

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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February 23, 2011

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

RE: Compliance of Commonwealth of
Pennsylvania with Section 410(a) of the
American Recovery and Reinvestment
Act of 2009
Docket No. I-2009-2099881

Dear Secretary Chiavetta:

Enclosed are Comments of the Office of Consumer Advocate, in the above-referenced proceeding.

Should you have any questions, please contact me at the number above.

Respectfully Submitted,


Tanya J. McCloskey
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50044

Enclosure

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Compliance of Commonwealth of	:	
Pennsylvania with Section 410(a)	:	Docket No. I-2009-2099881
of the American Recovery and	:	
Reinvestment Act of 2009	:	

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE
TO THE WORKING GROUP FINAL REPORT

I. INTRODUCTION

By Order entered January 24, 2011, the Public Utility Commission (Commission) moved forward its investigation into the requirements of Section 410(a) of the American Recovery and Reinvestment Act (ARRA)¹ by opening the Working Group Final Report for public comment. The Office of Consumer Advocate (OCA) participated in the Working Group and contributed to the Final Report.² The Commission Staff is to be commended for compiling and fairly presenting in the Working Group Final Report the diverse views of the utility and consumer stakeholders who participated in the working group. The OCA appreciates this opportunity to submit Comments to the Commission on this important matter.

At the outset, the OCA wishes to state its position that, through prior enactments of the General Assembly and Commission policies regarding the development of and cost recovery for

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

² A copy of the OCA's September 30, 2010 Comments on the Working Group Draft Report are attached to these Comments and incorporated by reference.

energy efficiency measures, the Commonwealth meets the provisions of ARRA Section 410(a)(1).³ Under the ARRA, the Commonwealth received a base allocation of funding from the Department of Energy (DOE). Section 410(a)(1) addressed the eligibility of states for additional funding for Energy Efficiency and Renewable Energy projects. As noted in the Working Group Final Report, in response to Section 410(a)(1), “Governor Rendell issued a letter to the Secretary of Energy on March 23, 2009, certifying that he had written to the Pennsylvania Public Utility Commission asking that it ensure the adoption of the general policy described in Section 410(a) of the Recovery Act.” Working Group Final Report at 2-3.

Since Governor Rendell’s March 23, 2009 letters to the DOE and Chairman Cawley, the Commission has acted in numerous cases, consistent with its statutory authority, to promote a policy that ensures that utility financial incentives are aligned with helping customers use energy more efficiently and that timely cost recovery and earnings opportunities are provided. For example, pursuant to Act 129 of 2008, the Commission has now approved the Energy Efficiency and Conservation Plans of the seven major electric distribution companies in Pennsylvania, resulting in spending of over \$975 million on energy efficiency programs over the four year term of these initial plans. These expenditures are all recoverable from consumers through automatic recovery mechanisms. These Plans are already promoting conservation by electric customers

³ Section 410(a)(1) states “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 efficiency savings, in a way that sustains or enhances utility customers’ incentives to use energy more efficiently.”

through the numerous programs, and the electric distribution companies are recovering their expenditures on a timely basis through automatic surcharge recovery mechanisms.⁴

In addition, under Act 129 of 2008, the Commission has approved the Smart Meter Implementation and Deployment Plans of six of the seven major electric distribution companies. A proposed settlement regarding the seventh of these Plans is now pending before the Administrative Law Judge. These Plans are intended to result in the deployment of smart meter technology and infrastructure throughout the Commonwealth. The smart meter deployment will provide additional opportunities for demand reductions and energy savings in the Commonwealth. To achieve these statutory goals, the Commission has approved full and current recovery of the costs of the program, including a return on the capital costs that will be incurred. In accordance with Act 129, this recovery is also being achieved through an automatic surcharge recovery mechanism.

The Commission has also addressed energy efficiency programs for natural gas companies. In addition to longstanding programs such as LIURP, the Commission has approved several initiatives to promote conservation proposed by natural gas companies in a number of cases.⁵ Most notably, the Commission approved a Natural Gas demand side management program for the Philadelphia Gas Works, along with an automatic surcharge recovery

⁴ PECO Energy has recently announced that it has already achieved its May 2011 requirement to reduce energy usage by 1%. PECO announced that its customers have saved 419,000 Mwh through its programs which results in more than \$68 million in savings on the customers' energy bills. PECO Press Release of November 3, 2010.

⁵ Pa. P.U.C. v. Equitable Gas Company, LLC, Docket No. R-2010-2171910, Order (Nov. 19, 2010)(PUC approved settlement which provides that Equitable will use an estimated \$2.678 million in intertate gas pipeline refunds to establish a three-year Pilot Residential Energy Conservation program); Pa. P.U.C. v. PECO Energy Company – Gas Division, Docket No. R-2010-2161592, Opinion and Order at 8, 14 (Dec. 29, 2010)(Allowed base rate recovery of up to \$2.008 million for gas energy efficiency programs, with any underspending to be returned through the Universal Service surcharge); Pa. P.U.C. v. Columbia Gas of Pennsylvania, Docket No. R-2009-2149262, Order (Aug. 18, 2010)(Per Joint Petition for Settlement Para. 21(d), as approved by the PUC, Columbia will meet with interested parties within the remaining months of 2010 to discuss the development of a pilot residential energy efficiency program).

mechanism, that will result in \$10 million being spent in 2011, with additional expenditures of this magnitude thereafter.⁶ PGW budgeted to spend \$54 million in total from 2010 through 2014. The OCA submits that the Commission's actions illustrate that the Commission is authorized to, and pursues, policies that further the goal of using energy more efficiently.

As of June 2010, the Department of Energy has committed over \$807.9 million in ARRA funding to the Commonwealth of Pennsylvania for energy efficiency and renewable energy plus other projects and initiatives. Of that amount, \$235 million is for five Smart Grid investment or demonstration projects which relate to public utility service.⁷ An additional \$13 million of the \$57.4 million awarded by DOE to FirstEnergy will also support smart grid improvements in Pennsylvania.⁸ DOE awarded another \$211.6 million in competitive grants for renewable energy and \$13.6 million to PJM Interconnection for Smart Grid work. These and other competitive grants complement the \$252.8 million in ARRA formula funding to allow Pennsylvania to ramp up its weatherization efforts to treat an additional 29,600 homes and provide savings for those low-income Pennsylvania households.⁹ As of February 4, 2011, the DOE has awarded virtually all of the \$16.6 billion of ARRA funding authorized for energy efficiency and renewable energy projects.¹⁰

⁶ Pa. P.U.C. v. Philadelphia Gas Works, Docket No. R-2009-2139884, Opinion and Order, (July 29, 2010)(PGW St. 10, "DSM Program Plan Annual Program Budgets and Savings").

⁷ See Department of Energy Recovery Act State Memos – Pennsylvania, pp. 1-2, available at http://www.energy.gov/recovery/documents/Recovery_Act_Memo_Pennsylvania.pdf.

⁸ On June 2, 2010, the DOE awarded a \$57.4 million competitive grant to First Energy of Ohio for Smart Grid projects. <http://www.energy.gov/recovery/documents/recoveryactfunding.xls>, line 472. Of the \$57.4 million, \$13 million is being used to support a project in Pennsylvania.

⁹ Id.

¹⁰ As of February 4, 2011, the DOE had awarded nationwide \$16.665 billion out of the \$16.666 billion authorized by ARRA for energy efficiency and renewable energy. See <http://www.energy.gov/recovery/data.htm>.

The OCA notes that the actual spending and associated benefits of this ARRA funding will stretch out over time.¹¹ As the OCA has maintained throughout the Commission's investigation, the Commission has statutory tools and policies in place that have enabled Pennsylvania to qualify for full funding under ARRA section 410(a). The OCA's comments on specific questions and issues identified by the Commission and Staff are presented in the Final Report and attached hereto for the Commission's convenience. The OCA will not repeat those comments here. Instead, the OCA will summarize the basis for the OCA's position that the Commonwealth has and continues to qualify for the Energy Efficiency and Renewable Energy ARRA funding awarded by the DOE, for the benefit of Pennsylvania consumers.

II. COMMENTS

Both the Commission and the General Assembly have long recognized the importance of energy conservation and energy efficiency measures to Pennsylvania's future. In 1986, the General Assembly included several provisions in the Pennsylvania Public Utility Code to address the implementation of energy conservation measures, to provide for timely cost recovery of any implemented measures, and to provide for performance factor considerations related to actions (or failure to act) to encourage the development of conservation and load management measures. See 66 Pa.C.S. §§ 1505(b), 1319, and 523(b)(4).

More recently, with respect to electric utilities, the General Assembly passed landmark energy efficiency and demand response legislation – Act 129 of 2008 -- that directly addresses many of the issues raised in Section 410(a). Act 129 requires each major electric distribution

¹¹ The DOE awarded PECO Energy Company a \$200 million grant, PPL Electric Utilities Corporation \$19 million, and Wellsboro Electric \$431,000 for Smart Grid projects. As of February 4, 2011, the DOE reports an outlay of \$0 to PECO, \$5.4 million to PPL, and \$84,000 to Wellsboro. Also, First Energy has received \$7.455 million of its \$57.4 million combined Ohio and Pennsylvania grant. See DOE Recovery Act Awardees – February 4, 2011 Excel file at <http://www.energy.gov/recovery/documents/recoveryactfunding.xls>, lines 472, 492, 494, 495.

company (EDC) in Pennsylvania to reduce energy consumption and peak demands by a series of statutorily imposed minimums. 66 Pa.C.S. §2806.1(c), (d). The failure of an EDC to achieve the specified reduction targets results in a financial penalty of not less than \$1,000,000 and not more than \$20,000,000. 66 Pa.C.S. §2806.1(f)(2). Act 129 explicitly permits utilities to recover the costs of conservation programs in a timely manner through an automatic adjustment clause. 66 Pa.C.S. §2806.1(k)(1). While Act 129 prohibits the recovery of decreased revenues due to conservation measures between base rate cases, the Act permits the utilities to reflect reduced revenues prospectively through *pro forma* energy sales and revenue calculations in base rate cases. 66 Pa.C.S. §2806.1(k)(2)(3).

While Act 129 applies only to electric companies, the Commission is authorized through various sections of the Public Utility Code to approve energy efficiency programs for natural gas companies and to provide timely cost recovery associated with such programs. Through Section 1505(b), the Commission is authorized to order either an electric or natural gas utility to establish conservation and load management programs. Section 1319 provides that the Commission shall allow the recovery of conservation or load management programs implemented by a natural gas or electric utility that are found to be prudent and cost effective. Expenses incurred pursuant to Section 1319 may be recovered either through base rates or through an automatic adjustment clause under Section 1307 to the extent they meet the standards set forth by the Commonwealth Court in the case of Pennsylvania Industrial Energy Coalition v. Pennsylvania Public Utility Commission, 653 A.2d 1336, 1348 (Pa.Cmwlth. 1995) (PIEC). The Commission is also required to consider a natural gas utility's efforts in pursuing cost-effective conservation and load management opportunities when determining just and reasonable rates. 66 Pa.C.S. §523; 52 Pa. Code §69.35.

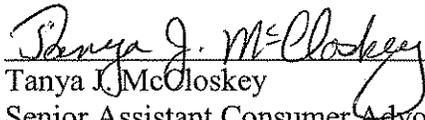
Finally, it should be noted that ARRA Section 410(a) also requires that energy efficiency programs be carried out “in a way that sustains or enhances utility customers’ incentives to use energy more efficiently.” In this regard, the Commission has taken a number of steps such as the gradual elimination of declining block rates and the rejection of high fixed customer charges in order to ensure that consumers who conserve energy receive a benefit from that conservation.

The OCA recommends that the Commission continue to employ the statutory tools and existing policies to ensure that Pennsylvania consumers receive the benefit of cost effective energy efficiency and demand reduction programs for both electric and natural gas utilities.

III. CONCLUSION

The OCA submits that the Public Utility Code, the Commission regulations, the Commission Policy Statements and many Commission initiatives are consistent with the standards set forth to qualify for funding under Section 410(a) of the American Recovery and Reinvestment Act.

Respectfully Submitted,



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Dated: February 23, 2011
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Compliance of Commonwealth of :
Pennsylvania with Section 410(a) : Docket No. I-2009-2099881
of the American Recovery and :
Reinvestment Act of 2009 :

ATTACHMENT TO THE
COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE
TO THE WORKING GROUP FINAL REPORT

BEFORE THE
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Compliance of Commonwealth of	:	
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COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

I. INTRODUCTION

The Office of Consumer Advocate (OCA) appreciates this opportunity to submit Comments to the Draft Final Report prepared by Commission Staff in this docket. The OCA submits that the Staff has done an excellent job in this Draft Report of compiling and fairly presenting the diverse views of the utility and consumer stakeholders who have participated in the working group. In these Comments, the OCA will state its position on the issues addressed in certain sections of the Draft Report. The OCA will only comment on those sections of the draft where it either disagrees with the draft or believes there is a need to amplify on or clarify its position regarding a point contained in the draft. Unless otherwise stated, the OCA's Comments are directed to the document entitled "ARRA Investigation Final Report, I-2009-2099881, Draft 8-10-10."

By way of introduction, however, the OCA wishes to state its position that, through prior enactments of the General Assembly and Commission policies regarding the development of and

cost recovery for energy efficiency measures, the Commonwealth generally meets the requirements of ARRA Section 410(a).

Both the Commission and the General Assembly have long recognized the importance of energy conservation and energy efficiency measures to Pennsylvania's future. In 1986, the General Assembly included several provisions in the Pennsylvania Public Utility Code to address the implementation of energy conservation measures, to provide for timely cost recovery of any implemented measures, and to provide for performance factor considerations related to actions (or failure to act) to encourage the development of conservation and load management measures. See 66 Pa.C.S. §§ 1505(b), 1319, and 523(b)(4).

More recently, with respect to electric utilities, the General Assembly passed landmark energy efficiency and demand response legislation – Act 129 of 2008 -- that directly addresses many of the issues raised in Section 410(a). As discussed more fully below, Act 129 requires each major electric distribution company (EDC) in Pennsylvania to reduce energy consumption by a series of statutorily imposed minimums. 66 Pa.C.S. §2806.1(c). The failure of an EDC to achieve the specified reduction targets results in a financial penalty of not less than \$1,000,000 and not more than \$20,000,000. 66 Pa.C.S. §2806.1(f)(2). Act 129 explicitly permits utilities to recover the costs of conservation programs in a timely manner through an automatic adjustment clause. 66 Pa.C.S. §2806.1(k)(1). While Act 129 prohibits the recovery of decreased revenues due to conservation measures through an automatic adjustment clause between base rate cases, the Act permits the utilities to reflect reduced revenues prospectively through *pro forma* energy sales and revenue calculations in base rate cases. 66 Pa.C.S. §2806.1(k)(2)(3).

While Act 129 applies only to electric companies, the Commission is authorized through various sections of the Public Utility Code to approve energy efficiency programs for natural gas

companies and to provide timely cost recovery associated with such programs. Through Section 1505(b), the Commission is authorized to order either an electric or natural gas utility to establish conservation and load management programs. Section 1319 provides that the Commission shall allow the recovery of conservation or load management programs implemented by a natural gas or electric utility that are found to be prudent and cost effective. Expenses incurred pursuant to Section 1319 may be recovered either through base rates or through an automatic adjustment clause under Section 1307 to the extent they meet the standards set forth by the Commonwealth Court in the case of Pennsylvania Industrial Energy Coalition v. Pennsylvania Public Utility Commission, 653 A.2d 1336, 1348 (Pa.Cmwlth. 1995) (“PIEC”), which is discussed below. The Commission is also required to consider a natural gas utility’s efforts in pursuing cost-effective conservation and load management opportunities when determining just and reasonable rates. 66 Pa.C.S. §523; 52 Pa. Code §69.35.

Finally, it should be noted that ARRA Section 410(a) also requires that energy efficiency programs be carried out “in a way that sustains or enhances utility customers’ incentives to use energy more efficiently.” In this regard, the Commission has taken a number of steps such as the gradual elimination of declining block rates and the rejection of high fixed customer charges in order to ensure that consumers who conserve energy receive a benefit from that conservation.

As set forth more fully below, the OCA submits that the Commission has statutory tools and policies in place to enable Pennsylvania to qualify for funding under ARRA section 410(a). The OCA looks forward to working with the Commission and other stakeholders to seek to ensure that these policies are implemented in the most cost-effective and beneficial manner.

II. COMMENTS

I. **Executive Summary** – No comments.

II. **Introduction** – No comments.

III. **Meaning of Section 410(a) of the ARRA**

The OCA would note at the outset that Section 410(a) of the ARRA does not mandate any specific action by this Commission or by the Commonwealth of Pennsylvania. Rather, this Section sets forth a number of conditions that must be met if the Commonwealth wishes to apply for certain supplemental energy efficiency funding from the federal government. Even then, Section 410(a) does not identify specific policies or programs that must be adopted in order to meet the conditions for this supplemental funding. Rather, it calls for “a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and will provide for timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings.” Importantly, this provision goes on to state that the policy must be conducted “in a way that sustains or enhances utility customers’ incentives to use energy more efficiently.” The Draft Report correctly notes that Section 410(a) does not mandate any particular ratemaking methodology such as “decoupling.”

Section 410(a) does not preempt – nor does it seek to preempt – applicable Pennsylvania law, such as the comprehensive framework that was recently established for the energy efficiency programs of Pennsylvania’s electric distribution companies (EDCs) in Act 129 of 2008. In OCA’s view, the statutory requirements of Act 129 and other provisions of the Public Utility Code are consistent with the policies set forth in Section 410(a) with respect to the appropriate ratemaking and support for energy efficiency programs. But at the end of the day, the

Commission is bound by the Public Utility Code and if, for some reason, the Commission concludes that it cannot meet the standards of Section 410(a) under Pennsylvania law, then that is the end of the inquiry. It is up to the General Assembly, not the Commission, to determine whether it wishes to change Pennsylvania law in order to qualify for supplemental funding under Section 410(a).

As set forth more fully below, however, it is the position of the OCA that the Commission does in fact already have the statutory authority and policies in place to meet the goals of Section 410(a) under current Pennsylvania law.

IV. Present Policies or Laws that Address Policy Goals Outlined in ARRA 410(a)

A. Rate Unbundling – No comments.

B. Elimination of Declining Block Rates

The OCA supports the Commission's policy of elimination of declining block rates, but emphasizes the point that such elimination should be gradual over time. The elimination of declining block rates is consistent with the last portion of ARRA Section 410(a) that the Commission's policy "sustains or enhances utility customers' incentives to use energy more efficiently." At the same time, the OCA is concerned that a "flash-cut" elimination of such rate structures could produce severe rate shock for some customer groups. The Commission has long recognized this concern and has appropriately implemented this type of rate change on a gradual basis.

C. Alternative Energy Portfolio Standards (AEPS) – No comments.

D. Act 129

Act 129 of 2008 represents a comprehensive effort by the Pennsylvania General Assembly to enact energy efficiency and ratemaking standards for EDCs. The recently

completed set of Energy Efficiency and Conservation (EE&C) proceedings represent this Commission's official response to that statute. In OCA's view, Act 129 and this Commission's decisions under that Act are consistent with the standards of Section 410(a), but in any case, they represent the current state of the law for electric utilities in Pennsylvania and cannot be altered by this Commission simply in order to qualify for funding under ARRA Section 410(a).

Act 129 contains a series of "carrots and sticks" that explicitly permits recovery of an EDC's costs through an automatic reconcilable adjustment clause and allows reduced revenues from conservation to be reflected prospectively in the *pro forma* rate calculations presented in base rate cases. Because energy efficiency usage reduction goals are explicitly mandated in Act 129 – and because utilities can be fined up to \$20 million for failure to meet those goals – the interests of the EDCs are clearly and directly aligned with their customers' interests in using energy more efficiently. The OCA submits that, when coupled with the automatic current rate recovery of conservation costs permitted in Act 129, the mandate and penalty provisions of the Act meet the requirements of Section 410(a).

Because Act 129 applies only to electric utilities, and not to natural gas utilities, we cannot look to Act 129 for policies regarding natural gas utilities in response to Section 410(a). Nevertheless, the OCA submits that, as set forth below, other provisions of the Public Utility Code provide the Commission with adequate tools to meet the policies of Section 410(a) for natural gas utilities as well.

E. Low Income Energy Conservation Programs including LIURP – No comments.

F. Existing Authority for Commission to Implement Policies – No comments.

V. Additional Measures to Consider to Address Policy Goals Outlined in 410(a)

A. Broad Principles

1. Flexibility to approve various approaches

The OCA agrees that the Commission should have substantial flexibility to select approaches that are best suited to meet the goals of Section 410(a) and the terms of the Public Utility Code. But that flexibility and discretion must lie with the Commission, not with each individual utility. It is up to the Commission to determine which approaches will maximize energy efficiency in a manner that will produce rates that are just and reasonable for the utility and its customers. That task cannot be delegated to the utility alone.

To use an example, some types of rate programs will benefit the shareholders of utilities whose sales are growing between rate cases (as has been true for most electric utilities), while other types of programs will benefit the shareholders of utilities whose sales are declining (like many natural gas utilities). If left to the sole discretion of the utility, each utility will understandably select the type of program that most benefits its shareholders, even if that program is not necessarily the most cost-effective or beneficial to customers. The Commission, on the other hand, is obligated to balance the interests of utility shareholders and consumers and to approve only those programs that the Commission determines best serve the overall public interest.

As such, the OCA submits that this section of the Draft Report should be modified to make it clear it is the Commission, not each individual utility, that should be given the flexibility to determine the programs that are best suited to meet the goals of Section 410(a) for each electric and natural gas utility.

2. Use of pilot programs – No comments

3. Use of “opt-in” or “opt-out” methodology – No comments

B. Rate Design

1. Formula-based rates

The OCA submits that formula-based rates should generally be limited to discrete cost elements that are substantial, volatile, and are outside of the utilities’ control. An example of the appropriate use of formula-based rates is fuel adjustment clauses that have traditionally been permitted under Section 1307 of the Public Utility Code. As noted below, however, the OCA acknowledges that automatic adjustment clauses for energy efficiency expenses are permitted pursuant to Act 129 and Section 1319 of the Public Utility Code.

2. Decoupling

Whatever the merits or objections to the use of decoupling, the issue is essentially moot in Pennsylvania, particularly with respect to electric utilities. Act 129 of 2008 expressly states that, while EDCs may utilize an automatic adjustment clause between base rate cases to recover the costs of energy efficiency and demand response programs, such costs may not include “decreased revenues of an electric distribution company due to reduced energy consumption or changes in energy demand.” 66 Pa.C.S. §2806.1(k)(2). Under Act 129, such decreased revenues may only be reflected “in revenue and sales data used to calculate rates in a distribution-base rate proceeding” under Section 1308. A parallel prohibition for automatic recovery of decreased revenues between base rate cases is included in the “smart meter” provision of Act 129 at 66 Pa.C.S. §2807(f)(4).

The Public Utility Code is silent on the issue of lost revenue recovery or decoupling with respect to natural gas utilities. However, the Commission will recall that National Fuel Gas Distribution Company’s request to implement a decoupling mechanism in 2006 was voluntarily

withdrawn after it resulted in the filing of 1267 formal complaints, testimony of 168 public input hearing witnesses, and the introduction of legislation in the Pennsylvania House of Representatives that would have required the PUC to “disallow any proposed rate, rate increase or rate surcharge based in whole or in part on the utilization of a revenue decoupling mechanism.” House Bill 2594 of 2006; see Pa. PUC v. National Fuel Gas Distribution Company, R-00061403, Recommended Decision of ALJs Corbett and Hoyer (Oct. 31, 2006), Statement of Chairman Wendell F. Holland (November 30, 2006), and PUC Final Order (December 4, 2006).

Unless and until some form of revenue decoupling is authorized by the General Assembly, the OCA submits that this is not a fruitful avenue for the Commission to explore in this context.

3. Straight fixed-variable

While the OCA agrees that straight-fixed variable (SFV) rate design may reduce the disincentive that a utility has to promote conservation, the OCA submits that this rate design has exactly the opposite effect on the consumer. By increasing the fixed monthly customer charge, and decreasing the per kwh or mcf usage charge, the effect of SFV rate design is that the customer sees less benefit from his or her own conservation efforts. The OCA submits that SFV rate design is precisely the type of policy that ARRA Section 410(a) is intended to discourage when it states that the desired regulatory policy must be accomplished “in a way that sustains or enhances utility customers’ incentives to use energy more efficiently.” SFV rate design produces a negative impact on the customers’ incentive to conserve energy. That is because the more costs that are reflected in the fixed monthly customer charge, the less benefit that the customer receives from conserving energy.

SFV rate design is also contrary to a long line of Commission decisions – and particularly the consistent Statements of Chairman Cawley – that warn against high fixed customer charges because of their negative impact on customer conservation. As noted by Chairman Cawley, for example, in an August 27, 2009, Statement regarding the base rate case settlements of UGI Penn Natural and UGI Central Penn Gas Companies: “From a policy perspective, allocating costs to variable distribution charges, instead of allocating them to a fixed customer charge, provides a stronger incentive for customers to conserve....” Pa. PUC v. UGI Penn Natural Gas Pa. PUC v. UGI Central Gas, R-2008-2079660, R-2008-2079675, Statement of Chairman Cawley (August 27, 2009). See also, Pa. PUC v. PG Energy, Docket No. R-00061365 (Order entered November 30, 2006) (Statement of then Vice Chairman Cawley noting that “the significant reduction in residential customer service charges from those in the case as filed, combined with the reduction or elimination of declining block charges for certain Honesdale customers, should help to provide strong incentives and rewards for energy conservation for these customers.”); Pa. PUC v. Duquesne Light Company, Docket No. R-00061346 (Order entered November 30, 2006) (Statement of then Vice Chairman Cawley regarding the reduction or elimination of declining block charges as an incentive for conservation).

The OCA submits that the use of SFV rate design is inconsistent with ARRA Section 410(a) as well as the longstanding pro-conservation policies of this Commission. As such, the OCA would recommend against its implementation at this time.

4. Modified straight-fixed variable

The OCA’s comments regarding straight fixed variable rate design are also applicable here. To the extent that the goal of the Commission (and the goal of ARRA Section 410(a)) is to promote conservation by electric and natural gas **consumers**, then the Commission should adopt

a policy that sharply limits the types and amounts of costs that are reflected in the fixed monthly customer charge, as opposed to the kwh and mcf charges. Customers will only benefit from conservation to the extent that reductions in usage result in reductions in monthly bills.

5. Annual rate adjustments between rate cases to reflect energy conservation effects

This section of the draft report suggests that it may be possible under current Pennsylvania law to permit annual "true-ups" for all costs and revenues between base rate cases, as long as those true-ups do not produce rate increases that exceed the level for a general base rate increase under Section 1308(d) of the Public Utility Code. The OCA does not agree that such general true-ups would be permitted under the Public Utility Code. The OCA would also oppose such annual adjustment clauses as a matter of policy.

As noted above with respect to formula-based rates, the OCA submits that automatic true-up mechanisms should be limited to discrete cost elements that are substantial, volatile, and are outside of the utilities' control. Again, an example of the appropriate use of this type of recovery mechanism is fuel adjustment clauses that have traditionally been permitted under Section 1307 of the Public Utility Code.

While base rate increases that are below the percentage levels that trigger the general rate increase requirements of Section 1308(d) may be permitted under Section 1308(a) and (b), those filings are still subject to notice and due process requirements and must be found by the Commission to result in just and reasonable rates. The OCA submits that there is nothing in the Public Utility Code or Pennsylvania case law that would support the type of automatic annual rate adjustment clause for all costs and revenues envisioned in this section of the draft report.

6. Inclining block rates (opposite of declining block rates)

The OCA agrees that inclining block rates, where cost-justified, can serve as a valuable tool to encourage conservation by customers. At the same time, care must be exercised so that steeply inclining rates do not impose hardships on low-income households with heavy energy burdens due to poor housing conditions. As the Commission is aware, PECO had inclining block rates for residential customers during the summer months for many years.

7. Time-of-use rates (higher rates for on-peak usage)

The OCA supports time-of-use rates, as long as they are offered to customers on a voluntary basis. Under Act 129 of 2008, electric default service providers “shall offer” time-of-use and real-time price plans to all customers with smart meter technology; and residential and commercial customers “may elect” to participate in such pricing plans. 66 Pa.C.S. §2807(f)(5). The OCA would oppose any effort to impose time-of-use rates on a mandatory basis, particularly on residential consumers.

8. Seasonal rates (higher rates for seasonal peak usage) -- No comments.

9. Flat block rates (one rate)

To the extent that this section refers to customers paying a single fixed monthly rate, regardless of usage, this type of rate would clearly eliminate all incentives for customers to conserve energy and would therefore be inconsistent with both ARRA Section 410(a) and longstanding Commission policy as noted above. As such, the OCA would not support such a proposal.

10. Reflecting EDC Lost Revenues Associated with Energy Conservation Programs in the Context of Base Rate Cases

As noted in the discussion of “decoupling” above, Act 129 of 2008 does not allow for recovery of lost revenues due to conservation between rate cases through an automatic adjustment clause. 66 Pa.C.S. §2806.1(k)(2). Act 129, however, does state that: “Decreased revenue and reduced energy consumption may be reflected in revenue and sales data used to calculate rates in a distribution-base rate proceeding filed by an electric distribution company under Section 1308.” 66 Pa.C.S. §2806.1(k)(3).

Under this provision, the OCA submits that an EDC may reflect the impact of conservation and energy efficiency measures on a prospective basis by considering such impacts in determining pro forma energy sales and revenue estimates. In other words, for example, if a utility were projecting future test year sales of 1,000,000 mwh under a “business-as-usual” scenario; and if the utility was implementing energy efficiency programs under Act 129 that were expected to reduce annual energy sales by 100,000 mwh; then the utility would be permitted to set rates prospectively at a projected sales level of 900,000 mwh. This would result in a higher per kilowatt hour rate level than if the Act 129 energy efficiency programs were not reflected in prospective rates.

What the EDC cannot do, in OCA’s view, is to seek retroactive recovery of revenues that may have been lost due to energy efficiency programs between base rate cases. This would have the same effect as allowing automatic adjustment recovery of those revenues, which is explicitly prohibited under the Act.

C. Financial Incentives – Positive and Negative

D. Other Methods to Align Incentives for Energy Conservation

1. **Third-party conservation rules**
2. **Energy conservation programs**
 - a. **Relation to different rate structures**
 - b. **Recovery of lost revenues**

The OCA's position on this issue is accurately set forth in the last paragraph of this section of the Draft Report that addresses the contentions of the consumer parties of the Working Group. The OCA would also reiterate the comments made in Section V.B.2 above with respect to the issue of "decoupling." That is, the General Assembly has spoken clearly with respect to electric utility recovery of lost revenues in Act 129 of 2008. In OCA's view, ARRA Section 410(a) does not mandate the automatic recovery of lost revenues between base rate cases or any form of decoupling as a condition for receipt of ARRA Stimulus funds. But if Section 410(a) is interpreted by the Commission to include such a requirement, then the Commission's inquiry is at an end because such recovery is simply not permitted -- at least for electric utilities -- under Pennsylvania law.

As to natural gas utilities, the Public Utility Code is silent with respect to the issue of lost revenue recovery, but as noted in Section V.B.2 above, it appears unlikely that the General Assembly would endorse such an approach.

- c. **Timely cost recovery**

Act 129 permits timely recovery of electric utility conservation costs through an automatic adjustment clause and such clauses have been established for each EDC in the recent PUC Act 129 proceedings. As set forth more fully below, the OCA submits that a similar type of recovery for natural gas costs may be permitted for natural gas utilities under Section 1307 of the Public Utility Code to the extent that such costs meet the requirements of Section 1319 of the

Public Utility Code and the standards for cost recovery set forth in the Commonwealth Court's decision in Pennsylvania Industrial Energy Coalition v. Pennsylvania Public Utility Commission, 653 A.2d 1336, 1348 (Pa.Cmwlt. 1995) ("PIEC"). The PIEC decision is discussed in Section VI of the Draft Report.

- d. **Positive incentives**
 - e. **Potential conflicts between gas and electric utilities over "credit" for conservation activities**
 - f. **Impact on customers' incentives to use energy efficiently**
 - g. **"Cost effective" requirement in Section 410(a)**
3. **Act 129 interplay with Section 410(a)**
- a. **Timely earnings opportunity for utilities**
 - b. **Cost effectiveness**
 - c. **Lack of positive incentives**
 - d. **Penalty for "independent movers" – those who adopted EE&C measures pre-Act 129**

The OCA would only note that while the primary beneficiaries of each EDC's Act 129 programs are those customers who actively participate in the programs, Act 129 also includes a cost/benefit test, the Total Resource Cost Test, that is designed to ensure that the net present value of the benefits of the programs will exceed the cost of the programs. As a result, all customers in the aggregate should benefit as a result of the Act 129 programs if they are properly designed and implemented. As such, even customers who do not directly participate in Act 129 programs or who have funded their own conservation measures may benefit as a result of a well-constructed, cost-effective utility-wide program under Act 129. In addition, a well-designed

portfolio of utility programs could introduce new and improved efficiency measures even to those customers who have already taken some steps on their own initiative.

4. Gas DSIC Interplay with Section 410(a)

As set forth in the Draft Report the consumer parties to the Working Group – including the OCA – see little or no relationship between the Gas DSIC and the subject of this Report. In any case, no member of the Working Group has suggested that a Gas DSIC is permitted under current Pennsylvania law and as such, there is no point in considering this issue as part of a Commission response to ARRA Section 410(a).

5. Policies to promote full fuel-cycle efficiency – No comments

6. Elimination of Barriers to Use of On-site Generation for Customers to Decrease Reliance on Grid – No comments

7. Energy conservation projects outside of utility-operated programs – No comments

VI. 1307 Adjustment Proceedings

The OCA agrees with the description of this issue set forth in the Draft Report. That is, Section 1307 provides an appropriate framework for recovery of natural gas utility conservation costs as long as those costs meet the requirements of Section 1319 of the Public Utility Code and the rate recovery standards set forth in the Commonwealth Court's decision in Pennsylvania Industrial Energy Coalition v. Pennsylvania Public Utility Commission, 653 A.2d 1336, 1348 (Pa.Cmwlth. 1995) ("PIEC"). As set forth above, with respect to electric utilities, Act 129 provides a separate, detailed automatic adjustment type recovery for electric conservation costs.

VII. Does Pennsylvania Already Fully Comply with Policy Goals of 410(a)

As noted above, it is the position of the OCA that through prior enactments of the General Assembly and Commission policies, the Commonwealth meets the policy goals of ARRA Section 410(a).

Both the Commission and the General Assembly have long recognized the importance of energy conservation and energy efficiency measures to Pennsylvania's future. Dating back to 1986, the General Assembly has included several provisions in the Pennsylvania Public Utility Code to address the implementation of energy conservation measures, to provide for timely cost recovery of any implemented measures, and to provide for performance factor considerations related to actions (or failure to act) to encourage the development of conservation and load management measures. Specifically, through Act 114 of 1986, the following sections were included in the Public Utility Code:

Section 1505(b)—Authority to order conservation and load management: This section provides that the Commission may order the utility to establish a conservation and load management program as part of determining or prescribing safe, adequate and sufficient service.

Section 1319—Financing of energy supply alternatives (specifically conservation and load management programs): This section provides for the recovery of all prudent and reasonable costs of conservation and load management programs.

Section 523(b)(4)—Performance factor considerations related to conservation and load management: This section provides for consideration for actions or failure to act to encourage the development of cost effective conservation and load management programs when determining just and reasonable rates.

66 Pa. C.S. §§523(b)(4), 1319, 1505(b).

More recently, with respect to electric utilities, the General Assembly has of course passed comprehensive energy efficiency and demand response legislation -- Act 129 of 2008 -- that addresses many of the issues raised in Section 410(a). Act 129 requires each major electric

distribution company (EDC) in Pennsylvania to reduce energy consumption by a minimum of 1% by May 31, 2011 and by a minimum of 3% by May 31, 2013. 66 Pa.C.S. §2806.1(c). The failure of an EDC to achieve the specified reduction targets results in a financial penalty of not less than \$1,000,000 and not more than \$20,000,000. 66 Pa.C.S. §2806.1(f)(2). Act 129 explicitly permits utilities to recover the costs of conservation programs in a timely manner through an automatic adjustment clause. While Act 129 prohibits the recovery of decreased revenues due to conservation measures through an automatic adjustment clause between base rate cases, the Act permits the utilities to reflect reduced revenues prospectively through pro forma energy sales and revenue calculations in a base rate case.

While Act 129 applies only to electric companies, the Commission is authorized through various sections of the Public Utility Code to approve energy efficiency programs for natural gas companies and to provide timely cost recovery and earnings opportunity associated with such programs. As noted above, through Section 1505(b), the Commission is authorized to order a utility to establish conservation and load management programs. Section 1319 provides that the Commission shall allow the recovery of conservation or load management programs implemented by a natural gas or electric utility that are found to be prudent and cost effective. Expenses incurred pursuant to Section 1319 may be recovered either through base rates or through an automatic adjustment clause under Section 1307 to the extent they meet the standards set forth by the Commonwealth Court in the PIEC case, which is discussed above. The Commission is also required to consider a natural gas utility's efforts in pursuing cost-effective conservation and load management opportunities when determining just and reasonable rates. 66 Pa.C.S. §523; 52 Pa. Code §69.35. With these provisions of the Public Utility Code, and the additional guidance provided to the Commission in Act 129, the Commission has full ratemaking

authority to align the interests of natural gas utilities and customers as it concerns using energy more efficiently.

While the statutes ensure proper authority to the Commission to meet the requirements set forth in Section 410(a) of ARRA, the Commission has also promulgated regulations, issued Policy Statements and issued Orders to sustain or enhance the incentives of customers and utilities to use energy more efficiently, to provide timely cost recovery and an opportunity for a utility to earn a fair rate of return.

For example, through Chapter 58 of the Commission regulations addressing the Low Income Usage Reduction Programs (LIURP), Pennsylvania electric and natural gas companies have implemented some of the best programs in the Nation for delivering weatherization, efficiency and conservation measures to low income customers. 52 Pa. Code Chapter 58. A recent study of Pennsylvania's LIURP programs found that since 1988, over \$330 million has been spent on weatherization treatments for more than 292,071 households. Long Term Study of Pennsylvania's Low Income Usage Reduction Program, John Shingler, Consumer Services Information Project, Penn State University (January 2009). Currently, residential ratepayers are supporting these programs mostly through dollar-for-dollar current cost recovery mechanisms.

The Commission also has regulations and policy statements in place that allow the Commission to monitor energy conservation efforts, ensure that certain conservation standards are met, and provide for the timely recovery of cost-effective energy conservation programs. For example, the Commission's regulations call for reporting on energy conservation initiatives through its universal service and energy conservation reporting requirements for both electric and natural gas companies. 52 Pa. Code §54.71-78 (electric) and §62.5 (natural gas). Through these reports, the Commission can assess the on-going efforts of the companies in energy

efficiency programs. As early as 1983, the Commission adopted a Policy Statement on the financing of energy supply alternatives. 52 Pa. Code §§69.31 to 69.36. Among the energy supply alternatives included in the policy statement were conservation and load management initiatives. 52 Pa. Code §69.31 and §69.34. The policy statement provides for the rate treatment of the reasonable and prudent costs incurred for cost-effective conservation and load management to be at least on par with any supply option. 52 Pa. Code §69.35. Additionally, the policy statement allows the Commission to consider the utilities' efforts when the Commission establishes just and reasonable rates. 52 Pa. Code §69.35. Finally, the policy statement requires the utilities to annually provide customers with information on specific means to efficiently utilize energy services. 52 Pa. Code §69.35(1).

Finally, in base rate proceedings, the Commission must determine the appropriate rate design for each class. In particular, the design of the usage charges for both distribution rates and supply rates can have a significant impact on the conservation incentive provided to the customer. Historically, some Pennsylvania natural gas companies and Pennsylvania electric companies used a declining block rate structure. This form of rate structure, however, may no longer be consistent with current energy pricing and the Commission's energy conservation goals. Through the base rate process, the Commission has recognized this point and exercised its authority to approve rate designs that are more aligned with customer conservation initiatives.¹ As set forth above, the PUC has supported the gradual elimination of declining block rates and has rejected proposals by utilities to implement high fixed customer charges. Both of these rate design policies are consistent with this Commission's pro-conservation policies and are

¹ For electric utilities serving as provider of last resort, the Commission has also issued a policy statement encouraging each EDC to implement rate designs that do not incorporate declining blocks, demand charges or similar elements. The Commission regulation states that POLR rate designs should encourage conservation. 52 Pa. Code §69.1810.

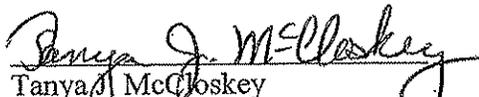
particularly relevant to the provision of ARRA Section 410(a) that requires policies that sustain or enhance “consumers’ incentives to use energy more efficiently.”

As can be seen, the Commission has ratemaking authority to address issues related to energy efficiency through the ratemaking process, and has taken care to specifically consider these issues. This authority allows the Commission to meet the requirements of ARRA Section 410(a) and the Commission has exercised its authority in a way that is consistent with the goals of that federal law.

III. CONCLUSION

The OCA submits that the Public Utility Code, the Commission regulations, the Commission Policy Statements and many Commission initiatives are consistent with the standards set forth to qualify for funding under Section 410(a) of the American Recovery and Reinvestment Act. The OCA looks forward to working with the Commission and other stakeholders in ensuring that these policies are implemented in a way that best serves the needs of the consumers of Pennsylvania and the Commonwealth as a whole.

Respectfully Submitted,


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