Hawke McKeon & Sniscak LLP
ATTORNEYS AT LAW

Thomas J. Sniscak
(717) 236-1300 x224
tjsniscak@hmslegal.com

100 North Tenth Street, Harrisburg, PA 17101 Phone: 717.236.1300 Fax: 717.236.4841 www.hmslegal.com

February 21, 2014

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room, 2 North
Harrisburg, PA 17120

RE: Columbia Water Company; Docket No. R-2013-2360798;
RESPONSE TO OCA'S EXCEPTION TO COMPLIANCE FILING

Attached is The Columbia Water Company's Response to the Exception filed by the Office of Consumer Advocate in the above-referenced matter. Copies have been served in accordance with the attached Certificate of Service, as well as upon the Office of Special Assistants and Administrative Law Judge Dennis J. Buckley.

If you have any questions regarding this filing, please do not hesitate to contact the undersigned.

Very truly yours,

Thomas J. Sniscak
William E. Lehman

Counsel to the Columbia Water Company

WEL/bes
cc: Per Certificate of Service
Honorable Dennis J. Buckley, Administrative Law Judge
Office of Special Assistants (via hand delivery with enclosed CD)

BEFORE THE
PENNSYLVANIA PUBLIC UTILTY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2013-2360798
	:	
The Columbia Water Company	:	

RESPONSE OF THE COLUMBIA WATER COMPANY TO THE EXCEPTION OF THE OFFICE OF CONSUMER ADVOCATE FILED IN RESPONSE TO COLUMBIA'S COMPLIANCE FILING

Pursuant to the 52 Pa.Code § 5.592(c) of the Pennsylvania Public Utility Commission's ("Commission") Regulations, The Columbia Water Company ("Columbia"), by and through its attorneys, Hawke McKeon & Sniscak LLP, hereby submits its Response to the Exception to Columbia's Compliance Filing filed by the Office of Consumer Advocate ("OCA") on February 18, 2014. For the reasons stated herein, OCA's Exception should be denied and the Commission should approve Columbia's compliance tariffed rates as soon as possible.

I. INTRODUCTION AND SUMMARY

On January 23, 2014, after 9 months of litigation, the Commission issued a Final Opinion and Order ("January 23 Order") directing Columbia to file a tariff supplement containing rates designed to produce jurisdictional operating revenues not in excess of $4,576,634 which was an increase of $534,970. (January 23 Order at 95). The suspension period – the period within which the PUC must either set rates or allow the filing to become effective by operation of law if no action is taken – expired on January 24, 2014. On February 6, 2014, Columbia filed a "compliance" tariff supplement that increased annual revenues by $534,970 as directed by the January 23 Order.

On February 7, 2014, the last day for filing a petition for reconsideration, the OCA filed a Petition for Reconsideration of the January 23 Order alleging that the Commission miscalculated the federal and state income tax and assessment amounts resulting in an overstatement of $90,776 to the overall taxes, and, thus, the overall revenue requirement. On February 20, 2014, Columbia filed an Answer to OCA's Petition for Reconsideration arguing that the Petition is nothing more than a collateral attack on a tax expense adjustment OCA lost in the Commission's January 23 Order under the guise of an alleged tax rate miscalculation and should be rejected.

On February 18, 2014, the OCA filed an Exception to Columbia's compliance tariff filing alleging the exact same tax expense adjustment that was set forth in its Petition for Reconsideration.

The Company's rate case expense claim in this matter does not and could not include rate case expense for attorney, company and consultant time to respond to OCA's meritless Petition for Reconsideration and Exception to the compliance filing. OCA proposed no adjustment in either filing for the additional rate case expense it created by its filings.

The OCA's Exception should be denied for numerous reasons and the Commission should approve Columbia's compliance tariff filing as soon as possible.

- First, the Exception does not comply with the Commission's requirement that Exceptions to compliance filings "***shall be strictly limited in scope to the factual issue of alleged deviation from requirements of the Commission order.***" 52 Pa. Code § 5.592(c). In fact, the OCA ***admits in its Exception that Columbia's tariff filing complied, to the dollar, with the revenue requirement allowed by the January 23 Order.***[1] The OCA's Exception is not properly limited and it does not

[1] The OCA states:

> On January 23, 2014, the Commission entered an Order permitting CWC to increase its base rates to generate an additional $534,970 of annual revenues. On February 6, 2014, CWC made a compliance filing that implemented an increase in annual revenues of $534,970." OCA Exception at 1 (internal footnote omitted).

allege – nor can it – that Columbia's compliance filing does not comply with the $534,970 increase granted by the January 23 Order in any way, and should be denied on this basis alone. Instead, OCA mounts a second-bite revenue requirement attack on a tax expense claim that it lost in the rate case thus arguing that something less than $534,970 should have been granted, and then attempts to bootstrap that argument into claiming therefore the compliance filing is in error. These are two different things, and OCA's challenge should be rejected. Thus, because Columbia's compliance filing produces the increase permitted by the January 23 Order, its rates should not be put in limbo or not allowed to be collected due to OCA's request for a future adjustment that may or may not happen.

- Second, the Exception is nothing more than a reiteration of the allegations put forth by the OCA in its meritless Petition for Reconsideration. As set forth fully in Columbia's response to OCA's Petition for Reconsideration, these arguments are nothing more than a collateral attack on a tax expense adjustment OCA lost in the Commission's January 23 Order under the guise of an alleged tax rate miscalculation and should be rejected.

- Third, the OCA's request for refunds under 66 Pa. C. S. § 1312 violates the commission-made rate doctrine which prohibits rates, which have been set by the Commission, to be retroactively charged and can only be changed prospectively.

- Fourth, the Commission, under its regulations can – and is legally obligated – to permit Columbia's rates to become effective even though an impertinent Exception has been filed. Columbia's tariff is in full compliance with the Commission's January 23 Order and should not be held up by the meritless filings of the OCA. Delay in approving the empirically correct compliance filing is causing and has caused economic injury to Columbia and undermines or violates the January 23 Order itself.

II. RESPONSE TO EXCEPTION

OCA Exception No. 1: **<u>CWC Should Be Directed to Establish Rates Designed to Recover The Revenue Increase Allowed By The Commission In Response To The OCA's February 7, 2014 Petition For Reconsideration In This Proceeding.</u>**

a. The OCA has not alleged nor shown that Columbia's compliance tariffed rates have deviated from the January 23 Order.

The Commission's regulation at 52 Pa. Code § 5.592(c) requires that an exception to a tariff revision "shall be strictly limited in scope to the factual issue of alleged deviation from requirements of the Commission order." 52 Pa. Code § 5.592(c). The OCA's Exception does not comply with this requirement and should be denied on this basis alone. The standard is simple: does the compliance filing comport with the Commission's January 23 Order? The answer to that is yes. The standard ***is not*** whether the compliance filing comports with the Commission's Order ***and*** potential or requested relief by a disgruntled party who seeks reconsideration. OCA essentially seeks to illegally rewrite Section 5.592(c) to add "does it deviate from OCA's Petition for Reconsideration." OCA's request here would illegally deprive, if not confiscate from utilities, their increases or would allow OCA to unnecessarily delay rate cases going into effect. Note that OCA suggests in its Exception and Petition that interest for refunds should occur, but it is completely silent as to adding interest to the Company for the economic injury OCA created by its delaying rates going into effect and monies collected.

The OCA's Exception does not allege or show any deviation from the Commission's January 23 Order. In fact, the OCA ***admits in its Exception that Columbia's tariff filing complied, to the dollar, with the revenue requirement allowed by the January 23 Order***. The OCA states:

> On January 23, 2014, the Commission entered an Order permitting CWC to increase its base rates to generate an additional $534,970 of annual revenues. On February 6, 2014, CWC made a compliance filing that implemented an increase in annual revenues of $534,970.

OCA Exception at 1 (internal footnote omitted). The Exception does not allege – nor can it – that Columbia's new rates allow it to collect more, or less, revenue than the January 23 Order allows or that the rate structure or allocation does not comply with the January 23 Order. The Exception admits that Columbia's rates are set at an amount and structure that allow it to collect the ***exact amount*** of revenue allowed by the January 23 Order and ***do not deviate*** from this order in any manner. OCA's Exception is simply a reiteration of its faulty logic and calculations set forth in its Petition for Reconsideration, which was nothing more than a collateral attack on a tax expense adjustment OCA lost in the January 23 Order under the guise of an alleged tax rate miscalculation.

OCA's Exception No. 1, does not allege that Columbia's tariff rates set forth in its compliance filing deviates in any way from the Commission's January 23 Order, does not comply with the Commission's requirements for such Exception at 52 Pa. Code § 5.592(c), and should be rejected on this basis alone.

b. The OCA relies on a faulty and apparently new calculation which leads to an understatement of total taxes to Columbia which is contrary to the January 23 Order.

Notwithstanding OCA's filing of a noncompliant and illegal Exception, the allegations in the Exception are nothing more than a reiteration of the allegations put forth by the OCA in its Petition for Reconsideration. As set forth in Columbia's Answer to the Petition for Reconsideration,[2] this is nothing more than a collateral attack on a tax expense adjustment OCA lost in the Commission's January 23 Order under the guise of an alleged tax rate miscalculation and should be rejected.

Specifically, the Exception alleges that the Commission miscalculated the federal and state income tax and assessment amounts resulting in an overstatement of $90,776 to the overall

[2] Columbia's January 20th Answer is incorporated as if set forth herein in its entirety and is attached as **Appendix A**.

taxes, and, thus, the overall revenue requirement. (OCA Exception No. 1 at 2) However, as set forth in full in Columbia's January 20 Answer (**Appendix A**), while alleging that the Commission miscalculated the federal and state income tax and assessment amounts resulting in an overstatement of $90,776 to the overall taxes, and, thus, the overall revenue requirement, the OCA does so by eliminating[3] in its calculations a tax expense adjustment made by the Commission at page 91 of its January 23 Order; namely, the amount of $214,095 associated with the accretion of the deferred credit related to the book and tax depreciation for CIAC. (OCA Schedule 1 – attached to the Petition for Reconsideration, Line 14) OCA's Exception, as it does in its Petition for Reconsideration, offers a faulty and apparently new calculation which would lead to an understatement of total taxes to the Company to the contrary of the January 23 Order. OCA's latest collateral attack via this Exception of a revenue requirement lost in the January 23 Order should be rejected.

c. The OCA's request for possible refunds under 66 Pa. C.S. § 1312 violates the Commission-made rate doctrine

On page 3 of the OCA's Exception, it requests that, should the Commission approve the compliance filing, the approval come with a requirement for refunds should the Commission ultimately rule in OCA's favor on the Petition for Reconsideration. However, the Commission-made rate doctrine prevents a rate, which has been approved by the Commission, from being changed retroactively. It is well-settled law that rates which meet the revenue increase approved by the Commission in a litigated general rate case are Commission-made rates, and can only be changed prospectively.[4] If the Commission changes the revenue requirement pursuant to OCA's

[3] The body of OCA's Petition for Reconsideration does not state that the Commission's approved tax expense adjustment had been removed; however, a review of OCA's new calculation of tax rates appearing as OCA Schedule 1 to the Petition for Reconsideration at line 14 shows OCA's error in not reflecting the adjustment made by the January 23 Order.

[4] *Cheltenham & Abington Sewerage Co. v. Pa. Pub. Util. Comm'n,* 344 Pa. 366, 25 A.2d 334 (1942); *Lancaster Ice Mfg. Co. v. Pa. Pub. Util. Comm'n,* 138 A.2d 262 (Pa. Super. Ct. 1958)

Petition for Reconsideration – which it should not – the rates can only be adjusted prospectively, not retroactively.

Here, Columbia's revenue requirement was set by the Commission in its January 23 Order after a fully litigated rate case. Columbia's tariffed rates are in full compliance with the revenue requirement set by the Commission. Therefore, Columbia's rates are Commission-made rates, which Columbia has a right to rely on and cannot be changed retroactively by awarding refunds. Columbia notes that this argument becomes moot if OCA's Petition for Reconsideration and Exception are denied, as they should be.

d. Notwithstanding OCA's Exception, the Commission should allow Columbia's compliance tariff filing to become effective as soon as possible.

The Commission's regulation at 52 Pa. Code § 5.592(d) permits the Commission to approve Columbia's compliance tariff and allow the rates to become effective even though an exception has been filed. Section 5.592(d) states, "Notwithstanding the filing of an exception, the Commission may allow the compliance rates to become effective." 52 Pa. Code § 5.592(d). First, the Commission is legally obligated to issue its ministerial action of acknowledging that the compliance filing rates meet to the dollar the Commission's January 23 Order. Even OCA admitted that, as explained in the preceding section of this Answer. The Commission should do this as soon as possible, and with all due respect, should have already have done so. Columbia is a small water company that prides itself in providing safe, efficient and quality water service to its customers in Lancaster and York counties. However, in order to achieve these goals, Columbia requires the increase in revenues granted by the Commission in its January 23 Order. The delay of a necessary money stream without interest results in economic harm to the Company and is legally inconsistent with the Commission's January 23 Order. It has also caused the company additional administrative and rate case expenses.

This case was originally filed on April 25, 2013, ten (10) months ago. The OCA has continuously challenged almost every issue in this case. Now, the OCA has challenged the compliance filing, not upon any allowable reason permitted by the Commission's compliance filing regulations at 52 Pa. Code §5.592(c), but through an identical attack which it set forth in its Petition for Reconsideration. The Petition for Reconsideration will be addressed by the Commission on its own merits but should not be a reason to delay the issuance of Commission approval of Columbia's rates, that are in complete compliance with the Commission's January 23 Order, and admitted to be in compliance by OCA.

Therefore, in compliance with the Commission's regulation at 52 Pa. Code § 5.592(d), the Commission should approve immediately, and without further delay, Columbia's compliance tariff filing, notwithstanding the OCA's erroneous Exception.

III. CONCLUSION

For all the reasons set forth above, Columbia Water Company respectfully requests that the Exception filed by OCA be denied and the Commission approve Columbia's compliance filing rates which are in accordance with the January 2013 Order immediately.

Respectfully submitted,

Thomas J. Sniscak, I.D. No. 33891
William E. Lehman, I.D. No. 83936
Hawke McKeon & Sniscak LLP
100 North Tenth Street
P. O. Box 1778
Harrisburg, PA 17105-1778
(717) 236-1300
(717) 236-4841 (fax)
tjsniscak@hmslegal.com
welehman@hmslegal.com

Counsel for the Columbia Water Company

Dated: February 21, 2014

APPENDIX A

Columbia Water Company's
Answer to OCA's Petition for Reconsideration
January 20, 2014

BEFORE THE
PENNSYLVANIA PUBLIC UTILTY COMMISSION

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2013-2360798
	:	
The Columbia Water Company	:	

ANSWER OF THE COLUMBIA WATER COMPANY TO THE PETITION FOR RECONSIDERATION OF THE OFFICE OF CONSUMER ADVOCATE

Pursuant to the 52 Pa.Code § 5.572(e) of the Pennsylvania Public Utility Commission's ("Commission") Regulations, The Columbia Water Company ("Columbia"), by and through its attorneys, Hawke McKeon & Sniscak LLP, hereby submits its Answer to the Petition for Reconsideration ("Petition") filed by the Office of Consumer Advocate ("OCA") regarding the Opinion and Order entered on January 23, 2014 in this proceeding ("January 23 Order").

I. INTRODUCTION AND SUMMARY

Columbia submits that the Petition does not meet the standard for reconsideration, otherwise fails on the merits, and should be denied. The Petition fails to raise any reason that satisfies the steep burden for reconsideration.

The Petition alleges that the Commission miscalculated the federal and state income tax and assessment amounts resulting in an overstatement of $90,776 to the overall taxes, and, thus, the overall revenue requirement. Petition at 3. However, this is nothing more than a collateral attack on a ***tax expense*** adjustment OCA lost in the Commission's January 23 Order under the guise of an alleged ***tax rate*** miscalculation.

APPENDIX A

Specifically, the January 23 Order at page 91 fully addressed an adjustment proposed by the Company correcting income tax expense "to reflect the tax effect of increasing taxable income by $214,095." OCA's Income Tax Calculation Table (OCA Schedule 1 attached to the Petition), Line 14, leaves out the $214,095 associated with the accretion of the deferred credit related to the book and tax depreciation for Contributions in Aid of Construction ("CIAC"). Company witness Gary Shambaugh explained details of this adjustment in his rebuttal testimony (CWC Statement No. 2R at 20:5-11) and included it in his GDS Rebuttal Exhibit No. 3 (Revised) on page 5. The OCA did not contest the inclusion of this amount in the body of its surrebuttal testimony but did exclude it from its tax calculation table attached to its surrebuttal testimony. (OCA Exhibit AEE-1S, Schedule 8S, Line 23) Therefore, the OCA was fully aware of the tax accretion issue and contested it by excluding it from its tax calculation table. The Commission, in its January 23, 2014 Order, fully addressed this issue and included the $214,095 in its taxable income calculations. This issue is not new and novel, as OCA's position opposing the Company's adjustment was rejected by the Commission by granting the Company's position, and thus the Petition does not meet the legal standard for reconsideration as set forth in *Phillip Duick, et al. v. Pennsylvania Gas and Water Company.*[1] OCA's reconsideration request and collateral attack on the Commission's resolution of a litigated tax expense adjustment by disputing tax factors should be denied.

II. OCA HAS NOT SATISFIED THE LEGAL REQUIREMENTS FOR RECONSIDERATION.

In *Duick,* the Commission enunciated the standards for exercising its discretion to grant a petition for reconsideration of a Commission Order. The Commission stated:

> A petition for reconsideration . . . may properly raise any matters designed to convince the Commission that it should exercise its

[1] 56 Pa. P.U.C. 553 (1982).

> discretion under [66 Pa. C.S. § 703] to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was said that "[p]arties . . . cannot be permitted by a second motion to review and reconsider, **to raise the same questions which were specifically considered and decided against them**. . . ." What we expect to see raised in such petitions are **new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.** Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on the matter or issue was either unwise or in error.

56 Pa. P.U.C. at 558-59 (internal citations omitted, emphasis supplied).

The Petition, while alleging that the Commission miscalculated the federal and state income tax and assessment amounts resulting in an overstatement of $90,776 to the overall taxes, and, thus, the overall revenue requirement (Petition at 3), does so by eliminating[2] in its calculations a tax expense adjustment made by the Commission at page 91 of its January 23 Order; namely, the amount of $214,095 associated with the accretion of the deferred credit related to the book and tax depreciation for CIAC. (OCA Schedule 1- attached to the Petition, Line 14) OCA's Petition offers a faulty and apparently new calculation which would lead to an understatement of total taxes to the Company to the contrary of the January 23 Order.

Reconsideration should not be granted where the issue has been previously heard, considered and resolved by the Commission. *Duick.* That is precisely the situation here. The issue of the validity of the $214,095 in taxable income is not new to this proceeding nor is OCA offering a new and novel argument against the adjustment. Moreover, OCA had ample and repeated opportunities to produce evidence as to tax factors and it should not be given a second bite at the evidentiary apple via reconsideration.

---

[2] The body of OCA's Petition does not state that the Commission's approved tax expense adjustment had been removed; however, a review of OCA's new calculation of tax rates appearing as OCA Schedule 1 to the Petition at line 14 shows OCA's error in not reflecting the adjustment made by the January 23 Order.

Specifically, the record shows Company witness Gary Shambaugh explained the basis for this adjustment in his rebuttal testimony (CWC Statement No. 2R at 20:5-11) and included it in his GDS Rebuttal Exhibit No. 3 (Revised) on page 5. Mr. Shambaugh testified:

> The remaining portion of the increase in revenues is attributable to the correction in the accretion of the deferred credit related to the book and tax depreciation for Contributions in Aid of Construction. AUS Consultants removed the $214,095 from booked revenues and made another adjustment to further reduce the Company's basis for taxes, thus double accounting for this adjustment and understating the state and federal income taxes. That has been corrected.

CWC St. 2R at 20:5-11. Mr. Shambaugh included this amount in his GDS Rebuttal Exhibit No. 3 (Revised) on page 5.

The OCA could have, but did not contest the inclusion of this amount in the body of its surrebuttal testimony. The OCA did, however, exclude it from its tax calculation table attached to its surrebuttal testimony at OCA Exhibit AEE-1S, Schedule 8S, Line 23. There is no question about the OCA having been fully aware of the tax accretion issue as it in fact contested it in its tax calculation table. The Commission, in its January 23 Order, addressed and considered the claim or issue and included the $214,095 in its taxable income calculations:

> [W]e find that a correction is necessary to increase income tax expense due to a double counting of a deduction of taxable income related to Contributions in Aid of Construction. CWC St. 2R at 20. To correct this error, the income taxes reflected in the Recommended Decision will be increased to reflect the tax effect of increasing taxable income by $214,095.

January 23 Order at 91.

The Commission obviously considered the evidence and legal arguments presented regarding this adjustment, and simply rejected the OCA's position on this matter and accepted Columbia's. The fact that OCA disagrees with the Commission's decision is an insufficient ground for reconsideration, and it is not a valid justification for the Commission to change its

decision in this case. This issue is not new and novel, OCA's proposed treatment of the tax expense claim was rejected by the Commission when it granted the Company's position, and thus OCA's Petition does not meet the legal standard for reconsideration as set forth in *Duick*. Consequently, OCA's reconsideration Petition – including its reduction of $90,776 to revenue requirement – should be denied.

III. CONCLUSION

For all the reasons set forth above, Columbia Water Company respectfully requests that the Petition for Reconsideration filed by OCA be denied.

Respectfully submitted,

Thomas J. Sniscak, I.D. No. 33891
William E. Lehman, I.D. No. 83936
Hawke McKeon & Sniscak LLP
100 North Tenth Street
P. O. Box 1778
Harrisburg, PA 17105-1778
(717) 236-1300
(717) 236-4841 (fax)
tjsniscak@hmslegal.com
welehman@hmslegal.com

Counsel for the Columbia Water Company

Dated: February 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA FIRST CLASS U.S. MAIL

Christine Maloni Hoover, Esquire
Senior Assistant Consumer Advocate
Erin L. Gannon, Esquire
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
CHoover@paoca.org
EGannon@paoca.org

Daniel G. Asmus, Esquire
Office of Small Business Advocate
300 North Second St., Suite 1102
Harrisburg, PA 17101
dasmus@pa.gov

Charles Daniel Shields, Esquire,
Senior Prosecutor
Richard A. Kanaskie, Esquire
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
400 North Street, Second Floor West
Harrisburg, PA 17120
chshields@pa.gov
rkanaskie@state.pa.us

Thomas J. Sniscak
William E. Lehman

Dated this 21st day of February, 2014