**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

Petition of West Penn Power Company Docket No. M‑2009‑2093218

d/b/a Allegheny Power for Approval of its

Energy Efficiency and Conservation Plan;

Petition for Reconsideration of the

Office of Small Business Advocate

**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 23, 2009 (*October 23 Order*),[[1]](#footnote-1) which conditionally approved the Energy Efficiency and Conservation Plan (EE&C Plan or Plan), filed by West Penn Power Company d/b/a Allegheny Power (Allegheny or Company) on July 1, 2009. For the reasons discussed below, we will deny in part and grant in part the OSBA’s Petition for Reconsideration.

# 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.

Allegheny filed its EE&C Plan on July 1, 2009. Numerous parties intervened prior to or at the prehearing conference, including the OSBA. The Plan was referred to Administrative Law Judge (ALJ) Katrina L. Dunderdale, who, on September 10, 2009, certified the record to the Commission for consideration and disposition.

By way of the *October 23 Order,* the Commission approved, with modifications, Allegheny’s EE&C Plan.

On November 9, 2009, the OSBA filed a Petition for Reconsideration (Petition) of the *October 23 Order*.

On November 19, 2009, Allegheny 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 Allegheny to recognize Street Lighting customers served under Tariff Schedules 51‑59 and 71, as a separate class or classes for the purpose of cost-recovery; and (2) direct Allegheny to file a red-lined version of its revised EE&C Plan. Petition at 4‑9.

**A. Lighting as a Separate Class**

In its Petition, the OSBA requests that Allegheny be required to recognize lighting customers served under Tariff Schedules 51‑59 and 71 as a separate class or classes for purposes of cost‑recovery. Petition at 9, ¶ 30a. The OSBA noted that it had argued that, by identifying government/non‑profit entities as a group that must meet specific conservation targets, the General Assembly had recognized government/non‑profit as a separate class. Petition at 4 and 5, ¶ 18 (citing OSBA MB at 15 and OSBA RB at 7 and 8). The OSBA had asserted that under Allegheny’s Plan, small commercial and industrial customers may be subsidizing the required reductions in consumption and peak demand of another class because Allegheny had grouped small commercial and industrial customers with government/non‑profit customers, for cost‑recovery purposes. Petition at 5, ¶ 19 (citing OSBA St. No. 1, Direct Testimony of Robert D. Knecht at 4[[2]](#footnote-2)). The OSBA posited that Allegheny’s grouping of small commercial and industrial customers with government/non‑profit customers was contrary to the Act’s requirement that the costs of EE&C measures be financed by the same customer class that receives the direct energy and conservation benefits from those measures. Petition at 5, ¶ 19 (citing 66 Pa. C.S. § 2806.1(a)(11)).

The OSBA states that Allegheny responded to the above‑referenced OSBA assertions by stating that it does not have a separate government/school/non‑profit customer rate class to which it could assign EE&C measure costs. Petition at 5, ¶ 20 (citing Allegheny MB at 49 and 50). The OSBA notes that the Commission specifically rejected the OSBA’s argument, principally on the grounds that Allegheny does not currently have a discrete rate class for government/non‑profit entities and that the Act does not require Allegheny to create customer rate classes beyond what it already has. Petition at 5, ¶ 21 (citing Order at 73).

The OSBA goes on to assert that subsequent to its decision in this proceeding, this Commission approved a PECO Energy Company’s EE&C Plan provision that treats street lighting as a separate class for cost‑recovery purposes. Petition at 5, ¶ 22. The OSBA posits that it presented substantially the same arguments in the PECO proceeding that it presented in the present proceeding. Petition at 6, ¶ 23. The OSBA asserts that although the Commission rejected the OSBA’s position in the PECO proceeding, the Commission’s approval of PECO’s proposal to treat street lighting as a separate class provided a way to mitigate the cross‑subsidization against which OSBA witness Knecht testified. Petition at 6, ¶ 23.

The OSBA states that as Allegheny already serves lighting customers under numerous rate schedules, recognizing lighting as a separate class or classes for purposes of cost‑recovery would provide a way to mitigate cross‑subsidization without requiring Allegheny to create a new class. Petition at 6, ¶ 24. The OSBA goes on to acknowledge that Allegheny’s EE&C Plan has no provision for recovery of any costs from the lighting customer classes. *Id*. The OSBA states that while Allegheny may not currently plan to expend EE&C Plan funds in support of customers in the lighting rate classes, it may choose to do so in the future. As such, the OSBA is concerned that costs associated with such programs would be inappropriately allocated to small business rate classes. *Id*.

Finally, the OSBA stresses that it is not seeking reconsideration of the Commission’s decision that the costs related to lighting efficiency in government/non‑profit buildings should be allocated to the rate classes under which those buildings are served. Petition at 8, ¶ 26. The OSBA stresses, however, that it is seeking reconsideration of the decision that Allegheny may assign conservation costs related to street lighting and area lighting to classes other than the ones under which such lighting service is provided. *Id*.

In its Answer, Allegheny states that, with respect to the issue raised by the OSBA concerning Street Lighting customers it is willing to allocate costs associated with EE&C measures in support of street and area lighting customers to that customer class. Answer at 2.

More specifically, Allegheny notes that it maintains 10 rate schedules devoted to street and area lighting, at Tariff No. 39 as Rate Schedules 51‑59 and 71. Answer at 2. The customers served under these rate schedules include municipal, unincorporated community and individual customers. Answer at 2 and 3. Allegheny goes on to state that while it does not currently have any EE&C measures that target street and area lighting customers, it serves such customers under distinct rate schedules and is able to allocate costs to them should any future programs be added to its EE&C Plan. Answer at 3.

**B. Red‑lined Version of Revised EE&C Plan**

In its Petition, the OSBA requests that Allegheny be required to file a red‑lined version of its EE&C Plan. The OSBA points out that Allegheny’s revised EE&C Plan is due on December 22, 2009, the parties’ comments will be due on January 4, 2010, and reply comments will be due on January 14, 2010. The OSBA submits that requiring the parties to review the revised EE&C Plans in multiple proceedings over the holidays is not conducive to the close scrutiny warranted for such complex cases. The OSBA argues that a red-lined version would facilitate meaningful review within a tight time frame. Petition at 8.

The OSBA also submits that the Commission regulations governing compliance filings in a rate proceeding at 52 Pa. Code §5.592(a) state that “[a] utility may also be required to provide an electronic, red-lined copy of any filing made to assist the parties in promptly indentifying and analyzing the filing.” The OSBA avers that while the revised EE&C Plan may not be a compliance filing in a rate proceeding as contemplated in Section 5.592(a), it is at least analogous to one. *Id*. at 8 and 9.

Allegheny states that while it is not required by the Commission’s rules to provide a red-lined version of its revised EE&C Plan, it will provide all parties and the Commission with a red-lined version along with its revised EE&C Plan if directed by the Commission. Allegheny notes that its EE&C Plan revision filing will consist of revisions to two programs and the EE&C Plan tables. Answer at 3.

**IV. Disposition**

**A. Lighting as a Separate Class**

We shall deny reconsideration with respect to the OSBA’s request that we direct Allegheny to recognize Lighting customers served under Tariff No. 39, Schedules 51-59 and 71, 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 23, 2009 Order for the simple reason that no such specific programs were offered by Allegheny. 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 23, 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][[3]](#footnote-3) 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 23, 2009 Order at 73.

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 Allegheny’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 find that while Allegheny does not oppose this Petition for Reconsideration, the Commission is not prepared to prejudge the assignment of costs associated with measures that have not yet been proposed. Act 129 and our Implementation Order provide for a process for EDCs’ and other parties to propose changes to EE&C Plans and a process under which such proposed changes are reviewed. If and when Allegheny proposes EE&C measures that target street and area lighting, the Commission will assess such a proposal at that time and base its decision on the evidence and facts presented at that time. For these reasons, we will not grant the OSBA’s Petition for Reconsideration, and will not direct Allegheny to recognize lighting customers served under Tariff No. 39, Schedules 51‑59 and 71 as a separate class or classes for the purpose of cost‑recovery at this time.

The Commission notes that, contrary to the OSBA’s assertion, our October 23, 2009 Opinion and Order did not allow Allegheny to assign conservation costs related to street lighting and area lighting to classes other than the ones under which such lighting service is provided, as no such program was proposed by Allegheny. At such time that any such lighting measures, or any other new measure, is proposed, the Commission will determine the proper cost allocation of such measures at that time through the process set forth in our *Implementation Order* at pages 23 and 24.

**B. Red‑lined Version of Revised EE&C Plan**

Regarding the request that Allegheny be directed to file a red‑line version of its EE&C Plan revisions, we agree with the OSBA that the issue is relevant to the filing schedule in this proceeding. Considering: (1) the breadth and complexity of Allegheny’s EE&C Plan; (2) the number of changes directed by our *October 23 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 *Implementation 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 Allegheny’s revised EE&C Plan. While we also question whether this issue is in strict accord with the *Duick* standard, as this request is not opposed by Allegheny, 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. As such, we grant the OSBA’s request and require that Allegheny 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.

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# V. Conclusion

For the reasons set forth above, we will deny in part and grant 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 23, 2009, which conditionally approved the Energy Efficiency and Conservation Plan of West Penn Power Company d/b/a Allegheny Power is denied in part and granted in part, consistent with this Opinion and Order.

2. That the Order entered at this docket number on October 23, 2009, is hereby amended to require West Penn Power Company d/b/a Allegheny Power to submit to the Commission and Parties to this proceeding a red-lined version of its Energy Efficiency and Conservation Plan that reflects all 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 Allegheny for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2009- 2093218 (Order entered October 23, 2009). [↑](#footnote-ref-1)
2. The OSBA sets forth Robert D. Knecht’s testimony in OSBA St. No. 1, more fully on pages 7 and 8 of its Petition. The Commission believes that this testimony when read in its entirety is equivocal and unsubstantiated and is therefore unpersuasive. As the Commission is denying the OSBA’s Petition for Reconsideration on other grounds, any credibility or persuasiveness determinations regarding Mr. Knecht’s testimony is not essential to the outcome of the Commission’s determination of this Petition for Reconsideration. [↑](#footnote-ref-2)
3. A typographical error was made in the October 27, 2009 Order. The correct site is Section 2806.1(a)(11). [↑](#footnote-ref-3)