

Highlights: PA PUC Public Session of April 6, 2017

Note: The Public Meeting [calendar](#) and the Public Meeting [agendas and summaries](#) are available on the Pennsylvania Public Utility Commission's website. [Video](#) from each Public Meeting can also be accessed through the website. Live broadcasts of the Public Meetings may be viewed via [streaming video](#).

At the April 6, 2017 Public Meeting of the Pennsylvania Public Utility Commission ("Commission"), the Commissioners adopted Staff's recommendations for action by a vote of 5-0 on all items listed on the Main Agenda and Carry-In Agenda, except as reflected herein below under the respective Commission agenda headings. Review of particular items considered by the Commissioners at this Public Meeting which may be of interest are addressed under the respective Commission agenda headings below. Relevant motions and statements are attached hereto. The next regular Public Meeting is tentatively scheduled for **April 20, 2017 at 10:00 a.m.** The minutes of the Public Meeting of the March 2, 2017, were, by a vote of 5-0, approved as submitted.

MAIN AGENDA

BUREAU OF AUDITS

- All matters approved as submitted.

BUREAU OF CONSUMER SERVICES

- PPL ELECTRIC UTILITIES CORPORATION, M-2016-2554787. Universal Service and Energy Conservation Plan for 2017-2019 filed on 6/30/16, in accordance with the Commission's regulations at 52 Pa. C.S. §§ 54.71 - 54.78. RECOMMENDATION: That the Commission adopt the proposed Tentative Order. Statement by Commissioner Sweet. Verbal Statements by Chairman Brown and Vice Chairman Place. Vote 5-0.

OFFICE OF SPECIAL ASSISTANTS

- MINDY JAYE ZIED AND BINNIE A ZIED VS PECO ENERGY COMPANY, P-2015-2520474 and P-2015-2500342. Formal Complaint filed on 8/24/15, alleging, inter alia, that their electric bills from PECO contained incorrect charges. On 12/23/16, the Complainants filed a Motion. We shall treat one portion of the Motion as a Petition for Rescission or Amendment under 52 Pa. Code § 5.572(d) and another portion of the Motion as a Motion for Certification of Interlocutory Order under 52 Pa. Code § 5.633. PECO filed an Answer to the Motion on 1/5/17. RECOMMENDATION: That the Commission adopt the proposed Opinion and Order. Statement by Chairman Brown. Vote 5-0.

- THE NORTH-EASTERN PENNSYLVANIA TELEPHONE COMPANY AND LEVEL 3 COMMUNICATIONS LLC, A-2017-2587154. Joint Petition filed on 2/3/17 seeking approval of an Interconnection Agreement pursuant to Section 252(e) of the Telecommunications Act of 1996. Notice of the Joint Petition was published in the Pa. Bulletin on 2/18/17. No comments or protests were received. RECOMMENDATION: That the Commission adopt the proposed Opinion and Order that grants the Joint Petition. Vote 5-0.

BUREAU OF TECHNICAL UTILITY SERVICES

- TDS TELECOM/MAHANAY & MAHANTANGO TELEPHONE COMPANY AND TDS TELECOM/SUGAR VALLEY TELEPHONE COMPANY, R-2017-2588893, R-2017-2588890, P-00961115F1000, P-00961116F1000. 2017 combined Price Index/Service Price Index Report filed on 3/1/17. No tariffs were filed. No protests were filed and no hearings were held. RECOMMENDATION: That the Commission adopt the proposed Order. Vote 5-0.

LAW BUREAU

- ACT 129 ENERGY EFFICIENCY AND CONSERVATION PROGRAM, M-2012-2289411. The Commission is required to submit a report to the Consumer Protection and Professional Licensure Committee of the Senate and the Consumer Affairs Committee of the House of Representatives. 66 Pa. C.S. § 2806.1(i)(2). To meet this requirement, the Commission directed the Statewide Evaluator (SWE) to provide a comprehensive Phase II Final Annual Report. In addition to outlining its audit activities and findings for PY7, the SWE was to review the electric distribution companies' (EDCs) PY7 Final Annual Reports and its own auditing information to determine whether or not the consumption reductions reported by the EDCs were accurate. The Commission must also determine whether the EDCs are in compliance with the requirements outlined at 66 Pa. C.S. §§ 2806.1(b), (c) and (d). With this Order, the Commission releases the SWE's Phase II Final Annual Report and assesses the EDCs compliance with reduction requirements. RECOMMENDATION: That the Commission adopt the proposed Order. Statement by Chairman Brown. Vote 5-0.
- WINDSTREAM COMMUNICATIONS INC, WINDSTREAM D&E SYSTEMS INC, PAETEC COMMUNICATIONS INC, USLEC OF PENNSYLVANIA INC, TALK AMERICA LLC F/K/A TALK AMERICA INC AND CAVALIER BUSINESS COMMUNICATIONS AND INTELLIFIBER NETWORKS INC., P-2016-2580976, P-2012-2327799, P-2012-2327798, P-2012-2327787, P-2012-2327792, P-2012-2327797, P-2012-2327812. Petitions filed on 12/20/16, requesting extensions of existing waivers of certain portions of the Commission's regulations at 52 Pa. Code §§ 53.58 and 53.59 relating to the tariffing and classification of services offered by competitive local exchange carriers (CLECs). The Commission waived the relevant portions of Sections 53.58 and 53.59 for the Windstream CLECs on 12/5/12, for a period of 4 years. The Commission has received no answers in response to these petitions. RECOMMENDATION: That the Commission adopt the proposed Order. Vote 5-0.

OFFICE OF ADMINISTRATIVE LAW JUDGE

- E MCCAULEY VS PENNSYLVANIA ELECTRIC COMPANY, C-2016-25559946. Formal Complaint filed 7/18/16 alleging persistent reliability and customer service problems. Penelec filed its answer on 8/24/16. A hearing was held on 12/1/16. COMMISSION REVIEW: That the Commission adopt ALJ Long's Initial Decision sustaining the complaint was to the reliability

issues and dismissing the customer service allegations. Postponed until the Public Meeting of April 20, 2017.

- HATTIE BEATRICE HOWELL VS PHILADELPHIA GAS WORKS, C-2016-2568426. Complaint filed 9/24/16 alleging that PGW did not credit her account with a payment made and that she would like her gas service restored. PGW filed its answer on 10/18/16. On 11/4/16, PGW filed a Motion for Summary Judgment based on the doctrine of res judicata. Complainant failed to file a response to the Motion. COMMISSION REVIEW: That the Commission adopt ALJ Heep's Initial Decision granting the Motion and dismissing the Complaint with prejudice. Vote 3-2 with Chairman Brown and Vice Chairman Place Dissenting, a Motion by Commissioner Sweet and a Statement by Chairman Brown.

CARRY-IN AGENDA

BUREAU OF TECHNICAL UTILITY SERVICES

- UBER TECHNOLOGIES INC., RAISER LLC, GEGEN LLC, AND RAISER-PA LLC VS PENNSYLVANIA PUBLIC UTILITY COMMISSION, B-2016-2569511, C-2014-2422723. By order dated 3/28/17, the Commonwealth Court stayed the appeal to allow the Commission, pursuant to Pa. R.A.P. 1701(b)(5), to take further action necessary for the Commission to review and consider approval of a Settlement Agreement. RECOMMENDATION: That the Commission approve the proposed Settlement Agreement. Statements by Commissioner Coleman, Commissioner Powelson and Chairman Brown. Vote 4-1 with Commissioner Coleman Dissenting and Commissioner Powelson concurring in result only.
- FULL SERVICE NETWORK LP, P-2016-2578704. On 12/6/16, FSN filed a petition requesting an order to extend the currently effective waiver of Chapter 64 regulations as applied to Pre-Paid Landline Service. RECOMMENDATION: That the Commission adopts the proposed Order. Postponed until the Public Meeting of April 20, 2017.
- REVIEW OF UNIVERSAL SERVICE & ENERGY CONSERVATION PROGRAMS, MOTION OF COMMISSIONER DAVID W. SWEET. Joint Motion by Commissioner Sweet and Vice Chairman Place. Verbal Statements by Commissioner Powelson and Commissioner Coleman. Vote 5-0.

NO ANNOUNCEMENTS

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120

PPL Electric Utilities Corporation's
Universal Service and Energy
Conservation Plan for 2017-2019

Public Meeting April 6, 2017
2554787-BCS
Docket No. M-2016-2554787

STATEMENT OF COMMISSIONER DAVID W. SWEET


Before the Commission is the proposed Tentative Order for PPL Electric Utilities Corporation's (PPL or Company) Universal Service and Energy Conservation Plan (USECP or Plan) for 2017-2019, as reviewed by the Commission's Bureau of Consumer Services (BCS) and Law Bureau.

My remarks today are a general observation of PPL's Proposed Plan and a request that PPL address certain specific issues in its response to the Tentative Order.

PPL's 2017-2019 USECP contains four major components that help low-income customers maintain utility service, such as OnTrack (*i.e.*, PPL's Customer Assistance Program), the Winter Relief Assistance Program (*i.e.*, PPL's Low-Income Usage Reduction Program), Operation Help (*i.e.*, PPL's Hardship Fund), and the Customer Assistance and Referral Evaluation Services Program (CARES).

While I commend PPL for modifying certain aspects of their proposed USECP, the Order raises some serious concerns regarding OnTrack enrollments, costs and subsequent benefits. Therefore, in their filing of supplemental information as directed in the Tentative Order, I specifically request that PPL address the concerns raised by BCS, particularly regarding the Company's OnTrack calculation methods, the determination of a customer's ability to pay and how, if at all, energy burden levels of low-income customers are accounted for in these calculations. I also ask that the impact of any programmatic changes that target this issue be included. Finally, I ask that PPL explain what factors are driving the increasing costs of the OnTrack program and what, if any, policies are in place to ensure low-income customers are enrolled in OnTrack before significant debt is accrued.

Date: April 6, 2017



Commissioner David W. Sweet

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PA 17120

Mindy Jaye Zied and
Binnie A Zied
v.

Public Meeting – April 6, 2017
2520474-OSA
Docket No: P-2015-2520474
P-2015-2500342

PECO Energy Co.

STATEMENT OF CHAIRMAN GLADYS M. BROWN

I strongly support providing any reasonable accommodation necessary to ensure that the parties appearing before this Commission are afforded due process and are able to have their cases heard. This includes providing Telecommunications Relay Service for the deaf and hearing impaired, offering interpreters for non-English speakers to the extent that the interpreters are available, and conducting telephonic hearings for those who are not able to attend in person.

The instant case is unusual in that one of the Complainants, Mindy Zied, is unable to attend the hearing in person due to medical issues and her age. The Complainants state that Mindy Zied also cannot participate in a telephonic hearing because of her disability. Our April 2016 and September 2016 Orders in this case permitted the Parties to submit written testimony and accompanying exhibits, instead of presenting oral testimony during a hearing to minimize the need for a telephonic hearing. We encouraged the Parties to stipulate to facts and the authenticity of documents to streamline the process. However, in order to protect the due process rights of the Parties, we did not eliminate the possibility of a hearing being required for cross-examination or to challenge exhibits. (April 2016 Order at 10).

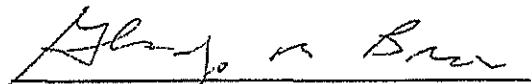
The presiding ALJ has determined that the paperwork submitted by the Complainants, in lieu of testimony, requires verification for authenticity and has scheduled a telephonic hearing for that purpose. The Complainants have renewed their request that this entire proceeding be handled on paper.

I believe that we have extended reasonable accommodations to the Complainants sufficient to afford them the opportunity to participate and have their case heard. However, the Commission cannot extend such accommodation to the point where it treads on the opposing party's right to due process. A party's right to cross-examination is a fundamental tenet of due process. In Pennsylvania, administrative due process rights include the fundamental right to cross-examine witnesses, inspect documents, and offer evidence in explanation or rebuttal. *Hartnett, Jr. v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00945707, 1994 Pa. PUC LEXIS 57 (October 19, 1994); *Shenandoah Suburban Bus Lines v. PUC*, 355 Pa. 521, 50 A.2d 301, 305 (1947).

Accordingly, I support denying the Complainants' request.

April 6, 2017

Date



Gladys M. Brown, Chairman

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Hattie Beatrice Howell

Public Meeting held April 6, 2017

v.

2578426-ALJ

Philadelphia Gas Works

Docket No. C-2016-2568426

MOTION OF COMMISSIONER DAVID W. SWEET

The case of Hattie Beatrice Howell v. Philadelphia Gas Works, Docket No. C-2016-2568426, raises the issue of whether or not a final Commission Order dismissing a case with prejudice after the complainant failed to attend the scheduled hearing and prosecute her case will act as a bar to a second complaint filed with the same allegations.¹ Res judicata requires a concurrence of four conditions: (1) identity of issues, (2) identity of causes of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the parties suing or sued.² The Pennsylvania Supreme Court merged this doctrine with the related doctrine of collateral estoppel, adding the requirement that the case acting as a bar must have been a final judgment rendered by a court of competent jurisdiction.³

PGW filed a motion for summary judgment relying on res judicata to support its request to dismiss the second complaint. The administrative law judge addressed the motion for summary judgment and determined that the doctrine of res judicata applied to support dismissal of the second complaint. There is considerable debate and even confusion regarding whether a Commission decision dismissing a complaint with prejudice for failure to appear and prosecute a complaint is a "final judgment" for purposes of the application res judicata. I do not believe that this line of analysis is necessary to resolve this case.

The purpose of the doctrine of res judicata is "to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protect the party relying on the prior adjudication from vexatious litigation." *Mintz v. Carlton House Partners, Ltd.*, supra at 474, 595 A.2d 1240, quoting *Lebeau v. Lebeau*, 258 Pa. Super. 519, 524, 393 A.2d 480, 492 (1978).

¹ Ms. Howell alleges in both complaints that PGW shut off her gas service, that she would like her service restored, that she had made a payment of \$400 to PGW that was not credited to her account, that she talked with a Mr. Smith at PGW, and that she was sent from the PGW office on 52nd Street to the PGW office on Sedgley to speak with someone there.

² *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Super 225, 234, 464 A.2d 1313, 1317 (1983).

³ *McNeil v. Owens-Corning Fiberglas Corp.*, 545 Pa. 209, 680 A.2d 1145, 1147-48 (1996).

The goal of Section 316 of the Public Utility Code appears to be the same:

§ 316. Effect of commission action

Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review. . . .

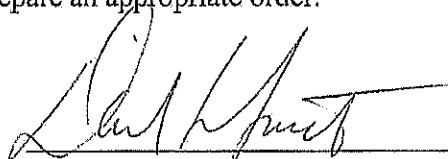
66 Pa.C.S.A. § 316 (in pertinent part)

In other words, whether or not to dismiss a complaint brought on the same allegations as a complaint which was already dismissed with prejudice is answered by the Public Utility Code, 66 Pa.C.S. § 316. The Commission Order dismissing the first complaint remains as a bar unless set aside by this Commission or modified on judicial review. Here, the order dismissing Ms. Howell's prior complaint with prejudice was not set aside by the Commission or by the courts and thus, has conclusive effect. This means that Ms. Howell is barred by Section 316 from relitigating the issues raised in her prior complaint. Consequently, the analysis regarding the application of the doctrine of res judicata, collateral estoppel, or their newer names of issue and claim preclusion, has been rendered unnecessary by the application of Section 316 of the Public Utility Code. Pursuant to the equally compelling doctrine of judicial efficiency, whereby a case can be disposed of in the least invasive way, the above-captioned Complaint should be dismissed with prejudice under Section 316 of the Public Utility Code.

THEREFORE, I MOVE THAT:

1. The Initial Decision of Administrative Law Judge Darlene Davis Heep in the case captioned *Hattie Beatrice Howell v. Philadelphia Gas Works*, Docket No. C-2016-2568426, is affirmed insofar as it dismisses the complaint and is vacated insofar as it relies on the doctrine of res judicata.
2. The Complaint of Hattie Beatrice Howell is dismissed based on Section 316 of the Public Utility Code. 66 Pa. C.S. § 316.
3. The Office of Special Assistants prepare an appropriate order.

Date: April 6, 2016



David W. Sweet, Commissioner

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Hattie Beatrice Howell

Public Meeting held April 6, 2017

v.

2568426-ALJ

Philadelphia Gas Works

Docket No. C-2016-2568426

Statement of Chairman Gladys M. Brown

Although I support dismissal of a case for failure to appear, I do not necessarily support dismissal of a case, with prejudice, for failure to appear absent a showing of abuse of process.¹ In this case, dismissal with prejudice is not based on any facts nor is it equitable or legal.

Hattie Beatrice Howell filed a Complaint against PGW on September 24, 2016, alleging that PGW did not credit a payment to her account and requesting that her service be restored. This Initial Decision grants PGW's Motion for Summary Judgment on the basis of the doctrine of *res judicata*.

The first complaint, filed in 2015, raised concerns about a \$400 payment. The instant Complaint again raises the issue of the \$400 payment but also discusses a \$2700 demand for payment. Given these different factual allegations and claims, there is no identity of the causes of action long-required by precedent before *res judicata* applies as a matter of law. *Delaware River Port Authority v. Pa. PUC*, 408 Pa. 169, 18 A.2d 982 (1962).

The ALJ also determines that the Commission's prior dismissal, with prejudice, of the 2015 complaint served to dispose of the claimant's rights to pursue any further remedy on a claim, being the equivalent of an action on the merits of the case. I do not agree that a dismissal of a complaint for failure to appear is equal to a dismissal on the merits. I base my conclusion on the fact that the courts of general jurisdiction do not agree that dismissal for failure to appear constitutes a decision on the merits. *Scharf v. DeCou Co.*, 320 Pa. 552, 183 A.41, 553-554 (1936); *Farabiugh Chevrolet v. Covenant Management, Inc.*, 361 Pa. Super. 234, 522 A.2d 100, 101 (1987); *Gutman v. Giordano*, 384 Pa. Super 78, 557 A.2d 782, 783 (1989); and, *Monroeville v. Liberatore*, 1999 Pa. Commw. LEXIS 537, 736 A.2d 31, 34 (1999).

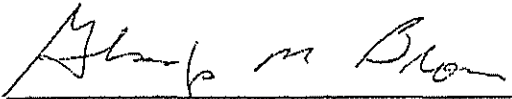
¹ Dismissal *with prejudice* of a case should not be done as a matter of course. See, *Martin W. Jefferson v. UGI Utilities, Inc.*, 1995 Pa. PUC LEXIS, Docket No. Z-00269892 (December 26, 1995) (dismissing a case, with prejudice, for abuse of the administrative process).

I have previously expressed concern regarding the Commission's practice of dismissing *pro se* complaints, with prejudice, as being inconsistent with Section 1.2 of our Regulations, 52 Pa. Code § 1.2, and the Commission's own case precedent regarding due process.² The recommendation in this case, to use a dismissal with prejudice, for failure to appear as a basis for *res judicata* concerns me even more as it places this Commission's practice even further afield from Pennsylvania case law.

My concerns are not alleviated by reliance on Section 316 of the Code, 66 Pa. C.S. § 316. Section 316 addresses *prima facie evidence of facts found* which are conclusive unless set aside. This creates a presumption that prior facts, such as tariffed rates, are reasonable and precludes collateral attacks upon those facts absent a showing of changed circumstances. *McLaughlin v. DQE*, Docket No. C-20065798 (2009) *Duquesne Light Co. et al. v. Pa. PUC.*, 715 A. 2d 540 (Pa. Cmwlth. 1998); *Popowsky v. Pa. PUC*, 669 A. 2d 1029, 1037 n. 14 (Pa. Cmwlth. 1995), rev'd in part on other grounds, 550 Pa. 449, 706 A. 2d 1197 (1997); *Zucker v. Pa. PUC*, 401 A. 2d 1377, 1380 (1979); *Schellhammer v. Pa. PUC*, 157 Pa. Cmwlth. 86, 629 A. 2d 189, 193 (1993).

There were no facts entered into a record here other than Complainant's failure to appear. Since there are no facts to create *prima facie evidence* under Section 316, Section 316 cannot sustain this decision.

April 6, 2017
Date


Gladys M. Brown, Chairman

² This Commission has long recognized the mitigating effect *pro se* status confers upon litigants unlearned in the law when confronted with technical violations of its procedural rules. *Carlock v. The United Telephone Co. of Pa.*, Docket No. F-00163617 (July 14, 1993). Most important, from my perspective, the Commission has stated that it is in the public interest that all litigants, particularly *pro se* litigants, be afforded a meaningful opportunity to be heard. *Amir V. Williams v. PECO Energy Co.*, Docket No. C-2010-2190024 (January 13, 2011).

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Act 129 Energy Efficiency
and Conservation Programs
- Phase II Compliance Order

Public Meeting held April 6, 2017
2289411-LAW
Docket No. M-2012-2289411

STATEMENT OF CHAIRMAN GLADYS M. BROWN


Before the Commission is the Act 129 of 2008 Energy Efficiency and Conservation Program Compliance Order (Order). With this Order the Commission progresses toward the conclusion of the second phase, or Phase II, of energy efficiency and conservation (EE&C) programs. These steps include releasing the Phase II Final Report documenting initial results for the entirety of the phase, and, making initial determinations on electric distribution companies' (EDCs) compliance with various Phase II mandates. I would like to highlight some of the initial results and determinations being released by the Commission.

Over the three year Phase II time-period commencing June 1, 2013, EDCs achieved a total of 3,370,673 MWhs of electricity reductions. These usage reductions include 459,581 MWh from Governmental/Educational/Non-Profit customers, and 324,869 MWh from Low-Income customers. In aggregate the Phase II portfolio of programs resulted in a total of \$2,194,356,000 in savings. This dollar figure produces a total resource cost test result of 1.7.¹ Therefore, in total, these programs achieved \$1.70 in savings for every \$1.00 invested.

Additionally, with this Order the Commission makes an initial determination that all seven EDCs with EE&C programs have met the overall electric consumption reduction requirements, the Governmental/Educational/Non-Profit customer consumption reduction requirements, the Low-Income customer consumption reduction requirements, and the Low-Income customer measure requirements.

These initial results and determinations for Phase II demonstrate the success of EE&C programs. I commend Commission Staff, the EDCs, and the energy efficiency service providers across the state for their continued work in this arena. I look forward to reviewing any critique(s) of these initial results and determinations.

April 6, 2017
Date


Gladys M. Brown, Chairman

¹ As defined in §2806.1(m) – Total Resource Cost Test is a standard test that is met if, over the effective life of each plan, not to exceed 15 years, the net present value of the avoided monetary cost of supplying electricity is greater than the net present value of the monetary cost of energy efficiency conservation measures.

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

Uber Technologies, Inc. et al.

Public Meeting April 6, 2017

2569511-LAW

v.

Docket No. B-2016-2569511

Pennsylvania Public Utility Commission

STATEMENT OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Commission is a proposed Settlement Agreement that would resolve a Petition for Review filed with the Commonwealth Court in response to the Commission's Orders of May 10, 2016 and September 1, 2016. In these Orders, the Commission imposed a civil penalty of approximately \$11.4 million for the unauthorized provision of passenger transportation service, and later, denied reconsideration of this Order on the merits.

While, in principle, I support a reasonable settlement of this matter, I believe that the proposed settlement figure of \$3.5 million is too low. The Commission's Bureau of Investigation and Enforcement conclusively demonstrated that the Petitioners committed a record number of violations of the Public Utility Code. While the resulting civil penalty was also a record for this agency, it was appropriate given the sheer quantity of the violations, approximately 123,000, and the Petitioners unwavering propensity to operate illegally, in spite of all official warnings given, and all official actions taken by the Commission to obtain a cessation of these activities. Even at this late date, the Petitioners continue to maintain that the Commission had no authority to enforce the Cease and Desist Orders it issued in response to the provision of unauthorized service.

In its Petition for Review, the Petitioners largely rely on the same arguments already raised before the Commission. The Petitioners' new, primary argument is that the Pennsylvania General Assembly, in passing Act 164 of 2016, created a statutory cap of \$250,000 for civil penalties imposed for the provision of unauthorized transportation network service. The Petitioners argued that this provision applied to this matter, and have asserted that their liability is therefore something less than \$250,000. However, the Commission was prepared to argue that this provision was not intended to apply to this case. This argument would have been supported by multiple on the record statements from the Legislative Journal by members of the General Assembly active in the passage of this bill. Additionally, the Commission was prepared to argue that the Petitioners' preferred application of this provision of Act 164 would have resulted in a violation of the Constitution of Pennsylvania.

I recognize that this statutory provision created additional uncertainty as to whether the Commission's decision would have been affirmed, and that there was the potential that the civil penalty could have been reduced to less than \$250,000. Accordingly, for that and the other reasons discussed in the proposed agreement, a reasonable settlement of this appeal would have been appropriate. However, I believe that if we had demonstrated more patience, a settlement for a significantly higher amount may have been negotiated, or if not, we should have let the Commonwealth Court address the merits of the Petition for Review.

It may be argued that the proposed settlement is in excess of any profit the Petitioners may have earned for the unauthorized service in question, and that it is thus sufficient to deter future violations of the Public Utility Code, or that even this reduced amount is too large. However, as a result of this agreement, the Petitioners will be paying only about \$28 for each proven violation of the Public Utility Code. By way of contrast, much smaller motor carriers of passengers and property are normally fined between \$250 to \$1,000 for a single violation of the Public Utility Code, including failure to maintain proof of insurance, file annual assessment reports, etc. Evaluating the size of a civil penalty or settlement without giving meaningfully appropriate weight to the quantity of the violations may result in regressive civil penalty policy for this agency. Nor was the Commission presented with a situation in which the Petitioners would be unable to continue service in Pennsylvania in the absence of a substantial reduction in the civil penalty. The Petitioners did not make this argument, and have already shown that they have the financial wherewithal to absorb multiple, recent, very large settlements resulting from litigation in other jurisdictions. A larger settlement would have served as an even stronger deterrent against future violations.

Finally, while the Petitioners have complied with the terms of the experimental authority granted by the Commission, I do remain concerned about future compliance with relevant laws or regulations, particularly where they may be in conflict with the Petitioners' preferred business practices. I hope that the payment of this civil penalty will cause the Petitioners to reevaluate their approach to the conduct of business in this Commonwealth. There are without question many federal, state or local laws or regulations that any one of us may disagree with as a matter of principle or public policy. However, we do remain a nation under the rule of law, and accordingly it is incumbent on all regulated entities to operate within the bounds of the law, and to pursue change through appropriate legislative or regulatory processes.

Therefore, I will be dissenting.


JOHN F. COLEMAN, JR.
COMMISSIONER

Date: April 6, 2017

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

**Uber Technologies, Inc., et al. v. Pa. Public
Utility Commission, No. 1617 C.D. 2016**

Public Meeting April 6, 2017
2569511-LAW
Docket No. B-2016-2569511

STATEMENT OF COMMISSIONER ROBERT F. POWELSON

Before us today for approval is a Settlement Agreement (Settlement) between Uber Technologies, Inc., *et al.* (Uber) and the Pennsylvania Public Utility Commission (PUC or Commission). The Settlement arises out of the Commission's May 10, 2016, Final Order imposing an \$11.4 million civil penalty on Uber for engaging in unauthorized Transportation Network Company (TNC) service in 2014.¹ I did not support that determination, and today, I continue to be troubled by the final resolution of this matter, which requires Uber to pay a civil penalty of \$3.5 million.

I have consistently stated throughout this proceeding that I do not agree with imposing such a high penalty on a company that caused no harm to consumers and, in fact, was providing a much needed service in the Commonwealth. Even at \$3.5 million, the fine against Uber is disproportionately high compared to other Commission decisions. During a virtually identical timeframe in 2014, Uber's competitor, Lyft, also operated as a TNC without a certificate. However, for reasons that continue to confound me, Lyft was able to settle with the Commission's Bureau of Investigation and Enforcement (I&E) for \$250,000, while I&E refused to conduct similar settlement discussions with Uber.

These two cases were extraordinarily similar, and yet Uber and Lyft received extraordinarily different treatment from the Commission. Both companies operated illegally for virtually the same period in 2014 (with Uber's activity lasting 5 days longer than Lyft's illegal operations). Uber did provide more trips during that time, but I would argue that this is evidence of nothing more than Uber's popularity, as opposed to some greater malicious intent by Uber. Regardless, Uber did not provide so many more trips as to warrant the vastly different penalties imposed by the Commission.

The real difference between the proceedings was that Lyft complied with I&E's request to turn over confidential trip data during the hearing process, while Uber refused, citing the proprietary nature of this information. I do not condone Uber's decision to withhold its trip information in disregard of the judges' orders. However, Uber's lack of cooperation was more than adequately addressed through a \$72,500 discovery sanction issued by the Commission.

¹ On September 30, 2016, Uber filed a Petition for Review with the Commonwealth of Pennsylvania challenging the Commission's Final Order. On March 28, 2017, the Commonwealth Court stayed the appeal to allow the Commission to review and consider approval of the Settlement.

Despite this, the Administrative Law Judges (ALJ) recommended an additional civil penalty of \$49 million for Uber.²

Let's stop for a minute to think about that - \$49 million. Excluding Uber, the highest penalty ever imposed by the Commission is \$1.8 million.³ That case involved an Electric Generation Supplier (EGS) that engaged in *intentionally deceptive* practices and caused a great deal of *actual* financial harm to a *large* number of customers. Uber's activities harmed no one, and in fact, its services were actively sought out by customers who were unhappy with traditional taxi service. The Commission, in the course of business, has not infrequently dealt with matters of life and death – natural gas pipeline explosions, electrocutions, and service issues that cause people to be without basic utility service – and we have never issued a fine over \$2 million. Yet, for a company that provided a new and innovative transportation service to customers who voluntarily requested rides, the ALJs recommended the highest fine in Commission history.

On paper, the rationale for recommending a \$49 million penalty was the number of illegal trips that Uber provided, along with the argument that a substantial fine was necessary to deter future violations. While Uber did give more ride rides than Lyft, it was certainly not enough more to justify a fine that is almost 200 times the penalty paid by Lyft. Nor is it persuasive to argue that a multi-million dollar penalty was necessary to deter future violations, because apparently the Commission believed \$250,000 was enough to deter Lyft, a company that engaged in virtually identical activity. In my view, the \$49 million penalty was an indirect way to punish Uber for its lack of cooperation during the hearing process, which is an unacceptable way for the Commission to do business. Regardless of our dislike for how Uber conducted itself before the Commission, the punishment must still fit the crime.

The Commission ultimately reduced the civil penalty amount to \$11.4 million, a decision to which I dissented because the fine continued to be disproportionate to the offense. Today's Settlement further reduces Uber's penalty to \$3.5 million, but even that amount is too high. In comparison to \$49 million, a \$3.5 million penalty may seem reasonable, but we cannot overlook that this is fine of over \$18,000 per day. I am not suggesting that Uber's path to certification was without fault or that the company should not pay a penalty. It is the Commission's job to ensure that motor carrier service in Pennsylvania is safe and reliable and I take that duty very seriously. However, given the mitigating factors that existed in this case, the fine should be reasonable and consistent with Commission precedent.

We cannot forget that when Uber and Lyft began offering TNC service, it was not clear that the companies were in fact operating illegally. In 2014, no Pennsylvania law or portion of the Commission's regulations addressed TNC service. The PUC offered certificates for traditional taxicab service, as well as broker licenses, which Uber's subsidiary applied for and obtained in 2013.⁴ However, neither of these categories fully encompassed TNC service, which is why the Commission ultimately granted Uber a certificate for "experimental authority." In a

² The ALJs recommended a civil penalty of \$49,852,300.

³ See *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (Opinion and Order entered December 3, 2015).

⁴ See *Application of Gegen, LLC for a Brokerage License*, Docket No. A-2012-2317300 (Order entered January 24, 2013).

situation like this, where the law was ambiguous, it is not appropriate to punish the wrongdoer in the extreme.

Additionally, the Commission must take into consideration Act 164, which limits the penalties for TNCs operating *prior* to the passage of the law to \$1,000 per day, or a total of \$250,000. In Uber's instance, this limits any Commission-imposed fine to \$191,000. Although some argue that Act 164's penalty cap applies only prospectively, that interpretation is not consistent with the plain language of the statute. In my view, the Legislature was clear in stating that the penalty cap applies retroactively. That, combined with the letter from Governor Wolf requesting the Commission to reconsider its penalty against Uber, reinforces that the fine here should be well below \$3.5 million.

However, in making my decision today, I am cognizant of the fact that the Commission has a history of encouraging settlement agreements. Here, Uber agreed to pay \$3.5 million to settle and resolve this issue. In the interest of supporting parties who want to amicably settle disputes and avoid the costs, delays, and uncertainty associated with litigation, I will vote to ratify the Settlement. Yet, I will concur in result only because I am disappointed with how we have reached this point, and that includes the Commission's handling of this case – from the issuance of the cease and desist order to how settlement discussions were conducted. While I recognize the importance of reaching a resolution in this matter and will reluctantly vote to approve the Settlement, I believe that the penalty ultimately agreed to continues to be excessive and disproportionate to the violation.

Date: April 6, 2017


ROBERT F. POWELSON
COMMISSIONER

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Uber Technologies, Inc.
v.
Pa. Public Utility Commission

Public Meeting April 6, 2017
2569511-LAW
Docket No. B-2016-2569511
C-2014-2422723

STATEMENT OF CHAIRMAN GLADYS M. BROWN


Before the Commission for consideration and disposition is the Settlement Agreement between the Commission and Uber Technologies, Inc. Gegen, LLC, Raiser, LLC and Raisier-PA, LLC (Uber).

I would like to take this opportunity to thank all of the Commission's staff, especially those individuals in the Law Bureau, who worked very long hours on this intense, complex and contentious case. While all of the cases that are brought before the Commission are important, some like this one take a little bit more time and effort from both parties to resolve. I thank you for your dedication and for a job well done.

This settlement, in my opinion, represents an acceptable solution to a challenge the Commission has been dealing with for some time. The resolution of this case will allow us to eliminate the uncertainty of the legislation that was passed by the General Assembly (Act 164 of 2016) which provided for permanent statewide authority for ride-hailing services but limited any fine for unlicensed operations within the state to \$250,000. While we are certain of our interpretation of the law, that this statutory change is prospective, the Commonwealth Court's interpretation might be contradictory to our interpretation. In addition, I agree with the staff recommendation that by settling this matter, the Commission avoids litigation risks. The terms and the amount of the settlement, I believe are fair and just in that Uber will pay \$3.5 million to the Commonwealth of Pennsylvania. The company will also file a praecipe at Commonwealth Court to discontinue its appeal of the Commission's prior Order.

This settlement is substantial and serves the interest of both parties. Again, I applaud the efforts of all of those involved in this case.

April 6, 2017
Date



Gladys M. Brown, Chairman

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Review of Universal Service and
Energy Conservation Programs**

**Public Meeting April 6, 2017
2596907-CMR
Docket No. M-2017-2596907**

**JOINT MOTION OF COMMISSIONER DAVID W. SWEET
AND VICE CHAIRMAN ANDREW G. PLACE**

The Public Utility Code requires that electric and natural gas utilities offer universal service and energy conservation programs that are developed, maintained and appropriately funded to ensure affordability and cost-effectiveness.¹ The portfolio of universal services generally includes Customer Assistance Programs (CAPs), Low-Income Usage Reduction Programs (LIURPs), Customer Assistance and Referral Evaluation Services (CARES) and Hardship Funds. These services are primarily provided to low-income customers;² however, some programs, such as CARES, may be available to non-low-income customers who meet certain requirements.

These programs, as outlined in each utility's Universal Service and Energy Conservation Plan, are intertwined with regards to design, budgeting, administration, reporting and evaluation, which is why we believe it is appropriate to incorporate the work currently being done with respect to LIURP and energy affordability matters into a comprehensive review of the entire universal service and energy conservation model.

The Commission has recently begun the process of reviewing two aspects of the universal service and energy conservation programs: (1) LIURP and (2) energy affordability. Specifically, on December 16, 2016, this Commission released a Secretarial Letter seeking informal stakeholder input on a number of questions regarding our existing LIURP regulations at 52 Pa. Code §§ 58.1 – 58.48.³ This feedback is intended to inform a possible future LIURP rulemaking. Additionally, at the March 16, 2017 Public Meeting, this Commission adopted a Joint Motion directing the Bureau of Consumer Services (BCS) to determine what constitutes an affordable energy burden for Pennsylvania's low-income households and, based on the analysis, to determine whether any changes in the Commission's CAP Policy Statement or other universal service guidelines are necessary to bring the programs into alignment with any affordability recommendations.⁴

Considering the Commission's recent action as part of a broader evaluation of universal service and energy conservation policies, we believe it is important to ensure ample stakeholder feedback throughout all steps of the process. These programs affect all ratepayers, whether through direct assistance to qualifying customers or through the surcharge that funds universal service programs. As

¹ See 66 Pa. C.S. §§ 2203(8) – regarding natural gas universal service programs - and 2804(9) – regarding electric universal service programs.

² Low-income customers are those at 150% or below the Federal Poverty Income Guidelines (FPIG). See the Federal Poverty Guideline - <https://aspe.hhs.gov/poverty-guidelines>.

³ See *Initiative to Review and Revise the Existing Low-Income Usage Reduction Program (LIURP) Regulations at 52 Pa. Code §§ 58.1 – 58.18* Secretarial Letter, at Docket No. L-2016-2557886, served Dec. 16, 2016.

⁴ See *Joint Motion of Vice Chairman Andrew G. Place and Commissioner David W. Sweet*, at Docket No. M-2017-2587711, adopted Mar. 16, 2017.

such, the feedback of stakeholders representing all interests, from low-income customers to consumer interest advocates to utilities, is necessary to ensure any outcomes are cost-effective and in the public interest. Only through collaboration can we address all relevant issues and balance the needs of all stakeholders.

To initiate this comprehensive review, the Commission's Law Bureau shall develop for this Commission's review a report on the statutory, regulatory, and policy frameworks of existing universal service programs and the steps required to initiate any proposed changes. This report will be due within 30 days of the entry date of this Order and will be released publicly.

Additionally, interested stakeholders may file comments on priorities, concerns and suggestions for amending and improving any or all of the universal service and energy conservation programs. Such comments may include, but are not limited to, issues of program design, implementation, costs, cost recovery, administration, reporting and evaluation. These comments should be submitted within 90 days of the entry date of this Order. The comments may also address the contents of the Law Bureau report.

In addition, BCS shall coordinate a stakeholder meeting to allow interested parties to present feedback on the filed comments and on any other priorities, concerns or suggested changes surrounding the universal service and energy conservation programs. This meeting should be held within 60 days after the due date of the aforementioned comments. BCS may reconvene the Universal Service Working Group (USWG),⁵ as needed, to solicit stakeholder feedback. The notice of the stakeholder meeting, including any reconvening of the USWG, shall be published in the *Pennsylvania Bulletin* to ensure broader outreach to any parties that may not have previously been involved in the USWG. BCS will be responsible for chairing any collaborative convened.

Following the meeting held by BCS, reply comments may be filed to address not only the previously-filed comments, but also anything discussed at the stakeholder meeting. These reply comments should be filed within 30 days of the stakeholder meeting. BCS, in consultation with the Law Bureau, is directed to prepare a report for this Commission's information that will summarize the feedback provided in the comments and reply comments, as well as any provided at the stakeholder meeting. The report should also provide a summary of all options proposed by stakeholders. This report should be submitted within 45 days of the due date of the reply comments and will be released publicly.

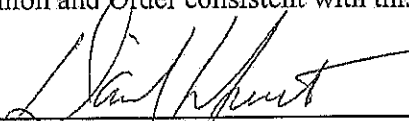
The feedback and results of the review of our LIURP regulations and energy burden levels, as well the reports from Law Bureau and BCS, will be considered by the Commission with a determination to be made regarding appropriate future actions, such as an *en banc* hearing, an Advanced Notice of Proposed Rulemaking or a revised Policy Statement.

⁵ The Universal Service Working Group (USWG) was initiated via Commission Order in 2009 with a directive to develop recommendations to coordinate residential Universal Service programs under the Commission's jurisdiction and to coordinate those programs with other state assistance programs, such as the Weatherization Assistance Program implemented by the Pennsylvania Department for Community and Economic Development. *See Universal Service Coordination Work Group*, at Docket No. M-2009-2107153 (Order entered June 11, 2009). It should be noted that any reconvening of the USWG will not constitute reconvening of its previous directives.

THEREFORE, WE MOVE THAT:


1. The Commission's Law Bureau draft a report, to be submitted to the Commission within 30 days of the entry day of the Order, outlining the statutory, regulatory, and policy frameworks of existing universal service programs and the processes required to initiate any proposed changes resulting from this comprehensive review. This Staff report will be released publicly at this docket.
2. Stakeholders submit written comments, at this docket, within 90 days of the entry date of the Order outlining their priorities, concerns and suggested changes to the universal service and energy conservation programs.
3. The Commission's Bureau of Consumer Services coordinate a stakeholder meeting, to be held within 60 days after the due date of the written comments, to solicit feedback on the filed comments and on any other priorities, concerns or suggestions for amending and improving universal service and energy conservation programs.
4. Stakeholders submit, at this docket within 30 days of the stakeholder meeting, written reply comments that may address anything in the previously-filed comments, as well as anything discussed at the stakeholder meeting.
5. The Commission's Bureau of Consumer Services, in consultation with the Commission's Law Bureau, prepare a report, within 45 days of the due date of the reply comments, summarizing all filed comments and any feedback from the stakeholder meeting. The report should also provide a summary of all options proposed by stakeholders.
6. The Commission's Secretary's Bureau insert a copy of all comments filed at Docket Nos. L-2016-2557886 and M-2017-2587711 into this docket.
7. The Opinion and Order be served on electric distribution companies, natural gas distribution companies and city-owned natural gas utilities with universal service and energy conservation program requirements; the Commission's Bureau of Investigation and Enforcement; the Office of Consumer Advocate; the Office of Small Business Advocate; the Industrial Energy Consumers of Pennsylvania, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, Philadelphia Area Industrial Users Group, PP&L Industrial Customer Alliance and West Penn Power Industrial Intervenors (collectively, Industrial Customer Groups); the Pennsylvania Utility Law Project; the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania; the Energy Association of Pennsylvania; the Dollar Energy Fund; Community Legal Services; the Community Action Association of Pennsylvania; the Tenant Union Representative Network; the Commission on Economic Opportunity; the Action Alliance of Senior Citizens of Greater Philadelphia; the Pennsylvania Department of Community and Economic Development; and the Pennsylvania Department of Human Services.
8. The Opinion and Order be published in the *Pennsylvania Bulletin*.
9. The Office of Special Assistants draft an Opinion and Order consistent with this Motion.

Date: April 6, 2017



Commissioner David W. Sweet

Date: April 6, 2017



Vice Chairman Andrew G. Place