

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**  
Uniform Cover and Calendar Sheet

66

<b>1. REPORT DATE:</b> August 2, 2002	<b>2. BUREAU AGENDA NO.</b> AUG-2002-OSA-0245*
<b>3. BUREAU:</b> Office of Special Assistants	
<b>4. SECTION(S):</b>	<b>5. PUBLIC MEETING DATE:</b>
<b>6. APPROVED BY:</b>  Director: C.W. Davis 7-1827 Supervisor:	August 8, 2002
<b>7. PERSONS IN CHARGE:</b> R.H. Albert 7-8108	
<b>8. DOCKET NO.:</b> R-00016850C0001	

9. (a) **CAPTION** (abbreviate if more than 4 lines)

(b) Short summary of history & facts, documents & briefs  
(c) Recommendation

**DOCUMENT FOLDER**

(a) Office of Consumer Advocate (OCA) v. PPL Electric Utilities Corporation (PPL)

(b) On October 29, 2001, PPL filed a Petition to increase its State Tax Adjustment Surcharge to permit recovery of increased revenue neutral reconciliation tax liability. On November 19, 2001, the OCA filed a Complaint against the Petition. By Order entered December 21, 2001, PPL's proposed rates were permitted to go into effect, pending resolution of the OCA Complaint. On July 16, 2002, Administrative Law Judge (ALJ) Weismandel issued a Recommended Decision that recommended dismissal of the OCA Complaint. Exceptions were filed by the OCA and the PP&L Industrial Customer Alliance (PPLICA). PPL filed Replies to Exceptions.

(c) The Office of Special Assistants recommends that the Commission adopt the proposed draft Opinion and Order which denies the Exceptions of the OCA and PPLICA and adopts the Recommended Decision of the ALJ consistent with the proposed Order.

Order Doc. No. 344145v1

Calendar Doc. No. 345661v1

**10. MOTION BY:** Commissioner Chm. Thomas

Commissioner Wilson - Yes

Commissioner Fitzpatrick -

Concurring

Commissioner Pizzingrilli - Yes

**SECONDED:** Commissioner Bloom

**CONTENT OF MOTION:** Staff recommendation adopted.

Concurring Statement of Commissioner Terrance J. Fitzpatrick attached.

	PUBLIC MEETING August 8, 2002 AUG-2002-OSA-245* thru OSA-251* Docket Nos. R-000168850C0001 ✓
PPL Electric Utilities Corporation	
Pennsylvania Power Company	R-00016851C0001
Metropolitan Edison Company	R-00016852C0001
Pennsylvania Electric Company	R-00016853C0001
Duquesne Light Company	R-00016854C0001
PECO Energy Company	R-00016856C0001
West Penn Power Company	R-00016857C0001

**CONCURRING STATEMENT OF  
COMMISSIONER TERRANCE J. FITZPATRICK**

These proceedings involve the complaints filed by the Office of Consumer Advocate (OCA) against the requests of the above-named electric utilities to recover increased state tax liability pursuant to 66 Pa. C.S. §2804(16). Administrative Law Judge (ALJ) Wayne Weisman del issued Decisions in which he recommended dismissing the complaints. Exceptions were filed by certain parties, mainly OCA and groups of industrial customers. The Office of Special Assistants (OSA) now recommends that we deny these Exceptions and dismiss the Complaints. I agree with the OSA recommendations.

In my view, the ALJ and OSA are correct in concluding that the issues raised here fall outside the scope of a "single issue rate case" under 66 Pa. C.S. §2804(16). This conclusion is based upon a legal interpretation of the statute. It is unfortunate, however, that the Commission did not reach this conclusion three months ago when the legal issue was ripe for decision in the context of OCA's "Petition for Review of and Answer to a Material Question." If the Commission had addressed the legal issue then, as I argued that it should, everyone involved would have been spared the time and expense associated with the additional hearings, briefs, etc. Since the purpose of a trial-type hearing is to resolve factual issues<sup>1</sup>, and our decision in this case turns on a legal issue, the additional proceedings over the past few months have not served any useful purpose.

In the future, I hope that the Commission makes administrative efficiency a higher priority.

DATED: August 8, 2002

Terrance J. Fitzpatrick  
Terrance J. Fitzpatrick  
Commissioner

<sup>1</sup> See e.g. *Diamond Energy Company v. Pa. Public Utility Commission*, 653 A.2d 1360 (Pa. Commw. 1995).



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

KJP

IN REPLY PLEASE  
REFER TO OUR FILE

August 8, 2002

R-00016850C0001

JOHN HUSOM ESQUIRE  
MORGAN LEWIS & BOCKIUS  
417 WALNUT STREET  
HARRISBURG PA 17101

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FILED

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Office of Consumer Advocate  
v.  
PPL Electric Utilities Corporation

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on August 8, 2002 has adopted an Opinion and Order in the above-entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty  
Secretary

Enclosure  
Certified Mail  
LJM

See attached list for additional  
parties of record

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held August 8, 2002

Commissioners Present:

Glen R. Thomas, Chairman  
Robert K. Bloom, Vice Chairman  
Aaron Wilson, Jr.  
Terrance J. Fitzpatrick, Concurring Statement attached  
Kim Pizzingrilli

Office of Consumer Advocate

R-00016850C0001

v.

PPL Electric Utilities, Inc.

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission are the Exceptions filed by the Office of Consumer Advocate (OCA) and the PP&L Industrial Customer Alliance (PPLICA) to the Recommended Decision (R.D.) issued on July 16, 2002, by Administrative Law Judge (ALJ) Wayne L. Weisman. Timely Replies to Exceptions have been filed by PPL Electric Utilities, Inc. (PPL or Company).

**History of the Proceeding**

On October 29, 2001, PPL filed a Petition to increase its State Tax Adjustment Surcharge (STAS) pursuant to Section 2810 of the Public Utility Code

(Code), 66 Pa. C.S. §2810, to permit PPL to recover increased Revenue Neutral Reconciliation (RNR) tax liability. The proposed increase in rates had the effect of increasing the Company's rates above the rate cap established in Section 2804(4) of the Code, 66 Pa. C.S. §2804(4), for certain retail rate schedules.

Petitions to Intervene in this proceeding were filed by PECO Energy Company (PECO) on November 13, 2001, by the Office of Small Business Advocate (OSBA) and PPLICA on November 28, 2001 and by the Mid-Atlantic Power Suppliers Association (MAPSA) on December 7, 2001. On November 19, 2001, the OCA filed a Complaint against the Company's Petition. The Company filed an Answer to the OCA Complaint on December 5, 2001.

By Order entered December 21, 2001, we approved, as modified, the Company's Petition and rejected a settlement proposed by the Parties. In that Order, it was expressly stated that approval of the Company's rates at that time did not preclude this Commission from "considering the further issues raised" in the OCA's November 19th Complaint. (Order entered December 21, 2001 at PUC Docket No. R-00016850, p. 4). At that time, we directed that the OCA's Complaint be adjudicated within sixty days. In that Order, we also granted intervention in the Complaint proceeding by the OSBA, MAPSA, PECO, and PPLICA.

By Secretarial Letter dated January 3, 2002, we advised the Parties that the time frame for consideration of the OCA's November 19<sup>th</sup> Complaint would be extended until February 21, 2002. Also in January of 2002, the OCA and PPLICA filed Petitions for Review in the Pennsylvania Commonwealth Court seeking review of our Order of December 21, 2001. Those Petitions for Review were quashed by the Commonwealth Court on March 21, 2002, and jurisdiction was returned to this Commission.

On April 15, 2002, the OCA filed a Petition for Review of and Answer to a Material Question. That Petition was filed in response to an earlier ruling by the ALJ regarding the scope of these proceedings and related discovery requests. The ALJ had limited the scope of these proceedings to the information required to be filed by the applicant requesting RNR adjustments under 52 Pa. Code §§54.95(c), 54.97(a) and 54.97(b)(1).

By Order entered May 9, 2002, we granted, in part, the OCA's Petition (Material Question Order). Pursuant to the Material Question Order, the OCA was given latitude to explore the Company's quarterly earnings data. However, we expressly declined to rule on the relevance of such data to proceedings brought under Section 2804(16)(ii) of the Code. We also determined that the ALJ properly limited inquiries into potentially offsetting tax savings to 2001 tax savings and barred the exploration of other expense issues. The Material Question Order further provided for a litigation schedule for the proceeding.

After the receipt of written testimony and evidentiary hearings, the ALJ issued his Recommended Decision on July 16, 2002. In that Recommended Decision, the ALJ recommended a finding that the earnings data introduced by the OCA into these proceedings are not relevant to a Section 2804(16)(ii) proceeding. The ALJ also recommended an over-all determination that the record before him was insufficient to justify altering this Commission's previous determination that the rates proposed by the Company are just and reasonable. Accordingly, the ALJ dismissed the OCA's November 19, 2001 Complaint.

Timely Exceptions were filed by the OCA and PPLICA. Replies to Exceptions were filed by PPL on July 30, 2002.

## Discussion

We note that we are not required to consider expressly or at great length each and every Exception raised by a party to a proceeding. *University of Pa. v. Pa. P.U.C.*, 86 Pa. 410, 485 A.2d 1217, 1222 (1984). Any Exception or argument that has not been specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

Prior to addressing the specific Exceptions of the OCA and PPLICA, it will be helpful to quote the Public Utility Code section which is at the heart of this proceeding. Section 2804(16)(ii) of the Code provides as follows:

### Section 2804. Standards for restructuring of the electric industry

The following interdependent standards shall govern the commission's assessment and approval of each public utility's restructuring plan, oversight of the transition process and regulation of the restructured electric utility industry:

\* \* \* \* \*

(16) The following shall apply:

\* \* \* \* \*

- (ii) With regard to any portion of the change in an electric distribution company's tax liability under section 2810 [relating to RNR] which would cause it to exceed the rate cap, the electric distribution company may file a single issue rate proceeding under section 1308(a) to recover that amount. The commission shall adjudicate, within 60 days, whether the resulting rates are just and reasonable.

Section 2810 of the Code provides for “revenue-neutral reconciliation” which is known as “RNR.” As noted by the Parties and the ALJ in this action, PPL’s RNR filing is one of several filings by electric distribution companies (EDCs). This is the *first series of these proceedings to come before the Commission under Section 2804(16)(ii) of the Code.*

The General Assembly has expressed its intent with regard to the RNR process in Section 2810(a) of the Code which reads as follows:

It is the intention of the General Assembly that the restructuring of the electric industry be accomplished in a manner that allows Pennsylvania to enjoy the benefits of competition, promotes the competitiveness of Pennsylvania’s electric utilities and maintains revenue neutrality to the Commonwealth. This section is not intended to cause a shift in *proportional tax obligations among customer classes or individual electric companies.* It is the intention of the General Assembly to establish this revenue replacement at a level necessary to recoup losses that may result from the restructuring of the electric industry and the transition thereto.

As we review the Exceptions of the Parties and the Recommended Decision, the foregoing legislative intent must be kept in mind. We read this intent as a fairly simple concept. The proportionate tax obligations of the electric distribution utilities will not change as a result of the advent of competition into the energy industry. Similarly, the rate caps in place pursuant to Chapter 28 of the Code may be adjusted, when necessary, pursuant to Section 2804(16) to ensure that electric distribution utilities collect appropriate revenues, through rates, to satisfy their state tax obligations as set forth in Section 2810.

While the OCA and PPLICA have each filed Exceptions, the PPLICA Exceptions mirror the OCA's first, second and fourth Exceptions. We will review PPLICA's Exceptions in conjunction with our discussion of those of the OCA.

### **OCA Exception No. 1, PPLICA Exception No. 3**

The OCA's first Exception cites error in the standard used by the ALJ. According to the OCA, the ALJ erred by using a standard limited to a review of the information that is required to be provided under 52 Pa. Code §§54.95(c) (relating to recovery of RNR tax liability), 54.97(a) (calculation of surcharge related to RNR tax liability) and 54.97(b) (relating to STAS filings). The OCA argues that the ALJ engaged in a simple computational review which resulted in an automatic pass-through of calculated tax liability. The OCA states that this analysis ignores the express language of the Code and fails to give meaning to all the words of the statute. (OCA Exc., p. 5).

To support its argument, the OCA describes Section 2804(16) of the Code as a three-part provision. Section 2804(16)(i) governs RNR recovery that does not cause an EDC to exceed the rate cap. The OCA places significance on the fact that Section 2804(16)(i) does not require an EDC to file a single-issue rate case or mandate a specific adjudication regarding the justness and reasonableness of the RNR charge. Also, the OCA notes that Section 2808(16)(i) references the STAS regulations when addressing a utility's ability to increase rates up to the level of its rate cap. (*Id.*, pp. 5-6).

The OCA contrasts Section 2804(16)(i) with Section 2804(16)(ii) and noted that the latter Section does not permit an EDC to utilize an automatic adjustment clause such as the STAS or Section 1307 when RNR recovery would move an EDC above its rate cap. Section 2804(16)(ii) requires this Commission to adjudicate whether the

resulting rates above the rate cap are just and reasonable. The OCA finds that the absence of any reference to the STAS provisions is notable. (OCA Exc., pp. 6-7).

The OCA next examines Section 2804(16)(iii) which relates to the obligation of an EDC to remit taxes for retail customers if a retail customer's electric generation supplier (EGS) fails to pay the tax. In that Section, the OCA points out that if the EDC has pursued all indemnification measures called for by the Code, it may seek recovery of its resulting tax liability without filing a single-issue rate proceeding. According to the OCA, the distinction between the Sections which do not require a single-issue rate proceeding and the one that does is significant. (*Id.*, p. 7).

The OCA points out that there is no requirement for a single-issue rate proceeding and a just and reasonable adjudication when an EDC does not propose to move above the rate cap or is recovering liability stemming from tax indemnification. The single issue rate case and just and reasonable determination is required only when an EDC proposes to increase rates above the rate cap without incurring the liability for indemnification. The OCA argues that the difference in treatment is meaningful and clearly shows that the General Assembly did not intend that RNR recovery, above the rate cap, was meant to be a simple flow through exercise. (OCA Exc., pp. 7-8).

The OCA states that the rules of statutory construction require that the Code be "interpreted to give meaning to the language of the Act and to recognize these distinctions in the Act so that the intent of the General Assembly is properly carried out." According to the OCA, if we permit the Company to increase rates above the rate cap based upon compliance with our regulations at 52 Pa. Code §§54.95(c), 54.97(a) and 54.97(b), we will have eliminated the statutory language calling for a single issue rate proceeding and an adjudication of the resulting rates as just and reasonable. (*Id.*, p. 8).

PPLICA offers an abbreviated version of the OCA reasoning in its third Exception. According to PPLICA, the ALJ determined that PPL's proposed rates were just and reasonable merely because he determined that they were known and measurable. PPLICA argues that a just and reasonable determination requires an examination of a utility's rate of return. (PPLICA Exc., pp. 6-7).

### **PPL's Reply**

In PPL's response, the Company argues that the OCA has mischaracterized the ALJ's recommended ruling in this case. The Company asserts that the ALJ did not merely allow an automatic pass-through of PPL's increased RNR taxes. Instead, PPL states that the ALJ relied upon three separate points in his recommendation. First, he determined that PPL had demonstrated that the proposed rates would accurately recover PPL's increased RNR tax liability. Second, he found that it was proper for PPL to recover its increased RNR tax liability through the STAS mechanism. Third, the ALJ found that the proposed rate increase would only serve to recover the increased RNR tax liability, not add to earnings. (PPL R.Exc., p. 5).

PPL also argues that the ALJ gave proper recognition to the differences in statutory treatment of RNR recovery above and below the rate cap. In addition, PPL argues that the OCA's view of this case moves far beyond single issue ratemaking as mandated by Section 2804(16)(ii) of the Code. PPL states that in Pennsylvania rate-making, a single issue proceeding is one that allows for recovery of a single, line item expense, citing *Pennsylvania Industrial Energy Coalition v. Pa. PUC*, 653 A.2d 1336, 1349-50 (Pa. Cmwlth. 1995) and *National Fuel Gas Distribution Corp. v. Pa.PUC*, 464 A.2d 546, 567 (1983). By insisting that this case include consideration of both earnings and historical tax expenses, PPL argues that the OCA is attempting to move this case away from the single issue proceeding envisioned by the statute. (*Id.*, pp. 5, 6).

## Disposition

We will deny both the OCA's first Exception and PPLICA's third Exception. We agree with the ALJ's reasoning on the appropriate standard to be applied in this proceeding. As noted by the ALJ, Section 2804(16)(ii) provides for the limited scope of this proceeding.

The OCA's first Exception is an introduction for the Exceptions that follow which relate to consideration of rate of return and offsetting tax savings. This first Exception stresses the OCA's argument that the ALJ has failed to properly use a "just and reasonable" standard as required by the Section 2804(16)(ii) by engaging in a pass-through type of analysis. (OCA Exc., p. 5).

At page 12 of the Recommended Decision, the ALJ stated the following:

The proceeding contemplated by the applicable statutory provisions is of limited and narrowly focused scope. Any non-general rate case is less sweeping in issues to be considered than a general rate case. *Cf., Popowsky v. PA PUC*, 683 A.2d 958 (Pa. Cmwlth. 1996), *cert. denied*, 543 Pa. 733, 673 A.2d 338 (1996). A single issue rate proceeding is the most strictly limited type of a non-general rate case.

The ALJ observed that this Commission possesses a great deal of flexibility in our ratemaking function. The ALJ quoted *Popowsky v. Pa.PUC*, 542 Pa. 99, 665 A.2d 808 (1995) as follows:

In determining just and reasonable rates, the PUC has discretion to determine the proper balance between interests of rate-payers and utilities. *Pennsylvania Public Utility*

*Commission v. Philadelphia Electric Co.*, 522 Pa. 338, 342-43, 561 A.2d 1224 (1989). As this Court stated in *Pennsylvania Public Utility Commission v. Pennsylvania Gas and Water Co.*, 492 Pa. 326, 337, 424 A.2d 1213, 1219 (1980), *cert. denied*, 454 U.S. 824, 102 S.Ct. 112, 70 L.Ed.2d 97 (1981),

There is ample authority for the proposition that the power to fix “just and reasonable” rates imports a flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and that the term “just and reasonable” was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formulation but rather to confer upon the regulatory body the power to make and apply policy concerning the appropriate balance between prices charged to utility customers and returns on capital to utility investors consonant with constitutional protections applicable to both.

*Popowsky*, 542 Pa. 99, 107-108, 665 A.2d 808, 812.

From the foregoing, it is clear that we are not restricted to a single, formulaic exercise when we pursue our ratemaking function. Clearly, the OCA and PPLICA are challenging the meaning of a single issue rate case as that term is used in Section 2804(16)(ii). We will address the OCA’s and PPLICA’s specific arguments regarding rate of return and offsetting tax liabilities below. However in the context of the OCA’s and PPLICA’s Exception on this point, their arguments clearly push for more than a single issue rate proceeding. The approach taken by the ALJ in this case was appropriate and conformed to the statutory guidelines for this proceeding as expressed in Section 2804(16)(ii) of the Code.

## OCA Exception No. 2, PPLICA Exception No. 2

The OCA's second Exception argues that the ALJ erred when he refused to examine offsetting tax savings which have occurred since the rate caps were established. In his Recommended Decision, the ALJ only permitted an examination of those changes which occurred for 2001. According to the OCA, the ALJ concluded "that changes in actual taxes paid have either flowed through in prior year STAS adjustments or were otherwise irrelevant." (OCA Exc., p. 8).

The OCA begins its discussion of this Exception by pointing out that the RNR is designed to "keep the Commonwealth's tax revenue whole as restructuring was implemented in the Commonwealth." (OCA Exc., p. 9). The RNR baseline was established based upon actual cash payments of taxes by electric distribution utilities for the 1995-1996 tax year "with the intent that this tax revenue level, adjusted for load growth, be maintained." (*Id.*). However, the OCA argues that there could be many changes in the actual state taxes paid by an EDC from the time when the rate caps were established or since the Electricity Generation Customer Choice and Competition Act (Act), 66 Pa.C.S. §§2801, et seq., was enacted. Despite those changes in actual taxes paid, the OCA asserts that those changes may not have been reflected in STAS adjustments because STAS adjustments relate to tax rates, not taxes paid. Thus, the OCA argues that to the extent the ALJ relied on a theory that STAS adjustments would have reflected prior tax changes, the Recommended Decision is incorrect. (OCA Exc., p. 9).

According to the OCA, in order to determine whether an increase above the rate cap is warranted, it is necessary to consider all changes in state tax liability since the Act went into effect. The OCA states that the rate caps set under the Act reflected all state taxes paid by the EDCs when the caps were established. Since those rate caps reflected all state taxes paid, the OCA argues that a single-issue rate proceeding designed

to determine whether the rate caps should be adjusted for taxes must include an analysis of the changes in all state taxes, not just the RNR tax. (OCA Exc., p. 10).

The OCA cites to *Popowsky v. Pa. PUC*, 683 A.2d 958 (Pa. Cmwlth 1996) (*Equitable*) for the proposition that a single issue rate case involving taxes should consider more than just the tax involved. In *Equitable*, the OCA states that the Commonwealth Court upheld a Commission decision which approved a rate increase for Equitable Gas Company solely to recover an increase in SFAS expense because we had also considered offsetting savings and Equitable's rate of return. The OCA argues that *Equitable* supports its position here because we considered "all savings in health care costs and other post employment expenses, and not just changes in the SFAS 106 expense when considering the single issue." (OCA Exc., pp. 10-11).

The OCA also argues that the magnitude of the changes in actual taxes paid by the EDCs is relevant. Although the OCA does not reference changes in PPL's liability, it describes reductions in state taxes paid by Metropolitan Edison, Pennsylvania Electric Company and Duquesne Light Company as examples of companies that have experienced significant reductions in taxes paid. The OCA then reiterates its concern that not all of those tax reductions have flowed through to rate payers in prior year STAS adjustments because they have not all been the result of changes in tax rates. (*Id.*, p. 11).

According to the OCA, if this issue is restricted to mathematical computations of RNR tax changes, there is no need for a single issue rate proceeding or a just and reasonable determination as set required by the statute. If that were the intent of the General Assembly, the OCA argues that there would be no distinction for RNR changes resulting in rates above the rate cap and rates within the rate cap. (OCA Exc., pp. 11-12).

In its last point under this Exception, the OCA argues that the ALJ erred in concluding that even if offsetting tax savings were to be considered, the STAS mechanism would have already flowed those savings through to ratepayers. The OCA notes that the ALJ correctly determined that the STAS mechanism is intended to permit an EDC to recover increased tax expenses that result from tax law changes which occur between base rate cases. However, the OCA asserts that the ALJ erred by failing to recognize that EDC taxes are driven not only by tax rates (which are picked up by STAS adjustments), but also by changes in the tax base on which the tax rate is applied. The STAS does not reconcile to actual taxes paid; it only goes to whether an EDC has collected its prior estimate of tax liability. Accordingly, the OCA argues that the STAS mechanism is not designed to and has not reconciled to actual taxes paid and, therefore, will not have acted to flow through offsetting tax savings to ratepayers as suggested by the ALJ. (OCA Exc., pp. 12-14).

PPLICA echoes the OCA's argument that the ALJ has erroneously relied upon STAS adjustments as a means for offsetting tax savings to have flowed through to consumers. PPLICA notes that the tax offsets it argues for involve taxes paid. STAS reconciliations merely reflect tax rates. According to PPLICA, the single issue rate proceeding should encompass all changes in an EDC's state tax liability. (PPLICA Exc., p. 6).

### **PPL's Reply**

PPL rejoins that the OCA's argument on this point violates the statute's requirement that this proceeding encompass a single issue (RNR tax liability), is factually flawed and constitutes unlawful retroactive ratemaking. PPL asserts that the single issue in any Section 2804(16)(ii) proceeding is that amount of RNR tax liability which causes

rates to exceed the rate cap. Accordingly, inquiries into any other areas of a utility's overall rate are outside of that issue.

PPL states that the RNR tax is a tax on gross receipts imposed by Section 2810 of the Code. That tax, according to PPL, is separate and distinct from all other taxes imposed on EDCs. PPL argues that although the RNR tax is calculated based upon, *inter-alia*, tax revenues from five other state taxes, the RNR tax is a separate tax. The single issue contemplated by Section 2804(16)(ii) is the RNR tax liability, not an all encompassing foray into the entirety of an EDC's state tax liability portfolio.

PPL also asserts that while the OCA argues that the claimed RNR tax increase should be offset by the amount of taxes paid, this is based upon a mistaken assumption that PPL's rates were based upon a test year which included actual taxes paid. According to PPL, there is no identified amount of state tax expense recovered through PPL's generation rates. Further, those rates were derived through a settlement and were based on market prices, not cost of service. PPL argues that it would be improper to engage in an off-set exercise because there is no specific amount of state tax identified in PPL's rates. (PPL R.Exc., pp. 8, 9).

PPL also points out that acceptance of the OCA's position would place it and other EDCs in a position never intended by the statute. Taxes are heavily dependent on earnings. If an EDC's current earnings were poor, it would not pay substantial corporate net income tax. Carrying the OCA's argument to its logical conclusion, PPL argues that a utility could be denied Section 2804(16)(ii) recovery at the very time it was most needed. (*Id.*, p. 10).

PPL responds to the OCA's reference to *Equitable* as standing for the proposition that a single issue rate proceeding can reference several different aspects of a single question. According to PPL, *Equitable* was a multi-issue case. In that case, PPL

asserts that one of the principal issues in *Equitable* involved Equitable's OPEB expenses. However, the Commission examined expenses that were clearly unrelated to OPEBs. (PPL R.Exc., p. 11).

### **Disposition**

In our Material Order, we ruled that only evidence concerning contemporaneous tax savings would be considered. (Material Order, p. 9). Based upon our view of the record and the arguments of the Parties, as well as Section 2804(16)(ii) of the Code, it is clear that a review of other years' taxes would take this proceeding far beyond the limited, single issue proceeding envisioned. We also agree with the ALJ that the 60 day time frame established by the statute provides guidance on the scope of this proceeding.

The ALJ is correct that this is a narrowly focused, single issue proceeding. PPL is also correct when it states that the RNR tax liability is a separately imposed tax on EDCs. In the words of the ALJ, if a general, base rate case calls for a searchlight, and a general multi-issue case requires a flashlight, a Section 2804(16)(ii) case uses a laser. (R.D., p. 12). The focus of this case is the Company's RNR tax liability as set forth in Section 2810, and that portion of PPL's rate request for RNR liability recovery which brings the Company's rates above the rate cap. The analysis required to adjudicate that limited tax liability does not encompass the host of tax issues that the OCA and PPLICA seek to raise.

We also are mindful of the 60-day time frame established by Section 2804(16)(ii). The host of issues which the OCA and PPLICA seek to raise in the context of prior tax savings, together with the rate of return claims, are wide ranging and complex. Tax issues and the appropriate recovery of taxes in utility rates can be among

the more complex matters which come before this Commission. Had the General Assembly intended the broad and far ranging type of inquiry urged by the OCA and PPLICA here, it would not have established such an abbreviated schedule by statute, together with the limitation that the proceeding focus on a single issue.

For the foregoing reasons, the OCA's second Exception and PPLICA's second Exception are denied.

### **OCA Exception No. 3**

The OCA argues in its third Exception that the ALJ erred when he concluded that the STAS mechanism was an appropriate mechanism for recovery of costs above the rate cap. Again, the OCA points to the different treatment afforded recovery of RNR changes which result in rates above the rate cap and changes which result in rates below the rate cap. According to the OCA, while the statute provides for use of the STAS mechanism for recovery of amounts which fall below the rate cap, no such treatment is expressed for matters falling above the rate cap under Section 2804(16)(ii). Thus, the OCA argues that there is no support in the Act for using the STAS mechanism in this instance. (OCA Exc., pp. 14, 15).

The OCA also argues that the ALJ erred when he determined that "a rate resulting from the STAS is automatically just and reasonable..." (OCA Exc., p. 15). The OCA points to the Policy Statement at 52 Pa. Code §69.52(E) which provides that surcharges which come into effect under the STAS mechanism are not to be deemed Commission made rates. Thus, according to the OCA, the STAS mechanism cannot be deemed to automatically produce just and reasonable rates according to the Policy Statement which implemented the STAS mechanism. Notwithstanding this limitation, the OCA complains that the ALJ has reached this precise conclusion. (*Id.*).

## **PPL Reply**

The Company responds to this Exception first by asserting that the OCA has raised this argument for the first time through Exceptions, and, therefore, has waived it. In addition, the Company notes that nothing in the Public Utility Code, including Section 2804(16)(ii), precludes use of the STAS mechanism for the recovery of RNR tax liability. The Company notes that our regulations at 52 Pa. Code §54.97(a) specifically provides for recovery of increases in RNR through an EDC's STAS mechanism. (PPL R.Exc., p. 12).

## **Disposition**

We agree with the ALJ that the STAS mechanism is an appropriate vehicle for recovery of increases in RNR liability and deny this Exception. Our regulations at 52 Pa. Code §54.97(a) expressly provide for recovery of increases in RNR taxes through the STAS mechanism. As discussed by the ALJ, the STAS mechanism is used to provide a means for utilities to collect increased tax expenses in rates which are the result of tax-law changes which occur between base rate cases. (R.D., p. 20).

To the extent that the OCA argues that the STAS mechanism does not lend itself to an examination of underlying, base rate case type issues, we again are guided by Section 2804(16)(ii)'s single-issue rate proceeding limitation as well as the 60-day time frame.

Our regulations at 52 Pa. Code §§ 54.95 and 54.97 were expressly designed to set forth the procedure by which EDCs subject to Section 2804(16) of the Code may seek rate adjustments to address increases in tax liability, including increases to the RNR

tax. (52 Pa. Code §54.91). At 52 Pa. Code §54.95(c)(3), it is specifically contemplated that an EDC will use a surcharge mechanism to recover its RNR tax liability. From the foregoing, it should come as no surprise that the STAS mechanism has been considered available for these types of cases.

The OCA is correct that STAS involves tax rates, not necessarily actual taxes paid. We are also mindful that our Policy Statement at 52 Pa. Code §69.52(E) contains the caveat noted by the OCA. However, neither of these two points invalidates the use of the STAS mechanism as a means for an EDC to adjust rates to reflect increases in its RNR liability. Simply put, the concerns of the OCA go to a base rate case analysis. The RNR recovery procedures set forth in Section 2804(16)(ii) of the Code as well as our regulations are designed for a single-issue rate proceeding which permits an EDC to properly recover RNR increases through rates. The STAS is an effective and appropriate mechanism to accomplish that task in between base rate cases. The OCA's third Exception is denied.

#### **OCA Exception No. 4; PPLICA Exception No. 1**

In its fourth Exception, the OCA argues that the ALJ erred when he determined that an EDC's rate of return is irrelevant in a single issue rate proceeding. The OCA asserts that this finding by the ALJ is inconsistent with the plain meaning of just and reasonable rates. Since Section 2804(16)(ii) expressly requires a finding that RNR adjustments resulting in rates above the rate cap must result in rates which are just and reasonable, the OCA argues that the issue of rate of return is extremely relevant in this proceeding. (OCA Exc., p. 16).

The OCA first assigns error in the ALJ's distinction between "earnings" and "return on equity." The OCA notes that counsel for several EDCs explained that

return on equity is merely an EDC's earnings expressed as a percentage of its rate base. Thus, to the extent the ALJ struggled to differentiate between "earnings" on the one hand, and "rate of return" on the other, that effort was not meaningful in determining whether "earnings" or "rate of return" was significant in a just and reasonable rate determination. (OCA Exc., p. 16-18).

What would have been meaningful, according to the OCA, is for the ALJ to have concluded that a determination that a rate is "just and reasonable" includes an examination of a utility's rate of return. The OCA cites to the rules of statutory construction at 1 Pa. C.S. §1903 which requires that words and phrases are to be construed according to their common and approved usage. As viewed by the OCA, the phrase "just and reasonable" has a specific meaning that has been established by many years of case law.

The OCA cites to several cases which it claims firmly establish that a determination that a rate is just and reasonable mandates an examination of a utility's rate of return. In *Pennsylvania Petroleum Association v. Pennsylvania Power & Light Company*, 488 Pa. 308, 412 A.2d 522 (1980), the Pennsylvania Supreme Court held: "Public utility rates must be 'just and reasonable.' ...A 'just and reasonable' rate means a rate that will give a utility a fair return." (Citation omitted, 488 Pa. at 310-11, 412 A.2d at 523-24). The OCA also cites to *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission*, 464 A.2d 546 (Pa. Cmwlth. 1983), which held that: "A determination that a utility's rates are unjust or unreasonable usually rests on a factual finding that the imposition of those rates unreasonably benefits the utility's investors at the expense of the utility's ratepayers." (*Id.*). (OCA Exc., pp. 18-19).

In arguing that rate of return is a necessary component of “just and reasonable” rates, the OCA also cites to one of our previous decisions in *Leaman v. GTE North Incorporated*, 1994 Pa. PUC LEXIS 90. In *Leaman*, we stated:

The Public Utility Code requires all utility rates to be “just and reasonable.” The Supreme Court of Pennsylvania has interpreted the phrase “just and reasonable.” A “just and reasonable” rate means a rate that will give the utility a fair rate of return. Thus, determining whether a telephone company’s rates are “just and reasonable” requires determining whether the telephone company’s rates are producing a fair rate of return. *Leaman* presented no financial information regarding GTE’s rate of return on its Pennsylvania intrastate rates.

The foregoing quote from our *Leaman* order is stated by the OCA to clearly establish that a just and reasonable determination must include an analysis of a utility’s rate of return. (OCA Exc., pp. 17-19).

The OCA also argues that the filing requirements for a Section 1308(a) proceeding as well as this Commission’s Order setting forth the information requirements for RNR filings clearly envision a rate of return examination. In the proceeding which established the filing requirements for a Section 2804(16)(ii) proceeding, the OCA submitted comments recommending that the Commission require an EDC to file an income statement and earnings information. The OCA notes that we determined not to impose such a requirement specifically for the RNR filing because EDCs must provide detailed quarterly earnings reports which include an income statement and rate base calculations. Thus, we had determined that such information would already be available, not that it was irrelevant. (OCA Exc., pp. 21-22).

Similarly, the OCA argues that our regulations at 52 Pa. Code §54.95(a) provides that an EDC proposing to increase its rates pursuant to Section 2804(16)(ii) of

the Code shall file a single issue rate proceeding under Section 1308(a) of the Code. According to the OCA, our regulations also provide for certain mandatory information to be included in a filing under Section 1308(a). Our regulations at 52 Pa. Code §53.52 (c) expressly provide that when utilities propose rates which represent increases over certain thresholds in a Section 1308(a) proceeding, an income statement, balance sheet and earnings information must be included with the filing. The OCA reads this requirement as further evidence that the Commission will consider rate of return information in any proceeding where a just and reasonable rate determination must be made. (OCA Exc., pp. 22-23).

Turning to the ALJ's determination that earnings or rate of return is irrelevant, the OCA assigns error on several grounds. The OCA notes that the ALJ referenced Section 2804(4)(iii) of the Code which expressly requires that the Commission consider rate of return before permitting an EDC to exceed its rate cap. The ALJ noted that Section 2804(16)(ii) does not contain a similar requirement. According to the OCA, that difference is of no moment. The OCA reiterates its argument that the just and reasonable requirement in Section 2804(16)(ii) necessarily includes a consideration of rate of return under Pennsylvania law. As the OCA sees it, a Section 2804(4)(iii) analysis takes into consideration "what is fair under all of the circumstances of the Act. *Under Section 2804(16)(ii), the analysis is more akin to a determination of just and reasonable rates within the context of a traditional base rate case.*" (OCA Exc., p. 25, emphasis added).

Second, the OCA states that the ALJ concluded that since taxes are remitted to the government, there is no impact on earnings if the EDC is permitted to collect the taxes. The OCA repeats its arguments that the STAS mechanism relates to the rate of taxation, not taxes paid. Thus, to the extent that taxes are over or undercollected in relation to actual taxes paid, that disparity will have an effect on earnings and, thereby,

the EDC's rate of return. Again the OCA notes that the STAS mechanism is merely intended to address tax rate changes between base rate cases; it does not capture changes in taxes since the time when rates are set. (*Id.*).

According to the OCA, the ALJ concluded that the rates currently charged have been established as just and reasonable. Since the ALJ viewed taxes collected through STAS to be pass-throughs without an impact on earnings, he determined that the resulting rates remain, *prima facie*, just and reasonable. (OCA Exc., p. 25). However, the OCA argues that the question is not whether just and reasonable rates remain just and reasonable, the question is whether increasing those rates to exceed the rate cap result in rates that are just and reasonable. (*Id.*, pp. 25-26).

The OCA again asserts that the ALJ's interpretation of Section 2804(16)(ii) standards reduces the RNR increase to a simple pass-through with no review. However, the OCA points out that if that had been the intent of the General Assembly, it would have treated these types of cases the same way it treated RNR increases which remained below the rate cap. The OCA argues that by requiring that the Commission engage in a just and reasonable determination in these types of proceedings, the General Assembly intended these matters to be treated differently. That includes an examination of rate of return according to the OCA. (*Id.*).

The OCA also argues that the ALJ considered the 60-day time frame for these types of cases to be significant. In his Recommended Decision, the ALJ discussed the abbreviated 60-day time frame set forth in the statute and found that time frame to dictate a much narrower review than that suggested by the OCA. However, the OCA points out that it presented testimony which developed a methodology for considering rate of return which could easily have been accomplished within the mandated time. In addition, the OCA noted the ALJ's concern that the RNR filing timelines mandated that

all electric utilities would file for rate cap exception at the same time. However, the OCA argues that not all EDCs would experience RNR changes which would bring their rates above the rate cap. (OCA Exc., p. 26).

PPLICA argues the same essential theories in its first Exception that are expressed by the OCA and summarized above. (PPLICA Exc., pp. 4-6).

### **PPL Reply**

PPL argues that there is nothing in the phrase “just and reasonable” which requires a rate of return analysis. PPL states that our ratemaking authority is broad and far-ranging, and observes that we have set rates on an operating ratio methodology. That methodology does not use a rate of return analysis. The Company points out that when our authority to set rates on an operating ratio methodology was challenged, the Pennsylvania Commonwealth Court found that we could use any method for setting a utility’s rates as long as there was a rational basis for that methodology. (PPL R.Exc., pp. 12, 13).

PPL refers to our process under Section 1318(a) of the Code by which we provide for recovery of purchased gas costs. As noted by PPL, rates developed under that Section must be just and reasonable, and yet our examination is based upon a least cost fuel procurement policy, not a rate of return analysis. (*Id.*).

The Company also responds to the OCA’s argument that the requirements of our regulations at 52 Pa. Code §§53.51 and 53.52 must be followed since this case arises under Section 1308(a) of the Code. The Company argues that our regulations at 52 Pa. Code 54.95 provide the specific filing requirements for RNR filings. Had our

intent been to also include the regulations cited by the OCA, the Company asserts that we would have stated that. (PPL R.Exc., pp. 15, 16).

The Company also states that a rate of return analysis is expressly included in other rate cap exceptions in the Code, but not for Section 2804(16)(ii) proceedings. The General Assembly expressly required that the Commission consider rate of return for cases arising under Section 2804(4)(iii)(c) of the Code, yet not Section 2804(16)(ii). According to the Company, the General Assembly clearly knew how to require a rate of return analysis had it wished to. It did not. (*Id.*, pp. 16, 17).

PPL points out that collection of the increased RNR liability will occur on a dollar-for-dollar basis and all money collected will be used to pay taxes imposed by the Commonwealth. Accordingly, recovery of the increased RNR liability will have no effect on PPL's earnings. Also, PPL argues that because its increased revenue will equal its increased RNR liability, the resulting rates are just and reasonable because they will not over or under recover RNR tax liability. (PPL R.Exc., p. 17).

Finally, PPL asserts that the 60-day time frame for this proceeding clearly impacts on whether the General Assembly intended to require a rate of return analysis or not. PPL states:

As anyone who has been through a general rate case process, even for a single utility, understands, completing the process within 60 days is not feasible (PPL Electric St. No. 1-R, p. 6). A full and fair rate or [sic] return analysis requires that experts be retained by each party, that discovery requests be processed for each side, that each side have at least one

opportunity to present testimony and at least one opportunity to cross examine the opponent's expert.

(PPL R.Exc., p. 17).

PPL also responds to the OCA's suggestion that a rate of return analysis can be performed by reference to Chapter 71 Financial Reports. The Company argues that those reports are not derived from a full, comprehensive analysis of a company's operations prepared for ratemaking purposes. (PPL R.Exc., p. 18).

### **Disposition**

Again, the OCA and PPLICA ignore the plain meaning of Section 2804(16)(ii) and attempt to engage in a general rate case type of review. That Section clearly provides for a much narrower inquiry than the OCA and PPLICA would prefer. Quite simply, a single issue proceeding, designed to be filed, argued and concluded within 60 days, is not meant to include a rate of return analysis.

We find that the ALJ was correct in his assessment of this issue. He stated, in pertinent part, as follows:

Examining respondent's rate of return to determine if rate caps should be allowed to be exceeded is certainly legitimate, but the proceeding would not be a single issue rate case! The legislature drew this distinction and it cannot be ignored. Only 66 Pa.C.S. §2804(4)(iii)(G), speaking through 66 Pa.C.S. §2804(16)(ii), directs that the proceeding be a "single issue rate proceeding." The other statutory provisions, 66 Pa.C.S. §§2804(4)(iii)(A), (C), (D), and (F), do not contain the phrase "single issue rate proceeding" for the simple reason that examining whether a rate of return is or is not "fair" encompasses many issues. As the Commission is without authority to change the statutory provisions, in order to

maintain the proceeding called for by 66 Pa.C.S. §2804(16)(ii) as “a single issue rate proceeding” an examination of respondent’s earnings must be ruled irrelevant.

(R.D., pp. 15-16).

As recognized by the ALJ, there is a clear distinction between Section 2804(4)(iii)(C) of the Code governing other increases in Federal or State tax rates and the language contained in Section 2804(16)(ii). Specifically, other requests by EDCs for rate cap relief due to tax increases under Section 2804(4)(iii)(C), are required to be accompanied by a showing that absent relief, the utility will be deprived of an opportunity to earn a fair rate of return. However, changes under Section 2810 (relating to RNR) fall within Section 2804(4)(iii)(G), a completely separate category under the rate cap exceptions, which then refers to Section 2804(16) for the specific procedures that must be followed. No similar burden of proof of demonstrating that the relief is needed to allow the utility to earn a fair rate of return is included in Section 2804(16). Based upon this distinction between these two categories of rate cap exceptions, we are satisfied that the Company need not demonstrate that the ability to earn a fair rate of return will be compromised if it is not permitted to recover increases in RNR tax liability.

We also agree with the Company’s analysis which provides several examples of “just and reasonable” rates which are set without engaging in a rate of return analysis. The comparison to purchased gas costs is an apt one as is the reference to operating ratio ratemaking. The OCA’s argument that “just and reasonable” necessarily includes a rate of return analysis is simply incorrect. *Popowsky v. Pa.PUC*, 674 A.2d 1149 (Pa. Cmwlth. 1996) (use of an operating ratio which does not include rate of return is permitted). This is further buttressed by the clear legislative intent as expressed in Section 2810(a) of the Code that the RNR tax is intended to maintain existing, proportionate tax liabilities regardless of the advent of competition. That intent provides

a rational basis for this Commission to make a “just and reasonable” determination of an EDC’s RNR filing without engaging in a complex and time consuming rate of return analysis.

The ALJ also expressed concerns about whether the 60 day time frame lends itself to a rate of return analysis. The ALJ compared this time frame to the six month suspension period, plus three additional months pending decision for a non-general rate case brought under Section 1308(b) of the Code. The ALJ noted that the Company as well as eight other jurisdictional electric utility companies using STAS must make simultaneous filings due to the timing of RNR rate announcements and the period within which RNR rate petitions must be filed. Each of those companies must have their rate proceedings determined within substantially the same time period. According to the ALJ, this serves to emphasize the extremely narrow and limited scope contemplated for these types of proceedings. (R.D., p. 16). We agree with the ALJ on this point as well. The time frame imposed on these cases clearly does not permit a rate of return analysis.

Above, we quoted a portion of the OCA’s Exception on this point. It bears repeating here. The OCA stated: “Under Section 2804(16)(ii), the analysis is more akin to a determination of just and reasonable rates within the context of a traditional base rate case.” (OCA Exc., p. 25). It is understandable that the OCA takes that position. However, it is contrary to the intent of the General Assembly as expressed in Section 2810(a) of the Code and as that intent is carried out in Section 2804(16)(ii). The OCA’s fourth Exception and PPLICA’s first Exception are denied.

#### **OCA Exception No. 5**

In this Exception, the OCA asserts that the ALJ erred when he criticized the OCA for failing to introduce earnings information from prior points in time. The OCA

argues that OCA Exhibit 1 is the Commission's Bureau of Fixed Utility Services' Quarterly Earnings Report for the Period Ending December 31, 2001. According to the OCA, this Exhibit contains a summary of the reported return on equity for each EDC from 1993 to the present. The OCA notes that the ALJ questioned the relationship between earnings and return on equity. However, the Quarterly Earnings Report presents that information in terms of each EDC's actual return on equity. (OCA Exc., pp. 27-28).

The OCA states that while a more detailed review of prior period returns on equity or earnings may have been useful in this proceeding, such a review is not necessary for the determinations to be made here. The OCA argues that the calendar 2001 equity return it used in this case is appropriate to assess the Company's current earnings adequacy. The OCA further argues that use of its OCA Exhibit 1, together with the methodology it presented in this case, is adequate for purposes of determining whether or not the Company's current return on equity supports a determination that the resulting rates are just and reasonable. (*Id.*).

### **Disposition**

Given our earlier determination that a rate of return analysis is not mandated in this proceeding, this Exception is moot. We note parenthetically that the Bureau of Fixed Utility Services Reports relied upon by the OCA in its analysis were not developed for ratemaking purposes.

### **OCA Exception No. 6**

The OCA reiterates its disagreement with the ALJ's conclusion that a 60-day time frame for resolution necessarily restricts the scope of this case. Noting the ALJ's concerns regarding the time needed for a typical rate of return review, the OCA

argues that it has presented a methodology for such a review that can be accomplished within the time frame provided by the statute. The OCA argues that use of its methodology (or one like it) is necessary for the Commission to arrive at a just and reasonable determination. (OCA Exc., p. 28).

The OCA asserts that using publicly available information, its witness was able to establish a cost of common equity range of 8.5 percent to 10.4 percent for determining whether a requested rate increase above the rate cap would produce just and reasonable rates. According to the OCA, we could establish a minimum benchmark cost of equity value within that range. If the Company's reported return on equity, after accounting for the increased RNR expense, exceeds that minimum benchmark, then the OCA would propose a finding that the increased rate is not just and reasonable. The basis for this position would be that the utility's earnings are already sufficient, even with the additional tax expense so there is no need to move above the rate cap. The OCA also suggests that an interim result could occur when a utility's return on equity prior to calculation of the RNR expense exceeds the benchmark, but falls below the benchmark, then the OCA would propose that an increase of no more than necessary to reach the Commission approved return on equity benchmark would be appropriate. (OCA Exc., pp. 30-33).

### **PPL Reply**

The Company argues that the OCA's position replaces the Code's requirement that the results be "just and reasonable" with a standard limited to whether the Company is earning above or below a certain benchmark. In addition, the Company asserts that the OCA's benchmark was not developed with reference to specific company information. PPL argues that any return on equity used must be based on company

specific information. In that case, PPL argues that its proper benchmark should be 12.5%. (PPL R.Exc., p. 19, 20).

The Company also points out that under the OCA's proposed standard, the EDCs may find themselves in a Catch-22 position. As stated by the Company, the OCA would deny RNR recovery under Section 2804(16)(ii) if actual state taxes paid are below 1996-1997 levels. If a utility experiences a declining financial performance, its taxes will fall. If those taxes fall below 1996-1997 levels, the OCA's mechanism would deny recovery. Conversely, if a utility experiences positive growth and increased earnings, and those earnings rise above the OCA benchmark, the utility will not be able to recover its increased RNR expense. (PPL R.Exc., pp. 20, 21).

### **Disposition**

Similar to the OCA's fifth Exception, this Exception is also moot due to our determination that a rate of return analysis is neither required nor contemplated by Section 2804(16)(ii). However, we note that the OCA's methodology itself presents a host of issues not envisioned by a single issue rate proceeding. The methodology itself, and the information it uses, are subject to challenges which go far beyond a single issue proceeding and certainly moves beyond a 60 day time period for litigation and resolution.

### **OCA Exception No. 7**

In this Exception, the OCA states that while the Company's earned or adjusted return on equity is below the OCA's suggested benchmark, there is insufficient evidence of record relating to any offsetting state tax savings for PPL. According to the OCA, absent that information, there is an insufficient basis upon which the Commission

can find that the proposed increase is just and reasonable. Accordingly, the OCA excepts to the ALJ's recommendation to approve the proposed increase. (OCA Exc., p. 33).

### **PPL Reply**

PPL responds that the basis for this Exception is the OCA's argument that *off-setting taxes were not considered in the ALJ's determination of this issue. Since off-setting taxes were properly excluded from this single issue proceeding, the Company argues that this Exception must be denied.*

### **Disposition**

We have previously determined that off-setting taxes (other than current year savings) are not relevant to this single issue RNR proceeding. Given that the basis for this Exception is the failure to include an examination of off-setting taxes, it is denied for the reasons expressed in our discussion of the OCA's second Exception and PPLICA's second Exception.

### **OCA Exception No. 8**

The OCA argues that its due process rights were violated when the schedule for this case was abbreviated by the issuance of a Secretarial Letter. While the OCA acknowledges that the statutory time frame for this action is 60 days, and that time frame has long since passed, the OCA argues that this Commission had previously set a litigation schedule in our Material Question Order. Following the scheduling guidelines set forth in the Material Question Order, the Parties and the ALJ established a litigation schedule. However, when this Commission shortened the schedule by Secretarial Letter,

the OCA argues that we modified a prior order without notice and an opportunity to be heard. (OCA Exc., p. 34).

As argued by the OCA, the Secretarial Letter violated Section 703(g) of the Code which requires that notice and an opportunity to be heard must be provided before this Commission modifies a prior Order. In addition, the OCA asserts that our action violated Section 331(d) of the Code by constraining the authority of the ALJ to regulate the course of the proceedings. The OCA also points to several of our regulations which provide authority to a presiding ALJ regarding authority to set hearing dates, authority to dispose of procedural matters and the authority to regulate the course of hearings. Finally, the OCA argues that the abbreviated hearing schedule deprived it of a meaningful opportunity to be heard on the merits of the action.

### **PPL Reply**

PPL argues that the Commission's Secretarial Letter which revised the procedural schedule made no substantive changes to prior Orders or determinations. Further, the Company states that in revising the schedule, the Commission was actually bringing the proceeding closer to the statutory time frame than was originally the case. The Company also notes that to the extent the OCA argues that the ALJ's discretion was circumscribed, the Commission always has the authority to direct the process of hearings. (PPL R.Exc., p. 22).

PPL also notes that while several of the OCA's Exceptions take issue with the ALJ's concerns that issues could not be resolved within a 60 day time frame, the OCA is complaining that the Commission's revised schedule deprived it of sufficient time to set out its case. In this context, PPL observes that the OCA had ten days to finish its testimony and had time to conduct discovery after the schedule change.

## Disposition

We are well aware of the effort that the time frame for these cases place on the Parties, our ALJ's and other Commission staff. We have repeatedly referenced in this Opinion and Order our reservations regarding the 60 day time frame and expansion of the issues in this proceeding beyond those called for by Section 2804(16)(ii). We compliment all of the Parties involved for their effort and dedication in bringing this matter before us in the time frame allotted.

Regardless of the change in the litigation schedule which occurred, we note that the OCA's Complaint was filed on November 19, 2001. That is over eight months ago. During that time, the parties have engaged in extensive discovery. There have been a substantial number of Prehearing Conferences as well as evidentiary hearings.

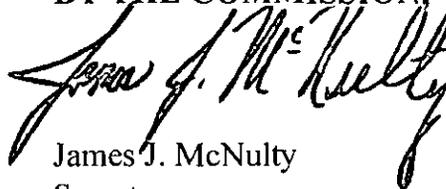
In view of the foregoing, no Party has been prejudiced, nor has anyone's due process rights been violated by a change in the schedule. Further, the modification of our Material Question Order was merely procedural, no substantive rights of any party were affected. Because the Secretarial Letter made no substantive changes to our Material Question Order, we find that the provisions of Section 703(g) of the Code did not apply.

For the foregoing reasons, the Exceptions of the OCA and PPLICA will be denied. We will adopt the Recommended Decision of ALJ Weismandel to the extent that it is consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That Exceptions of the Office of Consumer Advocate filed at this docket on July 24, 2002, are denied.
2. That the Exceptions of the PP&L Industrial Customer Alliance filed at this docket on July 24, 2002, are denied.
3. That the Recommended Decision of Administrative Law Judge Wayne L. Weismandel issued July 16, 2002 is adopted, to the extent that it is consistent with this Opinion and Order.
4. That the Complaint of the Office of Consumer Advocate filed at this docket is dismissed.

**BY THE COMMISSION,**



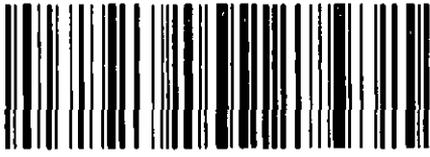
James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: August 8, 2002

ORDER ENTERED: August 8, 2002

2. Article Number



7106 4575 1293 1630 1195

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

R-00016850 0000 O/D  
Kevin J. Moody, Esquire

**COMPLETE THIS SECTION ON DELIVERY**

A. Received by (Please Print Clearly)

B. Date of Delivery 8/9/02

C. Signature [Signature]  Agent  Addressee

D. Is delivery address different from item 1?  Yes  No  
If YES, enter delivery address below:

SRB

PS Form 3811, June 2000

Domestic Return Receipt

2. Article Number



7106 4575 1293 1630 1218

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

R-00016850 0000 O/D  
Karen S. Miller Orner, Esquire

**COMPLETE THIS SECTION ON DELIVERY**

A. Received by (Please Print Clearly)

B. Date of Delivery

C. Signature [Signature]  Agent  Addressee

D. Is delivery address different from item 1?  Yes  No  
If YES, enter delivery address below:

SRB

PS Form 3811, June 2000

Domestic Return Receipt

2. Article Number



7106 4575 1293 1631 9992

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

R-00016850 0000 O/D  
Kent D. Murphy, Esquire

**COMPLETE THIS SECTION ON DELIVERY**

A. Received by (Please Print Clearly) Zulma Rodriguez

B. Date of Delivery 8/13/02

C. Signature [Signature]  Agent  Addressee

D. Is delivery address different from item 1?  Yes  No  
If YES, enter delivery address below:

SRB

POL  
Electric

PS Form 3811, June 2000

Domestic Return Receipt

JOHN H ISOM ESQUIRE  
MORGAN LEWIS & BUCKEUS  
417 WALNUT STREET  
HARRISBURG PA 17101

TANYA J MCCLOSKEY ESQUIRE  
OFFICE OF CONSUMER ADVOCATE  
FORUM PLACE  
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STEVEN C GRAY ESQUIRE  
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