



100 Park Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.237.8880 • Fax: 717.237.8830

Matthew L. Garber
Direct Dial: 717.237.5270
mgarber@mcneeslaw.com

October 16, 2017

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

VIA ELECTRONIC FILING

**RE: Review of Universal Service and Energy Conservation Programs
Docket No. M-2017-2596907**

Dear Secretary Chiavetta:

Enclosed please find for filing with the Pennsylvania Public Utility Commission the Joint Reply Comments of the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Philadelphia Area Industrial Energy Users Group, the PP&L Industrial Customer Alliance, and the West Penn Power Industrial Intervenors in the above referenced proceeding.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Matthew L. Garber

Counsel to the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Philadelphia Area Industrial Energy Users Group, the PP&L Industrial Customer Alliance, and the West Penn Power Industrial Intervenors

Enclosure

cc via email: Louise Fink Smith, Assistant Counsel, Law Bureau (finksmith@pa.gov)
Tiffany Tran, Assistant Counsel, Law Bureau (tiftran@pa.gov)
Joseph Magee, BCS (jmagee@pa.gov)
Sarah Dewey, BCS (sdewey@pa.gov)
RA-PCLAW-LIURP@pa.gov

www.McNeesLaw.com

Harrisburg, PA • Lancaster, PA • Scranton, PA • State College, PA • Columbus, OH • Frederick, MD • Washington, DC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Review of Universal Service and Energy : Docket No. M-2017-2596907
Conservation Programs :

**JOINT REPLY COMMENTS
OF THE MET-ED INDUSTRIAL USERS GROUP,
THE PENELEC INDUSTRIAL CUSTOMER ALLIANCE,
THE PHILADELPHIA AREA INDUSTRIAL ENERGY USERS GROUP,
THE PP&L INDUSTRIAL CUSTOMER ALLIANCE, AND
THE WEST PENN POWER INDUSTRIAL INTERVENORS**

Pamela Polacek (Pa. I.D. No. 78276)
Matthew L. Garber (Pa. I.D. No. 322855)
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166
Phone: 717-232-8000
Fax: 717-260-1688
ppolacek@mceeslaw.com
mgarber@mceeslaw.com

Counsel to the Met-Ed Industrial Users Group, the
Penelec Industrial Customer Alliance, the
Philadelphia Area Industrial Energy Users Group,
the PP&L Industrial Customer Alliance, and the
West Penn Power Industrial Intervenors

Dated: October 16, 2017

I. INTRODUCTION

On May 10, 2017, the Pennsylvania Public Utility Commission ("PUC" or "Commission") entered an Order requesting Comments on developing general standards for the appropriate funding and cost recovery mechanisms for Universal Service and Energy Conservation ("Universal Service") programs operated by Pennsylvania's utilities. In examining these issues, the Commission's Order requests that interested parties comment on any of the related Universal Service programs, including Customer Assistance Programs ("CAPs"), Low-Income Usage Reduction Programs ("LIURPs"), Customer Assistance and Referral Evaluation Services ("CARES"), and hardship fund programs.

On July 14, 2017, the Commission published a Staff Report prepared by the Commission's Law Bureau in compliance with the May 10 Order. The report provides an overview and historic perspective on the Universal Service programs. It also outlines the process of developing new regulations.¹

The Staff Report recognizes the long-standing Commission practice of allocating CAP costs "to the only customer class whose members are eligible for the program – residential customers."² In describing the history of the CAP program, the Staff Report states that, with a few exceptions, the Commission has allocated costs to the residential class since the program's early days.

To address issues of importance to large commercial and industrial customers, the Met-Ed Industrial Users Group ("MEIUG"), the Penelec Industrial Customer Alliance ("PICA"), the

¹ Staff Report, *Review of Universal Service and Energy Conservation Programs*, Docket M-2017-2596907 (issued July 14, 2017) ("Staff Report").

² *Id.*, pg. 7.

Philadelphia Area Industrial Energy Users Group ("PAIEUG"), the PP&L Industrial Customer Alliance ("PPLICA"), and the West Penn Power Industrial Intervenors ("WPPII") (collectively, "Industrials") submitted comments on August 8, 2017. Numerous other parties also submitted comments.

Of the many parties submitting comments, the Office of Consumer Advocate ("OCA") and joint commenters represented by the Pennsylvania Utility Law Project ("PULP")³ urged the Commission to change its long-standing practice on Universal Service cost allocation. PULP and OCA both asked the Commission to begin cross-class subsidization of Universal Service programs, which are only available to the residential class.⁴

On September 13 and 14, 2017, Commission staff held a Stakeholder Conference at the Commission.

The Industrials submit these Reply Comments in response to the cost allocation approach advocated by OCA and PULP. The Industrials urge the Commission to continue to its long-standing practice of assigning Universal Service costs to the residential class, which is consistent with cost causation as the core principle of utility ratemaking.

II. REPLY COMMENTS

For over 25 years, the Commission has maintained a practice of assigning Universal Service program costs to the residential classes, as residential customers are the only eligible beneficiaries of Universal Service programs in Pennsylvania. At various times, the Commission

³ PULP submitted joint comments on behalf of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), Tenant Union Representative Network (TURN), and Action Alliance of Senior Citizens of Greater Philadelphia (Action Alliance).

⁴ Joint comments by various Pennsylvania executive departments advocated for a review and consideration of cross-class funding, but did not take a strong position on Universal Service cost allocation.

has reviewed this cost allocation determination, and has consistently upheld it. Thus, with respect to this cost incurred by utilities, the Commonwealth has operated with a Commission policy that appropriately emphasizes cost causation as the central principle, consistent with all other costs that a utility may claim for recovery during its rate cases.

Now, OCA and PULP argue aggressively for an expansion of Universal Service cost recovery to non-residential customers. In essence, they argue that the Commission is at liberty to ignore precedent, that interclass cost allocation determinations should be redefined to include "indirect costs", that Pennsylvania should follow the alleged lead of "most" other states by expanding recovery to non-residential classes, and that a statewide administrator should be implemented to oversee Universal Service programs.

In these Reply Comments, the Industrials respond to each of these arguments by OCA and PULP. The Industrials demonstrate that (a) underlying facts have not changed to justify a reversal of the 25-year Commission precedent; (b) cost causation remains the "polestar" of utility ratemaking, and the OCA/PULP proposals contravene this standard; (c) OCA and PULP have failed to demonstrate that a majority of states utilize cross-class recovery; (d) a slow and precarious economic recovery is not the time to add a significant additional cost to Pennsylvania businesses; and (e) cross-class allocation is the wrong approach to address the perceived lack of public funding for economically-disadvantaged families. In addition, PULP's proposal for a statewide administrator invites the introduction of a vast degree of waste and inefficiency into the process. The Industrials urge the Commission to reject OCA's and PULP's arguments regarding cost recovery and to maintain its longstanding precedent.

A. Underlying facts have not changed to justify a reversal of the 25-year Commission precedent of allocating Universal Service program costs solely to the residential class.

Overturing precedent is no trivial matter, as all stakeholders depend upon precedent to understand and apply policy as they make operational decisions. With this issue, precedent is even more significant than usual, as Commission policy here implicates both electric and natural gas utilities and affects both rate cases and Universal Service plan proceedings.

The Commission's practice of allocating Universal Service program costs solely to residential customers has been upheld repeatedly by the Commission itself and by the Commonwealth Court. The Commission has reviewed this precise issue in multiple proceedings and has clearly provided that only residential customers should be allocated these costs. This policy is implemented across the Commonwealth with one unique exception.⁵ It has stood the test of time because it is a rational, sound policy that aligns with longstanding utility ratemaking principles by assigning costs on a cost-causation basis.

The Commonwealth Court has on numerous occasions affirmed the principle that administrative agencies, while not "bound" by prior precedent, "must render consistent opinions and should either follow, distinguish or overrule its own precedent."⁶ In other words, there should

⁵ Philadelphia Gas Works still maintains cross-class recovery as a vestige of the days when it was regulated by the Philadelphia Gas Commission. As the Commission itself acknowledged, PGW's allocation methodology was "inherited" from when PGW was regulated by the Philadelphia Gas Commission. See Final Order, *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (December 18, 2006). The Commission's primary reasoning for not forcing PGW to change its methodology has been rate shock. See *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. M-00021612, M-00021612C0001, M-00021612C002, M-00021612C000 (Order Entered March 31, 2003) ("Restructuring Order") and Recommended Decision, *Pa. PUC v. Philadelphia Gas Works*, Docket No. R-00061931 (July 24, 2007), pages 80-81. This is related to the historical dependence of PGW's programs on all classes.

⁶ *Bell Atl. v. Pub. Util. Comm'n*, 672 A.2d 352 (Pa. Cmwlth. 1995). This general principle has been affirmed numerous times. See, e.g., *Pennsylvania Trout v. Dep't of Env'tl. Prot.*, 863 A.2d 93 (Pa. Cmwlth. Ct. 2004); *Chester Cmty. Charter Sch. v. Dep't of Educ.*, 44 A.3d 715 (Pa. Cmwlth. Ct. 2012); *Barringer v. State Empl'es. Ret. Bd.*, 987 A.2d 163, 166 (Pa. Cmwlth Ct. 2009). In *Barringer*, the Commonwealth Court found that a decision of the State Employees Retirement Board could differ from its precedent because of significantly different facts. In the instant case, no facts

be a clear rationale to overrule precedent. To undertake a profound policy change, the Commission should identify its reasons for doing so, including what facts or laws have changed to require a departure from established precedent. The Commonwealth Court has effectively affirmed this principle by remanding issues to the Public Utility Commission where the Commission departed from its own precedent without justification.⁷

As seen by the following examples, no underlying factual or legal changes have occurred that would support a change in Universal Service cost allocation.

First, the fundamental reason for the Commission precedent is the utility ratemaking principle of cost causation, which is discussed herein, *infra*. Cost causation remains the "polestar" of utility ratemaking, as affirmed by the Commonwealth Court in *Lloyd v. Pa. PUC*.⁸

Second, OCA and PULP have identified no changes to the Universal Service programs that warrant an overruling of Commission precedent that Universal Service costs are incurred for, and should be allocated to, only residential customers. Universal Service programs have been, and continue to be, available only to qualifying residential customers. Businesses are not able to participate in the programs.

have been brought forth by PULP or OCA demonstrating why a reversal of Commission precedent is justified at this juncture.

⁷ The Commonwealth Court has remanded issues to the Commission for departure from earlier precedent. "The Company correctly observes that the disallowance of the utility's proposed inflation adjustment in NFGD was appealed to the Commonwealth Court and that the Court remanded the issue to the Commission for failure to provide its reasoning for rejecting the inflation adjustment and for departing from earlier precedent." *Opinion and Order, Pa. PUC et al. v. United Water Pennsylvania, Inc.*, 88 Pa. PUC 181, Docket Nos. R-00973947 and R-00973947C0001-C0014 (Jan. 29, 1998) (citing *National Fuel Gas Distribution Corp. v. Pa. Public Utility Commission*, 677 A.2d 865 (Pa. Cmwlth. 1996) (emphasis added)).

⁸ *Lloyd v. Pa. PUC*, 904 A.2d 1010, 1020 (Pa. Commw. Ct. 2006).

Third, access to utility services has not changed appreciably. In fact, utility commodity costs have *come down* in the years since the Great Recession began.⁹ While other outside economic forces may affect customers' ability to pay for household expenses (including utilities), energy costs, standing alone, are more accessible today than they were the last time the Commission took up this issue.

The arguments put forward by OCA and PULP boil down to a perceived need for more funds for the programs. Thus, OCA and PULP strain to find factual, legal and policy arguments to expand the pool of funders. As admitted by OCA, this is due to a lack of tax revenue for public welfare programs.¹⁰ Neither OCA nor PULP have identified significant factual shifts that would justify a profound reversal of precedent.¹¹

The Industrials recognize that the Commission desires to review the adequacy of the existing Universal Service programs and funding levels. This investigation will not change the fundamental nature of the programs as residential-only offerings. As a result, the Commission should follow and reaffirm its precedent to recover the costs only from the residential class.

⁹ *2016 State of the Market Report for PJM*, Monitoring Analytics, pg. 17, available at http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2016/2016-som-pjm-sec1.pdf (last visited October 12, 2017).

¹⁰ OCA Comments, pg. 38.

¹¹ While the Commission is not addressing this issue through a petition for reconsideration, the Industrials believe the Commission's standard for granting petitions for reconsideration is instructive to demonstrate the high burden that should apply to any reversal of precedent. In an April 20, 2017 opinion, the Commission stated its agreement with the Superior Court that "[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them." The Commission continued:

What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

Opinion and Order, *Core Communications, Inc. v. Verizon Pennsylvania Inc. and Verizon North, LLC*, Docket Nos. C-2011-2253750 and C-2011-2253787 (April 20, 2017) (citing *Pennsylvania Railroad Co. v. Pa. Public Service Commission*, 179 A. 850 (Pa. Super. 1935)) (emphasis added).

B. Cost causation remains the "polestar" of cost allocation, and the OCA/PULP proposals contravene this standard.

Beyond consideration of the Commission's own precedent, it remains true that *cost causation* is the "polestar" of ratemaking, as articulated by the Commonwealth Court in *Lloyd v. Pa. PUC*, and affirmed in many Commission decisions since.¹² The Commission previously determined that cost causation mandated recovery of Universal Service costs solely from residential customers. The Commission should reaffirm this precedent as part of this investigation so additional resources are not expended by the parties in various rate cases to once again reargue an issue that has long been settled.

OCA and PULP do not overtly deny that cost causation is the polestar of ratemaking; however, through a series of related arguments, they stretch the idea of cost causation beyond recognition.¹³ OCA and PULP argue that: all classes indirectly benefit from Universal Service programs, and therefore all classes should pay for them; the residential classes are "subsidizing" Pennsylvania's employers by paying for Universal Service programs; and, utility service is a "public good" that should be paid for by all ratepayers. Each of these arguments is designed to convince the Commission to look past traditional, objective ratemaking principles and apply an inappropriate and subjective measure of cost causation. The Industrials respond to these arguments below.

¹² See, e.g., Order and Opinion, *Pennsylvania Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2010-2161694 (June 21, 2012). "'Polestar' is a literary reference meaning 'directing principle' or a 'guide.' Recommended Decision, 2012 Pa. PUC LEXIS 1474, *66, Docket No. R-2012-2285985 (Aug. 29, 2012) (citing *The American Heritage Dictionary*, Houghton Mifflin Co. (1985)).

¹³ PULP, in particular, attempts to pin particular responsibility for poverty on Pennsylvania's business establishments. PULP Comments, pg. 56.

1. The Commission has explicitly recognized the connection between Universal Service programs and the residential class, and the Commission should reject OCA's and PULP's "indirect costs" arguments

The Commission's prior decisions have recognized the direct connection between the residential class and Pennsylvania's Universal Service programs. As described in the Law Bureau's Staff Report, the Commission has consistently held that non-residential customers, who are not eligible for Universal Service programs, should not be allocated the costs of these programs.¹⁴

In a 2004 PPL rate proceeding, OCA requested that the costs for PPL's Universal Service programs be allocated to all customer classes.¹⁵ The Commission found that "universal service programs, by their nature, are narrowly tailored to the residential customers and therefore should be funded only by the residential class."¹⁶ In 2006, in evaluating the same issue, the Commission acknowledged that "the only customer class whose members are eligible for the program" are residential customers.¹⁷ The Commission considered whether it "should depart from its long-standing policy of collecting CAP costs only from residential customers."¹⁸ It decided to "continue its current policy of allocating CAP costs to the only customer class whose members are eligible for the program – residential customers." The Commission, in large part, based its decision on the fact that only residential customers can qualify to receive Universal Service program benefits.¹⁹

Despite the plain emphasis on eligibility and direct benefits by the Commission, both OCA and PULP theorize about many supposed indirect benefits businesses may be receiving from Universal Service programs. PULP even goes as far as to state that residential classes are

¹⁴ Staff Report, pg. 7.

¹⁵ See Final Order, *Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R-00049255 (December 22, 2004).

¹⁶ *Id.*

¹⁷ See Final Order, *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (December 18, 2006).

¹⁸ *Id.*

¹⁹ *Id.* The Commission also mentioned its consideration of the economic strain a contrary decision could create.

subsidizing Pennsylvania's employers. Both PULP and OCA urge the Commission to consider "indirect costs", such as societal economic conditions, in determining who pays for Universal Service programs.

Similar arguments have been presented to the Commission in many proceedings over the years and have never been persuasive to the Commission.²⁰ There is nothing new or novel about the OCA's "indirect" benefits theory. Ironically, PULP quotes extensively from a Bureau of Consumer Services report provided to the Commission in the early 1990s.²¹ However, this particular BCS recommendation was never adopted by Commission. Likewise, the Commission should continue to reject these "indirect cost" arguments for the following reasons.

First, OCA and PULP have not identified verified and quantified indirect benefits that the Universal Service programs provide to non-residential customers. OCA's and PULP's theoretical musings are not supported by evidence or logic. The Industrials could use similar data to argue that keeping rates as low as possible for businesses makes them more competitive, allowing these businesses to provide enhanced employment opportunities that lift people from the low-income classification. As a result, the residential customers should, by extension, pay the full cost to serve all of the businesses in the Commonwealth. Of course, this runs contrary to cost causation, which examines direct costs to serve each class, just as asking non-residential customers to pay for Universal Service programs violates cost causation.

Second, PULP's argument that the residential class "subsidizes" employers is unsupported. Its theory appears to be based on the concept that employers can artificially depress wages because

²⁰ See, e.g., *Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R-00049255; see also *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00021612; *Pa. PUC v. UGI Utilities, Inc. – Gas Division*, Docket No. R-00994786; and *T.W. Philips Gas & Oil Co. – Application for Approval of a Restructuring Plan filed Pursuant to the Natural Gas Choice and Competition Act*, Docket No. R-00994790.

²¹ PULP Comments, pg. 51.

their employees can get assistance from Universal Service programs to pay for utility expenses. In our economic system, employers will pay the wages that are necessary to attract workers with the skills and knowledge that the employer needs for the job, while also considering the amount of other operating costs and the revenues that the business earns. The concept that an employer will make a conscious decision to reduce its compensation to a particular employee or class of employees because they may be eligible for Universal Service assistance is laughable. As OCA acknowledges in its comments, Pennsylvania's small businesses provide job opportunities that may not otherwise be available to low-income residents. Ironically, OCA admits that businesses already pay for a disproportionate share of local services,²² which means that the businesses are subsidizing the residential taxpayers regarding those services.

Third, the concept of ratemaking based on distant societal conditions does not provide a reliable limiting principle. Despite arguing that businesses create a need for residential Universal Service programs (and are "subsidized" by the residential class), PULP and OCA have presented no way to determine whether a non-residential ratepayer is helping to alleviate the burdens of poverty or adding to those burdens. Despite PULP's and OCA's compelling descriptions of the challenges of poverty, they have not articulated a rational and objective standard by which "indirect costs" should or could be measured. This opens the door to assigning costs on a subjective basis, based on someone's interpretation of the financial impact a ratepayer (or class of ratepayers) has

²² OCA Comments, pg. 37; White Paper, pg. 19. In Fiscal Year 2015, businesses were responsible for 41.5% of the state and local tax burden in Pennsylvania. See *Total State and Local Business Taxes*, December 2016, Council on State Taxation, pg. 15, available at <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=94697> (last viewed October 12, 2017). Generally, businesses are responsible for a variety of taxes, including business property taxes; sales and excise taxes paid by businesses on their input purchases and capital expenditures; gross receipts taxes; corporate income and franchise taxes; business and corporate license taxes; unemployment insurance taxes; individual income taxes paid by owners of noncorporate (pass-through) businesses; and other state and local taxes that are the statutory liability of business taxpayers. *Id.* at 1.

on low-income individuals in their community. There is no limiting principle or objective standard to this approach, which is why OCA and PULP must seek to assign costs to *all* ratepayers.²³

Finally, despite their arguments that employers are being "subsidized" by residential ratepayers, PULP and OCA fail to address the inequities that would be created by such a proposal. Based on PULP's and OCA's reasoning, successful employers who pay higher wages could end up paying more in utility costs to subsidize low-income residents as well as employers that pay lower wages. This is contrary to our economic system and appears to be a proposal that would be more appropriately implemented in a socialist economy.

2. OCA's "logical end" arguments on cost causation make little sense and serve as a red herring.

In its comments, OCA suggests that if the cost causation methodology was followed to its logical end, only residential customers *on the low-income and discount programs* would be paying for these program costs, thus defeating the purpose of the programs. This unreasonable extrapolation, however, is nothing more than a red herring designed to avoid the traditional, class-based approach to cost causation. There are two reasons this argument fails the smell test.

First, OCA ignores the basic fact of eligibility. A non-low income residential customer can become a low income residential customer. In other words, the programs remain available to residential customers should they fall into hardship. Conversely, non-residential customers, regardless of the financial problems they face, are not – and never will be – eligible for CAPs,

²³ See PULP Comments, pg. 61. If PULP's request for cross-class allocation is granted, PULP asks the Commission to set forth guidance on how to allocate costs between rate classes, and/or to "adopt specific factors for assessing proper allocation of universal service funding to all customers, including the relative ability of each class to bear CAP costs." PULP recognizes that opening the door to cross-class allocation, without accompanying standards, could result in "disputes . . . subject to unnecessary and lengthy litigation." Problematically, PULP suggests no specific standards for the Commission to adopt except the ratepayers "relative ability" to pay. Presumably, PULP wrongly assumes that entities that use more energy have a greater "ability to pay" simply because they are non-residential customers.

which are limited to residential customers. Accordingly, all residential customers may be eligible for low-income assistance, rendering them direct beneficiaries of these programs; thus, they are responsible for the costs.

Second, cost allocation is a *class-based exercise*. This is indicated in *Lloyd v. Pa. PUC*.²⁴ If OCA's argument was followed to its logical conclusion, it would result in the dismantling of the class-based ratemaking approach authorized in *Lloyd* and elsewhere. Classes, now core to the cost causation process, would become irrelevant to ratemaking.²⁵

3. PULP's reliance on *Lloyd* for "public purpose programs" is misplaced.

PULP relies on *Lloyd v. Pa. PUC*, a 2006 case, as an affirmation of the right to recover the costs of "public purpose programs" from all rate classes.²⁶ However, PULP's analysis of the *Lloyd* case is misplaced and incomplete.

First, the facts of *Lloyd* did not raise the question of whether non-residential classes should pay for benefits that accrue only to the residential class. In *Lloyd*, the underlying facts involved PPL's sustainable energy fund ("SEF"), a program that the PUC and the Commonwealth Court determined benefitted the system as a whole, not just one class. Unlike Universal Service programs, all classes of customers could access the programs offered by the SEF. The Commonwealth Court later made this same distinction in the *Met-Ed Industrial Users Group v. Pa. PUC* case ("*MEIUG*"), where the Court upheld the Commission's decision to recover Universal Service costs only from residential customers.²⁷

²⁴ *Lloyd v. Pa. PUC*, 904 A.2d 1010, 1015 (Pa. Commw. Ct. 2006).

²⁵ As a side note, OCA's argument on page 39 of its comments emphasizes that small businesses tend to pay lower wages. Based on OCA's reasoning, only businesses that pay low wages should support Universal Service programs.

²⁶ *Lloyd v. Pa. PUC*, 904 A.2d 1010, 1024 (Pa. Commw. Ct. 2006).

²⁷ *Met-Ed Industrial Users Group v. Pa. PUC*, 960 A.2d 189 (Pa. Commw. Ct. 2008).

Critically, *Lloyd* declares that cost causation is the "polestar" of ratemaking. In *Lloyd*, the Commonwealth Court rejects a Commission decision that elevated gradualism over cost causation without adequate justification.²⁸ Additionally, *Lloyd* describes a two-step inquiry in ratemaking.²⁹ First, the rate setter must determine what increase enables the utility to obtain an appropriate profit. Second, the rate setter must determine which portion each class bears of that cost responsibility. The second step is done by examining cost causation, as the Commission has already done many times in determining that Universal Service costs should be allocated only to residential customers.

In its comments, PULP does not address the class-based analysis described in *Lloyd*. The Commonwealth Court in *Lloyd* respected the Commission's determination that demonstrable benefits were going to all distribution ratepayers and affirmed the Commission's decision to continue funding the SEF from all classes on that basis.³⁰ In *MEIUG*, the Commonwealth Court later upheld the Commission's decision to allocate Universal Service costs solely to residential customers, which is the precise issue in this investigation. The Commission should follow and reaffirm the actual Commonwealth Court precedent applicable to this matter, rather than being misled by PULP's inaccurate and incomplete arguments about *Lloyd*.

²⁸ "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 costs required to deliver service to each class." *Id.* at 1016, quoting *Philadelphia Suburban Water Co. vv. Pa. PUC*, 808 A.2d 1044, 1060 (Pa. Commw. Ct. 2002). Universal Service program costs are not incurred to serve non-residential classes.

²⁹ *Id.* at 1015.

³⁰ PULP also argues on page 52 of its comments that the General Assembly would have precluded cross-class recovery of Universal Service costs if it had believed it to be appropriate. However, PULP is missing the context of statutory provision. The General Assembly did not need to address the issue at all regarding the recovery of Universal Service costs, because the Commission practice and precedent was already established that only residential customers pay. From a statutory interpretation context, we presume the General Assembly was aware of the Commission decision. *Commonwealth v. Ramos*, 83 A.3d 86, 91 (Pa. 2013). *See also*, e.g., *Governor's Office of Admin. v. Purcell*, 35 A.3d 811, 819 (Pa. Commw. Ct. 2011) and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). In contrast, during the implementing of electric industry restructuring, consumer education programs directly benefitted all customer classes (and thus, the costs recovered from all classes). When the gas industry was restructured, larger customers already had gas choice and, thus, were not required to pay for the consumer education efforts pursuant to the statute.

4. Utility service is not a "public good".

Another approach taken by OCA is to attempt to define utility service as a "public good" for which all ratepayers (or, alternatively, all citizens) should pay.³¹

With its comment, OCA sponsored a document entitled *The Customer Assistance Program as a Universal Service Program in Pennsylvania* ("White Paper"), authored by Roger D. Colton. Mr. Colton's White Paper relies on a definition of "public good" by the National Regulatory Research Institute ("NRRI") at Ohio State University. The quotes from NRRI are long, but the definition emphasizes that a public good can be defined as "any publicly induced or provided collective good" that "arise[s] whenever some segment of the public collectively wants and is prepared to pay for a different bundle of goods and services than the unhampered market will produce."³²

The NRRI definition is in the context of "telecommunications network modernization"—which ironically is addressed in Pennsylvania through competitive *markets* rather than having all customers pay for a single network as NRRI suggests. Thus, in Pennsylvania, the telecommunications network is not a "public good". More importantly, the NRRI definition quoted by Mr. Colton does not address utility payment assistance programs. Mr. Colton compares apples and oranges when he analogizes an infrastructure *system* that might not exist but for public investment to a series of programs designed to help customers pay for electric or gas service, both of which are already provided by the market. It is not clear what "good" the market is actually failing to provide.

³¹ Technically, all taxpayers benefit, according to Mr. Colton. White Paper, pg. 19. If all citizens benefit, this means non-ratepayers should also pay – but Mr. Colton & OCA have not proposed how non-ratepayers should contribute.

³² See White Paper, pp. 12-13.

Mr. Colton attempts to compare utility service to street lights or police protection, but these are not at all similar. Utility service is not paid for by tax dollars, and it would still exist absent public investment. In fact, most public utilities are private companies that provide service to earn a profit. The context of the NRRI definition of "public good" was infrastructure, not direct payments or aid to individuals.

Simply because certain commodities or services are important does not make them a public good, either. Food, shelter, and child care may all be necessities, but they are all provided by the market, unlike police protection and street lights, for which there is no market.³³ The government may provide aid to support its needy citizens in obtaining these services, but *still* these services are available in the market and provided by the market. Individuals and businesses often make voluntary charitable contributions to the United Way and other organizations to help needy citizens. Thus, even if the NRRI definition of "public good" is accepted, Universal Service programs would not qualify as public goods.

Mr. Colton's argument is ultimately circular. He uses the goal of redistributing funds to justify the premise that utility service is a public good, essentially because it helps redistribute funds. His position implies that money, a fungible asset, becomes a public good if it is applied to utility service, child care, and other services. This is demonstrated by his use of *minimum wage research* to explain the benefits of *affordable home energy*. (The only connection between those two concepts is that they involve reducing financial pressure on an individual or family.) His White Paper approaches utility service, child care, and minimum wage increases the same way, by essentially treating them as interchangeable public goods. Ultimately, Mr. Colton's definition of

³³ Ironically, Mr. Colton discusses child care as an analogous example of a public good, but provides no support for its categorization as such, except that it may have benefits to businesses. See White Paper, pg. 15.

public good is so expansive that it could include *any* funds or aid provided to needy individuals, since that aid arguably benefits the public at large. There is no reasonable limiting principle to his interpretation of public good. Not only is this a faulty definition, it is an unsustainable basis for utility ratemaking.³⁴

5. "Social policy ratemaking" is a faulty approach that will erode time-tested, objective methods of utility ratemaking.

PULP and OCA argue that electrical and gas service are public benefits and argue for businesses to shoulder a greater cost burden. Ultimately, PULP and OCA would rely on utility programs to make up for lack of tax revenue to fund "public good" programs. Theirs is essentially an unveiled attempt to utilize the Commission and its policies to accomplish certain social policy goals. While OCA and PULP may have laudable aims, public utility regulation is not the proper venue to make up for a perceived lack of public support dollars, or to try to resolve social issues that may not be resolvable with money at all, let alone by the provision of discounted utility service.

Utilities cannot cure the ills of society, and assistance with payments for utility service plays a limited role. Various commenters acknowledged this. Even OCA admitted that the need for more funding for Universal Service programs was based on lack of tax revenue.³⁵ However, poverty cannot be solved through this Universal Service fund, and the parties should not "back door" the issue through the PUC.

³⁴ Mr. Colton's White Paper, on page 14, cites a 1998 National Association of Attorneys General ("NAAG") report that may reference "universal service" as a public good. Using a passing reference from a two-decade old report from an unrelated trade organization, with no specific reference to Pennsylvania's regulatory context, is unpersuasive. No context was provided to the quote to explain whether the authors were seeking to provide a clear definition of public goods, or merely making a passing reference without an intent to use the technical definition of the term. *See* White Paper, pp. 14.

³⁵ OCA Comments, pg. 38.

Cutting through the "noise" of arguments about "indirect benefits", it is helpful to remember a basic, obvious fact stated by the Commonwealth Court: "[U]niversal service programs assist residential customers only."³⁶ Utility ratemaking is based on objective principles, not indirect social benefits. This time-tested approach to cost allocation should be maintained.

C. OCA and PULP have failed to demonstrate that a majority of states utilize cross-class recovery.

Attached to its comments, OCA included Appendix B, a listing of many states' CAPs, along with an indication of how the CAP programs are funded. While this chart provides some basic information, comparisons with other states' programs are not "apples to apples" comparisons.³⁷ OCA has not demonstrated that a majority of states use cross-class recovery.

First, OCA's analysis does not account for waivers of system benefits charges. In some jurisdictions, such as New Jersey, businesses can obtain waivers or discounts from CAP funding requirements.³⁸

Second, OCA's chart does not state whether non-residential customers can benefit from CAP programs or other programs that are included in the system benefits charge for each state.

Third, there are specific questions raised by data presented in the chart. For example, in Illinois, it appears that utility contributions to CAPs comes from shareholders. In Indiana, OCA addresses gas but does not address electric service.

Fourth, many states are missing from the analysis.

³⁶ *MEIUG*, 960 A.2d 189, at 200.

³⁷ See OCA Comments, Appendix B.

³⁸ See, e.g., *In re. Petition of Soundview Paper Co. LLC for Approval of a Rate Schedule CSG Transportation Service Agreement Between Pub. Serv. Elec. & Gas Co. and Soundview Paper Co., LLC and In re. Rate Schedule CSG Transportation Service Agreement Between Pub. Serv. Elec. & Gas Co. and Marcal Manufacturing, LLC and the Potential Discount of Societal Benefits Charges*, 2015 N.J. PUC LEXIS 321.

Fifth, each jurisdiction has a unique structure. An apples-to-apples comparison is not possible, because there are many aspects to how states govern utilities, provide social benefits for their citizens, etc.

Finally, at \$360 million in total assistance provided, CAP expenses in Pennsylvania outpace every other state in OCA's list except California. This is an enormous burden to add to the non-industrial classes *who are ineligible to participate in the CAP programs* in Pennsylvania.

D. PULP's proposal for a statewide administrator invites the introduction of a vast degree of waste and inefficiency into the process.

Various commenters have proposed a statewide administrator for Universal Service programs. While these are presented as means of introducing greater consistency and/or efficiency into the delivery of Universal Service program services, the Industrials are greatly concerned about new inefficiencies that are easily introduced into the process.

Bureaucratic programs are frequently rife with inefficiency and waste. For example, an analysis done on Pennsylvania's Energy Efficiency & Conservation program ("Act 129") for a 6-year period showed that \$659 million was spent on overhead costs, while only \$526 million was spent on energy efficiency projects.³⁹ That means only *44 cents on the dollar* goes to funding projects.

New programs may come with the promise of accountability, audits, cost controls, and elimination of waste, but this is very difficult to accomplish in reality. Businesses are already saddled with utility surcharges and expenses that create additional costs to doing business and

³⁹ Information presented by the Industrial Energy Consumers of Pennsylvania, gathered from the Pennsylvania Public Utility Commission website, available at http://www.puc.state.pa.us/filing_resources/issues_laws_regulations/act_129_information/electric_distribution_company_act_129_reporting_requirements.aspx (last visited October 12, 2017).

impact their ability to remain productive. The Industrials are opposed to the introduction of a new layer of bureaucracy into the Universal Service framework in Pennsylvania.

E. A slow and precarious economic recovery is not the time to add a significant additional cost to Pennsylvania businesses.

Pennsylvania was significantly impacted by the Great Recession, and recovery remains slow for Pennsylvania businesses. Many jobs have been lost, the economy continues to shift, and the rebuilding process continues to take time. In addition to the economic downturns, there are underlying competitive factors providing immense challenges to businesses in Pennsylvania.

As mentioned above, businesses continually pay for a large percentage of local services that benefit local communities. Businesses provide jobs, and their owners often invest substantially into the local communities over and above taxes. They provide crucial services and products and other benefits to their communities.

However, rather than recognizing these significant contributions, OCA and PULP attempt to paint a picture of employers "leeching" off the residential class. For its part, PULP proposes a new statewide bureaucracy to administer existing programs.

In 2006, the Commission stated, "The Commission believes that we should not initiate a policy change that could have a detrimental impact on economic development and the climate for business and jobs within the Commonwealth."⁴⁰ This was before the Great Recession, during a period of general economic growth. The same analysis holds true today—implementation of new utility charges for businesses may have a direct impact on the ability of Pennsylvania companies to compete, thrive, and provide employment.

⁴⁰ Final Order, *Customer Assistance Programs: Funding Levels and Cost Recovery Mechanisms*, Docket No. M-00051923 (December 18, 2006).

While OCA and PULP may see small and large businesses as an additional source of revenue, now is not the time to saddle businesses—some of whom rely heavily on utility service—with a completely new cost. PULP's and OCA's proposals would likely result in energy-intensive businesses bearing a disproportionate burden in subsidizing the residential class. This means the businesses that rely on energy for production would be hit hardest.⁴¹

F. Cross-class allocation is the wrong approach.

It is abundantly clear from PULP's and OCA's comments that they view Universal Service programs as a means of addressing broader, systemic issues. They analogize affordable utility service (or utility payment assistance) to "public goods" that are provided by tax funds and legally appropriated by Congress or the General Assembly.

This "back door" means of addressing poverty and other systemic social challenges is not the appropriate avenue to address these concerns. As admitted by OCA, the lack of public assistance dollars is essentially causing the Low Income Advocates to look elsewhere for support. The broader issues should be addressed through the appropriate channels—state and federal legislatures who have the taxing power and the power to determine broad social policy.

⁴¹ If the Commission does reverse years of precedent and cost causation by requiring the cross-class allocation of costs, the allocation and recovery should not be on a per-kWh or per-Mcf basis. The amount of kWh or Mcf used by a customer has no relationship to the purported "indirect benefits" of the programs. Larger energy users often pay higher wages and employ more people than the smaller users. There is no evidence that large energy users receive a larger benefit than smaller users. The only conceivable allocation that could be used is a customer or meter allocation and recovery mechanism.

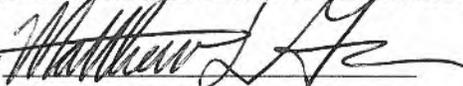
III. CONCLUSION

In conclusion, based upon established ratemaking methodology and longstanding Commission precedent, only the customer class benefiting from, and eligible for, Universal Service programs should be allocated these costs. Because essential facts and law surrounding Universal Service remain the same, the Commission should not attempt to disturb its precedent on this issue to advance the OCA's and PULP's goals of social policy ratemaking. Accordingly, in any Universal Service program standards developed by the Commission, the Commission must ensure that the costs of these programs are only allocated to the residential customer class.

WHEREFORE, the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Philadelphia Area Industrial Energy Users Group, the PP&L Industrial Customer Alliance, and the West Penn Power Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission consider and adopt, as appropriate, the foregoing Reply Comments.

Respectfully submitted,

McNEES, WALLACE & NURICK LLC

By 

Pamela Polacek (Pa. I.D. No. 78276)
Matthew L. Garber (Pa. I.D. No. 322855)
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717)232-8000
Fax: (717)237-5300

Counsel to the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Philadelphia Area Industrial Energy Users Group, the PP&L Industrial Customer Alliance, and the West Penn Power Industrial Intervenors

Dated: October 16, 2017