PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held October 27, 2005

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman, Statement attached
Bill Shane
Kim Pizzingrilli, Dissenting Statement attached
Terrance J. Fitzpatric, Dissenting Statement attached

Chapter 14 Implementation — Docket No. M-00041802F0002

RECONSIDERATION OF IMPLEMENTATION ORDER

BY THE COMMISSION:

On March 4, 2005, we issued an *Implementation Order* that addressed seven threshold issues on the implementation and enforcement of Chapter 14 (66 Pa. C.S. §§1401-1418), *Responsible Utility Customer Protection.* On August 24, 2005, we issued a *Section 703(g) Order Seeking Comments (Section 703(g) Order)* on one of these threshold issues - the interpretation of the payment agreement restrictions in §1405(d).

In the *Implementation Order* (page 5), we noted that §1405(d) "lends itself to more than one rational interpretation, and the interested parties on both sides of this issue have presented strong arguments." We further noted that this interpretation "will deny some customers of the right to at least one opportunity to receive a payment agreement from the Commission." *Implementation Order*, page 6.

Pursuant to Section 703(g) of the Public Utility Code, 66 Pa. C.S. §703(g), "[t]he Commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it." Bearing in mind our traditional role as the final arbiter of a utility customer's rights, we solicited comments pursuant to §703(g) in response to a proposed interpretation of §1405(d) that would amend our interpretation of this section in the *Implementation Order*.

The *Section 703(g) Order* required that comments be filed within 30 days, or by September 23, 2005. Written comments were filed by the following interested participants: Energy Association of Pennsylvania (EAP), Office of Consumer Advocate (OCA), Philadelphia Gas Works (PGW), Community Legal Services (CLS), Pennsylvania Utility Law Project (PULP), Aqua Pennsylvania, Inc. (Aqua), PPL Electric Utilities Corporation (PPLE) and PPL Gas Utilities Corporation (PPLG), Housing Alliance of Pennsylvania (Housing Alliance), Association of Community Organizations for Reform Now (ACORN), Women Against Abuse Inc. (WAAI), Peoples Natural Gas Company d/b/a/ Dominion Peoples (Dominion), Columbia Gas of Pennsylvania (Columbia), UGI Utilities Inc. (UGI), National Fuel Gas Distribution Corporation (NFG), Equitable Gas Company Division of Equitable Resources (Equitable), Pennsylvania Chamber of Business and Industry (Chamber of Business and Industry), Representative William DeWeese and Representative Michael Veon (Representatives), and Representative Dwight D. Evans (Representative Evans).

In reaching our dispositions herein, we have reviewed and considered all the comments filed by the parties. Moreover, a number of parties have taken the same position on an issue and we shall not repeat their arguments.

COMMENTS SUPPORTING AMENDMENT OF THE IMPLEMENTATION ORDER

The OCA urges the Commission to reconsider its prior determination as to payment agreements under §1405(d) and to allow the Commission to establish one payment agreement that meets the terms of Chapter 14. The OCA states that such an interpretation is consistent with the intent of the General Assembly and the plain language of the section.

OCA opines that even if there is ambiguity in the language of the provision, the principles of statutory construction require an interpretation of §1405(d) that allows the Commission to establish one payment agreement. According to the OCA, a rule of statutory construction is that when the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering the (1) occasion and necessity of the statute, (2) the mischief to be remedied, and (3) the consequences of a particular interpretation. 1 Pa. C.S. §1921. The OCA points out that while there were no public hearings on Senate Bills 689 and 677 that gave rise to Chapter 14, §1405 was clearly aimed at remedying the perceived concern that the Commission was requiring utilities to enter into multiple payment agreements of inordinate length. The alleged "mischief" to be remedied therefore was multiple payment agreements of inordinate length imposed by the Commission's Bureau of Consumer Services (BCS). The OCA explains that the remedy to this can be found in sections of 1405 that limit the maximum length of a PUC prescribed payment agreement and which limits the Commission to imposing a single payment agreement on the utility, absent a change in income.

The OCA believes that the consequence of the Commission's current interpretation is that the Commission's door is closed to any utility customer seeking a payment agreement if they already had one agreement established by the utility, no matter how economically oppressive that agreement may have been. The OCA asserts

that the consequences of such an interpretation are obvious - tens of thousands of Pennsylvanians will continue to be turned away from a Commonwealth agency that has been empowered to assure those citizens of safe and reliable utility service.

The OCA continues by pointing out that the rules of statutory construction also contain presumptions that the General Assembly (1) does not intend an absurd result, (2) intends that the entire statute be effective and certain, and (3) that the intent is to favor the public interest as against any private interest. 1 Pa. C.S. §1922.

According to the OCA, the Commission's current interpretation is contrary to all of these standards. The OCA submits that our currently effective interpretation has produced an unreasonable result as §1405(a) has been rendered inoperative by allowing utilities to establish payment agreements that will never be subject to Commission review and favors the private interest over the public interest.

Finally, the OCA argues that the Commission's current interpretation of §1405(d) effectively replaces the authority of the Commission with the discretion of the utility companies. The OCA believes that this is an unreasonable construction of the statute and that such construction is disfavored by Pennsylvania law.

The Leaders of the Democratic Caucus of the Pennsylvania House of Representatives also filed comments. The Representatives agree with the Commission that the language of §1405(d) is both ambiguous and obtuse, thereby lending itself to more than one interpretation. Consequently, the Representatives believe the interpretation will depend on which side of the issue the interpreter represents--the consumer or private industry. The Representatives submit that §1405(d), although ambiguous, does not preclude the establishment of initial payment agreements by the Commission.

To understand this conclusion, the Representatives believe that §1405(d) must be reviewed in conjunction with other provisions of §1405 such as §1405(a). The Representatives submit that the language in §1405(a) unambiguously affirms the Commission's long held authority to resolve payment disputes between customers and public utilities. More importantly, the language under §1405(a) explicitly gives the Commission the authority to establish payment agreements "within the limits established by this Chapter." The Representatives submit that if the General Assembly desired to prohibit Commission-established payment agreements, the language of §1405(a) would not equivocally convey to the Commission the authority to establish such agreements.

The Representatives further believe that if §1405(d) prohibits the Commission from establishing a "second or subsequent" payment agreement, the authority must exist for the establishment of an initial or first Commission-established payment agreement under Chapter 14. Logically, there must be a first Commission-established agreement in order for the prohibition of a "second or subsequent" agreement to stand. The Representatives conclude, like the OCA, that per the rules of statutory construction when interpreting an ambiguous provision, the public interest of utility consumers must prevail over private interest.

Representative Evans states that he offered Amendment No. A5498 to S.B. 677 on the House Floor, which was adopted by the House and that this was the final version of the bill to which the Senate concurred and the Governor signed into Law. Representative Evans realizes now that the language in §1405 can lend itself to another interpretation and in hindsight the amendment should have been worded less ambiguously. Nevertheless, Representative Evans believes that the proposed interpretation is more reasonable than the Commission's initial interpretation in the *Implementation Order*. Representative Evans submits that it was the intent of this language that the Commission can assert its power at least once for each customer as long as the length of the agreements falls within the guidelines established by subsection (b).

Representative Evans agrees with the conclusion reached by the Representatives in that §1405(d) has to be read within the complete context of §1405 in its entirety. Representative Evans acknowledges that the source of the confusion is in attempting to apply the definition of payment agreements found in §1403 to §1405, which leads commentors to argue that payment agreements described in §1405(d) must mean any payment agreement, including those with no PUC involvement. However, Representative Evans believes this interpretation is contrary to legislative intent, as the purpose of the entire §1405 is to outline the power of the PUC with regard to PUC ordered payment agreements; it does not limit nor outline payment agreements that are negotiated between utilities and customers without PUC involvement. Representative Evans believes this should be very clear after reading the General Rule under §1405(a) which should clarify that the words "second or subsequent" refer to a second or subsequent PUC ordered agreement.

Representative Evans concludes that it is very important that the Commission interprets this language correctly. Representative Evans submits that it was never his intent, and in his opinion, neither was it the intent of the General Assembly nor of the Governor to remove the PUC completely from payment agreements. According to Representative Evans, this would give the utilities an unfair advantage over customers, especially those who have payment difficulties and who might not be well versed in financial matters.

CLS supports the comments made by Representative Evans, the OCA and the Representatives in that the Commission has failed to consider §1405 in its entirety when adopting its initial interpretation, and that any interpretation must be done within the context of the General Rule in §1405. And like OCA, CLS believes the current Commission interpretation is contrary to the rules of interpreting an ambiguously worded statute and also cites as authority *Pennsylvania Labor Relations Board v. State College*

Area School District, 494, 337 A.2d at 267 ("We recognize the principle that a statute is never presumed to deprive the State of any prerogative or right unless the intention to do so is clearly manifest.").

In addition to the legal arguments, CLS lists several policy considerations that must be taken into account. Specifically, CLS believes that the disparity in bargaining power between residential customers threatened with service termination and utility companies is often too great to provide a level playing field for a true negotiation of a payment agreement between a customer and their utility. Moreover, CLS explains that customers under the threat of termination are often uninformed of the actual standards applicable to their situation and uninformed or unsure about whether an appeal from the denial of a payment agreement would really result in a stay of termination pending resolution of the appeal. Without the ability to order at least one payment agreement, CLS believes that an overwhelming public perception will exist that the Commission no longer exists to protect customers when they are most vulnerable.

PULP agrees that §1405 must be read in its entirety to provide the proper context. PULP points out that if the General Assembly intended §1405(d) to deprive the Commission of the authority to establish one payment agreement, it would not have included the words "second or subsequent." Accordingly, PULP asserts that it would not make sense to bar the Commission from establishing a second agreement if it were precluded from establishing a first. The Justice Project comments that payment agreements are often not "agreements" at all because the creditor has enormous bargaining power compared to the debtor. ACORN also points out the vagueness of the term "agreement" and that this term could cover any kind of payment demand made by a utility. The Housing Alliance shares the same concern and points out that while the term "agreement" may include a meeting of the minds and fair bargaining, in consumer transactions this is often not the case. The Alliance comments further that many lower

income consumers have literacy or language barriers and that parents faced with the loss of utility service will sign whatever they need to in order to keep their children warm.

WAAI shares a deep concern with consumers in especially desperate situations. WAAI emphasizes that a recurring problem they see are battered women who are at a huge disadvantage when negotiating with utility companies because they are in fear of imminent loss of heat, lights, hot water, etc. In particular, while Chapter 14 excludes consumers with Protection from Abuse (PFA) Orders, WAAI believes that there are many practical reasons as to why many victims never obtain a PFA. WAAI comments that they understand that customers must first talk with the utility involved and attempt to reach an agreement with them, but that it is critically important that customers who are unable to pay their bills have an opportunity to seek help from the PUC.

PPLE and PPLG filed comments stating that it agrees with the Commission that §1405(d) lends itself to more than one rational interpretation, and accordingly, PPLE and PPLG have no objection to either interpretation. At the same time, PPLE and PPLG urges the Commission to (1) continue to adhere to the payment agreement payback periods in §1405; (2) evaluate the possibility of streamlining the payment agreement procedures; and (3) focus on the most vulnerable households (under 250% of the federal poverty level).

COMMENTS OPPOSING AMENDMENT OF THE IMPLEMENTATION ORDER

EAP filed comments claiming that the language in §1405, "absent a change in circumstance (sic), the Commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous agreement" clearly prohibits the Commission from establishing a payment agreement if a utility has already established one and there is no change in income or circumstance. The basis of EAP's opinion is that the definition of "payment agreement" at §1403 includes both utility-established and Commission-established agreements. EAP claims that the use of the term "shall" in §1405 indicates a command that allows no discretion on the part of the person instructed to carry out the directive.

The EAP also questions the validity of the supporting information provided in the Commission's August 11 motion and subsequent *August 24 Order*. The EAP believes that while the data provided is not complete, there is no factual basis for the Commission stating that over 24,000 customers have been turned away for payment agreements by the Commission in 2005. EAP also states that Commissioner Shane's claim that the industry had a 3% rate of uncollectible receivables in the 1980's and early 1990's, that remains the same today, is incorrect because it fails to include, Customer Assistance Programs (CAP) costs. If such costs are included, the EAP claims that the correct percentage is approximately 6%.

Finally, the EAP believes that the more appropriate venue for the Commission in seeking to modify Chapter 14 lies in §1415, which permits the Commission no later than two years from the date of passage to report to the Legislature any changes it deems appropriate.

PGW states that since absolutely nothing has changed since the Commission's original March 4, 2005 decision regarding §1405(d), there is no legal basis whatsoever to support a reversal and that such a contemplated "flip-flop" would be arbitrary and capricious. PGW submits that the courts of this Commonwealth have held that the actions of an administrative agency will not stand when those actions amount to a manifest abuse of discretion, a purely arbitrary execution of the agency's functions, or are capricious. PGW believes that by reversing itself as to the meaning of "payment agreement," the PUC would be abusing its discretion and acting in an arbitrary and capricious fashion.

With respect to the substantive issue, PGW states that had the General Assembly intended a distinction between Commission and utility payment agreements, it would have made such a distinction in the definition found at §1403. PGW explains that in other provisions of Chapter 14, such as §1405(b) and §1405(c), the General Assembly does make a distinction between Commission and utility payment agreements. According to PGW, the proper analysis of §1405(d) is that a customer gets one payment agreement, whether utility/consumer derived or PUC-directed and if the customer defaults on that agreement, the PUC may not establish a second or subsequent agreement, but the public utility may in its discretion. As additional support for this position, PGW represents that at the PUC's February 3, 2005 Act 201 Forum, Dianne Warriner, a House Republican staff person, made unrecorded statements that, expressed this same understanding of §1405(d).

If the Commission does reverse itself, PGW concludes that it should exercise its authority within certain reasonable parameters and make it clear that if a customer defaults on a PUC-ordered payment agreement, then §1405(d) applies and a second or subsequent PUC-ordered agreement will not be permitted. In addition, PGW suggests that the Commission should acknowledge that the limitations as to duration in §1405(b) apply, that these payment agreements should include reasonable upfront payments in the

amount of at least two months of estimated usage, and the Commission should proactively monitor the implementation of its order to prevent "backsliding to pre-Chapter 14 conditions."

Dominion looks at this issue from a psychological perspective and states that Chapter 14 was designed to change ingrained behavior and should be allowed enough time for the behavior to be altered. Dominion believes that the data gathered on this subject over the next several months will be very useful to better measure the success of this behavioral transformation, concluding that the Commission's current interpretation is now settled law and should be upheld.

Columbia believes that sound regulatory and legal principles require the Commission to respect the decisions of a prior Commission, particularly a decision made by Commissioners sitting only six months ago. Columbia notes that in that six month period, three new Commissioners were appointed and that the Order issued on *August 24* was by a 3-2 vote with two of the three votes in favor coming from two of the newly appointed Commissioners. Columbia is extremely concerned that the Commission is abandoning sound precedent without adequate justification. Columbia dismisses the data in the *August 24 Order* concerning 24,000 contacts to BCS and the statement of the owner of a Giant Eagle Supermarket as "pure hearsay" and "completely irrelevant" and thus insufficient to justify reversing precedent.

UGI also dismisses the data presented in the *Section 703(g) Order* questioning the relevance of whether a particular unregulated business has uncollectible expenses at a level greater or less than regulated electric and gas utilities. UGI adds that it is not surprising that the BCS has continued to receive payment arrangement requests from consumers that cannot be processed under Chapter 14 rules. UGI claims that this is because customers have been educated for decades through various notices and

communications to pursue administrative remedies to obtain payment arrangements and to forestall termination.

NFG concurs with EAP and the other gas utilities in that the language in §1405(d) and §1403 is not ambiguous. NFG also believes that it is misleading for the Commission to refer to a percent of write-off instead of referring to whole dollars, since the low percentages indicated in the Commission's Joint Motion can imply a low number of write-offs. NFG also rejects the Commission's use of the write-off amount for a single Giant Eagle supermarket in Indiana PA since the utility business and the supermarket business could not be more different.

Equitable states that a payment agreement is not a contract of adhesion and is something which the customer has agreed to voluntarily. In dealing with a utility, the customer is a free bargaining agent without any obligation to adhere to a document which he or she is powerless to alter. If the customer is unhappy with the terms of the proposed payment agreement, the customer can complain to the Commission. Granting the customer a later "right of appeal" to the Commission after the customer has first voluntarily negotiated a payment agreement with the utility would amount to the customer appealing his or her own voluntary act, which Equitable states is completely at odds with the principle that in order to appeal a party must be aggrieved.

Aqua concurs with the above noted comments of the gas utilities in that the wording of §1405(d) is not ambiguous and there is also no distinction in the definition found at §1403 of payment agreement between the utility and Commission agreements. However, Aqua also proposes some procedural safeguards that the Commission should put in place if it does indeed adopt the prospective interpretation of §1405(d). These safeguards should include a timeframe of 30 days within which BCS must issue a payment agreement and that such agreements should include a lump-sum up front payment.

The Chamber of Business and Industry states that the clarity of language in §1405 (d) and the scope of specific direction to the PUC included in Act 201 makes it clear that only one payment agreement is permitted absent a change in income and that the decision to enter into a second agreement is left to the discretion of the utility and not the Commission.

IMPLEMENTATION ORDER AND SECTION 703(G) ORDER

In the *Implementation Order* (page 5), we find that "absent a change in income §1405(d) precludes the Commission from establishing a second payment agreement if a customer has defaulted on a previous payment agreement." We rendered this decision after first considering the definition of "payment agreement" that covers both utility agreements and Commission agreements.

Section 1403 defines "payment agreement" as "[a]n agreement whereby a customer who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments." Based on our finding, at that time, that the legislature "declined to make a specific distinction between payment agreement reached by the utility and the customer or an agreement established by the Commission," *id,* we decided that the "one payment agreement" rule would apply to both utility and Commission-established payment agreements. As a result of this analysis, we concluded that the language did not provide for the Commission establishing a second payment arrangement.

However, upon further reflection of this decision, and within our administrative discretion, we issued the *Section 703(g) Order* to further consider our disposition. We specifically noted that the phrase "second or subsequent payment agreement" is not

defined in the statute. *Section 703(g) Order*, page 2. Moreover, assuming that if the General Assembly wanted to prevent the Commission from establishing even a first payment agreement after a default of a payment agreement initiated by the utility, the section would simply read "[a]bsent a change in income, the Commission shall not establish or order a public utility to establish a payment agreement if a customer had defaulted on a previous payment agreement." *Section 703(g) Order*, page 3. Instead of this simple, straight forward terminology, the General Assembly added the phrase "second or subsequent," which could be interpreted "to create a limit on Commission authority only as to second and subsequent Commission established payment Agreements - and not to prohibit initial payment agreements established by the Commission after the customer had defaulted on a utility-established payment agreement." *Id.*

Thus, if the phrase refers to any payment agreement, rather than specifically a Commission-established payment agreement, the *Implementation Order* should stand. On the other hand, based on our analysis above, the provision could also be interpreted to mean only a Commission-established payment agreement.

DISCUSSION AND DISPOSITION

No doubt should exist that in our *Implementation Order* we struggled with the resolution of this issue. We were forthcoming about the difficulty in correctly implementing this provision. Despite our legal analysis that the language of the statute lends itself to more than one rational interpretation, we also concluded that we were "persuaded by the plain language of §1405(d) - the Commission shall not establish a second payment agreement if a customer has defaulted on a previous payment agreement absent a change in income." *Id.*

These statements on our part, that the language of the statute is subject to more than one interpretation and that we are persuaded by the plain language of §1405(d), are inconsistent and our decision needs to be reconsidered and amended pursuant to Section 703(g).

As we will discuss herein, we shall adopt the proposed interpretation of §1405(d) contained in our *Section 703(g) Order*. We have been persuaded by the statutory construction arguments put forth by the OCA and the other Commentors supporting an interpretation of §1405(d) that would permit the Commission (in addition to instances where there has been a change in income) to establish one payment agreement that meets the terms and limitations of §1405.

1. Commission Authority Under Section 703(g)

Section 703(g) has been interpreted to mean that prior orders of the Commission have no preclusive effect on the Commission from taking action, even though it has issued an order governing the same matter and involving the same parties. *Popowsky v. Pennsylvania Public Utility Commission*, 805 A.2d 637, 642 (Pa. 2002). Our decision to reconsider a prior order is a matter of administrative discretion. *West Penn Co. v. Pennsylvania Public Utility Commission*, 100 A.2d 110 (Pa. Super. 1953). In fact, our prior interpretation of the statute – in the *Implementation Order* – is not binding upon us even if the interpretation received judicial approval. *Elite Industries, Inc., et al. v. Pennsylvania Public Utility Commission*, 832 A.2d 428, 432 (Pa. 2003). As is the case here, the Court in *Elite Industries, Inc.,* found merit with the Commission's position because the Commission's "changes in policy and regulation were made in consideration of the public interest." *Id.* However, the Commission may not undertake a

substantive change of a prior order without providing all interested parties notice and an opportunity to be heard. *Scott Paper Co. v. Pennsylvania Public Utility Commission*, 558 A.2d 914, 919 (Pa. 1989).

In *Bell Atlantic v. Pennsylvania Public Utility Commission*, 672 A.2d 352, 354 (Pa. 1995), the court clearly stated that the Commission is not bound by the rule of stare decisis. The Commission's obligation is to render consistent decisions, and the Commission can comply with this judicial mandate by overruling or distinguishing precedents inconsistent with new decisions. *Id.* Furthermore, there must be a reasonable and substantial basis for our order. *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 101 A.2d 127 (Pa. Super. 1953).

Based on the legal precedent guiding our action here, we find no support for PGW's assertion that our action will be arbitrary and capricious and Columbia's argument that the order we seek to amend is too recent. Appellate courts have adopted a "strong deference" standard for reviewing agency interpretations of statutes which they are charged to enforce. *Dee-Dee Cab, Inc. v. Pennsylvania Public Utility Commission*, 817 A.2d 593, 597 (Pa. 2003).

2. Statutory Construction

The purpose of statutory construction is to "ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S.A. §1921(a). Initially, we concluded that the term "payment agreement" as used in §1405(d) regarding the limit on the number of payment agreements, includes either a utility-negotiated payment agreement or a Commission-established payment agreement. Therefore, if a customer broke a payment agreement with a utility, the Commission could not establish another payment agreement. Since §1410 requires customers to first contact the utility to resolve their problems, we

effectively concluded that the intent of the General Assembly is to remove the Commission from consideration of problems that can be resolved by means of payment agreements.

In reconsidering this interpretation, we have reviewed the definition of the term "payment agreement" and find that its use in §1405(d)[1] does not bar an interpretation that gives a customer the opportunity to get at least one Commission-established payment agreement. Although the definition of the term "payment agreement" could encompass both a utility-established and Commission-established payment agreement, we conclude that the reference to the Commission in subsection (d) is a limit on the Commission ordering a "second" or "subsequent" Commission-established or Commission-ordered payment agreement. In other words, the term "payment agreement" does cover a Commission-established payment agreement, and the reference in subsection (d) is to the Commission and the directive is to the Commission, and not utilities.

Moreover, the use of phrase "second or subsequent payment agreement" cannot be reasonably interpreted to mean only utility-established agreements as the reference is a directive to the Commission to "not establish or order." Therefore, within the context of this provision, the Commission cannot establish another agreement if the customer defaulted on a previous Commission payment agreement, nor can the Commission order a public utility to enter into another payment agreement with the customer by requiring the utility to set the same or new terms. In other words, the provision does not allow the Commission to order the utility to directly deal with the customer and work out payment terms again. The Commission cannot "order a public utility" to set new payment terms again after a default by the customer on the previous terms. Thus, the Commission

[1] Section 1405(d) provides as follows: **(D) Number of payment agreements.**—Absent a change in income, the Commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement. A public utility may, at its discretion, enter into a second or subsequent payment agreement with a customer.

cannot establish two payment agreements, nor can the Commission order a utility to enter into a second payment agreement after a default and accomplish indirectly what the General Assembly has prohibited.

On reconsideration, and based on this reference to payment agreement in subsection (d), we therefore find that the words of §1405(d) do not prohibit the Commission from establishing one payment agreement. Nevertheless, given that the parties have also raised the issue of this provision being ambiguous, we shall examine the intent of the General Assembly. 1 Pa. C.S.A. §1921(c).

Rather than merely focus on the specific language of subsection (d) of §1405, the section in its entirety must be reviewed. According to §1405(a), the General Rule of the section, the Commission is authorized to "investigate payment disputes and establish payment agreements between a public utility, customers, and applicants within the limits established by this Chapter." The remaining subsections provide requirements for the length of payment agreements under §1405(b), prevent the Commission from establishing payment agreements for customers enrolled in Customer Assistance Programs under §1405(c) and, of course, under §1405(d), the Commission is prevented from establishing a second or subsequent payment agreement.

The Commission is now clearly authorized by Chapter 14 to establish payment agreements. While the Commission's Bureau of Consumer Services (BCS) has been authorized since 1978 to "investigate and issue final determinations on all informal consumer complaints,"[2] the Commission's authority to establish payment agreements was not explicit. Nevertheless, BCS has historically mediated and established payment agreements between customers and utilities. Based on our review of subsection (d) in this context, we doubt that the General Assembly intended to prevent the Commission from establishing even one payment agreement.

[2] 66 Pa. C.S. §308(d).

Rather, when placed in the context of the entire section dealing with payment arrangements, subsection (d) is properly read as a limitation on the general power, now made explicit, of the Commission to establish at least one payment arrangement. As such, we agree with the reading of subsection (d) and rationale expressed by Representative Evans in his comments:

> ... the purpose of the entire §1405 is to outline the power of the PUC with regard to PUC-*ordered* payment agreements. It does not limit nor outline payment agreements that are between utilities and customers without PUC involvement. This should be very clear after reading §1405(a), which establishes the General Rule. This is a very important point, and I will restate it more strongly. §1405(a) only outlines the power of the PUC, not the utilities, and it establishes the context of the entire section. Introducing the idea that the first payment agreement may include a utility-arranged agreement without the PUC involved runs counter to the purpose of the entire section and causes the confusion over the meaning of the words "second or subsequent" in §1405(d). Keeping the General Rule in mind, it ought to be clear that the words "second or subsequent" refer to a second or subsequent PUC-*ordered* agreement.

We find this reading of subsection (d) to be reasonable.[3]

We also agree with the reading and rationale expressed by those Commentators who argue that Chapter 14 was enacted to limit the Commissions' ability to enter into multiple payments of inordinate length. Furthermore, we believe that it was not the intent of the General Assembly to allow utilities to establish payment agreements that will not be subject to review by the Commission. In fact, the length of time formulas under subsection (b) are strictly for the Commission as utilities are not bound by these amortization periods. Given that §1410 requires that customers first contact the utility to resolve their problem before filing a complaint, it will be more than likely that the first payment agreement a customer has will be with the utility and, as such, the Commission

[3] The Commission acknowledges that the comments of legislators submitted in this proceeding do not represent the view of the entire legislature. However, the comments of Representative Evans are persuasive in and of themselves and consistent with our reading of the statute.

would be largely divorced from the establishment of payment agreements. However, if it was the intent of the General Assembly to so curtail Commission-established payment agreements, §1405(a) would not have been so clear that the Commission has authority to establish a payment agreement and §1405(d) so unclear that the reference to "second or subsequent payment agreement" refers to both utility and Commission-established payment agreements.

We also agree with the Representatives that there must be a first Commission-established payment agreement in order for the prohibition of a "second or subsequent" agreement. However, the effect of our prior interpretation under reconsideration is that if a customer entered into a payment agreement with the utility, the customer had the "one payment agreement" allowed by §1405(d), and the Commission is without authority to order even one payment agreement.

We have indicated previously our agreement with the Commentors that the Rules of Statutory Construction require an interpretation of §1405(d) that allows the Commission to establish at least one payment agreement. Although §1405 does limit the number of payment agreements that the Commission can order and limits the term of the payment agreements, we now conclude that nowhere does §1405, or any other provision of Chapter 14 divest the Commission of its authority to establish *one* payment agreement for non-CAP customers.

Assuming alternatively that there is ambiguity in the words of the provision, the Rules of Statutory Construction under §1921 provide that the intention of the General Assembly may be ascertained by considering, *inter alia*:

(1) The occasion and necessity for the statute.
(2) The mischief to be remedied.
(3) The consequences of a particular interpretation.

Here, we believe the General Assembly considered the perceived concern over multiple payment agreements and that Commission payment agreements were amortized over too long of a period of time.

In addition, the alleged "mischief" to be remedied by this legislation was also multiple payment agreements of inordinate length imposed by BCS. Rather than preventing the Commission from ordering a single payment agreement that satisfies the terms of Chapter 14, the limits placed solely on the Commission as far as length of payment agreements indicates this is the mischief to be remedied.

Next to be considered is the consequences of our interpretation in the *Implementation Order*. The consequences of our action will be to eliminate a necessary check and balance to the utility's bargaining power and to eliminate customers' access to the Commission for a reasonable payment agreement.

In ascertaining legislative intent, there are certain presumptions that may be considered such as the following:

> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.
> (2) That the General Assembly intends the entire statute to be effective and certain.
> (5) That the General Assembly intends to favor the public interest as against any private interest.

1 Pa. C.S.A. §1922. Consistent with our previous analysis, we submit that the General Assembly did not intend to preclude the Commission from establishing even one payment agreement given that the intent of the section was to prevent multiple payment agreements of inordinate length. Furthermore, for every part of the statute to be effective, including §1405(a), the Commission must be allowed to establish a payment agreement that is contemplated by subsection (a), after a customer defaults on a prior

payment agreement with the utility. If our interpretation in the *Implementation Order* stands, allowing utility-established payments that will never be reviewed through a Commission-established payment agreement, will effectively favor the private interest at the expense of the public interest that allows customer access to the Commission.

To summarize, the Rules of Statutory Construction support our proposed interpretation since this interpretation will lead to a reasonable result, allows §1405(a) to be effective, and favors the public interest. We also agree with the Commentators that our current interpretation deprives the Commission of the opportunity to establish a payment agreement for a customer, which is clearly manifested in Chapter 14. Although §1405(d) allows a public utility the discretion to enter into a second or subsequent payment agreement with a customer, this authority does not act to limit the Commission's authority to establish its first payment agreement. To do so would replace the Commission's authority - a result in disfavor with Pennsylvania law.[4]

CONCLUSION

We find that §1405(d) does not divorce the Commission from its traditional fundamental role as final arbiter of utility consumers' rights with respect to payment agreement issues. Rather, §1405(d) permits the establishment of one payment agreement by the Commission, subject to the requirements and limitations of §1405. First, §1405(b) requires the Commission to adhere to specific length of time limitations for payment agreements. Second, the rates paid by the Customer Assistance Program customers cannot "be the subject of payment agreements negotiated or approved by the Commission." Third, §1405(e) sets forth the requirements and limitations for the

[4] *See MCI Worldcom, Inc. v. Pennsylvania Public Utility Commission*, 844 A.2d 1239 (Pa. 2004); *see also, Pennsylvania Labor Relations Board v. State College Area School District*, 337 A.2d 262 (Pa. 1975).

extension of payment agreements if a "customer defaults on a payment agreement established under subsections (a) and (b) as a result of a significant change in circumstance." Finally, §1405(f) provides that if a consumer fails to comply with the terms of a payment agreement, that failure shall be grounds for the public utility to initiate termination of service; **THEREFORE,**

IT IS ORDERED:

1. That the Commission's *Implementation Order* issued March 4, 2005 at this docket is hereby reconsidered pursuant to Section 703(g) of the Public Utility Code.

2. That the *Implementation Order* (Issue No. 1, pages 3-7) is hereby amended to the extent consistent with the discussion herein, and as follows:

> We conclude that §1405(d) permits the Commission (in addition to instances where there has been a change of income) to establish one payment agreement that meets the terms of Chapter 14 before the prohibition against a second payment agreement in §1405(d) applies.

3. That a copy of this Order be served on the parties at Docket No. M-00041802F0002.

BY THE COMMISSION

James J. McNulty

Secretary

(SEAL)

ORDER ADOPTED: October 27, 2005

ORDER ENTERED: OCT 3 1 2005

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

Chapter 14 Implementation –
Reconsideration of
Implementation Order

PUBLIC MEETING October 27, 2005
OCT-2005-L-0113
M-00041802-F0002

STATEMENT OF VICE CHAIRMAN CAWLEY

On March 4, 2005, the Commission issued an Implementation Order addressing certain threshold issues relating to implementing Chapter 14. Before us for consideration is the recommendation of the Law Bureau in response to the Commission's *Section 703(g) Order Seeking Comments* entered on August 24, 2005 ("Reconsideration Order"). I agree with the staff recommendation that the Commission should amend its Implementation Order consistent with the recommendation and offer the following additional reasons in support of changing our original interpretation of our authority under Section 1405. That section provides in relevant part:

> **§ 1405. Payment agreements**
>
> (a) **General rule.**—The commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers. The commission is authorized to establish payment agreements between a public utility, customers and applicants within the limits established by this chapter.
>
> (b) **Length of payment agreements.**—The length of time for a customer to resolve an unpaid balance on an account that is subject to a payment agreement that is investigated by the commission and is entered into by a public utility and a customer shall not extend beyond
> ***
>
> (d) **Number of payment agreements.**—Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement. A public utility may, at its discretion, enter into a second or subsequent payment agreement with a customer.
>
> (e) **Extension of payment agreements.**—If the customer defaults on a payment agreement established under subsections (a) and (b) as a result of a significant change in circumstance, the commission may reinstate the payment agreement and extend the remaining term for an initial period of six months. The initial extension period may be extended for an additional six months for good cause shown.
> ***

Having carefully reviewed and considered the several filed comments, I conclude that Section 1405 allows the Commission to establish one payment agreement that meets the terms of Chapter 14 before the prohibition in Section 1405(d) against establishment of a second payment agreement applies.

The plain language of Subsections (a) and (b) of Section 1405, when read together, as they must be, makes clear that the Commission has the authority to establish one payment agreement within the parameters of Subsection (b).

The second sentence of Subsection (a) unequivocally gives the Commission authority "to establish payment agreements between a public utility, customers and applicants within the limits established by [Chapter 14]." The first sentence of Subsection (a) authorizes the Commission "to investigate complaints regarding payment disputes between a public utility, applicants and customers."

Subsection (b) then provides for the maximum lengths of time that customers are allowed to "resolve" an unpaid balance on an account "that is subject to a payment agreement that is investigated [pursuant to a complaint] by the commission and is entered into by a public utility and a customer...." *Thus, Subsection (b) specifically addresses a customer complaint involving a payment agreement previously entered into between a customer and a public utility.* The Commission may hear that complaint under Section 701 (relating to formal complaints) or under Section 308.1(a) (relating to informal complaints) and may grant relief by establishing under Subsection (a) a payment agreement that comports with the parameters of Subsection (b). If the customer-utility payment agreement comports with Subsection (b), the Commission is powerless to do more and must dismiss the complaint (unless it finds that there has been a "change in [the customer's] income" or a "significant change in circumstance" under Subsections (d) or (e), respectively, as described below). But, at the least, the customer is given one opportunity to appeal to the legislatively-created administrative agency that, since its inception more than ninety years ago, has been the final arbiter of disputes between public utilities and their customers.

In the event that the Commission finds that the customer-utility payment agreement is more stringent than the parameters of Subsection (b), the Commission may establish a payment agreement consistent with Subsection (b) the first time the customer files a complaint with the Commission. However, the Commission may not establish, or order the public utility to establish, a second or subsequent payment agreement if the customer defaults on the payment agreement established by the Commission.

In other words, by the terms of Subsections (a) and (b), even though a customer defaults on a "previous" payment agreement with the public utility, that customer may still informally or formally complain to the Commission. There is no statutory deadline line to do so, equivalent to, for example, the 30-day appeal period within which a final Commission decision must be appealed to the Commonwealth Court. The Commission, if it has not yet established a payment agreement involving the same unpaid account balance, may establish a payment agreement in conformity with Subsection (b). Thereafter, absent a "change in income," the Commission may not establish a second payment agreement or order the utility to do so on the same unpaid balance.

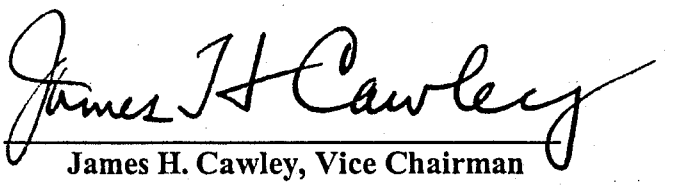
The only other relief possible pursuant to Subsections (a) and (b) is provided by Subsection (e)—reinstatement and extension of the one payment agreement entered into with the Commission or of the payment agreement or agreements entered into with a utility (at its

discretion as provided in the second sentence of Subsection (d)) upon proof of a "significant change in circumstance."

Consequently, by overlooking the plain language of Subsection (b) when read in conjunction with Subsection (a), the Commission in its *Chapter 14 Implementation Order* entered on March 4, 2005, at Docket No. M-00041290F0002, reached a conclusion that the Commission has no authority to establish a payment agreement in conformity with Subsection (b) if a customer defaulted on a "previous" payment agreement with a public utility. I respectfully disagree with the Commission's original interpretation of Section 1405(d).

For the foregoing reasons, the Commission's analysis failed to give effect to the authority granted by Subsections (a) and (b) to establish a *first and only* (except where there has been a "change in income") payment agreement upon complaint concerning a "payment dispute" involving a previous customer-utility payment agreement.

October 27, 2005



James H. Cawley, Vice Chairman

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

Re: Chapter 14 Implementation
Reconsideration of Implementation Order

PUBLIC MEETING
OCTOBER 27, 2005

OCT-2005-L-0113
Docket No. M-00041802F0002

DISSENTING STATEMENT OF COMMISSIONER KIM PIZZINGRILLI

By this Order, the majority of the Commission supports the reconsideration and amendment of the Commission's March 4, 2005 *Implementation Order* relative to the *Responsible Utility Customer Protection Act*[1] (Act). Specifically, the Commission today reverses the prior Commission conclusion that absent a change in income, Section 1405(d) precludes the Commission from establishing a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement[2].

As a matter of policy, I support the Commission having authorization to establish a payment arrangement, regardless of whether the customer had a previous utility payment arrangement. However, after actively participating in all facets of implementing Chapter 14 since its enactment, I continue to support the Commission's March 4, 2005 determination on this issue. In order to provide the Commission with a clear and unequivocal legal right to provide consumers with more than one payment agreement, absent a change in income, I find that a legislative amendment to Chapter 14 is necessary and therefore, I respectfully dissent.

Consistent with the prior Commission decision and my prior statements on this issue, I find that Section 1403 defines "payment agreement" as "[a]n agreement whereby a customer who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments." 66 Pa.C.S. §1403. Thus, by its definition the term "payment agreement" includes both utility agreements and Commission agreements. Due to the lack of distinction between payment agreements reached between a utility and the customer or an agreement established by the Commission, the "one payment agreement" rule of §1405(d) applies whether the prior agreement was established by the Commission or by the utility.

In lieu of reversing a prior Commission decision that was legally sound, consistently followed and unchallenged as to its correctness, the Commission could have required the

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[1] 66 Pa.C.S. §§1401-1418.

[2] To clarify, it should be noted that the Commission took reconsideration by its own motion, as no party sought reconsideration of the March 4, 2005 *Implementation Order* nor has the issue been appealed to the Commonwealth Court of Pennsylvania.

implementation of consumer safeguards by Pennsylvania's electric, gas and water utilities. Specifically, in circumstances where a utility offers a consumer a payment arrangement that provides for a more stringent payment plan than the Commission is permitted to offer pursuant to Section 1405(b) of the Act, prior to accepting such an offer, the utility should be required to inform the consumer of their right to refuse such offers and seek review by the Commission. By properly informing customers of their rights when negotiating payment arrangements with a utility via the implementation of a clear and uniform approach to utility payment arrangement offerings, the Commission could have safeguarded customer's rights and avoided reversing a prior Commission decision absent a legislative amendment to Chapter 14.

While Chapter 14 places limits on the Commission's authority to issue payment agreements, Pennsylvania's electric, gas and water utilities continue to have discretion in establishing payment arrangements with their customers. Thus, I reiterate my comment that the utilities should employ a pragmatic approach in handling consumer complaint cases and remind them of their ongoing obligation under Chapter 56 to reach reasonable payment terms with their customers.

In addition to educating customers of their rights under the Act, the Commission, consumer advocates and the utilities must continue to work cooperatively to inform consumers to "Prepare Now" for the impending winter heating season and of the availability of customer assistance programs.

I continue to expect utilities to negotiate with their customers in good faith and to ensure adequate protection of Pennsylvania's most vulnerable citizens.

October 27, 2005
Date

Kim Pizzingrilli
KIM PIZZINGRILLI, COMMISSIONER

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105

CHAPTER 14 IMPLEMENTATION

PUBLIC MEETING October 27, 2005
OCT-2005-L-0113*
M-00041802F0002

DISSENTING STATEMENT OF COMMISSIONER TERRANCE J. FITZPATRICK

A majority of the Commission today adopts the recommendation of the Law Bureau to reconsider its Chapter 14 Implementation Order, entered earlier this year, and to reverse its earlier interpretation of Section §1405(d), 66 Pa. C.S. §1405(d). Specifically, the majority now concludes that a customer is always entitled to one payment agreement ordered by the Commission, even when the customer has defaulted on a previous payment agreement consented to by the customer and the utility, and despite the fact that the statute states explicitly that the decision to allow a second or subsequent payment agreement is committed to the discretion of the utility, not the Commission. I respectfully dissent.

Section 1405 is entitled "Payment agreements." Subsection (d) provides:

> (d) Number of payments agreements. – Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement. A public utility may, at its discretion, enter into a second or subsequent payment agreement with a customer.

66 Pa. C.S. §1405(d). On its face, this language is straightforward--the Commission may not order a second or subsequent payment agreement (absent a change in income), but the utility has discretion to enter into such a payment agreement.

Chapter 14 defines the term "payment agreement" as follows:

> "Payment agreement." An agreement whereby a customer who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments.

66 Pa. C.S. §1403. This definition does not distinguish between a payment agreement consented to by the customer and utility, (hereinafter referred to as a

"customer/utility payment agreement"[1]) and a payment agreement ordered by the Commission. Thus, the definition must be read to include both types of payment agreements.[2]

Since the term "payment agreement" includes both customer/utility payment agreements and Commission-ordered payment agreements, the prohibition in the first sentence of Section 1405(d) on the Commission ordering a second or subsequent payment agreement (when a customer defaults on a previous one) applies regardless of whether the first payment agreement was a customer/utility or Commission-ordered payment agreement. This conclusion is buttressed by the second sentence of Section 1405(d), which states that the decision to allow a second payment agreement is left to the discretion of the utility. The conclusion is also consistent with Section 1410(1), 66 Pa. C.S. §1410(1), which requires customers to first seek to resolve complaints with the utility before filing complaints with the Commission. This latter section refutes any notion that a resolution of a customer complaint by the Commission is superior to a resolution of the complaint by the utility and customer without the Commission's intervention.

The majority, however, concludes that the language of Section 1405(d) "does not bar an interpretation" (proposed Order, p. 17) that allows the Commission to order another payment agreement even though the customer has defaulted on a previous customer/utility payment agreement. The majority reaches this result by interpreting the words "payment agreement" in the first sentence of Section 1405(d) – but apparently only in that sentence – as referring solely to a Commission-established payment agreement. Thus, the argument goes, the Commission is prohibited from ordering a second payment agreement only in situations in which the Commission issued the first one.

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[1] In negotiating a customer/utility payment agreement, the customer is not bound to accept the terms offered by the utility. If the customer is not satisfied with the terms of a proposed payment agreement, the customer has a right to complain to the Commission. 52 Pa. Code §56.140-56.165. Accordingly, the process already provides an "opportunity" for a customer to obtain a Commission-established payment agreement, and the majority errs in concluding that it is necessary to allow a second payment agreement to provide this opportunity.

[2] This reading of the Act is consistent with the intent of the General Assembly. The Declaration of Policy at §1402 of the Act states: "These [residential utility service] rules have not successfully managed the issue of bill payment." 66 Pa. C.S. §1402(1). Additionally, the Declaration of Policy states: "The General Assembly seeks to achieve greater equity by eliminating opportunities for customers capable of paying to avoid the timely payment of public utility bills." 66 Pa. C.S. §1402(2).

The conclusion of the majority can be restated as follows: the Commission has authority to order a second payment agreement where the customer defaults on a customer/utility payment agreement. This conclusion contradicts the plain language of the first sentence of Section 1405(d).[3] The Commission may not treat the previous customer/utility payment agreement as though it did not exist, given the fact that it falls within the definition of "payment agreement" in Section 1403 of the Act.

The majority's interpretation also runs afoul of the second sentence of Section 1405(d), which states on its face that the decision to allow a "second or subsequent payment agreement" is committed to the discretion of the utility. In the situation at issue here, the Commission is claiming the right to order a second payment agreement where a customer defaults on a customer/utility payment agreement. Since the Commission is claiming the authority to order a second payment agreement, the utility's discretion would only come into play as to whether to allow a "third or subsequent payment agreement." Again, this is contrary to the express language of the statute.

I recognize the public debate regarding Chapter 14, especially in light of the escalation in natural gas prices as we enter the winter heating season. However, the power to amend the requirements of that Chapter rests solely with the elected branches, not with this Commission.

DATE: October 27, 2005

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
COMMISSIONER

[3] The "Plain Meaning Rule" of statutory construction states: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. §1921(b).