

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

**Pennsylvania Public Utility
Commission, Law Bureau Prosecutory
Staff v. Aqua Pennsylvania, Inc.**

**Public Meeting – January 13, 2011
2155842-OSA
Docket No. M-2010-2155842**

DISSENT IN PART OF VICE CHAIRMAN TYRONE J. CHRISTY

Today the Commission is considering a Settlement Agreement (Settlement) between the Commission's Law Bureau Prosecutory Staff (LBPS) and Aqua Pennsylvania, Inc. (Aqua), which was filed on July 30, 2010. The Settlement, among other things, provides for a civil penalty of \$15,000 and a \$10,000 contribution to Aqua's Helping Hand program.¹ By an Opinion and Order entered October 15, 2010, the Commission requested comments on the Settlement, and I issued a Statement inviting comments on the appropriateness of directing \$15,000 to Aqua's Helping Hand program in lieu of the civil penalty.

Comments were filed by the Dollar Energy Fund (Dollar Energy) and the Office of Consumer Advocate (OCA). The LBPS filed Comments in response to the OCA's Comments.

Dollar Energy supports directing the \$15,000 to a hardship fund to assist low-income utility customers. Dollar Energy states:

Many families throughout the Commonwealth are struggling to make ends meet. Choices between providing a nutritious meal, taking necessary prescription medication or receiving necessary utility service are becoming all too common. Hardship funds are essential to assisting utility consumers through crisis situations.

Dollar Energy Fund has been assisting low-income utility customers since 1983. Unfortunately, the need for utility assistance is growing, it is well known that those without utility service will do what they must to provide for their families, which could mean utilizing unsafe gas, electric and water sources. Redirecting the civil penalty of \$15,000 to a suitable hardship program will help many low-income utility customers maintain or restore safe utility services.

The OCA also supports directing the \$15,000 to an established hardship fund designed to help eligible low-income customers. The OCA states:

¹ In addition, Aqua will make a number of internal changes to its operations and training procedures to ensure that errors which gave rise to this proceeding will not be repeated.

Helping eligible customers to catch up on their past due water bills can avoid terminations and mitigate the need for payment arrangements. Particularly in these difficult economic times, adding \$15,000 to the Helping Hand fund, rather than paying a \$15,000 civil penalty, could assist many Aqua consumers who, at this time, are forced to choose between purchasing food or medication and staying current on their water bills or payment arrangements.

Once again I am disappointed with the majority's decision to reject the comments filed by Dollar Energy and the OCA, and to direct the \$15,000 to the Commonwealth's General Fund in lieu of supplementing Aqua's low-income program. Assuming an average grant of \$300, this amount could have helped 50 low-income families retain their utility service. While some may argue that settlement amounts should be directed to the General Fund rather than low-income programs, I think it is important to put into context the relatively small settlement amounts compared to the resources that this Commission requires be spent on universal service programs.

The Commission has established and administers universal service programs that are designed to assist low-income gas and electric customers retain their utility service. The costs of these programs are paid for solely by the electric and gas utilities' other residential customers. The utilities do not receive any monies from the Commonwealth's General Fund for these programs. Non-residential utility customers also pay nothing toward the cost of these programs. Only the utilities' other residential customers are required to pay for these programs. In 2009, electric and gas residential customers paid over *\$440 million* to support low-income universal service programs. The amount of the annual "tax" paid by an average residential gas and electric customer to support universal service programs varies, but it is as high as \$74.44 for an electric customer (PECO - Electric) and \$225.90 for a gas customer (PGW - Gas), and it continues to increase each year. The General Assembly has been content to let the Commission run these low-income assistance programs solely with funds collected from residential utility customers, without any assistance from the General Fund. Having been left to our devices to fund utility universal service programs, I see no reason why we should direct the relatively small settlement amounts we collect from utilities to the General Fund. We should direct these sums to utility low-income programs and, by doing so, help low-income families and at the same time take some of the pressure off the other residential customers who have to pay for universal service programs.

The only policy objection that I have heard to directing settlement proceeds to utility low-income programs is that the "utility gets the money back" and therefore the settlement does not provide a disincentive to the utility. With all due respect, I believe that this argument is misplaced. Settlement amounts generally are not high enough to significantly affect a utility's earnings. The real disincentive comes from the negative publicity associated with a case where the utility has been accused of wrong-doing. This remains unchanged regardless of where the settlement proceeds are directed. The impact of this negative publicity greatly exceeds the penalty that a utility pays as a result of settlements with the LBPS. No utility desires this negative publicity, which can affect its stock price. In extreme cases, this Commission can penalize a utility in the form of a lower return on equity for a pattern of poor performance. In

short, the monetary penalties that are paid by fixed utilities as a result of Commission settlements largely are symbolic; therefore, directing the settlement proceeds to low-income programs rather than the Commonwealth's General Fund has no impact on the disincentives that these cases provide.

Another issue that sometimes has been raised is whether the Commission has the legal authority to direct the payment of settlement proceeds to low-income programs rather than the General Fund. At its meeting on November 23, 2010, the Commission's Consumers Advisory Council unanimously endorsed the attached memorandum prepared by Renaldo L. Hicks, Esq., the Council's Chairman. The memorandum notes that settlements do not involve any admission or finding of wrongdoing, and there generally is no evidentiary record upon which a fact finder actually could impose a civil penalty. The payment of settlement amounts to low-income programs in these cases is legally sound. More importantly, the memorandum concluded as follows:

Accordingly, I support the Resolution of Cindy Datig to "Request and encourage the Commission to continue to support and permit settlement funds in non-litigated matters and matters which do not result in findings of fact and conclusions of law which constitute violations of law to be directed to low-income programs and hardship funds."

As stated above, this memorandum was unanimously endorsed by the Commission's Consumers Advisory Council on November 23, 2010. I strongly urge the Commission to heed this advice and reconsider its recent opposition to redirecting settlement proceeds to low-income programs.

I respectfully dissent from the majority's decision to the extent, and for the reasons, discussed above.

1-13-11
DATE

Tyrone J. Christy
TYRONE J. CHRISTY, VICE CHAIRMAN



R. L. HICKS & ASSOCIATES

17 North Second Street, 16th Floor
Harrisburg, PA 17101
(717) 260-3060 Fax (717) 260-3072
www.rlhickslaw.com

Direct Dial: (717) 260-3070
Email: rlh@rlhickslaw.com

Date: November 23, 2010

To: Pennsylvania Public Utility Commission
Consumer Advisory Council

Subject: Disposition of Funds from Settlements
at the Pennsylvania Public Utility Commission

From: Renardo L. Hicks, Chairman

I do not disagree with the legal analysis of Shane Rooney in his memo dated November 19, 2010 concerning the direction of civil fines and penalties imposed upon public utilities to recipients other than the General Fund of the Commonwealth of Pennsylvania¹; however, in his evaluation of the actual practice of directing funds from settlements to low income assistance and universal service programs here at the Pennsylvania Public Utility Commission ("Commission"), he starts his analysis in the wrong place. I have participated in many settlements at the Commission and in the Pennsylvania Attorney General's Office which have in funds being directed to recipients other than the General Fund, and in the particular circumstances of these transactions this practice is completely legal and consistent with the requirement of directing fines and civil penalties to the General Fund.

Importantly, these settlements do not involve the imposition of a "fine" or "civil penalty." At the Commission, typically the staff raises charges or questions regarding the acts or practices of a utility company and requests information regarding such acts or practices from the utility to determine whether a violation of regulations or law has occurred. In response the utility provides the information and claims that its acts or practices do not violate the Commission's regulations or the Public Utility Code. In many of these cases, no evidentiary hearings are conducted.

¹ Chapter 33 of the Public Utility Code provides for the assessment of civil penalties against public utilities and their disposition. 66 Pa.C.S. §§3301-3316.

Consequently, neither the staff's allegations nor the utility company response is proven and no judge or fact finder decides who is actually correct. Nevertheless, in an effort to resolve the differences of opinion between staff and the utility – and nearly always without any admission or finding of wrongdoing – the utility and the staff often agree to disagree and resolve the matter through a settlement, with changes in practice and funds directed to low income or universal service programs. These settlements are properly subject to review by the Commission and if they are not appropriate, the parties may properly return to the battlefield and fight it out in evidentiary hearings to determine who is correct.

It is important to note that such settlements explicitly include “no finding or admission or wrongdoing” because such a finding is the basis upon which a “civil penalty” may be imposed. Put another way, in the absence of a finding of violation of the Commission's regulations or the law – or an admission of violation of the Commission's regulations or the law, there is no legal basis upon which to impose a civil penalty! It is also commendable and consistent with Commission policy, to see the staff and utility companies agree to resolve disputes without protracted litigation and expense and to have consumers benefit from these abbreviated and settled disputes.

This practice is not very different from the approach taken by the Pennsylvania Office of Attorney General's Bureau of Consumer Protection (“BCP”). BCP is responsible for enforcing the PA Unfair Trade Practices and Consumer Protection Law² (“UTPCPL”). While the UTPCPL provides for resolution of disputes by BCP through an Assurance of Voluntary Compliance with restitution to consumers, injunctive relief and the imposition of civil penalties, the Attorney General's office has long engaged in the practice resolving many disputes, before engaging in full evidentiary hearings, through settlement with no admission of wrongdoing by the company and provisions that direct funds to the Attorney General's office to be used for “future consumer protection purposes.” Such practice has been ongoing and undisputed for many years.

In my view, the Commission's practice of permitting the staff and utilities to direct settlement funds to low income and universal service programs in non-litigated proceedings – particularly in circumstances where no evidentiary hearings take place and there is no finding or admission of wrongdoing – is more equitable. Moreover, in response to concerns of “unjust enrichment” by utilities, or concerns that they are being permitted to benefit from their bad acts by funding service for customers who merely return the money to the utility for the payment of utility service, I agree with the recommendation of Cindy Datig, Chief Executive Officer of the Dollar Energy Fund. **Direct settlement dollars to a general utility assistance funding pool of organizations that administer utility low income programs and hardship funds.** This suggestion places emphasis upon the benefit to consumers, instead of the utility.

² 73 P.S. §§201-1 – 201-9.2.

The above practice is completely consistent with the legal requirement that fines and civil penalties imposed by the Commission be paid to the General Fund of the Commonwealth. Where the Commission finds facts to support a violation and concludes as a matter of law that such violation has been committed, civil penalties appropriately may be imposed. However, in the absence of such factual findings and legal conclusions, the imposition of civil penalties is simply not required by Pennsylvania law.

Accordingly, I support the Resolution of Cindy Datig to "Request and encourage the Commission to continue to support and permit settlement funds in non-litigated matters and matters which do not result in findings of fact and conclusions of law which constitute violations of law to be directed to low income programs and hardship funds."