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August 25, 2020

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

Re: Answer of the Energy Association of Pennsylvania to Joint Petition of TURN AND CAUSE-PA, ET AL. for Due Process Relief, Docket M-2020-3019244

Dear Secretary Chiavetta:

Attached for filing, please find the Energy Association of Pennsylvania's Answer to the Joint Petition in the above docket.

Sincerely,

A handwritten signature in black ink that reads "Donna M.J. Clark". The signature is fluid and cursive, with a long horizontal stroke at the end.

Donna M.J. Clark
Vice President & General Counsel

Enclosure

CC: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Emergency Order Re: Establishing Public Utility : M-2020-3019244
Service Termination Moratorium :

**ANSWER OF THE ENERGY ASSOCIATION OF PENNSYLVANIA TO JOINT
PETITION OF TURN AND CAUSE-PA, ET AL. FOR DUE PROCESS RELIEF**

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

Pursuant to 52 Pa. Code § 5.61, the Energy Association of Pennsylvania (“EAP” or “Association”) hereby responds to the Joint Petition for Due Process Relief (“Joint Petition”) filed on August 5, 2020 by the Tenant Union Representative Network (“Turn”), Action Alliance of Senior Citizens of Greater Philadelphia (“Action Alliance”) and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”) (hereinafter collectively referenced as the “Low Income Advocates”).¹ In the Joint Petition, the Low Income Advocates contend that the Pennsylvania Public Utility Commission (“Commission” or “PUC”) should not lift its moratorium on service terminations for all utility customers pending completion of an on-the-record, public process designed: 1) to evaluate whether allowing terminations to a person’s home will hinder the Commonwealth’s response and recovery from the impacts of the COVID-19 pandemic; and 2) to develop a “just and equitable” plan to address the accrual of utility debt resulting from Commission’s Emergency Order and the impacts of the COVID-19 pandemic. The

¹ Note that the Joint Petition was served on EAP, the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”) and the PUC Bureau of Investigation & Enforcement (“I&E”). EAP is a trade organization and does not represent its members individually in legal proceedings. Note also that service was not made on individual utilities that are members of EAP nor was service effectuated on water/wastewater or telecommunications utilities all of which are also prohibited from terminating service under the PUC March 13 Emergency Order. The Joint Petition failed to include and serve indispensable parties.

Low Income Advocates suggest that Commission action to modify or lift the termination moratorium policy established via a Commission Emergency Order in March 2020 must be preceded by an on the record public process to satisfy their concept of due process and is inexorably tied to the Governor's Proclamation of Emergency Disaster.²

As set forth below, EAP disagrees with the Petition and opposes its request for an arguably lengthy process prior to any Commission action to alter the across-the-board ban on all service terminations, which has now been in effect for over five months, i.e. since March 13, 2020. An evidentiary process was neither legally required nor followed prior to imposing this policy, and no formal adjudicatory process should be imposed as a prerequisite to amending the existing Emergency Order. In this case, "due process" is satisfied by the procedure followed by the Commission – it gave stakeholders (including low-income advocates) the opportunity to provide written comments to inform and assist the Commission in making its decision of whether to lift the moratorium. Rather, EAP submits that it is time to provide utilities with the option to resume terminations as part of their collections process, recognizing that with respect to residential customers the established process provides a myriad of additional procedural and substantive consumer protections under statutory law (Chapter 14) and the Commission's regulations (Chapter 56). These consumer protections are distinct from those provided under common law for commercial and industrial customers. EAP requests that the Commission lift the ban on terminations as of September 1, 2020.

EAP, however, does not object to a Commission proceeding following the lifting of the moratorium on September 1, 2020 to consider policy issues regarding the impact of the COVID-

² On March 6, 2020, pursuant to subsection 7301(c) of the Emergency Management Services Code, 35 Pa. C.S. §§ 7101, et seq., Governor Tom Wolf issued a Proclamation of Disaster Emergency proclaiming the existence of a disaster emergency throughout the Commonwealth for a period of up to ninety (90) days. As allowed by the Code, the Proclamation was renewed for another ninety days on June 3, 2020.

19 pandemic on utility customers and their ability to maintain service. Such a proceeding could provide a basis for new Commission policies that fall within the Commission’s authority under the Public Utility Code and/or recommendations to the General Assembly regarding policies not currently authorized by statute.

II. ANSWER³

A. Current Circumstances, the Voluntary Efforts of Utilities, and the Myriad Consumer Protections Available Through Chapter 14 and the Regulations in Chapter 56 Support Lifting the Ban on Terminations.

EAP contends that continuing the ban on terminations is not sustainable or in the best interests of customers and believes that it is time for the Commission to adopt a new approach. While the COVID-19 pandemic continues to affect many aspects of life in the Commonwealth, the nation, and the world, circumstances have changed since March. Broad, stringent policies imposed by Governor Wolf and the Pennsylvania Department of Health (“DOH”) such as business closures and stay-at-home orders have been replaced by social distancing and requirements to wear masks, which are more targeted and sustainable. Further, it has been acknowledged by the Commission that: prolonging the moratorium indefinitely increases the risk that mounting arrearages will ultimately result in increased terminations; customers who are falling behind in paying their bill should be notified and informed of established and available utility and government assistance programs; and that lack of payment to utilities may eventually impact the ability of companies to provide safe and reliable service.⁴

³ EAP will not respond to each numbered paragraph in the Joint Petition but does deny the allegations to the extent they are legal conclusions, state arguments or opinion or repeat the request for relief. EAP denies all factual averments which to the extent the Joint Petition is treated as initiating an adversarial proceeding must be established by substantial evidence.

⁴ See, at Docket No. M-2020-3019244: Motion of Commissioner John F. Coleman at June 18, 2020 Public Meeting Regarding Modification and Extension of Termination Moratorium; Motion of Chairman Dutrieulle seeking Modification of the March 13 Emergency Order at the July 16, 2020 Public Meeting; Joint Statement of Commissioners Coleman and Yanora to Chairman’s July 16 Motion; Chairman Dutrieulle’s Letter Seeking Comment on the Moratorium dated August 10, 2020.

With respect to the concern of mounting arrearages, EAP collected information from its members showing that arrearage totals from March 2020 to June 30, 2020 increased approximately 39% for residential customers, 23% for low-income residential customers, and 54% for non-residential customers as compared to the same period in 2019. The data collected revealed that EAP member utilities had customers in arrears in the aggregate amount of \$290.6 million (residential), \$147.3 million (low-income), and \$48.6 million (non-residential) for this period in 2019. For 2020, dollars owed increased to \$403.7 million (residential), \$181.2 million (low-income), and \$74.9 million (non-residential). EAP provided this information to the Commission and the General Assembly in support of a legislative proposal designed to direct assistance from the federal CARES Act legislation to Pennsylvania utility customers.

Moreover, during the last five months, and even pre-dating the Commission's Emergency Order, EAP's member utilities have voluntarily offered support to their customers in a variety of ways suited to lessen the pandemic-related economic impact that many currently face. For example, EAP members expanded corporate giving to hardship funds, food banks and other community support organizations and increased outreach campaigns to bolster residential customer awareness of assistance available during these unprecedented times. As circumstances warrant and based on factors which vary among utilities operating in different regions of the Commonwealth, utilities have exercised their discretion to modify company policy and, in some instances, have waived late payment charges and reconnection fees, have halted the removal of residential customers from assistance programs for failure to recertify income eligibility, and have offered payment agreements, typically available only to residential customers, to small business

customers. These actions are in addition to the increased state and federal government assistance extended to address the economic impacts of the COVID-19 pandemic.⁵

The voluntary efforts of utilities during the pandemic augment the robust regulatory programs available in Pennsylvania for residential customers who are struggling to pay their utility bills. These include exhaustive procedural protections (e.g., personal contact requirements at numerous points in the collection process prior to termination, bars on termination when there is a dispute, postponement of termination for customers with medical conditions, opportunities for agreements to repay past due amounts with a utility payment agreement and, if that effort fails, an opportunity for a Commission payment agreement), utility-specific universal service programs for low income residential customers (e.g. discounted rates, access to hardship funds, weatherization/energy efficiency programs), and taxpayer-funded programs (federal LIHEAP).

In light of these substantial and significant protections which constitute a comprehensive safety net for residential customers in particular, EAP maintains that the Commission should end the blanket prohibition on service terminations effective September 1, 2020 to restrain the further growth of customer arrearages and to encourage customers to enroll in available assistance programs.

B. The Low Income Advocates Request for Due Process Relief is Misplaced and Overlooks the Established Consumer Protections Afforded Residential Customers by the General Assembly and Implemented Via Commission Regulations.

With respect to any implication that an on-the-record public process prior to lifting the Commission imposed moratorium is legally necessary so as to provide “due process” for

⁵ The federal government has extended unemployment benefits, provided stimulus funds to households and businesses, and sent funding to states to alleviate the impacts of the pandemic. The Pennsylvania Department of Human Services (“DHS”) introduced a LIHEAP Crisis Recovery Program this summer which granted automatic supplements to LIHEAP recipients for the 2019-2020 season and permitted new applications for customers with termination-level arrearages for a new summer season ending August 31, 2020. A past due amount serves as evidence of a crisis during the new summer season, a significant and beneficial change of policy on the part of DHS.

customers who may face termination in the future, EAP contends that such reasoning is flawed. No procedural due process concerns would be implicated by Commission action to modify its March 13 Emergency Order whereby the Commission established a temporary policy in response to the unprecedented circumstance of the COVID-19 pandemic. A formal adjudicatory process was not required prior to the issuance of the Emergency Order and should not be required for the Commission to end its temporary ban on terminations. *See, Barasch v. Pa. PUC*, 546 A. 2d 1296, 1302 (Pa. Commw. 1988) (“Procedural due process does not require notice and a hearing in every conceivable situation involving administrative action.... However, these procedural safeguards should accompany a situation where the administrative action is adjudicatory in nature and involves substantial property rights.”) (quoting *Conestoga Nat. Bank of Lancaster v. Patterson*, 275 A. 2d 6, 9 (Pa. 1971)). Here, the Commission provided an opportunity for all stakeholders to provide input with comments to the Chairman’s August 10th Letter filed to the Commission’s Emergency Order docket. To the extent that utility service could be viewed as a “substantial property right”, it has been and will continue to be amply protected by the General Assembly in Chapter 14 of the Public Utility Code, 66 Pa. C. S. §§ 1401 – 1419 and in the Commission’s Chapter 56 regulations. The rights and obligations of customers and utilities as defined in Chapter 14 and implemented via Chapter 56 were not altered by the Emergency Order and will not be weakened when it is inevitably lifted.

EAP further refutes any argument or implication advanced by the Low Income Advocates that the Commission has obtained the power to go beyond the scope of its statutory authority delegated under the Public Utility Code by relying upon the Governor’s Proclamation of Disaster Emergency issued on March 6, 2020. Paragraphs 1 and 2 of the Joint Petition. The pertinent paragraph of the Proclamation of Emergency Disaster states in full that:

“Further, I [the Governor] hereby *suspend the provision of any regulatory statute prescribing the procedures for conduct of Commonwealth business*, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder, or delay necessary action in coping with this emergency. Commonwealth agencies may implement emergency assignments *without regard to procedures required by other laws, except mandatory constitutional requirements*, pertaining to performance of public work, entering into contracts, incurring obligations, employment of temporary workers, rental of equipment, purchase of supplies and materials, and expenditures of public funds.” (Emphasis added.)

As an independent agency not subject to direct supervision and control of the Governor, the Commission’s authority cannot be expanded beyond its statutory mandate under the powers granted to the Governor by the Emergency Management Code, 35 P.S. Section 7101, *et. seq.* *Accord, e.g., Delaware River Port Authority v. Pa PUC*, 145 A.2d 172,174 (Pa. 1958) (“the area of administrative activity is not boundless; the commission’s power is statutory; and the legislative grant of power to act in any particular case must be clear.”); and *National Fuel Gas Distribution Corp. v. Pa PUC*, 464 A. 2d 546, 564 (Pa. Commw. 1983) (“The Commission has only those powers expressly provided in the Code.”) Moreover, while the Emergency Management Code empowers the Governor to “suspend the provision of any regulatory statute *prescribing the procedures for conduct of Commonwealth business....*”, 35 P.S. § 7301 (f) (1) (emphasis added), that Code does not authorize the suspension of substantive statutory provisions.

C. Monitoring Circumstances After the Moratorium is Lifted Will Enable the Commission to Consider Policy Adjustments and/or Recommend Statutory Changes to the General Assembly.

At the same time, the continuing uncertainty over the magnitude and duration of the COVID-19 pandemic and its consequent economic damage may cause some anxiety over the adequacy of these established consumer protections. In this regard, EAP emphasizes first that the regulated collection process in Pennsylvania does not start with termination, which is always a last resort for utilities, and that there are myriad opportunities along that pathway where the customer

and the utility can reach an accommodation to halt or postpone termination. Lifting the termination ban on September 1, 2020 initiates a carefully balanced and controlled collection process which is further back-stopped by an annual winter moratorium provided for under Chapter 14.

Second, EAP acknowledges and understands that the Commission will monitor circumstances after lifting the termination moratorium for example by scrutinizing monthly reports filed by utilities pursuant to 52 Pa. Code § 56.231 and, if warranted, by seeking additional information from utilities under section 504 of the Public Utility Code, 66 Pa. C. S. § 504. By way of example, in June utilities responded to a Commission request for additional data regarding the impact of the COVID-19 pandemic on collections from residential and small commercial customers.⁶

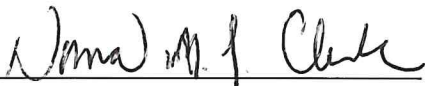
Moreover, following the lifting of the moratorium the Commission could initiate an *en banc* or working group proceeding to determine 1) whether additional policies within its legal authority are appropriate to enhance consumer protections under extenuating circumstances such as a pandemic, or 2) whether a request to the General Assembly for additional legal authority may be appropriate. EAP and its members would welcome the opportunity to participate in such a proceeding if initiated by the Commission.

⁶ See Secretarial Letter and associated utility filings in response, *COVID-19 Customer Service, Billing, and Public Outreach Provisions Request for Utility Information*, Docket No. M-2020-3020055.

III. CONCLUSION

For the reasons stated above, EAP requests that the relief requested in the Joint Petition be denied and, in the alternative, the Commission enter an Order lifting its ban on terminations as of September 1, 2020.

Respectfully submitted,



Terrance J. Fitzpatrick (ID # 35287)
Donna M. J. Clark (ID # 39866)
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Date: August 25, 2020

VERIFICATION

Terrance J. Fitzpatrick, deposes and says that he is President and CEO; that he is duly authorized to and does make this Verification on behalf of the Energy Association of Pennsylvania; that the facts set forth in the foregoing Answer of the Energy Association of Pennsylvania are true and correct to the best of his knowledge information and belief; and that this verification is made subject to the penalties of 18 Pa.C.S. §4904 (relating to unsworn falsification to authorities).

Terrance J. Fitzpatrick

Terrance J. Fitzpatrick

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Emergency Order Re: Establishing Public Utility : **Docket No. M-2020-3019244**
Service Termination Moratorium :

CERTIFICATE OF SERVICE

I hereby certify that I have, on this day, served true and correct copies of the Answer of the Energy Association of Pennsylvania to Joint Petition of TURN et al. and CAUSE-PA in the above captioned matter upon the following persons and in accordance with the requirements of 52 Pa. Code § 1.54.

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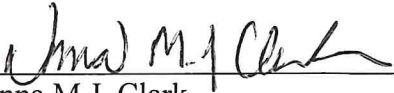
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Date: August 25, 2020



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