

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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April 27, 2018

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

Re: The Tax Cuts and Jobs Act: Tax Reform Bill  
Signed Into Law on December 22, 2017  
Docket No. M-2018-2641242

Dear Secretary Chiavetta:

Enclosed please find the Office of Consumer Advocate's Motion to Strike in the above referenced proceeding. The undersigned certifies that this filing contains no averments or denials of fact subject to verification and penalties under 52 Pa. Code Section 1.36.

Copies have been served as shown on the Certificate of Service.

Respectfully Submitted,

/s/ Barrett C. Sheridan

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Assistant Consumer Advocate

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Robert A. Marinko, Office of Special Assistant  
Honorable Gladys M. Brown, Chairman  
Honorable Andrew G. Place, Vice Chairman  
Honorable Norman J. Kennard, Commissioner  
Honorable David W. Sweet, Commissioner  
Honorable John F. Coleman, Jr., Commissioner  
\*248100

## CERTIFICATE OF SERVICE

The Tax Cuts and Jobs Act: Tax Reform : Docket No. M-2018-2641242  
Bill Signed Into Law on December 22, 2017 :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Motion to Strike, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 27<sup>th</sup> day of April 2018.

### SERVICE BY E-MAIL & INTER-OFFICE MAIL

Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

### SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

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Fax: (717) 783-7152  
Dated: April 27, 2018  
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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Tax Cuts and Jobs Act: Tax Reform Bill	:	Docket No. M-2018-2641242
Signed Into Law on December 22, 2017	:	
	:	
Columbia Water Company's Petition for	:	
Rescission to the Commission's March 15,	:	
2018 Temporary Rates Order Relative to	:	
Petitioner	:	

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**MOTION TO STRIKE OF  
THE OFFICE OF CONSUMER ADVOCATE**

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**I. INTRODUCTION**

Pursuant to Section 5.103, the Office of Consumer Advocate (OCA) moves to strike the pleading filed by Columbia Water Company (Columbia Water or Company) on April 13, 2018 styled as Columbia Water's "Answer to New Matters Raised in the Office of Consumer Advocate's Answer" (Answer to New Matter) to the Company's Petition for Reconsideration and Rescission.<sup>1</sup> 52 Pa. Code § 5.103. The Commission should strike Columbia Water's April 13 pleading which seeks to bolster the Company's March 30, 2018 Petition for Reconsideration through an unauthorized pleading. The Commission's regulations "do not provide the opportunity for a Party to file a response to arguments in an Answer to a Petition for Reconsideration." West Goshen Township v. Sunoco Pipeline, L.P., Docket No. C-2017-2589346, Order at 6, fn. 5 (Mar. 15, 2018)

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<sup>1</sup> A Notice to Plead is attached, as required by Section 5.103(b).

(West Goshen); see 52 Pa. Code § 5.572. The Commission should strike Columbia Water's unauthorized Answer to New Matter pleading in its entirety.

In the alternative, in the event the Commission reviews Columbia Water's Answer to New Matter, the Commission must disregard Columbia Water's arguments and statements. The OCA Answer addressed the ground for preservation of the Commission's March 15, 2018 Temporary Rates Order as to Columbia Water, not new material facts or a request for different relief. Columbia Water's disagreement with the OCA's Answer does not justify Columbia Water's attempt to supplement and bolster its Petition for Reconsideration. West Goshen at 6, fn. 5.

The Commission's ruling on the merits of Columbia Water's request for relief from the Temporary Rates Order should be limited to consideration of the record, the Company Petition, and the OCA Answer.

## **II. MOTION TO STRIKE**

### **A. Introduction**

On February 12, 2018, the Commission initiated this investigation "to determine the effects of the [Tax Cuts and Jobs Act of 2017 (TCJA)] on the tax liabilities of Commission-regulated public utilities for 2018 and future years and the feasibility of reflecting such impacts in the rates charged to Pennsylvania utility ratepayers." February 12 Secretarial Letter. The Secretarial Letter established the Commission's intent to examine the impact of the change in federal tax law on not only the utility's federal income tax expense, but also deferred tax balances and state income tax expense. Id. at 1-2. After a comment period and request for designated utilities to reply to data requests,

the Commission entered its Temporary Rates Order on March 15, 2018, directing Columbia Water to implement temporary rates.

Columbia Water filed responses to the Secretarial Letter data requests on March 9, 2018, in advance of the Temporary Rates Order. Columbia Water indicated that some 2017 tax information would not be available until later, prior to April 30, 2018.

On March 30, 2018, Columbia Water petitioned the Commission to: 1) reconsider the requirement that Columbia Water implement temporary rates, and 2) rescind the Temporary Rates Order as it applies to Columbia Water.

The Commission entered an Order on April 5, 2018, granting “reconsideration within the meaning of Pa. R.A.P. Rule 1701(b)(3) of the Commission’s Order entered March 15, 2018, pending review of, and consideration on, the merits of the Petition.”

Pursuant to Section 5.572(e), the OCA filed an Answer opposing the Company Petition on April 9, 2018. The OCA addressed the information available to the Commission and the grounds which support the Temporary Rates Order as to Columbia Water. The OCA Answer recommends that the Commission deny Columbia Water’s request for reconsideration and rescission of the Temporary Rates Order, as it applies to Columbia Water. See, OCA Answer at 1-10.

Pursuant to Section 5.63, Columbia Water filed an Answer to New Matter, on the premise that the OCA’s Answer raised “new averments.” Columbia Water Answer to New Matter, ¶ 1; 52 Pa. Code § 5.63.

The Commission should strike Columbia Water’s Answer to New Matter as an unauthorized and improper pleading.

B. Columbia Water's Answer To New Matter Is An Improper Pleading, In The Context Of A Request For Reconsideration Of A Commission Order.

First, an answer to new matter is not an appropriate pleading at this phase. Pa. PUC v. Philadelphia Gas Works, Docket No. R-2008-2073938, Opinion and Order at 16-17 (2009) (PGW). In PGW, the Commission faced a similar set of pleadings: 1) a petition for reconsideration filed by the Office of Small Business Advocate (OSBA); 2) answers filed by PGW, OCA, and TURN; and 3) an answer to new matter filed by OSBA pursuant to Section 5.63 in reply to PGW's answer to the OSBA petition. Id. at 2-3, 16-17; 52 Pa. Code § 5.572. PGW moved to strike the OSBA answer to new matter, and OSBA filed an answer to the PGW motion. Id. at 16-17. The Commission struck the OSBA answer to new matter, stating "[w]e agree [with PGW] that there is no provision for an Answer by OSBA under these circumstances."<sup>2</sup> PGW at 17.

More recently, the Commission considered the same improper pleading practice in West Goshen, where the Township filed a petition for reconsideration, the defendant pipeline filed an answer in opposition, and the Township filed a reply to new matter. No motion to strike the Township's reply to new matter was filed before the Commission ruled. Nonetheless, the Commission determined that "[o]ur Regulations do not provide the opportunity for a Party to file a response to arguments in an Answer to a Petition for Reconsideration." West Goshen at 6, fn. 5. The Commission denied the Township's petition for reconsideration, based upon "review of the record, the Petition, and the Answer thereto...." Id. at 17.

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<sup>2</sup> The Commission advised that if PGW's answer to the petition for reconsideration "contained inappropriate arguments or 'New Matter,'" then the OSBA's procedural remedy was to file a motion to strike, not an answer pursuant to Section 5.63. PGW at 17; see, also, Application of Lyft, Inc., Docket No. A-2014-2415045, Opinion and Order at 1-2, 5-6, 25-27 (Feb. 12, 2015)(Lyft) (Motion to strike an answer to a petition for reconsideration granted in part. Stricken portions of answer presented arguments "more appropriately raised in a petition for reconsideration or other relief under Section 5.572 of our Regulations, rather than in a responsive filing.").

Second, Columbia Water's Answer to New Matter is outside of the scope of Section 5.572. 52 Pa. Code § 5.572. Good cause exists for the Commission to limit pleadings to a petition for reconsideration and related relief and an answer, pursuant to Section 5.572. The Temporary Rates Order is final as to Columbia Water unless the Commission grants Columbia Water's request for relief in the form of reconsideration and rescission on the merits. The legal framework is clear:

The Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) (Rehearing) and 703(g) (Rescission and amendment of orders), 66 Pa. C.S. §§ 703(f) and 703(g). **Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.**

West Goshen at 10 (emphasis added). Section 5.572(a) and (c) allow for the filing of a petition for reconsideration within 15 days after the Commission order is entered or otherwise final. 52 Pa. Code § 5.572(a), (c). A petition for rescission may be filed at any time, consistent with Section 703(g). 52 Pa. Code § 5.572(d); 66 Pa.C.S. § 703(g). Section 5.572(e) allows for the filing of an answer to such a petition, but it must be filed within 10 days. 52 Pa. Code § 5.572(e). Section 5.572 properly does not allow for additional pleadings which could stretch out and complicate the question of whether to reconsider, amend, or rescind an otherwise final Commission order.

Third, the Commission's standard for grant of a petition for reconsideration gives clear notice that the arguments in support must be presented in a well-pled petition for reconsideration. See, e.g. West Goshen at 10, quoting Duick v. Pennsylvania Gas and Water Co., 56 Pa. P.U.C. 553 (1982) (Duick). In the absence of a well-pled petition for reconsideration, the Commission "consider[s] it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error."

Duick at 559. As the Commission has oft noted “because a grant of relief on such petitions may result in the disturbance of final orders, reconsideration should be granted judiciously and only under appropriate circumstances.” West Goshen at 10, citing West Penn Power v. Pa. PUC, 659 A.2d 1055 (Pa. Commw. 1995), *appeal denied*, 544 Pa. 619, 674 A.2d 1079 (1996); City of Pittsburgh v. PennDOT, 490 Pa. 264, 416 A.2d 461 (1980).

The Commission must strike Columbia Water’s Answer to New Matter in its entirety as an unauthorized and improper pleading. PGW at 17. Columbia Water bears the burden of presenting the Commission with a well-pled petition for relief pursuant to Section 5.572 and Section 703(g). The Commission should not allow the Company, in the guise of an answer to new matter, to supplement and bolster the Company’s Petition for Reconsideration.<sup>3</sup> Further, Columbia Water’s disagreement with the substance of the OCA’s Answer does not justify Columbia Water’s improper and unauthorized pleading.<sup>4</sup> West Goshen at 6, fn. 5. The Commission should limit its consideration of Columbia Water’s request for reconsideration and rescission of the Temporary Rates Order to the Company Petition and the OCA’s Answer. West Goshen at 16.

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<sup>3</sup> For example, Columbia Water’s Petition for Reconsideration cited the lack of Federal Income Tax (FIT) expense in its 2017 base rate filing. Columbia Water Petition for Reconsideration, ¶¶ 10-14. Columbia Water’s Answer to New Matter appends excerpts of the record from its most recent base rate proceeding, to supplement that position. Columbia Water Answer to New Matter, ¶ 5. Columbia Water’s Petition for Reconsideration broadly alleged the Temporary Rates Order violates the single-issue ratemaking principle, without citation. Columbia Water Petition for Reconsideration, ¶ 16, fn. 3. Columbia Water’s Answer to New Matter supplements its Petition with legal citations. Columbia Water Answer to New Matter, ¶ 8, fn. 4.

<sup>4</sup> The Company’s Answer to New Matter criticizes the OCA Answer for “ignoring” certain information and “making peripheral claims” and asks the Commission to disregard OCA arguments as irrelevant. Columbia Water Answer to New Matter, ¶¶ 1, 7, 9. Contrary to Columbia Water’s assertion, the OCA Answer focused on matters within the express scope of the February 12 Secretarial Letter – the impact of the TCJA on federal and state tax expense, as well as accumulated deferred income taxes (ADIT). The OCA Answer relied upon the OCA March 9 comments and the Company’s March 9 partial replies to the Secretarial Letter data requests.



### III. REQUEST FOR ALTERNATIVE RELIEF

In the event that the Commission reviews the substance of Columbia Water's Answer to New Matter, the OCA submits that the Commission should not rely upon Columbia Water's new arguments which are raised for the first time or claims of material facts which are outside of the record. West Goshen at 6, fn. 5. Further, the Commission should not consider and accept the Company's statements made to bolster and supplement its Petition for Reconsideration,<sup>5</sup> for the reasons set forth above.

Columbia Water's Petition for Reconsideration focused on the Company's position that it has no federal tax expense in base rates. The OCA Answer supports preservation of the Commission's Temporary Rates Order as to Columbia Water, because the scope of the Commission's investigation encompasses the impact of the TCJA on federal tax expense, state income tax expense, and changes in ADIT balances. As noted in the OCA Answer, Columbia Water deferred providing information regarding 2017 tax expense, net operating loss amounts, and deferred taxes balances until late April. See, OCA Answer at 6-7. Further, the Company declined to provide information regarding the impact of the TCJA on the Company as "inapplicable." Id.; see Columbia Water March 9 Reply to Data Requests.

In its Answer to New Matter, Columbia Water iterates its position that the Company has no federal tax expense in base rates due to tax loss carry forwards, and so the Commission should rescind the Temporary Rates Order as to Columbia Water. See, Columbia Water Answer to New Matter, ¶ 1. The Company cites to Comments filed by

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<sup>5</sup> Examples include Columbia Water's Answer to New Matter statements regarding federal tax expense in base rates and the impact of the Temporary Rates Order on Columbia Water's ability to borrow. See, Columbia Water Answer to New Matter, ¶¶ 1, 2, 8.

the OCA on April 6, 2018 in this docket as support for this outcome. Id., ¶¶ 1, 5. Because Columbia Water relies upon OCA comments that were filed after the Temporary Rates Order, after the Company's Petition for Reconsideration, and after the OCA Answer, the OCA should be allowed leeway to address this Company argument.

Contrary to the Company's assertion, the OCA has been consistent in its advocacy on the need for adjustments to utility rates to account for the impact of the TCJA. The Company's position that the OCA Answer's discussion of ADIT is a new matter is also incorrect. See, Columbia Water Answer to New Matter, ¶¶ 6, 7.

The OCA has advocated in this proceeding that utility rates should be adjusted to reflect the impact of the TCJA on federal income tax expense, state income tax expense, **and/or** ADIT. OCA March 9 Comments at 1, 4-5, Att. A at 3-6; OCA April 6 Comments at 5-6. The OCA's March 9 Comments stated in pertinent part:

Due to the enactment of a reduced federal corporate income tax rate, utilities will realize tax savings in two ways, a reduced annual tax expense and excess ADIT.

...

The corporate tax rate reduction is having an immediate impact on investor-owned utilities in two significant areas, the first being reduced tax expense. ... During the ratemaking process, the federal income tax component of a utility's rates is accounted for through a gross up of the utility's net income. Now that the TCJA is in effect, this gross up may not adequately capture the reduced federal corporate income tax rate. For this reason, utilities are now charging ratepayers for an expense at a rate that it may not be incurring.

The second impact the TCJA has on investor-owned utilities is that it will cause utilities to have excess Accumulated Deferred Income Taxes (ADIT). The Internal Revenue Code (IRC) applies different rules for when a public utility may actually incur a tax versus when it must recognize the tax for book purposes, *i.e.* the amount it collects from ratepayers for its cost of service. ADIT is a regulatory tool tracked by a utility to ensure that funds ratepayers pay towards a utility's income taxes align with the actual federal taxes paid by a company over a period of time. When the federal tax rate, however, decreases from 35 percent to 21 percent, the Company

has to pay less tax in the future than it collected from ratepayers in the past. This extra capital is excess ADIT.

Id., 1, 4-5.

The OCA April 6 Comments, regarding small gas utilities, acknowledged that some utilities may not have federal income tax expense for a number of reasons, including a net loss carryforward position.

The OCA recognizes that the small NGDCs identified in the March 12 Secretarial Letter may not have federal tax expense incorporated in base rates for a number of reasons. For example, the utility may be in a net loss carry forward position or the utility filed as a sole proprietorship. In such instances, the OCA understands that it would not be appropriate to reduce the utility's rates if it is not currently collecting tax expense from ratepayers. For this reason, the OCA awaits the filings from each utility to determine whether those companies collect tax expense from ratepayers. The OCA looks forward to those filings.

OCA April 6 Comments at 5. The OCA April 6 Comments continued:

**To the extent that a small NGDC collects tax expense from ratepayers and/or has excess ADIT, however, the principles outlined above and in the OCA's Comments filed on March 9 are applicable.** Namely, the Commission should recognize that these tax savings are an extraordinary and substantial, non-recurring event justifying the return of the savings to ratepayers on an immediate basis. See March 9 OCA Comments at 8-12.

Id. at 5-6 (emphasis added). As to both Columbia Water and the small gas utilities, the OCA has consistently stated that an assessment of the impact of the TCJA on the utility's federal income tax expense, state income tax expense and/or ADIT balances will depend on the particular, quantified information provided in reply to Commission's data requests. See, OCA Answer at 6-7.

The OCA did not raise new matters by arguing in the OCA Answer for preservation of the Temporary Rates Order as to Columbia Water. The impact of the TCJA on Columbia Water's federal income tax expense is but one part of the

Commission's investigation and consideration reflected in the Temporary Rates Order. The OCA Answer stated the need for review of information regarding the impact of the TCJA on Columbia Water's ADIT balances, as support for the Temporary Rates Order. OCA Answer at 6-7. This was not a new argument by the OCA.

Further, the Company's Petition for Reconsideration stated that the Commission overlooked the Company's recently settled base rate case, when the Commission entered the Temporary Rates Order as to Columbia Water. Columbia Water Petition for Reconsideration, ¶¶ 10-13. The Petition specifically cited to a provision in the base rate case settlement agreement. Id., ¶ 13. The OCA Answer properly responded to the Company's Petition with an examination of the settlement agreement language. See, OCA Answer at 3-5. The OCA Answer did not raise a new matter.

In the event that the Commission does not strike the Columbia Water Answer to New Matter, the OCA submits that the Commission should disregard Columbia Water's statements and arguments set forth in the Company's Answer to New Matter. The OCA Answer did not raise new arguments or facts, or request relief beyond preservation of the Temporary Rates Order as applied to Columbia Water. The Commission should not decide Columbia Water's Petition for Reconsideration based upon the Company's Answer to New Matter.

### III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate respectfully requests that Commission strike Columbia Water Company's Answer to New Matter. In the alternative, the OCA requests that the Commission disregard the Company's Answer to New Matter and decide the Company's Petition for Reconsideration based upon the record, the Petition, and the OCA Answer.

Respectfully Submitted,



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Dated: April 27, 2018

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**BEFORE THE  
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	:	
Columbia Water Company's Petition for	:	
Rescission to the Commission's March 15,	:	
2018 Temporary Rates Order Relative to	:	
Petitioner	:	

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**NOTICE TO PLEAD**

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Pursuant to Section 5.103(b), the Office of Consumer Advocate (OCA) hereby provides notice that a written responsive pleading, if any, must be filed within 20 dates of the date of service of the enclosed OCA's Motion to Strike. 52 Pa. Code § 5.103(b). Failure to answer may allow the Public Utility Commission or presiding officer to decide the OCA Motion to Strike against you. Any response to the OCA's Motion to Strike must be filed with the Secretary of the Public Utility Commission, at the address below, with a copy served on counsel for the OCA, and where applicable, the Administrative Law Judge presiding over the proceeding.

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Bldg.  
400 North St., Second Fl.  
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Respectfully Submitted,

A handwritten signature in cursive script, reading "Barrett C. Sheridan", written in dark ink on a light background.

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