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February 23, 2011

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

VIA HAND DELIVERY

RE: American Recovery and Reinvestment Act Investigation – Comments to the ARRA Working Group Final Report; Docket No. I-2009-2099881

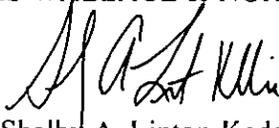
Dear Secretary Chiavetta:

Please find enclosed the original and fifteen (15) copies of the Comments of the Industrial Energy Consumers of Pennsylvania ("IECPA"), the Central Penn Gas Large Users Group ("CPGLUG"), the Columbia Industrial Intervenors ("CII"), the Duquesne Industrial Intervenors ("DII"), the Met-Ed Industrial Users Group ("MEIUG"), the Penn Power Users Group ("PPUG"), the Penelec Industrial Customer Alliance ("PICA"), the Philadelphia Area Industrial Energy Users Group ("PAIEUG"), the PNG Industrial Intervenors ("PNGII"), the PP&L Industrial Customer Alliance ("PPLICA"), the West Penn Power Industrial Intervenors ("WPPII") and the UGI Industrial Intervenors ("UGIII") (collectively, "Industrial Customer Groups") to the ARRA Working Group Final Report filed in the above-referenced proceeding.

Please date stamp the extra copy of this transmittal letter and Comments and kindly return them for our filing purposes.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Shelby A. Linton-Keddie

Counsel to the Industrial Customer Groups

SLK/lmc
Enclosures

c: Steven Bainbridge, Law Bureau (via E-mail)
Certificate of Service

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

American Recovery and Reinvestment Act :
Investigation : Docket No. I-2009-2099881
:

**COMMENTS OF THE INDUSTRIAL CUSTOMER GROUPS
TO THE ARRA WORKING GROUP FINAL REPORT**

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Energy Users Group, PNG Industrial Intervenors,
PP&L Industrial Customer Alliance, UGI Industrial
Intervenors and West Penn Power Industrial
Intervenors

Dated: February 23, 2011

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I. INTRODUCTION

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. 111-5, which, among other things, provided in Section 410(a) for additional state energy grants in excess of the base allocation awarded to the States.¹ Specifically, under the ARRA, grants totaling \$3.1 billion were available under the Federal State Energy Program, contingent upon the Governor of the State notifying the Secretary of Energy, in writing, that certain conditions have been met.²

On May 6, 2009, the Pennsylvania Public Utility Commission ("PUC" or "Commission"), issued an Investigative Order seeking public input on Pennsylvania's compliance with Section 410(a) of the ARRA. To that end, upon receipt of Comments and Reply Comments on July 6, 2009, and August 5, 2009, respectively, the PUC convened a technical conference on November 19, 2009. Shortly thereafter, the Commission established a working group, lead by the PUC's Law Bureau, to further discuss issues regarding the ARRA and to prepare a report for submission to the Commission.

After numerous meetings of the ARRA Working Group, a Final Report was prepared; notably, however, there was no consensus reached by the ARRA Working Group participants. On or about January 24, 2011, the Commission issued the ARRA Working Group's Final Report ("Final Report") for public comment. Pursuant to the established schedule, the Industrial Energy Consumers of Pennsylvania ("IECPA"), the Central Penn Gas Large Users Group ("CPGLUG"), the Columbia Industrial Intervenors ("CII"), the Duquesne Industrial Intervenors ("DII"), the Met-Ed Industrial Users Group ("MEIUG"), the Pennsylvania Power Users Group ("PPUG"), the Penelec Industrial Customer Alliance ("PICA"), the Philadelphia Area Industrial Energy Users

¹ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 410(a), 123 Stat. 115 (2009).

² It is unclear whether this conditional amount remains available at this time.

Group ("PAIEUG"), the PNG Industrial Intervenors ("PNGII"), the PP&L Industrial Customer Alliance ("PPLICA"), the West Penn Power Industrial Intervenors ("WPPII") and the UGI Industrial Intervenors ("UGIII") (collectively, "Industrial Customer Groups") hereby submit these comments.

IECPA is a 21 member ad hoc group of energy intensive industrial customers of electricity and natural gas. More than 41,000 Pennsylvanians are employed by IECPA member companies, which use significant amounts of electricity and natural gas in their operations. CPGLUG, DII, MEIUG, PPUG, PICA, PAIEUG, PNGII, PPLICA, WPPII and UGIII are all ad hoc groups of commercial, institutional and industrial customers of electricity and/or natural gas that participate in various proceedings before this Commission. The Industrial Customer Groups' members continually strive to implement strategies and improvements to reduce electricity and natural gas costs and to operate more efficiently.

II. COMMENTS

Throughout the inception of this proceeding, the Industrial Customer Groups have actively advocated that Pennsylvania is fully compliant with Section 410(a) and that additional Commission action, including but not limited to the consideration of various revenue decoupling mechanisms, is neither necessary nor appropriate public policy for Pennsylvania.³ While the Industrial Customer Groups' position on these issues is accurately contained within the ARRA Working Group Final Report and will not be repeated verbatim in these Comments,⁴ the Industrial Customer Groups submit these Comments to reiterate that revenue decoupling is contrary to Pennsylvania law and will otherwise have a negative impact on consumers, regulators and conservation efforts. Pennsylvania has already adopted multiple policies that collectively meet the Section 410(a) mandates.

A. Revenue Decoupling is Not Necessary to Comply with ARRA Section 410(a) And is Inappropriate for Pennsylvania.

To obtain potential access to additional stimulus funding under the ARRA, Former Governor Rendell certified to the United States Department of Energy that Pennsylvania (and specifically the Commission) would pursue a general policy consistent with Section 410(a), which requires that:

The applicable State regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, with respect to which the State regulatory authority has ratemaking authority, a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provide timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable

³ See, e.g., Comments of the Industrial Customer Groups, Docket No. I-2009-2099881 (July 6, 2009); see also Reply Comments of the Industrial Customer Groups, Docket No. I-2009-2099881 (Aug. 5, 2009).

⁴ The Industrial Customer Groups' failure to address a specific proposal raised either in the ARRA Final Report itself or individually by any party does not represent the Industrial Customer Groups' support for, or acquiescence to, such proposal. The Industrial Customer Groups address their primary areas of concern in Comments throughout the Final Report and submit these Comments only on areas that necessitate an additional response. Nonetheless, any arguments contained in the Industrial Customer Groups' Comments in the Final Report but not directly addressed in these comments are hereby incorporated by reference.

efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.⁵

As indicated in the ARRA Working Group Final Report, utility and consumer representatives have strong disagreements over the correct interpretation of this statute.⁶

Utilities, such as Columbia Gas of Pennsylvania, Inc. ("Columbia") and National Fuel Gas Distribution Corporation ("NFG"), argue generally that current rate structures are designed so that increases or decreases in volumetric consumption produce increases or decreases in utility revenue and earnings, which create disincentives to promote conservation.⁷ Moreover, these utilities contend in the Final Report that regulatory lag associated with base rate cases is not "timely cost recovery"⁸ and that utilities should be given the ability to recover decreased revenue associated with energy conservation through automatic adjustment mechanisms.⁹ According to NFG, Section 410(a) mandates action by this Commission (and presumably every State that desires to access the additional funding source) because Congress wanted changes to the "status quo."¹⁰ Accordingly, utility ARRA working group participants advocate for, among other things, revenue decoupling¹¹ and financial incentives for exemplary energy efficiency performance.¹² Such recommendations run counter to Section 410(a) of the ARRA, Former Governor Rendell's direction to the Commission, and Pennsylvania law. As a result, each of these recommendations should be rejected by the Commission.

Section 410(a) of the ARRA has multiple requirements. As explained in the Industrial Customer Groups' comments within the Final Report,

⁵ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 410(a), 123 Stat. 115 (2009).

⁶ See, e.g., Final Report at 3.

⁷ See, e.g., *id.* pp. 3-4, 7-8, 89.

⁸ See, e.g., *id.* pp. 91-92.

⁹ See *id.* pp. 88, 92.

¹⁰ See *id.* at 8.

¹¹ See, e.g., Final Report at 92.

¹² *Id.*

...to qualify under Section 410(a), Pennsylvania must establish that: (a) it has a general policy that aligns utility financial incentives with helping customers use energy more efficiently; (b) its general policy provides timely cost recovery and timely earnings opportunities for utilities associated with cost-effective measurable and verifiable efficiency savings; and (c) the policy satisfying criteria (a) and (b) sustains or enhances customers' incentives to use energy more efficiently.¹³

Section 410(a) does not require the adoption of new policies in order to fulfill its requirements. If, as here, a State's existing policies meet the requirements, then no additional action is required. Clearly, Section 410(a) does not condition funding on the adoption of revenue decoupling mechanisms (or any other specific policy that is alleged to meet the goals of the section).¹⁴

When approaching the Commission to institute an investigation into ARRA Section 410(a), Former Governor Rendell clearly sought steps that would sustain ratepayers' costs for energy conservation; not increase ratepayer costs to cover utility financial incentives or provide "keep whole" payments to encourage utilities' promotion of conservation programs. As illustrated by the letter to PUC Chairman Cawley in regard to this investigation, the Governor specifically asked that the PUC:

[C]onsider additional steps the Commonwealth can take to establish appropriate incentives in electric and natural gas utility rates for energy efficiency programs, consistent with State law, the attached statute and relevant PURPA requirements. These include policies to align interests of utilities to support conservation without raising the cost of conservation and increasing the cost to ratepayers of measurable, verifiable efficiency savings.¹⁵

Although ARRA stakeholders generally agree that revenue decoupling, at least for Electric Distribution Companies ("EDCs"), is statutorily prohibited,¹⁶ at least one party (under the guise of complying with Section 410(a)) advocates in the Final Report for revenue

¹³ *Id.* at 10.

¹⁴ Notably, this conclusion is included in the Final Report when stating "it is significant in terms of legislative construction that the requirement is broadly constructed and does not specifically mandate a particular ratemaking methodology, including 'decoupling'." Final Report at 5.

¹⁵ *Id.* at 3 (citing Letter of Governor Edward G. Rendell to Chairman James H. Cawley, March 23, 2009) (emphasis added).

¹⁶ *See id.* pp. 20, 39, 40, 42, 53.

decoupling as a way to align utility financial incentives with helping customers use energy more efficiently.¹⁷ As stated unequivocally by the Industrial Customer Groups throughout the Final Report, revenue decoupling would not help Pennsylvania achieve its energy efficiency goals or compliance with Section 410(a), and has also been found to have little positive effect on conservation.¹⁸

While rates are calculated and designed to provide a utility with an opportunity to earn a fair return, there is no guarantee that a utility will earn an authorized amount by year.¹⁹ A guaranteed return is not part of the regulatory compact between the utility and the State. Consistent with this reality, in Act 129, the General Assembly specifically prohibited revenue decoupling for energy efficiency and conservation plans filed by EDCs.²⁰ Counter to other parties' positions in the Final Report, this is sound public policy that also should equally apply to Natural Gas Distribution Companies ("NGDCs").

Moreover, instead of promoting conservation efforts, revenue decoupling has been shown to make electric companies indifferent to conservation, since a utility would be awarded its return regardless of consumption. Counter to the clear directives in Section 410(a), revenue decoupling would not "sustain or enhance customers' incentives" to conserve energy.²¹ Making utilities whole through the recovery of "lost" revenue due to demand conservation efforts will reduce or eliminate any savings benefits customers expect to realize by engaging in energy efficiency and conservation programs. Without clear incentives and savings benefits for customers to conserve electricity or natural gas, there is little (if any) motivation for customers to sustain or enhance energy conservation. Instead, revenue decoupling will skew the price signal

¹⁷ See, e.g. Final Report at 88.

¹⁸ See *id.* pp. 55-59.

¹⁹ See *id.* at 56 (citing *In re Pa. Power & Light Co.*, 1998 WL 417435, *3 (Pa. P.U.C. 1998)).

²⁰ See 66 Pa C.S. §§ 2806.1(k)(2),(3).

²¹ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 410(a), 123 Stat. 115 (2009).

to customers, while at the same time, shifting the risk for energy efficiency and conservation programs to ratepayers and away from shareholders.

Based on the above, it is clear that revenue decoupling is not only contrary to Pennsylvania law, but also constitutes bad public policy. As a result, revenue decoupling should not be pursued by the Commission either at this time or at any time in the future.

B. The Best Way to Achieve Energy Efficiency Goals is to Implement Cost-Based Pricing and Properly-Designed Rate Structures.

As explained more fully in the Final Report, the Industrial Customer Groups are long-time advocates of cost of service reflective pricing and rate design.²² Cost-based pricing sends the correct price signals to customers and would provide appropriate incentives for customers to engage in energy efficiency and conservation initiatives without impairing a utility's financial condition.²³ Currently, some utilities' rates are primarily based on an energy (kWh or Mcf) basis; however, when rates are properly designed, the only costs that would be collected on a kWh or Mcf basis are those costs that vary based on the number of kWh or Mcf used.²⁴ Thus, the rate structure would be aligned to provide both customers and utilities with an incentive to use fewer kWh or Mcf.²⁵ Similarly, when rates are properly designed, the costs incurred by the utility that vary based on demand are collected through a demand or kW charge.²⁶ Accordingly, when customers reduce their demand through energy efficiency or conservation measures (as contemplated by ARRA Section 410(a)), customers would see a cost reduction while utilities would be kept whole. Finally, under cost-based pricing, fixed costs that do not vary based on

²² See Final Report pp. 11-12.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

energy (or natural gas) consumption would be collected as a customer charge, which again keeps the utility whole.

As explained further in the Industrial Customer Groups' Comments contained in the Final Report, not only would cost-based pricing send appropriate price signals to customers and ensure that utilities are not harmed by conservation efforts, but cost-based pricing is also consistent with Pennsylvania precedent that has adopted a ratemaking policy in favor of cost-based allocation and rate design.²⁷

Rather than instituting revenue decoupling which violates Pennsylvania law and guarantees utilities an awarded return (instead of only ensuring an opportunity to earn that return), the Commission should continue Pennsylvania's current ratemaking process, with an emphasis on cost of service as the "polestar" for ratemaking.²⁸ Doing so meets the requirements of Section 410(a) by (1) constituting a policy that aligns utility financial incentives with helping customers use energy more efficiently; (2) providing timely cost recovery and timely earnings opportunities for utilities; and (3) enhancing customers' incentives to use energy more efficiently.

²⁷ See Final Report pp. 11-12.

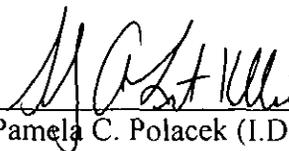
²⁸ See *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 1020 (Pa. Cmwlth. Ct. 2006).

III. CONCLUSION

WHEREFORE, the Industrial Energy Consumers of Pennsylvania, Central Penn Gas Large Users Group, Columbia Industrial Intervenors, Duquesne Industrial Intervenors, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, Philadelphia Area Industrial Energy Users Group, PNG Industrial Intervenors, PP&L Industrial Customer Alliance, UGI Industrial Intervenors and West Penn Power Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission consider and adopt, as appropriate, the foregoing Comments as well as the Industrial Customer Groups' Comments contained within the American Recovery and Reinvestment Act Working Group Final Report.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

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Dated: February 23, 2011

CERTIFICATE OF SERVICE

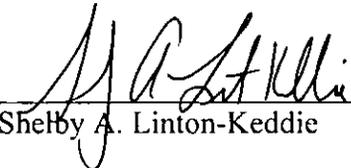
I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

VIA E-MAIL

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Shelby A. Linton-Keddie
Counsel to the Industrial Customer Groups

Dated this 23rd day of February, 2011, at Harrisburg, Pennsylvania.

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