement of policy at regulation 56.31 of the Code. These requirements squarely conflict with Federal Fair Credit standard and should be rejected.

The Commission has limited jurisdiction to regulate credit standards to be used by the public utilities because this matter is preempted by federal law, specifically the Fair Credit

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[3] While the statutory mandate is clear, namely that a full payment of a deposit is required before service is initiated, the issue for this Commission is not restricted to facial conflict between the Commission's regulation and the Sections 1404(a) and (e). The Association notes that telecommunication utilities have the right under Commission regulations to receive their full deposit within 30 days of the initial partial payment, but PGW and the other energy utilities are being required to await the passage of 90 days. 52 Pa. Code 64.36(1)(i). Even without the facial conflict with the statute, it appears inconsistent to treat the energy industry differently than the telecommunications industry on collection of security deposits.

Reporting Act ("FCRA"). The principle of federal preemption of state law derives from the second clause of Article VI of the United States Constitution, the Supremacy Clause. *Arnoldy v. Forklift L.P. et. al.*, 2007 Pa.Super 143 (2007); *Werner v. Plater-Zyberk*, 2002 Pa.Super 42, 799 A.2d 776 (2002). Under the Supremacy Clause, federal law is "the supreme law of the land" and any conflicts between federal and state laws must be resolved in favor of federal law. Id.

The Pennsylvania Supreme Court has recognized three types of preemption which are as follows:

> *(1)* express preemption, where the federal law includes a provision that expressly preempts the state statute;
>
> *(2)* field or implied preemption, where Congress has legislated in a field so comprehensively that it has implicitly expressed an intention to occupy the given field to the exclusion of state; and
>
> *(3)* conflict preemption, where the state statute either precludes compliance with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Office of Disciplinary Counsel v. Marcone, 855 A.2d 654 (Pa. 2004).

The FCRA imposes notice requirements on any person using consumer [credit] reports as the basis for taking adverse actions. See 15 U.S.C. §1681m (a). "Person" is defined in the FCRA as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. §1681a (b). Public utilities fall within the definition of a "person" under the FCRA that use consumer [credit] reports as part of their credit policies and procedures in determining creditworthiness of their customers; therefore, the utility would be subject to the mandates of the FCRA.

The FCRA in Section 1681t addresses its relationship with state laws. In general, except as provided in subsection (b) and (c) of Section 1681t, the subchapter does not annul, alter, affect, or exempt any person subject to the provisions of the subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of the subchapter and then only to the extent of

inconsistency. 15 U.S.C. §1681t(a). The FCRA provides in Section 1681t(b) that no requirement or prohibition may be imposed under the laws of any State (1) with respect to any subject matter regulated under (C) subsections (a) and (b) of Section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer...15 U.S.C. §1681t(b)(1)(C).

Based on this discussion, one must conclude that the FCRA does not exempt a person from complying with state laws that are consistent with the FCRA, **but** also that no requirement or prohibition may be imposed under State law with regard to any subject matter regulated under subsections (a) (duties of users taking adverse actions on basis of information contained in consumer reports) and (b) (adverse action based on information obtained from third parties other than consumer reporting agencies) of Section 1681m (Requirements on users of consumer reports). Id.

Sections 1681m (a) and (b) of the FRCA expressly preempt the Commission from issuing standards that conflict with those provisions The statutory language of Chapter 14 Section 1404 (a)(2) relating to credit standards is not at odds with the FCRA, in that it requires the utility when attempting to establish creditworthiness to "employ standards for using [credit scoring] methodology that fall within the range of general industry practice". 66 Pa.C.S.A. §1404(a)(2).

The proposed regulation, however, requires the public utility to include in their tariffs filed with the Commission, their credit and application procedures along with their credit scoring methodology and standards. 52 Pa.Code §56.36. Specifically, Section 56.36(1) attempts to regulate the duties of the utility when taking an adverse action based on information contained in an adverse credit report. 52 Pa.Code §56.31(1). This is contrary to federal law and any attempt to regulate this matter is preempted.

Moreover, the EAPA submits the Commission's proposal to place credit scoring procedures and methodologies in utility tariffs is inappropriate under the FCRA because this is proprietary information belonging to the credit scoring agency. Under the FCRA Section 1681g, a consumer reporting agency shall not be required to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer. 15 USC

§1681g(a)(1)(B). This confidential information cannot be placed in a utility tariff since public utilities are required to keep copies of tariffs open to public inspection. See 66 Pa.C.S. §1302.

Finally, as a general matter, utility management is in the hands of the utility, including decisions related to the necessity and propriety of operating expenses, unless on the basis of record evidence, the Commission finds an abuse of the utility's management discretion. *National Fuel Gas Distribution Corp. v. Pennsylvania Public Utility Commission*, 464 A.2d 546 (Pa. Commw. 1983).

In this instance the Commission, by attempting to oversee how a utility establishes creditworthiness by way of tariff approval, intrudes unnecessarily into the utility's management discretion. The statutory language at Section 1404(a)(2) is clear that an applicant or customer is to establish creditworthiness **to the satisfaction of the public utility** (emphasis added) using generally accepted credit scoring methods which employ methodologies that fall within the range of general industry practice. 66 Pa.C.S.A. §1404(a)(2). Unless the Commission can establish that the utility abused its managerial discretion in determining creditworthiness or denying credit, or an arbitrary action by the utility can be shown, it is not within the province of the Commission to intervene. Furthermore, if credit scoring procedures are tariffed as the Commission proposes, the utility's flexibility to revise their business practices is hindered since a tariff revision would be required before the utility could make any changes.

Finally, the courts have determined that an agency's failure to interpret a statute according to its plain meaning is a reversible abuse of discretion. *Peoples Natural Gas Co. v. Pennsylvania Utility Commission*, 116 Pa. Commw. Ct. 512, 542 A.2d 606 (1988). The principal objective of interpreting a statute is to effectuate the intention of the legislature and give effect to all of the provisions of the statute. 1 Pa.C.S.A §1921(a); *Commonwealth v. Drummond*, 775 A.2d 849 (Pa.Super.2001). The plain language of a statute generally provides the best indication of legislative intent. *Commonwealth v. McClintic*, 589 Pa. 465, 909 A.2d 1241(2006). The legislature was explicit in their word choice stating that creditworthiness is to be established **to the satisfaction of the public utility.** 66 Pa.C.S.A. §1404(a)(2) (emphasis added). The Commission, by requiring credit practices and procedures to be included in Commission approved tariffs as a way of oversight, is not only usurping the authority of the utility, but also vitiating legislative intent.

This discussion of credit standards would also apply to Section 56.191(d) of the regulations. Although 1407(d) is not in violation of the FCRA, the proposed, corresponding regulation, specifically §56.191(e) is, in that the Commission wants a utility's credit practices and procedures included in its tariff.

Another striking difference between the proposed regulations and those employed for telecommunications entities relates to the credit histories for applicants. The proposed regulations seek to embody management decision-making into a tariff. This development is in sharp contrast to what is required of telecommunications utilities under 52 Pa. Code 64.31 and 64.32. There, the telecommunications utilities get to determine deposit policies which "shall be based on the credit check of the applicant or customer", credit standards and the material that can be considered include (52 Pa. Code §64.32(4)) credit card history, residences over the past 5 years, employment of the applicant, social security number and a number of modern day credit tracers.

VIII. PAYMENT AGREEMENTS – NEED TO BE REVISITED (SECTIONS 56.14, 56.97, 56.151).

According to the Commission and pursuant to the Reconsideration of Implementation Order of October 31, 2005, Section1405(d) permits the Commission (in addition to instances where there has been a change of income) to establish one payment agreement in addition to any payment agreements that the utility has entered before the prohibition against a second payment agreement in Section1405(d) applies.

The general rule regarding payment agreements is set forth in Section 1405(a) which provides:

The Commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers. The Commission is authorized to establish payment agreements between a public utility, customers and applicants within the limits established by this chapter.

66 Pa.C.S.A. §1405(a).

§1405(d) (Number of payment agreements) provides:

Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement. A public utility may, at its discretion, enter into a second or subsequent payment agreement with a customer.

66 Pa.C.S.A §1405(d).

"Payment agreement" is defined in the statute as:

An agreement whereby a customer who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments.

66 Pa.C.S.A §1403.

The Commission's position hinges on the phrase "second or subsequent" in §1405(d), which it maintains creates a limit on Commission authority only as to second and subsequent Commission established payment agreements. It claims the language of the statute does not prohibit initial payment agreements established by the Commission after the customer has defaulted on a utility established payment agreement.[4]

Another payment agreement issue is presented with Section 1410(1). The EAPA maintains that Chapter 14 requires the customer to contact the utility first, which allows them the opportunity to enter into a payment agreement before getting the Commission involved. Section 1410(1) of the statute which provides:

The commission shall accept complaints only from customers who affirm that they have first contacted the public utility for the purpose of resolving the problem about which the customer wishes to file a complaint. If the customer has not contacted the public utility, the commission shall direct the customer to the public utility.

66 Pa.C.S.A §1410(1).

Words of a statute are to be considered in their grammatical context. *Commonwealth v. Drummond*, 775 A.2d 849 (Pa.Super. 2001) (en banc). In construing a statute to determine its

[4] Pushing this overall statutory analysis to the side for the moment, the Association would point out that the Commission's current practice of not deciding cases before it for an extended period is tantamount to implementing a payment agreement, in that the utility is not allowed to terminate a customer for nonpayment while the matter is before the Commission. Currently, the Commission has over 6,000 such cases waiting to be processed. Some of these cases are ones which the Commission has already issued payment agreements. Others have been waiting for extended periods for resolution, which also conflicts with the length of payment agreements contained in §1405(b).

meaning, courts must first determine whether the issue may be resolved by reference to the express language of the statute, which is to be read according to the plain meaning of the words. 1 Pa.C.S. §1903(a). Words and phrases must be construed according to the rules of grammar and their common and approved usage. Id.; *Commonwealth v. Drummund*, 775 A.2d 849 (Pa.Super. 2001) (en banc).

The express language of §1405(d) is clear. "*Absent a change in income, the commission* ***shall not*** *(emphasis added) establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous agreement.*" 66 Pa.C.S.A. §1405(d). Statutory construction rules provide that "where a specific provision follows a general provision in the same statute, the specific prevails and is construed as an exception to the general rule. 1 Pa.C.S. §1933, *Zuppo v. Commonwealth of Pennsylvania*; 739 A.2d 1148 (Pa. Commw. 1999); In re *Waits' Estate*, 336 Pa. 151, 7 A.2d 329 (1939). In this instance, Section 1405(d), the specific provision, would prevail over Section 1405(a), the general rule provision, thus clearly prohibiting the Commission from establishing a payment agreement if a utility has already established one and there is no change in income.

The legislature, in defining "payment agreement" in Chapter 14, made no distinction between payment agreements established by the Commission and payment agreements established by the utility. See 66 Pa.C.S.A. §1403. The legislature, however, does make such a distinction as between utility established and Commission established payment agreements in Sections 1405(b) and 1405(c). Had they intended to make this distinction in Section 1405(d), they would have done so. Only a public utility may, "at its discretion", enter into a second or subsequent payment agreement with a customer. See 66 Pa.C.S.A §1405(d).

Also, the legislature's use of the word "shall" in the statute was not haphazard. Words and phrases in a statute shall be considered according to their common and appropriate usage. 1 Pa.C.S.A. §1903(a); *Stewart v. Commonwealth of Pennsylvania*, 593 A.2d 14 (Pa. Commw. 1991); *O'Neill v. Borough of Yardley*, 565 A.2d 502 (Pa. Commw. 1989). By definition, the term "shall" generally is mandatory, with "no room to overlook a statute's plain language to reach a different result." *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148 (1997). Black's Law Dictionary defines the word "**shall**": "As used in statutes, contracts, or the like, this

word is generally imperative or mandatory...The word in ordinary usage means 'must' and is inconsistent with the concept of discretion." Blacks Law Dictionary (8th ed. 2004).

"Shall" denotes a mandatory, not permissive, instruction which allows no discretion on the part of the one instructed to carry out the directive. The legislature's use of **shall not** (emphasis added) in Section 1405(d) evidences its clear intent to mandate that the Commission is not permitted to establish or order a public utility to establish a second or subsequent payment agreement. Additionally, the courts have held that an agency's failure to interpret a statute according to its plain meaning is an abuse of discretion. *Monessen Southwestern Railway Co. v. Pennsylvania Public Utility Commission*, 507 Pa. 586, 493 A.2d 666 (1985).

Proposed Sections 56.97(b) and 56.151(3) provide a laundry list of provisions restricting a utility's discretion in entering into payment agreements with a customer.

It is well established that regulations must be consistent with statute under which they are promulgated. *Popowsky v. Pennsylvania Public Utility Commission*, (No. 1995 C.D.2003). Moreover, when there exists an apparent inconsistency or conflict between a statute and a regulation promulgated thereunder, the statute must prevail. *Tiani v. Department of Public Welfare*, 86 Pa. Commw. Ct. 640, 486 A.2d 1016 (1985).

The proper analysis of Section 1405(d) is that a customer gets one payment agreement, whether it be utility or Commission established, and if the customer defaults on that agreement, the Commission shall not establish a second or subsequent agreement, but the public utility may, at its discretion, do so. Chapter 14 requires the customer to contact the utility first for purposes of entering into a payment agreement. If a utility and a customer voluntarily agree to a payment agreement, such an agreement, by definition, is mutually acceptable, which is inconsistent with the standards of proposed Sections 56.97(b) and 56.151. Proposed sections 56.97(b) and 56.151(3) should therefore be rejected because they conflict with the mandates of Chapter 14 regarding payment agreements.

IX. RATE DISCRIMINATION SHOULD BE A CONCERN OF THE COMMISSION (SECTIONS 56.83, 56.12(7) AND 56.35(2)).

Sections 1405(a) and (b) provide rules regarding payment agreements. Section 1405(a) (General Rule) states:

The commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers. The commission is authorized to establish payment agreements between a public utility, customers and applicants within the limits established by this chapter. 66 Pa.C.S.A §1405(a).

Section 1405(b) specifies the length of time payment agreements can be extended for customers with various income levels. Section 1405(b) (Length of Payment agreements) provides:

The length of time for a customer to resolve an unpaid balance on an account that is subject to a payment agreement that is investigated by the Commission and is entered into by a public utility and a customer shall not extend beyond:

(1) Five years for customers with a gross monthly household income level not exceeding 150% of the Federal poverty level.

(2) Two years for customers with a gross monthly household income level exceeding 150% and not more than 250% of the Federal poverty level.

(3) One year for customers with a gross monthly household income level exceeding 250% of the Federal poverty level and not more than 300% of the Federal poverty level.

(4) Six months for customers with a gross monthly household income level exceeding 300% of the Federal poverty level. 66 Pa.C.S.A. §1405(b).

The legislature, in subparagraph (d) (Number of payment agreements) limits the number of payment agreements the Commission can establish as follows:

Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement. A public utility may, at its discretion, enter into a second or subsequent payment agreement with a customer. 66 Pa.C.S.A. §1405(d).

The Commission, despite statutory language, has extended these repayment periods or granted second or subsequent payment agreements, absent a change in income, to many customers who defaulted on previous payments. Furthermore, by ordering a utility to defer payment, for example, for 12 months for a customer with a gross monthly household income of

300% of the federal poverty level, the Commission overlooks §1405(b)(4) which provides that the maximum period of time is 6 months. See 66 Pa.C.S.A. §1405(b)(4).

It is the position of the EAPA that the Commission, by extending and/or granting subsequent payment agreements is, in essence, providing an interest-free loan to the recipient of the agreement. Customers timely paying their utility bill and those not subject to a payment agreement are paying for comparable utility service, but at a higher rate. This amounts to rate discrimination because there is an "unreasonable preference" to one customer while subjecting another to an "unreasonable disadvantage".

The Public Utility Code addresses rate differences and reasonableness thereof among classes of customers as follows:

66 Pa. C. S. §1301: *Every rate made, demanded, or received by any public utility or by any two or more public utilities jointly, shall be just and reasonable and in conformity with regulations or orders of the Commission ...*

66 Pa. C. S. §1303: *No public utility shall directly or indirectly, by any device whatsoever, or in anywise demand or receive from any person, corporation, municipal corporation a greater or lesser rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed as provided in this part. Any public utility having more than one rate applicable to service rendered to a patron shall, after notice of service condition, compute bills under the rate most advantageous to the patron.*

66 Pa.C.S. §1304: *No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, municipal corporation, or subject any person, corporation or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service... Nothing herein contained shall be deemed to prohibit the establishment of reasonable zone or group systems, or classifications of rates...*

Judge Kramer, in *Philadelphia Suburban Transportation Co. v. Pennsylvania Public Utility Commission,* dealt with the meaning of these provisions as applied to rate structure: as long as the classification of customers is reasonable or is founded upon some reasonable basis, a utility may charge different rates for different classes of customers; whether the classification is reasonable is a question of fact to be determined by the finder of fact, the PUC. *Philadelphia Suburban Transportation Co. v. Pennsylvania Public Utility Commission,* 3 Pa. Commw. 184, 281 A.2d 179 (1971). There is no set formula for determining proper ratios among the rates of different customer classes. *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, et al.*, 47 Pa. Commw. 512, 532, 409 A.2d 446 (1979).

The establishment of a rate structure is an administrative function uniquely within the expertise of the PUC and the reasonableness and the difference between rates are factual questions for the PUC whose findings must be upheld if supported by competent evidence. *Carbonaire Co. v. Pennsylvania Public Utility Commission*, 114 Pa. Commw. 124, 137, 538 A.2d 959 (1988) (the differences between industrial customers were such that it was reasonable for the PUC to allow rate differences); *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission, et al.*, 47 Pa. Commw. 512, 538, 409 A.2d 446 (1979); *United States Steel Corp. v. Pennsylvania Public Utility Commission et. al.,* 37 Pa. Commw. 173, 190, 390 A.2d 865 (1978).

Mere variations in rates among classes of customers does not, per se, create an intolerable preference or unreasonable discrimination. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002); *Builders Owners and Managers Association v. Pennsylvania Public Utility Commission*, 470 A.2d 1092 (Pa. Commw. 1984); *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission*, 47 Pa. Commw. 512, 538, 409 A.2d 446 (1979). Different rates may be charged to customers that receive a different type, grade or class of service. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002); *Zucker v. Pennsylvania Public Utility Commission et al.*, 43 Pa. Commw. 207, 401 A.2d 1377 (1979); *Carpenter v. Pennsylvania Public Utility Commission*, 15 A.2d 473 (Pa. Super. 1940). Before a rate can be declared unduly preferential and therefore unlawful, it is essential that there be not only an advantage to one, but a resulting injury to another. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002); *Philadelphia Suburban Transportation Company v. Pennsylvania Public Utility Commission et. al.*, 3 Pa. Commw. 184, 192, 281 A.2d

179 (1971). In order for a rate differential to survive a challenge brought under Section 1304 of the Public Utility Code, 66 Pa. C. S. §1304, the utility must show that the differential can be justified by the difference in cost required to deliver service to each class. *Lloyd v. Pennsylvania v. Public Utility Commission*, 904 A.2d 1010 (Pa. Commw. 2006); *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002). Overall, the rate differentials must advance efficient and satisfactory service to the greatest number at the lowest overall charge. Id. If the total sum demanded of one customer is illegally high and illegally low for another, there is rate discrimination. *Allegheny Ludlum Corp. v. Pennsylvania Public Utility Commission*, 149 Pa. Commw. 106, 119, 612 A.2d 604 (1992) (free service is necessarily an illegally low charge).

Administrative agencies do not have the authority to order a regulated company to change lawful conduct on the theory that it is in the best interest of its customers. *Aetna Casualty and Surety Insurance v. Insurance Department*, 536 Pa. 105, 638 A.2d 194 (1994). The corollary is true; that an agency cannot waive a mandate of statute because it is in the public interest. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002); *Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission*, 663 A.2d 281 (Pa. Commw. 1995). A statutory command defines the public interest and an administrative agency established to enforce that statutory command simply lacks the authority to issue countermand orders. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 663 A.2d 1044 (Pa. Commw. 1995).

In this instance, the Commission is authorizing, despite statutory mandates, deviation from an approved tariff by extending and granting second or subsequent payment agreements to many customers who defaulted on prior payments. The Commission, by extending the repayment period for certain customers, is providing them an interest-free loan with which to pay their utility service, thereby placing one customer at an advantage over another for the comparable service. Having more than one rate applicable for comparable services rendered within the same class of customers amounts to rate discrimination.

Provisions contained in §56.83, §56.12(7) and §56.35(2) all provide preferences to one set of customers over others and generally do not comply with either 66 Pa.C.S. §§1405 or 1407.

X. DELAYS IN REGULATORY PROCESSING OF CAP CASES HAS BEEN A PROBLEM FOR SOME COMPANIES (SECTIONS 56.92, 56.97, 56.140-181).

Section 1405(c) prohibits the Commission from negotiating or approving payment agreements for customers participating in a Customer Assistance Program ("CAP"). 66 Pa.C.S.A §1405(c). "Payment agreement" is defined as "an agreement whereby a customer who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments". 66 Pa.C.S.A. §1403.

It is the Commission's position that they can still address CAP-related factual disputes including, but not limited to, billing, eligibility requirements, meter reading accuracy, etc., as part of their obligations at 66 Pa.C.S.A. §2203(8) and §2804(9). The Commission maintains that these types of disputes are unrelated to the prohibition at §1405(c). According to the Commission, one wishing to go forward with a CAP-related dispute would follow complaint procedures in Chapter 56. See 52 Pa.Code §§56.92, 56.97, 56.140-56.181.

Section 1405(a) provides that "the commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers. The Commission is authorized to establish payment agreements between a public utility, customers and applicants within the limits established by this chapter. 66 Pa.C.S.A §1405(a).

The EAPA takes the position that in certain circumstances the Commission, pursuant to Section 1405(a), may investigate and authorize payment agreements. The EAPA contends, however, that the Commission does not have the authority to delay or postpone payment of bills by CAP customers while it is reviewing the specifics of CAP programs, billing, eligibility requirements, default, etc., because extending or delaying the time for payment is, in essence, establishing a payment agreement which is prohibited by §1405(c).

The Statutory Construction Act states that where a specific provision follows a general provision in the same statute, the specific provision prevails and is construed as an exception to the general provision. 1 Pa.C.S §1933; *Zuppo v. Commonwealth of Pennsylvania*, 739 A.2d 1148 (Pa. Commw. 1999); *Bowers v. State Employees' Retirement Board*, 29 Pa. Commw. 561, 371 A.2d 1040 (1977); *Petition of Turkey Run Fuels, Inc.*, 173 Pa.Super. 76, 95 A.2d 370 (1953). In this instance, Section 1405(c) is an exception to the general rule of Section 1405(a) and would therefore prevail.

Additionally, CAPs are tariff programs. Section 1304 of the Public Utility Code establishes standards that must be followed when a utility is making a rate. 66 Pa.C.S.A. §1304. Section 1304 must be read in conjunction with other provisions of the Public Utility Code, such as Section 1302 which requires, inter alia, that "tariffs showing rates" be filed with the PUC and be made available for public inspection. 66 Pa.C.S.A. §1302. Section 1303 of the Public Utility Code states in part:

No public utility shall directly or indirectly, by any device whatsoever or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed.

66 Pa.C.S.A §1303.

This provision has been interpreted to mean that public utility tariffs have the force and effect of law and are binding on the customer, as well as the utility. *Pennsylvania Electric Co. v. Pennsylvania Public Utility Commission*, 663 A.2d 281 (Pa. Commw. 1995 Intolerance for utility tariff deviation has been expressed with equal force by Pennsylvania appellate courts on numerous occasions. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002).

Moreover, administrative agencies do not have the authority to order a regulated company to change (i.e., allow tariff deviation) lawful conduct on the theory it is in the best interest of its customers. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002); *Aetna Casualty and Surety Insurance Co. v. Insurance Department*, 536 Pa 105, 638 A.2d 194 (1994). The corollary is equally true; an agency cannot waive a mandate of statute because it is in the public interest. *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 808 A.2d 1044 (Pa. Commw. 2002).

Chapter 14 clearly prohibits CAP rates from being the subject of payment agreements negotiated or approved by the Commission. The prohibition against payment agreements for CAP customers is an exception carved out of the statute. By allowing a delay or postponement of a CAP payment(s) under the pretext of pending resolution of a factual dispute is to allow an

unwarranted tariff deviation. The Commission cannot "directly or indirectly" stray from the utilities' approved tariffs. As a result, proposed regulatory changes at sections 56.92, 56.97, and 56.140-181 are inconsistent with §1405(c).

XI. THERE ARE A NUMBER OF CHAPTER 56 REGULATIONS THAT NEED TO BE ELIMINATED (SECTIONS 56.81, 56.83).

Chapter 14 includes grounds for authorized termination of service with notice. See Section 1406(a).. The Commission proposes incorporating those mandates into the regulations at 52 Pa.Code §56.81. Section 1406(c) sets forth grounds for which immediate termination without prior notice is authorized. The Commission proposes incorporating those mandates into Section 56.98 of the regulations. The Commission also wants to revise the grounds for authorized termination by creating a distinction between grounds for termination with notice and grounds for immediate termination without notice.

The Commission also notes that Chapter 14 does not specifically list instances for which termination is not authorized as currently found at Section 56.83 of the regulations. This section includes prohibitions on terminating utility service for nonpayment of non-basic charges, for charges of a different rate class, for overdue account balances less than $25.00 and for unpaid concurrent service. Maintaining Section 56.83 to the extent it is consistent with Chapter 14 is proposed by the Commission. It also wants to maintain the distinction between "user without contract" and "unauthorized user" and proposes defining these terms in the regulations.

The EAPA's position is that Section 56.81 of the regulations is superseded by Chapter 14 as specifically stated in the Historical and Statutory Notes of Chapter 14. 66 Pa.C.S.A. §§1401-1418. The EAPA also maintains that Section 56.81 is also inconsistent with the "declaration of policy" found at Section 1402. 66 Pa.C.S.A. §1402.

Additionally, the EAPA contends there are many inconsistencies between Chapter 14 and Section 56.83. Maintaining Section 56.83 in its current state as much as possible, as the Commission would like, is inconsistent with the statute, and thus, the following sections should be eliminated for the following reasons:

56.83(1) and (2): Relates to concurrent service and are inconsistent with the policy goals of Chapter 14;

56.83(3): Addresses nonpayment of merchandise and fees;

56.83(4): Relates to nonpayment of bills of other customers;

56.83(5) and (6): These sections are not necessary because Chapter 14 has created very specific rules about deposits, termination, and payment agreements;

56.83(7): Addresses services furnished more than 4 years ago, which is not necessary, since this is to be addressed in the make-up bill regulations;

56.83(8): Conflicts with the definition of "customer" as found at Section 1403;

56.83(9): Addresses nonpayment of estimated charges unless the estimated bills were required due to denial of access to the meter;

56.83(10): The $25.00 threshold is not mentioned in Section 1406(a)(1); and

56.83(11): The $25.00 threshold is not mentioned in Section 1406(a)(1). It also defeats the purpose of a security deposit and creates an additional risk of loss to the utility.

Section 1504 of the Public Utility Code gives the Public Utility Commission the express power to prescribe by regulations "*just and reasonable standards ... to be furnished, imposed, observed and followed by and for all public utilities.*" 66 Pa.C.S.A. §1504(1); *Popowsky v. Pennsylvania Public Utility Commission*, (no. 1995 C.D. 2003); *Every public utility may have reasonable rules and regulations governing conditions under which it shall be required to render service.* 66 Pa.C.S. §1504. When reviewing the validity of an agency's regulation or interpretation thereof, the Court must determine whether the regulation is consistent with the statute under which it is promulgated. *Peek v. Department of Aging*, (no. 1328 C.D. 2004); In this instance, the foregoing regulations are inconsistent with Chapter 14 for the reasons stated above, and therefore should be abrogated.

The EAPA also takes the position that the "user without contract" are unauthorized users where service is maintained without customer application and is subject to immediate termination without notice. Section 1406(c) (Grounds for immediate termination) reads as follows:

(1) A public utility may immediately terminate service for any of the following actions by the customer:

(i) Unauthorized use of the service delivered on or about the affected dwelling.

(ii) Fraud or material misrepresentation of the customer's identity for the purpose of obtaining service.

(iii) Tampering with meters or other public utility's equipment.

(iv) Violating tariff provisions on file with the commission so as to endanger the safety of a person or the integrity of the public utility's delivery system.

(2) Upon termination, the public utility shall make a good faith attempt to provide a post termination notice to the customer or a responsible person at the affected premises, and, in the case of a single meter, multiunit dwelling, the public utility shall conspicuously post the notice at the dwelling, including in common areas when possible.

66 Pa.C.S.A. §1406(c).

Maintaining a distinction between "user without contract" and "unauthorized user" as the Commission proposes will not minimize uncollectible expenses or encourage timely payments.

Under the Statutory Construction Act, the object of all interpretation of statutes is to ascertain and effectuate legislative intent. 1 Pa.C.S.A. §1921. Had the legislature intended to make the distinction between "user without contract" and "unauthorized user" in Chapter 14, it would have done so.

Under Section 1406(c), all unauthorized users of a service would be subject to immediate termination without notice. 66 Pa.C.S.A. §1406(c)(1)(i). Immediate termination of a service is at the discretion of the utility as evidenced by the statutory language which reads in part ... "*a public utility **may** (emphasis added) immediately terminate service for ... unauthorized use of the service...*" Id.

Also, a reading of Section 1406 evidences the legislature's intent that termination of service, authorized or immediate, (barring winter termination) rests with the public utility and

not the Commission. 66 Pa.C.S.A. §1406. For example, under Section 1406(a) (authorized termination), "*a public utility **may** (emphasis added) notify a customer of termination ...*" 66 Pa.C.S.A. 1406(a). Section 1406(b) (grounds for immediate termination) states that "*a public utility **shall** (emphasis added) ...* 66 Pa.C.S.A. 1406(b). In statutory interpretation, words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. 1 Pa.C.S.A. §1903(a). "May" denotes discretion, and "shall" denotes mandatory action.

The Courts have recognized the Commission's duty to the public and a utility's right of self-management. *Pennsylvania Public Utility Commission v. Philadelphia Electric Co., et al.*, 522 Pa. 338, 561 A.2d 1224 (1989). The Courts have further recognized that it is not within the province of the Commission to interfere with the management of a utility unless an abuse of discretion or arbitrary action by the utility has been shown. Id. Unless clear statutory authority is found for an agency to control management matters, it should not be implied. *North Pennsylvania Power Co. v. Public Utility Commission*, 333 Pa. 265, 5 A.2d 133 (1935) (overturned in part). Additionally, the Commission's application of its regulations may not conflict with fundamental statutory principles, and when the Commission exceeds its statutory authority, a court may find an abuse of discretion. 66 Pa.C.S. §501; *Rohrbaugh v. Pennsylvania Public Utility Commission*, 556 Pa.199, 727 A.2d 1080 (1999). An obvious corollary of the foregoing proposition is that if there has been an abuse of managerial discretion, and the public interest has been adversely affected thereby, then the Commission is empowered to intervene. Id. Lastly, in determining whether management has abused its discretion in operating the utility, the Commission cannot fall prey to judging management action by hindsight. *Pennsylvania Public Utility Commission v. Philadelphia Electric Co., et al.*, 522 Pa. 338, 561 A.2d 1224 (1989).

Chapter 14 is very clear in its language mandating when the utility may terminate service and what it shall do prior to termination of service. 66 Pa.C.S.A. 1406. The Commission's authority to inject itself into the internal management of a public utility is limited. The Commission has no authority to supplant the decision making responsibility of management on matters committed to their discretion. The Commission, by attempting to inject itself into managerial decisions of the utilities, by proposing regulations inconsistent with Chapter 14, would be acting outside its legislative authority as interpreted by Pennsylvania courts.

XII. WINTER TERMINATION REQUIREMENTS SHOULD ACTUALLY ASSIST THE PUBLIC INTEREST AND NOT MERELY ADD COSTS (SECTION 56.100)

The Commission recognizes that the new winter termination rules as set forth in §1406(e) are significantly different from and therefore supersede the regulations of §56.100. Section 1406(e) restricts termination without Commission permission to customers at or about 250% of the federal poverty level (150% for PGW). 66 Pa.C.S.A. §1406(e) (1) and (2). The statute does not address or provide direction on a utility's obligation to determine and confirm a customer's eligibility for winter-time termination based on their income, nor does it provide direction on the customer's obligation to cooperate with such procedures. As a result, the Commission proposes significant changes to the survey provisions of §56.100. Those changes are as follows:

a.) maintain the distinction between heat and non-heat accounts;

b.) verify that an account is eligible for winter termination before terminating service;

c.) the utilities will, via §56.100 (4) and (5), be required annually, at the beginning of the winter, to survey the heat related accounts they have terminated and make a good faith effort to restore service to as many as possible;

d.) the utility shall report to the Commission by December 15 of each year on their efforts and the number of heat related accounts without service, and subsequently provide two updates, the first on January 15 and the second on February 15, during the winter months; and

e.) the utility shall report to the Commission anytime they become aware of a death following a termination of utility service where it appears that the death may be linked to lack of utility service.

The Commission also proposes additional requirements to the survey process including clarification of what grounds for termination shall be included in the survey in addition to nonpayment, and categorization of the accounts by the first three digits of the customer's postal code.

The EAPA believes that the updates to the winter survey are unnecessary because requirements for monthly reporting, including monthly termination activity, and postal code

categorization are already set forth in §56.231 as currently written. See 52 Pa.Code §56.231. The Commission in §56.100 not only imposes requirements on a public utility that were not expressed or intended by the legislature, but also broadens the scope of the statute. Further, EAPA does not believe these additional requirements improve the survey process or assist more customers.

Adding costs for additional survey updates on January 15 and on February 15 of each year does not appear to be in the public interest. First and foremost, additional surveys without additional sources of governmental relief for the poor are counter-productive. Second, adding the costs of surveys, namely between $50 and $75 to canvas a household would cost between $718,000 and $1,077,000 or an estimated total of between $1.4 million and $2.1 million, which must be reflected immediately in utility rates. Third, the additional surveys and reporting requirements do not address the underlying societal problem.

The Commission previously chose not to add more surveys because of cost considerations as more than two additional surveys "would impose undue burdens on utilities." Proposed Rulemaking Order issued September 26th, 2008, Attachment One, Page 42. Therefore, the Commission has found that cost is an issue. Without an analysis of the costs and benefits, the Commission should not impose the additional costs of these two surveys on customers. Since there is a ready acknowledgment as to the cost burden without any quantification or possible existence of benefits, the argument that the imposition of two costly surveys does not serve the public interest is readily apparent.

There is no additional funding source provided by any government agency to assist those who continue to be off after December 15. The industry provides 1) LIHEAP applications, 2) hardship fund applications and, 3) CAP applications. Yet a significant amount of customers subject to a second survey chose not to avail themselves of these energy assistance options earlier in the winter season. Additional energy assistance is needed, not additional surveys.

Moreover, as the Commission's own data illustrates that the people who remain without a central heating source beyond December consist mainly of the following:

1. Consumers who are unwilling to file an application for LIHEAP assistance despite utility encouragement and provision of LIHEAP forms;

2. Consumers who are unwilling to provide income information to utilities so as to permit their qualification for CAP rates; and

3. Consumers who have had CAP rates, but failed to maintain their low $20-$25 a month payment and thereby lost the forgiveness of their previous debt.

An additional problem which has surfaced in the survey process is the double counting of homes where both electric and gas service has been terminated. The winter survey always double counts gas/electric customers who have had both services terminated.

It is fundamental that the power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the Legislature as expressed by the statute. *Harrisburg Area Community College v. Pennsylvania State Employees Retirement System*, 821 A.2d 1255 (Pa.Commw.2003); *Pennsylvania Association of Life Underwriters, et al., v. Commonwealth of Pennsylvania Department of Insurance, et al.*, 29 Pa. Commw. 459, 371 A.2d 564 (1976); Commonwealth v. DiMeglio, 385 P. 119, 122 A.2d 77 (1956). The regulations therefore may not broaden the scope of a proscription in the statute or impose requirements not plainly expressed in the statute. *Fireman's Relief Association of Washington v. Minehart*, 430 Pa. 66, 241 A.2d 745 (1968).

When there exists an apparent inconsistency or conflict between a statute and a regulation promulgated thereunder, the statute must prevail. *Commonwealth v. Reynolds*, 876 A.2d 1088 (Pa. Commw. 2005); *Commonwealth of Pennsylvania vs. DeFusco*, 378 Pa.Super. 442, 549 A.2d 140 (1988); *Tiani v. Department of Public Welfare*, 86 Pa. Commw. Ct. 640, 486 A.2d 1016 (1985). While courts traditionally accord the interpretation of the agency charged with administration of the act some deference, it is well-settled that an administrative regulation must be consistent with the statute under which it is promulgated. *Commonwealth of Pennsylvania vs. DeFusco*, 378 Pa.Super. 442, 549 A.2d 140, (1988) (Delaware River Port Authority was not vested with the authority to promulgate rules and regulations that directly contravene matters expressed in the Motor Vehicle Code); *Wiley House v. Scanlon*, 502 Pa. 228, 465 A.2d 995 (1983) (court determined that the Department of Education's regulation was not inconsistent with the Public School Act); *Commonwealth Department of Public Welfare v. Forbes Health System*, 492 Pa. 77, 422 A.2d 480 (1980) (medical assistance regulations consistent with

enabling statute). Section 56.100 is inconsistent with §1406 for the reasons set forth above and therefore the requirement for additional winter surveys should be rejected.

The EAPA also objects to the Commission's proposal of reporting deaths possibly relating to utility termination which occur in a utility's service area. If this proposal is allowed to stand, liability may be imputed to a utility where none would otherwise exist. Before responsibility or liability is assessed, along with possible fines or sanctions, the utility should be entitled to the fundamental principles of fairness; i.e., the right to notice and hearing, before its rights, duties, and obligations may be affected.

This crucial issue which the Association asks the Commission to consider is: whether additional surveys without additional energy assistance from either the state or federal government benefits responsible rate payers or those in need of energy assistance.

The utilities are prepared to advocate with the Commission that customers who remain without a central heating source in January are entitled to a LIHEAP cash and/or crisis grant during the winter moratorium. Further, the utilities will continue to urge permanent state funding through legislation for those customers eligible for energy assistance.

XIII. MEDICAL CERTIFICATION PROVISION (SECTION 56.111- 56.118).

Section 1406(f) (Medical certification) provides as follows:

> A public utility shall not terminate service to a premises when a licensed physician or nurse practitioner has certified that the customer or a member of the customer's household is seriously ill or afflicted with a medical condition that will be aggravated by cessation of service. The customer shall obtain a letter from a licensed physician verifying the condition and shall promptly forward it to the public utility. The medical certification procedure shall be implemented in accordance with commission regulations.

66 Pa.C.S.A. §1406(f).

The Commission proposes adding to the new regulations, "nurse practitioners" as medical professionals qualified to provide medical certification, either oral or written. The position of the EAPA is that the term "nurse practitioner" should be added whenever a regulation

in Chapter 56 references **oral** (emphasis added) medical certification, but that **written** (emphasis added) medical certification is still only acceptable from a licensed physician.

Under the Statutory Construction Act, the object of all interpretation of statutes is to ascertain and effectuate the legislative intent. 1 Pa.C.S. §1921. In interpreting a statute, the words of the statute must be construed according to their plain meaning and usage, with technical words being given their technical meaning... Id. at §1903(a). Section 1406(f) states in part that "*The customer shall obtain a* ***letter*** *(emphasis added) from a licensed physician*" 66 Pa.C.S.A. 1406(f). "Letter" is defined by the Merriam-Webster Dictionary as: "... (2a) a direct or personal written or printed message addressed to a person or organization." Merriam-Webster Dictionary (2008).

When a statute is free from any ambiguity, any further deliberation as to its meaning is unwarranted. 1 Pa.C.S. 1921(b); *Meier v. Maleski*, 670 A.2d 755 (Pa. Commw. 1996), aff'd, 549 Pa. 171, 700 A.2d 1262 (1997). In Pennsylvania, the courts have adopted a "strong deference" standard for reviewing agency interpretations of statutes, which they are charged to enforce. *Dee-Dee Cab, Inc v. Pennsylvania Public Utility Commission*, 817 A.2d 593 (Pa. Commw. 2003) (the court held that the Commission's administrative interpretation of the Medallion Act was reasonable and consistent with the express language of the statute); *Scanlon v. Department of Public Welfare*, 739 A.2d 635 (Pa. Commw. 1999). However, an agency's failure to interpret statutes, regulations or orders consistent with their clear and plain meaning constitutes an abuse of discretion. *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission*, 116 Pa. Commw. Ct. 512, 542 A.2d 606 (1988) (the Commission abused its discretion in failing to apply and be bound by its own Certificate of Public Convenience); *Monessen Southwestern Railway Co. v. Pennsylvania Public Utility Commission*, 507 Pa. 586, 493 A.2d 666 (1985). A presumption exists that the legislature placed every word, sentence and provision in the statute for some purpose and therefore courts must give effect to every word. *Commonwealth v. Ostrosky*, 909 A.2d 1224 (Pa. 2006).

Based on the plain meaning of the words used in 1406(f) of Chapter 14, the written (i.e., letter) medical certification should be provided by a licensed physician only. See 66 Pa.C.S.A. §1406(f). If the legislature had intended to include licensed nurse practitioner as being authorized to issue a written medical certification, then they would have expressly stated such in

§1406(f). EAPA does not believe that it is appropriate for the Commission to expand the statute, via regulation, beyond the clear and unambiguous language of the statute.

As for emergency provisions, the telecommunications industry has been able to responsibly control added costs for medical certificates through its emergency provisions related to the medical certificates contained in §64.101 through and including §64.109. The Association would suggest that the identical provisions be used for the water, electric and gas industry, with one modification. This modification would be to add the term "nurse practitioner" every place the rules seek oral certification.

The provisions in proposed §56.111 through §56.118 should be eliminated and replaced with the provisions contained in §64.101 through and including §64.109. In particular, the following existing telecommunication utility provisions should be added immediately to the proposed regulations for the other utilities:

§64.107 Suspension upon medical certification.

When the certification has expired, the original grounds for suspension shall be reviewed and the utility may suspend service without additional notice, if notice previously has been mailed or delivered, if the customer has failed to make or to maintain an agreement on payment arrangements, and if the utility makes a reasonable attempt to contact the customer at least 24 hours before suspension.

§64.109 Suspension prior to expectation of medical certification.

A utility may suspend service prior to the expiration of the medical certification when the customer fails to make timely payments for service provided by the utility after the date on which service is restored or suspension postponed. The company must follow notice procedures prior to suspension according to Section 64.71 through 64.74.

Note: "Utility" has been substituted for "LEC" or "telephone company".

The Commission has found the current telecommunications regulations reasonable. Given the magnitude of utility receivables and the legislative direction embodied in Section 1402 to reduce outstanding amounts due, implementing the regulations of the other industry the Commission oversees rather than the onerous, expensive regulations proposed, is a preferable regulatory course.

XIV. INFORMAL CASES NEED TO BE ADDRESSED

The proposed regulations contained in §56.140 through §56.181 could result in an increase in receivables and an increase in utility rates. Since the passage of Act 201, there has been a steady increase in the number of unresolved informal cases. Some of these cases involve CAP customers and the informal complaint procedure has been used to avoid compliance with §1405(c). The legislature has recognized the ability of the Commission to establish CAP rates but customers still have the responsibility to pay for the undisputed portions of their bills. CAP customers currently receive a reduced rate and debt forgiveness. However, the Commission should require CAP customers to make their normal monthly payments when the Commission is examining issues related to "billing, eligibility requirements and default."

The Commission claims that its proposed regulations governing energy and water utility complaints is analogous to telephone regulations at 52 Pa. Code §64.153. A review of that regulation requires the Commission staff:

> "Upon the filing of an informal complaint, which shall be docketed as "complainant v. company", Commission staff will immediately notify the utility, review the dispute and within a reasonable period of time, issue to the utility and the complaining party an informal report with findings and a decision."

As with the telephone industry, EAPA believes that the Commission should similarly endeavor to resolve energy-related cases in a reasonable time frame.

Because pursuant to Act 201, the Commission is legally mandated to reduce the level of energy receivables and further, the Commission finds the telecommunication regulation at 52 Pa. Code §64.153 as comparable, and there are over 6,000 pending energy collections cases currently before the Commission, the Association contends that the proposed informal complaint regulations should be modified. 52 Pa. Code §64.153. Likewise, for formal complaints, the provisions contained in 52 Pa. Code §64.161 through §64.163 should apply to energy and water utility formal complaint processes. As to payment of bills pending resolutions of disputes and complaints, 52 Pa. Code §64.171 is superior to proposed Section 56.181. Of particular note is a comparison of section 5 in these regulations where the telecommunication rule uses the word

"shall" and the energy utility provision uses "may". Again, this subtle difference increases receivables in contradiction to the direction of Act 201's mandate.

The two provisions are provided below:

§64.171(5) Telecommunications Utilities:

> *"Effect of acceptance of partial payment. The acceptance by a LEC of a partial payment for a bill pending final outcome of a dispute shall not be deemed an accord and satisfaction or waiver of the right of the utility payment in full as subsequently agreed to by the parties or decided by the Commission."*

§56.181(5) Energy & Water Utilities:

> Effect of acceptance of partial payment. The acceptance by a public utility of a partial payment for a bill pending final outcome of a dispute may not be deemed an accord and satisfaction or waiver of the right of the public utility to payment in full as subsequently agreed to by the parties or decided by the Commission."

The word "shall" means a partial payment is never sufficient for a telecommunications utility, but the term "may" means it might be for energy and water utilities. There is no valid explanation given or plausible for this proceeding which involves lowering accounts receivables.

XV. SECTION 56.12(7) BUDGET BILLING IS CONTRARY TO THE PROVISIONS OF ACT 201 (SECTIONS 56.12, 56.35, 56.38, 56.41).

The language contained in the last two sentences of 56.12(7) is at odds with the direction given by the legislature to eliminate opportunities to avoid the timely payment of bills. See Section 1402(3). Utilities are to be provided with equitable means to reduce their uncollectibles. Id. Allowing a customer to make payment of $26 over a 12 month period simply delays full payment unnecessarily, thereby compounding a utility's cash flow difficulties. Moreover, to comply with this regulation, the utilities would need to increase programming and other collection tracking, which comes at a cost, all contrary to the spirit of Chapter 14. This rule should fail.

Section 56.35(2) tries to resurrect the name game and is directly contrary to Act 201. If the utility can prove that an applicant received the benefit of utility service at another dwelling, Act 201 permits denial of service until full payment is made. The proposal that would allow the continued shifting of names seeks to incorrectly bless "unjust enrichment" with the public interest.

Section 56.41(1)(i)(A) has the utility sending notice to a perpetual non-payer that they get one more bad payment before a deposit will be required. This is bureaucratic, costly and does not serve the public interest.

XVI. APPLICANTS ARE NOT ENTITLED TO PAYMENT ARRANGEMENTS. SECTION 1407 GOVERNS (SECTIONS 56.2, 56.32, 56.35 AND 56.38).

The Commission, in its proposed rules, does not necessarily distinguish between a delinquent customer and applicant. Where this is of particular consequence is the case where a utility customer moves out owing a balance and then becomes an applicant elsewhere in the service territory. The proposed rules attempt to disregard the plain language of Section 1407 and to provide payment arrangement rights to applicants.

First, the starting point of statutory construction must be the legislative language and the courts may assume that the legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

Courts (and Commissions) are to presume that a legislature says in a statute what it means and means in a statute what it says. *Connecticut Nat'l Bank v. Germain*. 503 U.S. 249 (1992).

The Commission is without discretion here, as absent any ambiguity, the Commission must enforce the clearly expressed legislative intent by applying the statute as written without reference to legislative history or pre-code practice. See, e.g., *Mountain States Tel. & Tel. v. Pueblo of Santa Anna*, 472 U.S. 237 (1988).

Every part of a statute must be viewed in connection with the whole so as to harmonize all parts, if practicable, and give sensible and intelligent effort to each, for it is not to be presumed that the legislature intended any part of a statute to be without a meaning. .

The express language of §1407 requires full payment of outstanding balances. If there is even a remote conflict between §1405 and §1407, then the expressed interest of expediting payment, reducing receivables and lowering any debt contained in the Acts' declaration of policy. See 66 Pa.C.S. §1402.

However, the inappropriateness of the proposed regulation is greater than the failure to comply with either the explicit language of Act 201 or its declaration of policy. What the Commission is proposing also contradicts its previous practice.

As the Commission said in *Frayne v. PECO,* Docket C-20029005, Opinion and Order entered September 10, 2003, the record reveals that the complainant moved from the premises involved in August 2002. Finding of Fact 3. Because the Complainant no longer resides at the service address, a payment arrangement is no longer available as a vehicle to address the Complainant's account balance. Therefore, the entire account is immediately due. See *Enid Rivera v. PPL*, Docket No. Z-00332295 , entered August 8, 1997, Frayne Decision, page 3.

If neither former Commission policy under Chapter 56 nor explicit statutory language or intent permit payment arrangements for persons whose energy or water has been terminated, why would an agency attempt to expand the statutory mandate beyond its authority The Association estimates that this policy alone could lead to an increase in receivables and costs in excess of an estimated $30 million annually. Proposed regulations 56.2, 56.32, 56.35 and 56.38 should be removed.

XVII. ADDITIONAL COSTS ASSOCIATED WITH PROPOSED ELECTRONIC BILLING PROCESS (SECTION 56.11).

Customers' use of electronic billing has increased, and in fact, many customers prefer receiving their bills electronically. Additionally, utilities can see savings from reduced printing and mailing costs. EAPA agrees that the Chapter 56 rulemaking process provided a satisfactory vehicle for addressing electronic billing and further agrees that certain protections should be in place, such as voluntary participation, a visual format that mirrors the paper bill including messages, bill inserts, assurance of customer privacy, etc.

EAPA disagrees, however, with Section 56.11(b)(1) which states that customers using electronic billing retain "the option of continuing to receive a paper bill if desired." EAPA believes that this proposed provision goes against the rationale of providing electronic billing services. A provision that was put into place to streamline the billing process for both the customer and the utility has now essentially doubled the processes and costs. EAPA members estimate that at current electronic billing enrollment levels, requiring utilities to provide the additional paper bill to its electronic billing customers will range anywhere from thousands to hundreds of thousands of dollars per utility each year.

A customer who receives his/her bills electronically and subsequently determines that the paper method is preferred maintains the option to revert back to paper billing with proper notice.

XVIII. SECTION 56.101 AND SECTION 56.98 ARE NO LONGER VALID.

The BCS staff has taken the position under current section 56.101 that payment made by a customer with an insufficient fund check, represents a payment toward a company payment arrangement, which then requires that the company must begin the termination process with a 10-day notice. Letter from compliance specialist Sara J. Hinton, BCS, dated December 7, 1994.

That interpretation, and indeed 56 §101, are superseded by Act 201, 13 Pa.C.S. §3502 and 18 Pa.C.S. 4106(d). The language contained in 66 Pa.C.S. A., Section 1406 specifically places public utilities on the same level as all other debtors when the customer acts in a fraudulent or deceptive fashion. 52 Pa.Code §1406(h). A nonsufficient fund check or access devise fraud should warrant immediate disconnection.

Section 56.98 does not comply with either Act 201 or the criminal code of the Commonwealth. The Commission has stated that tendering a bad check or an access device which is unauthorized, revoked or cancelled is not fraud. Second Implementation Order, Page 23-24. However, while the Commission is provided deference on regulatory matters, it does not have any authority to alter criminal statutes.

Act 201, Section 1408(h) refers to an unauthorized credit card use (as relating to access device fraud) Fraudulent use of credit cards, 19 Pa.C.S.A. §4106 and bad checks, 18 Pa.C.S.A. §1405, are under the "offenses against property forgery and fraudulent practices".

Because the utilities, like all other persons, must comply with the criminal sections of the Commonwealth, the Second Implementation Order becomes void as to this issue.

A bad check, or a bad credit card, is fraud and constitutes grounds for immediate termination.

XIX. DOES NOT FOLLOW THE CHAIRMAN'S MANDATE OR TELECOMMUNICATION UTILITY REGULATION (SECTION 56.163).

EAPA agrees that the Commission has the authority to codify or specify utility response times. However, in the spirit of promoting cooperation and improving processes and efficiency, it is not unreasonable for the Commission, like courts, to expeditiously process cases. Indeed, the Chairman recognized this in setting Commission efficiency as a priority.

If the industry is given five days to respond to complaints without service due to nonpayment termination, then the Commission staff should be required to address and resolve each informal complaint within 30 days. The BCS currently has over 2,000 cases that are over a year old. There are nearly 1,000 cases that are two or more years old. These delays are in the millions of dollars for some companies, and overall, represent over $10 million in unpaid energy utility usage. In the telecommunications industry, 52 Pa. Code 64.153 requires that the Commission act on an informal complaint within a reasonable timeframe.

Section 56.163 should be amended to require the BCS to address a customer complaint within 30 days of receipt of the utility data. The industry is willing to positively respond if the regulations require an expeditious regulatory review. The over $10 million dollars in receivables being held up by regulatory procedures is not in the public interest or in compliance with the intent of Act 201.

XX. PROPOSED REGULATION REGARDING FOREIGN LANGUAGE ON TERMINATION NOTICES IS EXPENSIVE AND CAUSES UTILITY PRICES TO NEEDLESSLY BE INCREASED (SECTION 56.91).

The Commission has, in the past, encouraged utilities to indentify and address language barriers that exist within their service territories. The industry has in some instances employed Spanish-speaking customer service representatives, in other instances employed Spanish-language menu options on utility call center interactive voice response systems and using on-call third party translation services to communicate with customers via telephone.

Yet, despite an outreach program that exceeds what the Commission requires of telecommunications companies, despite what is not required of energy providers in the kerosene, oil or propane industries, despite the absence of any governmental program requiring printing of a foreign language requirement on cigarettes, liquor, seat belts, subpoenas, medication, poisons, tax forms, eviction notices or legislation, the Commission proposes that utilities print notices in other languages where there is substantial existence of a foreign language in a utility's service areas. The proposed regulation is unprecedented in any other energy industry, business service/product or government document.

The requirement that the notice has to reflect a language where there is a substantial "existence of a foreign language" is simply too vague. There are multiple dialects of what English-speaking people refer to as Spanish, Chinese and Korean. Is substantial by municipality? By county? By neighborhood? By city block? This proposed regulation language is designed to extend energy usage without pay and trap the industry into post-termination review. Procedures that will hinge on a definition of when there is a substantial foreign language.

The Association would also represent to the Commission that there is no evidence that foreign language is a concern. The industry as noted earlier, has positively and pro-actively addressed its customers who wish to communicate in a foreign language. There is no evidence that those current costs and procedures are not sufficient. Nor is there any evidence as to the cost of this proposed regulation. The Commission is asked to recognize that printing costs, programming costs, and multiple language translations all increase the price of electricity and

natural gas service. The Commission is also asked to take administrative notice that no such regulations appear for telecommunication utilities.

XXI. IDENTITY THEFT HAS SOME FEDERAL RAMIFICATIONS (SECTION 56.32, 56.35, 56.36).

The proposed regulations again attempt to revive the name game. Simply stated, the public interest is ill-served by permitting households to avoid payment for energy used by a group of people who have unjustly enriched themselves. The regulations set forth in Sections 56.32, 56.35, 56.36, are encouraging the use of the name game or identity theft or both and should be eliminated for the reasons set forth below.

As many as 9 million Americans have their identities stolen each year. The crime takes many forms. Thieves may establish gas, water or electric service using someone else's identity. Crooks may use proof of utility service to get driver's licenses illegally or apply for government benefits using a bogus address.

Utilities properly equipped may be the first to spot the red flags that signal the risk of identity theft, including suspicious activity suggesting that thieves may be using stolen information to establish service. The Federal Trade Commission ("FTC") has issued a new regulation called the Red Flags Rule which requires utilities, as well as other companies, to develop a written Red Flags program to detect, prevent and minimize the damage that could result from identity theft. The Federal Trade Commission, the nation's consumer protection agency, enforces the Red Flags Rule and will begin doing so on May 1, 2009..

XXII. CREDIT STANDARDS (SECTION 56.282).

The Association disagrees with §56.282(a)(2) ownership of real property. In these troubled financial times, ownership of real estate or the existence of a one-year lease is not a convincing indicator of credit worthiness. This requirement is not persuasive since virtually all customers or applicants either own or rent their homes. Equally convincing, is that all overdue residential customers are either homeowners or renters. Pursuant to Chapter 14, the utilities are permitted to use their choice of credit scoring and this should not be undermined.

XXIII. TRANSFER OF ACCOUNTS (SECTION 56.16).

Under §§56.12(4)(ii) and (iii), the public utility is required to obtain an actual meter reading and, when not permitted access by the customer, should initiate termination proceedings as identified in §56.81(3). Additionally, 52 Pa. Code §59.24(a) requires public utilities to have access to meters, service connections and other property owned by it on the premises of customers, for purposes of maintenance, operation and meter reading. Refusal to provide such access "shall constitute sufficient cause for discontinuance of service."

However, under §56.16(a), the customer is only required to notify the utility, at least seven days in advance, "specifying the date on which it is desired that service be discontinued." As long as the utility is notified, the customer must be taken out of billing without regard to whether or not the utility was provided access to the meter to secure service. As indicated above, this interpretation is contrary to §§56.12(4) and 59.24(a).

In situations involving inside meters where there is more than one meter on the service line, the issue can be one of safety, i.e. was a valve cap installed if an appliance was disconnected? Association members make every effort to schedule the discontinuance at a time and date convenient to the customer to ensure access to the meter; however, there remain many situations when the Company is not provided access to discontinue the service.

Additionally, §56.16(a) states that the utility will estimate the final reading if unable to gain access and adjust the final bill once a reading is obtained. However, the proposed regulation is silent on who is responsible for the utility service consumed during the period between the time the customer vacated the premises and the utility is provided access.

For the above reasons, the Association recommends changing §56.16(a) to read:

(a) A customer who is about to vacate premises supplied with public utility service or who wishes to have service discontinued shall give at least 7 days notice to the public utility and a noncustomer occupant, specifying the date on

which it is desired that service be discontinued and provide access to the utility meter. In the absence of a notice or meter access, the customer shall be responsible for services rendered until the meter is secured or service is transferred to another party.

Under §56.16(d), it is noted that the unpaid balance "which is equivalent to the cash deposit requirement" may be transferred to the account of a third party guarantor. This statement is inconsistent with 66 Pa. C.S. § 1404(b) which states that the "guarantor shall be responsible for all missed payments owed to the public utility" and conflicts with the proposed wording in §56.33. Therefore, §56.16(d) should be changed to read:

(d) In the event of a termination of service to a residential customer, a public utility may transfer all missed payments owed to the public utility to the account of a third-party guarantor.

XXIV. CONCLUSION.

The Association believes that the Commission has an opportunity to reduce overall utility receivables and thereby utility rates to electric, gas and water utility customers. A necessary cost/benefit analysis has not been undertaken by the Commission. Many of the proposed regulations are directly contrary to Act 201 and the Commission simply cannot subvert the rule of either that law or numerous other laws referenced in these comments.

Regarding the issues surrounding medical certificates, security deposits, informal complaints, foreign language, and numerous other issues, the Commission is seeking to impose a far greater level of costs and a greater receivable burden on electric, gas and water utility industries than it imposes on the telecommunication utility industry. While this is clearly against the often cited comparison to the telecommunications rules contained in the implementation orders, it also flaunts the directives given in Act 201.

The Commission has set forth a goal to mitigate electric price increases. Yet, these regulations needlessly harbor increased costs for electric, as well as gas and water utilities and their timely paying customers. As such, the public interest is not served by these regulations. The Association urges the Commission to re-examine the proposed regulations using a cost/benefit analysis, focusing particularly on the express and plain meaning of the statute.

Respectfully Submitted,

J. Michael Love
President & CEO
mlove@energypa.org

Donna M. J. Clark
Vice President & General Counsel
dclark@energypa.org

Energy Association of Pennsylvania
800 North Third Street, Suite 301
Harrisburg, PA 17102

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