



COMMONWEALTH OF PENNSYLVANIA

July 10, 2020

E-FILED

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

**RE: Pennsylvania Public Utility Commission v. Columbia Gas of Pennsylvania, Inc. 2020
Base Rate Filing / Docket No. R-2020-3018835**

Dear Secretary Chiavetta:

Enclosed please find the Answer and Verification, on behalf of the Office of Small Business Advocate (“OSBA”), to the Petition of Columbia Gas of Pennsylvania, Inc. For Reconsideration of The Chief Administrative Law Judge’s June 3, 2020 Order Extending The Statutory Suspension Period, in the above-captioned proceeding.

Copies will be served on all known parties in this proceeding, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Steven C. Gray

Steven C. Gray
Senior Supervising
Assistant Small Business Advocate
Attorney ID No. 77538

Enclosures

cc: Robert D. Knecht
Parties of Record

**ANSWER OF THE
OFFICE OF SMALL BUSINESS ADVOCATE
TO THE
PETITION OF COLUMBIA GAS OF PENNSYLVANIA, INC. FOR
RECONSIDERATION OF THE CHIEF ADMINISTRATIVE LAW JUDGE'S JUNE 3,
2020 ORDER EXTENDING THE STATUTORY SUSPENSION PERIOD**

I. Introduction

On June 23, 2020, Columbia Gas of Pennsylvania, Inc. (“Columbia” or the “Company”) filed its Petition for Reconsideration of the Chief Administrative Law Judge’s June 3, 2020 Order Extending the Statutory Suspension Period (“*Petition*”) with the Pennsylvania Public Utility Commission (“Commission”).

On July 6, 2020, the Bureau of Investigation and Enforcement (“I&E”) filed an answer to Columbia’s *Petition*.

On July 6, 2020, the Office of Consumer Advocate (“OCA”) also filed an answer to Columbia’s *Petition*.

In accordance with 52 Pa. Code Section 5.61(a), the Office of Small Business Advocate (“OSBA”) files this answer to Columbia’s *Petition*.

II. The Governor’s Authority

Initially, Columbia claimed that June 3, 2020, Order (“*Extension Order*”) issued by Chief Administrative Law Judge Charles E. Rainey, Jr. (the “Chief ALJ”) is invalid because it “is contrary to statute, appellate case law and the Commission’s own precedent.” *Petition*, at 1. To support its argument, Columbia set forth the legal basis for its argument, as follows:

The Governor’s Executive Order and the Commission’s Emergency Order do not provide a basis for extending the suspension period beyond the time provided by statute.

Petition, at 1-2, citing to the Governor’s *Proclamation of Disaster Emergency* (March 6, 2020) and the Commission’s *Emergency Order*, Docket No. M-2020-3019262 (Order issued March 20, 2020).

Columbia later argued, as follows:

While the Executive Order has empowered the Commission to take necessary steps to address COVID-19, that grant of authority must be subject to reasonable jurisdictional boundaries and limitations – namely the Commission’s prescribed authority pursuant to the Public Utility Code.

Petition, at 9.

Columbia’s legal argument is simply wrong, and the Chief ALJ’s *Extension Order* is valid.

As set forth below, the Public Utility Code does not limit the authority of the Governor.

On April 13, 2020, the Pennsylvania Supreme Court addressed the Governor’s *Proclamation*, as well as the authority granted to the Governor, in *Friends of DeVito v. Wolf*, 2020 Pa. LEXIS 1987.¹

The Pennsylvania Supreme Court, exercising its King’s Bench jurisdiction, ruled, as follows:

[W]e conclude that the COVID-19 pandemic triggered the Governor's authority under the Emergency Code and that as a result of the COVID-19 pandemic, the Governor had the authority under the Emergency Code to declare the entirety of the Commonwealth a disaster area.

DeVito, at 35.² The Supreme Court continued, as follows:

As to the predicate requirements that the interests of the public justify the Governor's assertion of its authority, the nature of this emergency supports it.

DeVito, at 37.

The Supreme Court also observed:

The Emergency Code specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full force of law. 35 Pa.C.S. § 7301(b).

¹ Columbia attempts to limit the Pennsylvania Supreme Court’s decision in *DeVito* to “certain constitutional challenges.” *Petition*, at 12. That is a purposefully inaccurate summary of *DeVito*. Furthermore, *DeVito* contained no special exemption from the Governor’s Executive Order for public utilities operating in the Commonwealth.

² The *DeVito* decision is attached to this Answer.

DeVito, 42.

Finally, and devastating to Columbia's legal argument, the Supreme Court stated, as follows:

Upon the declaration of a disaster emergency, the Emergency Code vests with the Governor expansive emergency management powers, including, inter alia, to '*[s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of Commonwealth business, or the orders, rules or regulations of any Commonwealth agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency...*'

DeVito, at 25 (emphasis added).

Therefore, the Pennsylvania Supreme Court has ruled that the Governor's March 6th *Proclamation of Disaster Emergency* is a legal, valid exercise of authority granted to the Governor. The Pennsylvania Supreme Court has also ruled that statutes "prescribing the procedures for conduct of Commonwealth business," as well as the Commission's "orders, rules or regulations" may be suspended while the Governor's *Proclamation* is in effect. The Governor's *Proclamation* remains in effect as of the time of this filing, as the *Proclamation* was renewed through the Governor's June 3, 2020, *Amendment to Proclamation of Disaster Emergency*.³

Columbia's legal argument is contrary to the Supreme Court's ruling in *DeVito* and should be dismissed with prejudice.

II. Columbia Backpedals

After citing a series of cases that do not, in any way, overturn the Pennsylvania Supreme Court's decision in *DeVito*, Columbia concludes, as follows:

To be clear, Columbia does not challenge the Chief ALJ's or the Commission's **authority** to extend the procedural schedule in this case. Columbia challenges the authority and need to extend the statutorily mandated suspension period.

³ The *Amendment to Proclamation of Disaster Emergency* renews the *Proclamation* for an additional ninety (90) days from June 3, 2020. The June 3rd *Amendment* is attached to this Answer.

Petition, at 12 (emphasis added).

As set forth above, Columbia appears to challenge both the Governor's and the Commission's authority to in any way modify a statute. Nevertheless, in this quoted section of the *Petition*, Columbia does state that it does not challenge the Commission's authority to extend the procedural schedule in this case.

If Columbia is abandoning its legal arguments, and now concedes that the Governor and the Commission do, in fact, have the authority to suspend and modify statutory deadlines, then the only remaining issue is whether the Chief ALJ made a just and reasonable decision in his *Extension Order*.

On the other hand, if Columbia is still attempting to argue whether the Governor, and through his *Proclamation*, the Commission, have authority to suspend statutes, the *DeVito* case has addressed and rejected that legal argument.

III. The Columbia / I&E Alternative

Columbia, in its *Petition*, stated as follows:

In its Answer to I&E's Motion and during oral argument at the prehearing conference, Columbia presented a reasonable alternative proposal that would allow parties additional time in the procedural schedule without ultimately depriving Columbia of revenue from the new rates. The Extension Order overlooks and does not consider Columbia's proposal.

Petition, 12. Columbia continued, as follows:

Although not all parties were in favor of Columbia's proposal, I&E, the moving party, and CII [Columbia Industrial Intervenors] indicated that they were agreeable with Columbia's proposal.

Id., at 13 (footnote omitted).

First, the OSBA absolutely opposed Columbia's procedural schedule proposal. *June 3, 2020, PreHearing Transcript*, at 13, lines 10-14. Columbia is correct – other parties opposed the Company's "alternative proposal." *Id.*, at 12, line 16 through 15, line 1.

Second, since there was no agreement regarding Columbia's "alternative proposal," the Chief ALJ correctly focused his *Extension Order* on what was before him -- the Motion of I&E to extend the procedural schedule. Columbia's complaint that the Chief ALJ did not address or approve a non-unanimous procedural alternative is misplaced and should be dismissed by the Commission.

Finally, footnote 12 in Columbia's *Petition* contains an interesting legal assertion. It states, as follows:

Furthermore, to the extent the Emergency Order authorizes a modification to the process set forth in Section 1308(d), it unquestionably must also authorize a billing adjustment back to the statutory suspension date,

Petition, at 13, footnote 12.

The OSBA rejects the legal concept that public utilities "unquestionably" must be granted a billing adjustment retroactive to the original suspension date. It is not "unquestionable" that the Commission will make public utilities whole in light of a disaster proclamation. Furthermore, it is entirely within the utility's control as to when it chooses to file its pleadings. In this case, Columbia chose to file for a rate increase on April 24, 2020, approximately seven weeks after the *Proclamation* was issued and while the *Proclamation* remained in effect. At the time of its filing, Columbia was fully aware that the rate case, and the relief Columbia seeks through its rate case, could be delayed.

Finally, and perhaps most important, the issue of "making public utilities whole" is not before the Commission at this time. Columbia's *Petition* is solely focused on the Chief ALJ's *Extension Order*, and it would be inappropriate to decide the issue of retroactive billing adjustments

in the context of a scheduling dispute. If and when the issue of retroactive billing adjustments is ripe for adjudication, the OSBA will fully respond at that time.

IV. Conclusion

The OSBA respectfully requests that the Pennsylvania Public Utility Commission deny Columbia's Petition for Reconsideration.

Respectfully submitted,

/s/ Steven C. Gray

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Senior Supervising
Assistant Small Business Advocate

For:

John R. Evans
Small Business Advocate

Office of Small Business Advocate
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Dated: July 10, 2020

VERIFICATION

I, John R. Evans, hereby state that the facts set forth herein above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 07/10/2020



(Signature)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2020-3018835
	:	
Columbia Gas of Pennsylvania, Inc.	:	

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email (*unless other noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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