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Jurisdictional Authority for Low-Income Programs Can be Found in Multiple Places.

NOTE TO READERS

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MULTI-STATE STUDY OF LOW-INCOME PROGRAMS CATALOGUES JURISDICTIONAL AUTHORITY FOR REGULATORY ADOPTION OF PROGRAMS.

A multi-state study of low-income programs in 13 states concluded that when regulators desire to implement a low-income affordability program, sound and readily sustainable regulatory foundations exist, without explicit legislation action, upon which to base regulatory approval and have such approval be sustained as a matter of law and policy.

The multi-state study found that low-income rate affordability programs in the United States present a wide-range of issues for regulators, legislators and the judiciary to consider. Not only do the programs present classic questions of law involving a construction of what statutes do or do not require (or allow), but also present mixed questions of law and policy to be addressed within the context of utility regulation.

The discussion that considers these issues below focuses on the *jurisdictional* aspects of the various low-income programs around the country. This focus leaves an array of questions with respect to each of the state programs for the reader to consider within the context of each individual program.

The jurisdictional question of whether state regulators have the authority to adopt a low-income rate affordability program can generate a set of diametrically opposed answers. On the one end of the continuum, a state utility commission may find that it has within its basic regulatory authority the necessary discretion to order (or approve) a low-income program. On the other end of the spectrum, a commission may find that it has within its basic regulatory authority no power at all to order (or approve) such programs.[1] Not surprisingly, many states are in the middle. These states will approve programs that have certain attributes, or that will approve programs if prescribed demonstrations can be made.

LEGISLATIVE AUTHORIZATION

The multi-state research found that states have frequently mandated the creation of low-income affordability programs by statute, thus rendering moot the question of whether sufficient regulatory authority exists to pursue such programs under the traditional regulatory authority of the state utility commission. Maryland, California, Nevada and New Jersey, for example, all had utility commissions act after the legislature enacted a statute directing the implementation of a low-income program.

Other states have acted to adopt low-income affordability programs without specific legislative authorization. Pennsylvania's commission found that it had the authority to order programs to stop the "wasteful" cycle of repeating service disconnections, reconnections, failed-payment-plans, and a return to the start of the cycle with another disconnection. The Ohio commission found that it had authority under the state of "emergency" which it found to exist as a result of the tens of thousands of households that were losing their utility service due to the unaffordability of home energy. Indiana utilities found authority to adopt their low-income programs under a statute providing for "alternative regulatory plans," which allow the utilities and the state commission to set aside all or parts of traditional regulation when to do so is in the public interest.

Even state utility commissions that have expressed doubt about their regulatory authority to implement permanent statewide programs have adopted smaller programs using different aspects of their regulatory authority. The Missouri utility commission, for example, has held that it lacks statutory authority to adopt preferential rates. Nonetheless, that commission has approved multi-million dollar programs by electric and natural gas companies to deliver rate affordability and arrearage forgiveness through specifically-dedicated funds. Similarly, the Colorado commission, even before the state supreme court decision proscribing preferential rates was legislatively overturned, approved a low-income energy efficiency program on the grounds that it was cost-effective, while also approving a rate affordability pilot to test whether it could be shown to be cost-effective.

FUTURE LEGAL AUTHORITY

The multi-state review of affordability programs found that numerous stakeholders have advanced creative justifications upon which to structure their low-income affordability programs. Some of those justifications have been approved, while others have not.

- The Ohio utility commission justified its low-income program based on a finding of an "emergency" caused by the tens of thousands of low-income Ohio customers that had lost their utility service;

- A Colorado fuel fund justified one of its low-income programs on the grounds that the utility was not using ratepayer funds, but rather a portion of the penalties imposed on the utility for failing to meet prescribed quality of service standards;

- Nevada Bell justified its telephone lifeline program on the grounds that keeping customers on the telephone system enhanced the value of the network to all

[1] One should note the obvious at the outset of this discussion. This analysis examines states in which low-income programs have operated at one level or another. If a state were to have held that it did not, under any conditions, have authority to implement a program, the state would not be included in this analysis. To that extent, the discussion below will discuss, more often than not, the basis *for* the implementation of low-income programs.

customers, not merely to those receiving the lifeline rate;

- Indiana utilities justified their programs as part of a proposal for "alternative regulation" that was specifically authorized by statute.

The lines of analysis presented below do not necessarily apply in every state. The application of any given line of reasoning depends upon the specific statutes that are extent in any given state.

Foundational Policy Basis for Commission's Existence

The multi-state research found that the regulation of natural gas and electric rates in any given state is governed not only by the statutes that specifically mention the ratemaking process, but by the statutes setting forth the broad regulatory mission of the state utility commission as well. Invoking such statutes is akin to the work of environmental advocates who historically have sought to have utility regulators take into account the environmental implications of their decisions.

Just as environmental protection can be advanced through enforcement of the "general charge" of a utility commission, low-income protection can be advanced by enforcement of that language as well. For example, many such statutes <u>*direct*</u> the utility commission to undertake its duties within the constraint of maintaining public health and safety. The way to conceptualize this approach to low-income rates is to think of these general charges as being the seminal documents of the agency. Policy declarations included in the charter documents of an administrative agency create enforceable obligations on the part of that agency.

Universal Service as a "Public Good"

The notion that assistance provided to low-income households supports the broader public interest is not an unusual idea. In the public utility industry, for example, universal service is considered by many authoritative sources to be a "public good" subject to the financial support of ratepayers as part of the general regulatory oversight of public utilities.

The question which presents itself, of course, involves determining how to define "public good" so as to include universal service. Fire hydrants and streetlights, for example, have been found to be public goods. The basic telecommunications network has also been found to be a "public good" as a justification for spreading network costs over all customer classes in support of the promotion of universal service.

Improving Business Competitiveness

An increasing body of research has documented how the problems associated with inability to pay affect the competitiveness of local business and industry as well. Special rates for energy customers, as well as state regulatory decisions regarding ratemaking in the telecommunications industry, frequently are premised on their positive impacts on promoting business competitiveness. These considerations have also supported "implicit subsidies" generated by transferring costs from high-cost rural areas to lower-cost urban areas in both the energy and telecommunications industries.

The multi-state research found that the conclusion that assistance to low wage, poverty-level workers will promote the competitiveness of local business and industry is neither profound nor much disputed by researchers that consider the impacts of programs such as home energy affordability subsidies on private employers.

THE LEGISLATIVE FRAMEWORKS

The "legal" framework of energy assistance programs around the nation does not rest exclusively in the regulatory decisions of the various state utility commissions. It rests, also, in the statutory structures upon which many of the study programs are based. These statutory decisions exhibit considerable, though clearly not universal, differences on major program decisions. Patterns do appear, however.

Program Scope

The "scope" of a universal service program refers to the extent to which all low-income customers within a state are covered by the program. Some state programs are focused on delivering benefits to customers of a particular fuel type. The states of Maine and Maryland, for example, have directed the implementation of a statewide electric universal service program. In contrast, states such as New Jersey, Pennsylvania, Nevada and California have all mandated that programs be directed to both natural gas and electric customers. While Oregon and Washington have made all programs optional to utilities, both states have such programs by both natural gas and electric utilities.

Program Coverage

Most states that have enacted universal service programs restrict those programs to regulated utilities. Programs in New Jersey, Maryland, Pennsylvania and California are legislatively focused on regulated utilities. In contrast, Maine's legislation is specifically directed not simply toward the state's three investor-owned electric utilities, but to Maine's consumer-owned electric utilities as well. In Wisconsin, municipal utilities must, at a minimum, operate local programs that are equivalent to the statewide program.

Program Design

One issue policymakers must face is whether to create a uniform statewide program, or to allow diversity in program design amongst utility service territories. Maine and Pennsylvania allow each utility within the state to develop its own program design, so long as those designs are consistent with state prescribed minimum standards. New Jersey, Nevada and Maryland have all implemented uniform statewide programs. Washington and Oregon rely upon voluntary program proposals that are initiated by each individual utility. While those program designs are similar, law or policy does not dictate the similarity.

The decision of the Maine Commission acknowledged a unique approach argued by the state Office of Public Advocate. In its essence, the OPA urged that there should be rebuttable presumption favoring a uniform program. According to the OPA, "all three utility-sponsored programs should be similarly designed, except to the extent that demonstrably different customer needs exist." While the Maine Commission rejected that approach given time constraints on the design and implementation of programs in the state, the Commission held open the possibility of imposing such a future requirement.

Program Support

Program support involves primarily the collection of funding in support of the low-income affordability programs. One primary question is whether program funds should be collected from all customer classes or from the residential customer class alone. The Pennsylvania CAP programs, along with the voluntary programs in Oregon and Washington, are all based on financial support provided only by the residential class. In contrast, the Nevada legislation directs that funding will be collected from all "retail customers." Program funding in Maryland and New Jersey, too, are statutorily directed to be collected on a per unit of energy basis from all customers.

EFFICIENCY INVESTMENTS AS A RATE AFFORDABILITY PROGRAM COMPONENT

Every state that has adopted a home energy affordability program has incorporated an energy efficiency component into that affordability initiative. Differences appear, however, in the manner in which the efficiency program is integrated into the broader affordability effort, in the means of targeting the efficiency investments to particular households, in the linkage between the rate affordability and efficiency program components, and in the cost recovery for the program components.

The Connection between Affordability and Efficiency

The connection between the rate affordability and energy efficiency components of home energy affordability program varies widely by state. In some states the connection is explicit. Maine regulators have held, for example, that the obligation to deliver energy efficiency measures to participants in the various utility affordability programs flows from a statutory mandate to operate the programs efficiently. New Jersey regulators have found that the state's rate affordability program will provide a steady stream of new participants into the energy efficiency program. Nevada requires that the agencies administering the rate affordability and energy efficiency components of the overall affordability programs develop a joint annual planning document explaining how the programs will operate together.

While part of a low-income affordability effort, not all low-income energy efficiency programs have the pursuit of affordability improvement as their primary objective. The California utility commission, for example, has explicitly held that the objective of that state's Low-Income Energy Efficiency (LIEE) program is to promote affordability. As a corollary of that objective, the California commission has emphasized that the goal in California is to expand the number of households served by the efficiency program rather than to expand the measures delivered in any given household. In contrast, the Pennsylvania Low-income Usage Reduction Program (LIURP) is viewed foremost as a usage reduction program. Efficiency investments through LIURP should be targeted to maximizing the cost-effective reduction of energy. Targeting is toward high use customers, with the affordability impacts taken into account only among customers with equal consumption levels.

Finally, some states implement low-income usage reduction programs on equity principles. These states find that even widely offered demand side management programs adopted for residential customers frequently do not reach the low-income customer. New Jersey, for example, found that due to characteristics unique to the low-income population, unless special low-income usage reduction programs were implemented, these poverty level households would end up paying for the efficiency programs without receiving any benefits from those programs. In these states, the low-income usage reduction programs are not designed to confer a special affordability benefit on the poverty population, but rather simply to ensure that the poverty population is not excluded from receiving benefits from these programs.

Administratively Linking Affordability and Efficiency

Most states operating a rate affordability program link their rate initiatives with their energy efficiency initiatives through a referral process. The automatic qualification of a high use affordability participant for the receipt of energy efficiency measures, however, does not exist. Bill reductions through usage reduction and bill reductions through rate discounts/energy assistance are not found to be interchangeable.

States such as Maine, Maryland and Pennsylvania refer high use affordability program participants to their usage reduction programs, though such referrals do not have any "preference" in the receipt of efficiency services. States such as New Jersey and Wisconsin require high use affordability program participants to accept efficiency services to the extent that such services are offered and the customer has sufficient dominion over his or her residence to authorize the acceptance of such services.

Cost Recovery

Some states incorporate the cost recovery of their low-income energy efficiency investments directly into the broader effort to address the unaffordability of home energy bills to low-income households. The state of Nevada exemplifies such jurisdictions. In Nevada, the legislation explicitly directs not only that efficiency measures be funded, but also that a prescribed percentage of the low-income funding be devoted to low-income efficiency measures. States such as Indiana are at the other end of the continuum. Indiana's utilities commit to an annual funding stream as part of their affordability efforts, but that commitment is individualized to each utility and is not part of a broader statewide program.

SUMMARY AND CONCLUSIONS

Policymakers throughout the country have addressed a number of regulatory and legal issues that are common to programs in their adoption, design and implementation. While most states have mandated the creation of low-income affordability programs through specific state action, such legislative direction is not a prerequisite to pursuing such programs.

Readers may download a complete copy of the multi-state study, including individual detailed appendices relating to the creation, design and evaluation of programs in each of the 13 states, from:

www.appriseinc.org

Fisher, Sheehan and Colton, Public Finance and General Economics (FSC) provides economic, financial and regulatory consulting. The areas in which *FSC* has worked include energy law and economics, fair housing, affordable housing development, local planning and zoning, energy efficiency planning, community economic development, poverty and telecommunications policy, regulatory economics, and public welfare policy.

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