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VIA OVERNIGHT DELIVERY

May 31, 2012

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

RE: Implementation of Act 11 of 2012
Docket No. M-2012-2293611

Dear Ms. Chiavetta:

Enclosed for filing in the referenced matter, please find the original and four copies of the Comments of Columbia Gas of Pennsylvania, Inc. to Tentative Implementation Order. Please file the original and three copies of the document and return the fourth copy to me, file-stamped, in the postage prepaid envelope included herewith.

I have served copies of this document pursuant to Ordering Paragraph 3 of the Tentative Implementation Order.

If you have any questions, please call me at 724.416.6355 or e-mail me at tjgallagher@nisource.com. Thank you for your assistance.

Sincerely,

Theodore J. Gallagher

enclosures

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Act 11 of 2012	:	Docket No. M-2012-2293611

COMMENTS OF COLUMBIA GAS OF PENNSYLVANIA, INC.
TO TENTATIVE IMPLEMENTATION ORDER

A. INTRODUCTION

By way of a Tentative Implementation Order entered on May 11, 2012 in the captioned matter, the Commission has proposed procedures and guidelines to implement Act 11 of 2012.[1] The Tentative Implementation Order followed up on a working group meeting that the Commission convened on April 5, 2012 to discuss Act 11 implementation issues with stakeholders.

In the Tentative Implementation Order, the Commission provided that any interested party may submit comments within twenty days of the entry of the Order. Columbia Gas of Pennsylvania, Inc. ("Columbia" or "the Company'), by and through its attorneys, hereby submits its comments in response to the Commission's Tentative Implementation Order. Columbia appreciates the opportunities that the Commission has afforded to stakeholders, both at the April 5, 2012 working group meeting and in comments to the Tentative Implementation Order, to provide input regarding Act 11 implementation.

[1] Act 11 of 2012 was signed into law on February 14, 2012.

At the outset, Columbia commends to the Commission's attention and consideration the comments submitted by the Energy Association of Pennsylvania ("EAPA"), particularly EAPA's discussion of suggested revisions to the Model Tariff regarding the list of accounts. In addition to EAPA's Comments, Columbia hereby submits its own Comments for the Commission's consideration.

B. BACKGROUND

Columbia is a certificated Natural Gas Distribution Company, providing sales and transportation services to approximately 414,000 customers in 26 counties in western, central, and south-central Pennsylvania, subject to the Commission's regulatory jurisdiction. Columbia has long been a proponent of a natural gas utility Distribution System Improvement Charge ("DSIC") that has been authorized by Act 11. Among natural gas utilities in the Commonwealth, Columbia has been a leader in the replacement and improvement of infrastructure, having engaged since 2007 in the type of accelerated infrastructure program that is envisioned by Section 1352 of Act 11. In order to recover the cost of infrastructure improvements made under that program, Columbia has filed and completed three base rate proceedings since 2008. In each of those proceedings, Columbia's initial filing featured a DSIC proposal in the hope that the legislature would authorize a natural gas DSIC before the case was concluded. In each of those proceedings, in the absence of legislative authority to implement a DSIC, the Company withdrew its DSIC proposal at the outset of settlement negotiations. As Columbia will demonstrate when it submits its long-term infrastructure improvement plan, Columbia plans to continue its accelerated program. Thus, the DSIC mechanism

will be an important option for Columbia as it seeks to recover the ongoing costs associated with that program.

C. COMMENTS

1. Section 1352 – Long-Term Infrastructure Improvement Plan

As noted above, since 2007 Columbia has been engaged in the type of long-term infrastructure improvement plan envisioned by Section 1352.

In footnote 2 on page 8 of the Tentative Implementation Order, the Commission invited parties "to address how the utility will comply with Section 59.38 of our regulations while implementing the long-term plan." That section of the regulations calls for utilities to notify the Commission of proposed major construction, reconstruction or maintenance of plant at least 30 days prior to the commencement of work. Columbia has been able to comply with Section 59.38 of the Commission's regulations during the course of its current accelerated infrastructure replacement program. Given that experience, Columbia does not foresee necessary conflict between a formally approved long-term infrastructure improvement plan and the filing of reports under Section 59.38.

In the Tentative Implementation Order, the Commission states that the long-term plan submitted under Section 1532 of Act 11 will necessarily include "a review of all distribution plant, including its inventory, age, functionalities, reliability and performance." Referring to the language of Section 1352, Columbia notes that the statute requires that the long-term plan include information pertaining to "eligible property". Columbia respectfully submits that review of "all distribution plant" is much broader than the scope of review mandated by the statute, and that the requirement to

submit data of that nature will constitute an unnecessary, and undue burden upon utilities. Thus, the procedures and guidelines for the submission of long-term infrastructure improvement plans should be limited to "eligible property", consistent with 66 Pa. C.S. § 1352.

2. Section 1353 – Distribution System Improvement Charge

Columbia submits that the Model Tariff attached as Appendix A to the Tentative Implementation Order will serve to exclude items from recovery under a DSIC that should be included. In its Comments, the EAP discusses this issue. Columbia fully agrees the EAP's discussion of this issue, and submits that EAP's recommendations should be adopted.

In discussing the acceleration requirement of a utility's long-term infrastructure improvement plan, the Commission recognized "that some utilities have already taken substantial steps recently to increase prudent capital investment to address their aging infrastructure" and maintained that "those utilities should indicate in their long-term plan how the DSIC will maintain or augment acceleration of infrastructure replacement and prudent capital investment." (Tentative Implementation Order at 9). Subsequently, in its discussion of DSIC, the Commission observed that "Inasmuch as acceleration of infrastructure replacement is a statutory element of the long-term plan required for DSIC approval, it is also a necessary element to be demonstrated to secure Commission approval of a utility's proposed DSIC." (*Id.* at 12). Columbia submits that, for a utility that has already taken substantial steps recently to increase prudent capital investment to address its aging infrastructure, the procedures and guidelines that are established for approval of a proposed DSIC should specifically provide that the acceleration

requirement can be satisfied by demonstrating that the DSIC will maintain or augment that acceleration.

3. Section 1355 – Commission Review

The Tentative Implementation Order appropriately recognizes that a utility's proposed DSIC and initial tariff are subject to full Commission review and may be challenged by interested parties, who may be entitled to a hearing and an initial decision by an Administrative Law Judge in appropriate circumstances. As noted elsewhere in the Tentative Implementation Order, a DSIC petition must include a long-term infrastructure improvement plan under Section 1352 as well as a certification that the utility has filed a base rate case under Section 1308(d) within five years prior to the filing of the utility's DSIC petition. Both the long-term infrastructure improvement plan and the base rate case will have been subject to Commission scrutiny, and a DSIC filing should not be an opportunity for parties to revisit matters decided in those filings. Thus, Columbia submits that the Commission's procedures and guidelines should specify that any matters either approved in a utility's long-term infrastructure improvement plan or its prior rate case should not be included among the "relevant and material factual issues" that can serve as the basis for referring a DSIC filing to the Office of Administrative Law Judges for hearing and decision.

Moreover, given the regulatory lag that Act 11 is designed to address, Columbia submits that it would be appropriate for the Commission to establish an accelerated 90-day timeline for the review and consideration of initial DSIC filings. Should the matter remain undecided after such 90-day period, the utility should be permitted to implement its proposed DSIC subject to refund.

4. Section 1357 – Computation of Charge

The Commission invited comments on whether a stipulated cost of equity from a settled rate case, agreed to or unopposed by all parties, can be used consistent with Section 1357(b)(2) in the computation of a DSIC. (Tentative Implementation Order, fn. 5). In the context of major rate cases, it has long been the stated policy of this Commission to favor full or partial settlements in which all interested parties have had an opportunity to participate. 52 Pa. Code § 69.401. Columbia submits that it can be generally accepted that Act 11 is a complex piece of legislation. While Act 11 establishes that cost of equity may be determined by referring to the utility's most recent fully litigated rate proceeding or from the Commission's quarterly earnings reports, the statute is silent on establishing a cost of equity where there has not been a fully litigated rate case. The Supreme Court of Pennsylvania has held that "An administrative agency's expert interpretation of a statute for which it has enforcement responsibility is entitled to great deference and will not be reversed unless clearly erroneous." *Alpha Auto Sales v. Dep't of State*, 537 Pa. 353, 644 A.2d 153, 155 (Pa. 1994). Furthermore, when the statutory scheme is technically complex, such deference is even more necessary. *Popowsky v. Pennsylvania Public Utility Commission*, 550 Pa. 449,462, 706 A.2d 1197, 1203 (1997). Clearly, the General Assembly wishes for DSIC to be used as a tool in addressing aging infrastructure in the Commonwealth. Columbia submits that a Commission interpretation of Act 11 that would encourage the use of DSIC, such as permitting the calculation to be based upon a stipulated cost of equity, is permissible particularly where the statute does not prohibit the Commission from doing so.

5. Section 1358 – Customer Protections

Like other utilities in this Commonwealth, in order to meet competition from an alternative fuel, Columbia's tariff provides for flexible distribution charges. Addressing this situation in the Tentative Implementation Order, the Commission states, "In our tentative view, the statutory language does not appear to permit a utility to have variances in its DSIC rates based on customer class, whether that difference is based on the calculation of the DSIC percentage or on the underlying DSIC-eligible property." (Tentative Implementation Order at 18). Columbia submits that Section 1357(d)(1) provides that a DSIC shall be "applied in a manner consistent with section 1358 (relating to customer protections) to each customer under the utility's ***applicable*** rates and charges." Under the rules of statutory construction, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]" 1 Pa.C.S. § 1903(a). Also, "the plain words of a statute cannot be disregarded where the language is free and clear from all ambiguity." *Erie-Western Pennsylvania Port Authority v. Rugare*, 370 A.2d 768 (Pa. Cmwlth. 1977); 1 Pa.C.S. § 1921(b). In order for the word "applicable" to have meaning within the context of Section 1357(d)(1), there must be some rates and charges to which a DSIC may not be applicable.

This interpretation is supported by subsection 1358(c), which provides that "nothing in this subchapter shall be construed as limiting the existing ratemaking authority of the commission, . . . or as indicating that the existing authority of the commission over rate structure or design is limited." Act 11 was intended to promote utility infrastructure improvement and to address regulatory lag associated with the investment necessary to engage in such improvement. It was not intended to address

any aspect of flexed rates. Thus, interpreting the Act as mandating that the DSIC must be assessed to flexed rate customers goes beyond the intent of the General Assembly. Further, it is at odds with the General Assembly's specific recognition that Act 11 is not intended to impact the commission's current authority over rate structure or design. That current ratemaking authority includes the authority to approve flexed rates. Moreover, it creates the incongruous situation whereby flex contracts would be unaffected in the event that a utility were to seek recovery of its investments by way of a full rate case under Section 1308(d), but those same contracts would be impaired if a utility were to implement a DSIC.

In the context of flexed rate contracts, regulatory 'out' clauses are common. Such clauses permit a party to terminate the contract when it loses its value due to a change in laws or regulations. The price of a competitive alternative will remain the same to a flex customer, whether a DSIC is assessed to that customer or not. Consequently, should the Commission require that a DSIC be assessed to flexed rate customers, Columbia anticipates that virtually all of those customers will exercise their right to terminate and opt for the competitive alternative that gave rise to the flex contract in the first place. This will have a negative impact on Columbia's remaining customers, from whom Columbia will need to recover the revenues that were once collected from its flex customers. Certainly, this would be a consequence not intended by the General Assembly.

Flexed rate customers have all entered into their contracts with the expectation that the rate charged by their utility will meet their competitive alternative. Adding a DSIC charge to their rates will serve to impair the value of those contracts substantially, and could well constitute a violation of the contract clause of the Federal Constitution,

which prohibits a state law from impairing the obligation of contracts. U.S. Const., Art. I § 16, cl. 1. While there is plenty of jurisprudence to establish that contract impairment is permissible where the state law at issue has a significant and legitimate public purpose, Columbia submits that the fact that Act 11 was not intended to deal with flexed rates, in conjunction with the negative impact on non-flex customers described above weighs against the conclusion that there is a significant and legitimate public purpose that justifies the substantial impairment of flexed rate contracts. Furthermore, inasmuch as charging a DSIC to current flexed rate customers would amend contractual obligations between utilities and their customers, Columbia submits that the Commission could not do so without reasonable notice and hearing pursuant to 66 Pa. C.S. § 508.

This Commission has recognized that a principal goal of allowing utilities to flex rates in order to compete with bypass and energy alternatives is to benefit all customer classes through the retention of service. *Pa PUC v. The Peoples Natural Gas Company,* 2005 WL 6504491. If flexed rate customers must be assessed DSIC, future negotiations to bring new customers onto utility systems will be hampered. The alternatives will either be for prospective flex customers to accept the risk that their negotiated rates will not be static or for the utility to agree to "eat" the cost by adjusting flexed rates downward in the event of a DSIC. Neither alternative is likely to promote successful negotiations, with a resulting negative impact on the growth of utilities and, ultimately, higher rates for remaining customers.

D. CONCLUSION

Columbia respectfully requests that the Commission consider the comments submitted herein when it issues a Final Order to establish procedures and guidelines to

carry out Act 11. And, as discussed above, Columbia endorses and commends to the Commission's attention the Comments submitted in this matter by the Energy Association of Pennsylvania.

Respectfully submitted,

COLUMBIA GAS OF PENNSYLVANIA, INC.

By: _____

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Its Attorneys

Dated: May 31, 2012

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