**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held December 17, 2009

Commissioners Present:

James H. Cawley, Chairman

Tyrone J. Christy, Vice Chairman

Kim Pizzingrilli

Wayne E. Gardner

Robert F. Powelson

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| Petition of Duquesne Light Company for Approval of its Energy Efficiency and Conservation Plan; Petition for Reconsideration of the Office of Small Business Advocate | Docket No. M-2009-2093217 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

# I. Introduction

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration of the Office of Small Business Advocate (OSBA or Petitioner) of the Commission’s Opinion and Order of October 27, 2009 (*October 27, 2009 Order*)[[1]](#footnote-1)which conditionally approved the Energy Efficiency and Conservation Plan (EE&C Plan, or Plan), filed by Duquesne Light Company (Duquesne) on June 30, 2009.

**II. Background and Procedural History**

Governor Edward G. Rendell signed Act 129 of 2008 (Act or Act 129) into law on October 15, 2008. The Act took effect thirty days thereafter on November 14, 2008. Among other things, the Act amended the Public Utility Code (Code), 66 Pa. C.S. §§ 101 *et seq*., to require the Commission to develop and adopt an Energy Efficiency and Conservation (EE&C) Program by January 15, 2009.

By Opinion and Order entered January 16, 2009, at Docket No. M‑2008‑2069887 (*Implementation Order*), the Commission: (1) established the standards that Electric Distribution Company (EDC) EE&C Plans must meet, and (2) provided guidance on the procedures to be followed for submittal, review and approval of all aspects of EDC EE&C Plans.

Duquesne filed its EE&C Plan on June 30, 2009. Numerous Parties intervened prior to or at the prehearing conference, including the OSBA. The Plan was referred to Administrative Law Judge (ALJ) Fred R. Nene, and on September 2, 2009, ALJ Nene certified the record to the Commission for consideration and disposition.

By way of the *October 27, 2009 Order*, the Commission approved, with modifications, Duquesne’s EE&C Plan.

On November 12, 2009, the OSBA filed a Petition for Reconsideration (Petition) of the Commission’s Opinion and Order of October 27, 2009.

On November 23, 2009, Duquesne filed an Answer to the Petition.

# III. Discussion

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553, 559, (1982). Under the standards set forth in *Duick*, a Petition for Reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Duick* at 559. It has also been held that, because a grant of relief on such petitions may result in the disturbance of final orders, it should be granted judiciously and only under appropriate circumstances. *West Penn Power v. Pennsylvania Public Utility Commission*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

We note that any issue, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In its Petition, the OSBA requests that the Commission: (1) direct Duquesne to recognize Lighting customers served under Tariff Schedules SE, SM, and SH as a separate class or classes for purpose of cost-recovery; and (2) direct Duquesne to file a red-lined version of its revised EE&C Plan.

In its Answer, Duquesne questions whether the OSBA’s request for reconsideration meets the requirements for Commission reconsideration. Duquesne points out that what the OSBA is asserting as a “novel argument” or ”newly discovered evidence” is the Commission’s approval of PECO’s proposal to treat Street Lighting as a separate class for cost-recovery purposes, in the PECO EE&C Plan proceeding. Duquesne argues that neither the PECO proposal nor the Commission’s approval of a specific surcharge in a proceeding involving another EDC’s EE&C Plan would constitute newly discovered evidence nor otherwise appear to meet the legal standard for reconsideration. Answer at 2.

Duquesne argues that it has already separated out the Lighting customers from its other commercial and industrial customers. Duquesne submits that if, in the future, it proposes to implement programs for Lighting customers, it would need to file an amendment with the Commission, to which the OSBA as well as all other Parties would have an opportunity to comment. Duquesne avers that the OSBA’s argument is not applicable to Duquesne’s programs since street lighting is already separated from other commercial and industrial customers for cost recovery purposes. Answer at 2-3.

With respect to the issue raised by the OSBA concerning filing a red-lined version of its revised EE&C Plan, Duquesne states that it has no objection to providing a red-lined version to OSBA and any other party that requests a red-lined version of Duquesne’s revised Plan. Answer at 3.

**IV. Disposition**

We shall deny reconsideration with respect to the OSBA’s request that we direct Duquesne to recognize Lighting customers served under Tariff Schedules SE, SM and SH, as a separate class or classes for purpose of cost-recovery. In applying the *Duick* standard, we find that with regard to the Lighting issue, the OSBA has not met that standard in this case.

The assignment of costs for EE&C Plan measures that target street and area lighting were not raised or addressed in the October 27, 2009 Order for the simple reason that no such specific programs were offered by Duquesne. In contrast, the issue of a separate class for Street Lighting was addressed by the Commission in the PECO Order due to the simple fact that PECO proposed EE&C measures that targeted those customers. Thus, we do not believe that the allocation of lighting costs is an issue ripe for determination in the present matter. Furthermore, the OSBA has failed to cite any case to support its position that we can look to evidence and facts presented in another case to decide a different case where such evidence and facts were not presented. Such a result would allow a party to, in essence, present new evidence after the record was closed without giving the other parties an opportunity to challenge and respond. This would clearly violate the due process rights of those other Parties. We are not willing to set such a precedent, and we suspect that the OSBA would not want its due process rights compromised in such a manner.

Further, our *October 27, 2009 Order* specifically rejected the OSBA’s broad argument that 66 Pa. C.S. § 2806.1(a)(11) requires the creation of a separate rate class for Government/Non-Profit entities. In that Order, the Commission stated:

A more reasonable interpretation of Section 2806.1(a)(10)[sic][[2]](#footnote-2) under these circumstances is that the costs of measures benefitting governments, school districts, institutions of higher education and non-profit entities must be assigned in a reasonable manner to the rate class(es) in which those customers are embedded.

October 27, 2009 Order at 58.

This statutory requirement may be accomplished in myriad ways. Act 129 establishes certain requirements that must be met by electric distribution companies (EDCs), but gives the EDCs discretion (subject to Commission review) over the method by which the EDC will comply with those requirements. In reviewing the revised Plans, we will determine whether Duquesne’s cost recovery mechanism complies with the requirements of 66 Pa. C.S. § 2806.1(a)(11). As such, this aspect of the OSBA’s Petition is denied as premature.

We do, however, agree with the OSBA that the issue of requiring a red-lined version of the revised EE&C Plan is relevant to the filing schedule in this proceeding, although we question whether this issue is in strict accord with the *Duick* standard. Nonetheless, as this request is not opposed by Duquesne, we will consider it in this Opinion and Order consistent with our authority under Section 703(g) of the Code, 66 Pa. C.S. § 703(g), relative to rescission and amendment of orders.

Upon due consideration of (1) the breath and complexity of Duquesne’s EE&C Plan;( 2) the number of changes directed by our *October 27, 2009 Order;* (3) the fact that the Commission and many of the Parties will be reviewing multiple EE&C Plans concurrently; (4) the ten-day filing deadlines for Comments and Reply Comments established in our *October 27, 2009 Order*; and (5) the Commission’s time constraints for EE&C Plan review set forth in 66 Pa. C.S. § 2806.1(e)(2)(ii), we find that the clear identification of all Plan changes is essential to the effective and efficient review of Duquesne’s revised Plan. As such, we grant the OSBA’s request and will require that Duquesne file with the Commission and all parties of record a red-lined version of its EE&C Plan revision filing that reflects all modifications made to its EE&C Plan.

**V. Conclusion**

For the reasons set forth above, we will grant, in part, and deny, in part, the Petition for Reconsideration of the Office of Small Business Advocate, consistent with this Opinion and Order; **THEREFORE;**

**IT IS ORDERED:**

1. That the Petition for Reconsideration of the Office of Small Business Advocate of the Opinion and Order of October 27, 2009, which conditionally approved the Energy Efficiency and Conservation Plan of Duquesne is granted, in part, and denied in part.

2. That, pursuant to our authority under 66 Pa. C.S. § 703 (g), we will amend the Order entered at this docket number on October 27, 2009, to require Duquesne to shall submit to the Commission and Parties to this proceeding a red-lined version of its Energy Conservation and Efficiency Plan that reflects all of the modifications to its Plan.

3. That a copy of this Opinion and Order be served on the Parties to this proceeding.



**BY THE COMMISSION,**

James J. McNulty

Secretary

(SEAL)

ORDER ADOPTED: December 17, 2009

ORDER ENTERED: December 23, 2009

1. *Petition of Duquesne Light Company for Approval of its Energy Efficiency and Conservation Plan,* Docket No. M-200902093217 (Order entered October 27, 2009). [↑](#footnote-ref-1)
2. A typographical error was made in the October 27, 2009 Order. The correct site is Section 2806.1(a)(11). [↑](#footnote-ref-2)