

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held
September 21, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair, Conflict Statement
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

M-2023-3020643

v.

Great American Power, LLC

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Reconsideration (Petition), filed by the Commission's Bureau of Investigation and Enforcement (I&E) on July 21, 2023, seeking reconsideration of the Opinion and Order entered July 6, 2023 (*July 2023 Order*), relative to the above-captioned proceeding. On July 24, 2023, and July 31, 2023, Great American Power, LLC (GAP or the Company) and the Office of Consumer Advocate (OCA),

respectively, filed Answers to the Petition. For the reasons set forth herein, we shall deny I&E's Petition, consistent with this Opinion and Order.

I. Background

An extensive history of this proceeding was set forth in our *July 2023 Order*. See, *July 2023 Order* at 2-4. As such, we will not repeat the procedural history here.

By Order entered March 2, 2023 (*March 2023 Order*), we directed that notice of the Order and a proposed Joint Petition for Approval of Settlement (Settlement), filed on January 13, 2023, by I&E and GAP (collectively, the Parties), be published in the *Pennsylvania Bulletin*, to provide an opportunity for interested parties to file comments with the Commission regarding the proposed Settlement within twenty-five days after the date of publication.¹

On March 18, 2023, the *March 2023 Order*, along with the Settlement and Statements in Support filed by each of the Parties to the Settlement, were published in the *Pennsylvania Bulletin*, 53 Pa. B. 1629 (March 18, 2023). In accordance with the *March 2023 Order*, comments on the proposed Settlement were due on or before April 12, 2023 (*i.e.*, twenty-five days after the *March 2023 Order* was published). On April 12, 2023, the OCA filed Comments in response to the *March 2023 Order*. Replies to the Comments were not filed.

At the Public Meeting of June 15, 2023, the Commission adopted a Joint Motion of Vice Chairman Stephen M. DeFrank and Commissioner John F. Coleman, Jr.

¹ We note that the Parties filed the proposed Settlement with respect to an informal investigation conducted by I&E concerning allegations regarding GAP, a jurisdictional electric generation supplier. See, *July 2023 Order* at 2.

(Joint Motion) directing that, *inter alia*: (1) the proposed Settlement be rejected; and (2) the matter be returned to I&E to take whatever further action may be warranted. Joint Motion at 4. Consequently, on July 6, 2023, the Commission issued the *July 2023 Order* that, *inter alia*: (1) denied the Settlement; and (2) referred the matter to I&E for further proceedings, as deemed necessary and appropriate. *July 2023 Order* at 33-34.

As previously noted, I&E filed the Petition on July 21, 2023. On July 24, 2023, GAP filed an Answer in Support of I&E's Petition (Answer in Support). On July 31, 2023, the OCA filed an Answer to I&E's Petition (Answer).

By Opinion and Order entered on August 3, 2023, we granted reconsideration pending further review of, and consideration on, the merits, pursuant to Pa. R.A.P. 1701(b)(3).

II. Discussion

Legal Standards

Initially, we note that any issue or argument that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the Parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

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) and (g), 66 Pa. C.S. §§ 703(f) and 703(g), relating to rehearings, as well as the rescission and amendment of orders. 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.

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982) (*Duick*).

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard, we agree with the court in *Pennsylvania Railroad Company v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935) (*Pennsylvania Railroad*), wherein it was stated that “[p]arties...cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them... .” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission. *Duick*, 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad*).

Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

As we proceed in our review, we note that the considerations of *Duick*, on application, essentially, require a two-step analysis. See, e.g., *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No.

C-2012-2304183 (Order entered May 19, 2019) (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket Nos. A-2012-2329717, A-6415209 (Order entered September 11, 2014)). The first step is that we determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. *Id.* The second step of the *Duick* analysis is to evaluate the new or novel argument, or overlooked consideration that is alleged, in order to determine whether to modify our previous decision. *Id.* We will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. *Id.*

July 2023 Order

In the *July 2023 Order*, we discussed the terms of the Settlement, which included, *inter alia*: (1) the payment, by GAP, of a cumulative civil penalty amount of \$92,500; and (2) several remedial modifications to the Company's internal operational procedures designed to address the issues raised by I&E in its informal investigation.² *July 2023 Order* at 14-18 (citing Settlement at ¶¶ 40-42).

We also provided an analysis of the OCA's Comments regarding the Settlement.³ *See, July 2023 Order* at 20-25. Based on our analysis, we agreed with the OCA that the Parties' proposed Settlement failed to: (1) sufficiently address the

² We note that an extensive discussion of the terms of the Settlement was set forth in our *July 2023 Order*. *See, July 2023 Order* at 14-18. As such, we will not repeat that discussion here.

³ We note that an extensive discussion of the OCA's Comments was set forth in our *July 2023 Order*. *See, July 2023 Order* at 20-25. As such, we will not repeat that discussion here.

seriousness of the alleged conduct; (2) provide adequate remedies for all impacted customers; (3) impose sufficient corrective actions for GAP; and (4) impose a civil penalty sufficient to deter future violations. *July 2023 Order* at 25-26.

Additionally, we provided an analysis of the Settlement and the issues addressed therein, based on our Policy Statement at 52 Pa. Code § 69.1201, which sets forth ten factors to be considered in evaluating whether a civil penalty for violating a Commission order, Regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable, and approval of the settlement agreement is in the public interest.⁴ *See, July 2023 Order* at 26-33. Based on our analysis, we found that application of the guidelines contained in the Policy Statement did not support approval of all the Settlement terms as filed. *July 2023 Order* at 33. Specifically, we found that, given the serious and egregious nature of the allegations, GAP's poor compliance history, and the insufficient amount of civil penalties, the proposed Settlement was not reasonable nor in the public interest. *Id.* We stated that:

[...] this is GAP's third appearance before the Commission in recent years, which appears to demonstrate a system of repeated patterns of behavior that, if not addressed, may threaten to undermine consumer faith in Pennsylvania's retail electric market.

Id. Accordingly, we denied the proposed Settlement and referred the matter to I&E for such further proceedings as deemed necessary and appropriate. *Id.*

⁴ We note that an extensive analysis of the Settlement based on our Policy Statement at 52 Pa. Code § 69.1201 was set forth in our *July 2023 Order*. *See, July 2023 Order* at 26-33. As such, we will not repeat that discussion here.

Petition and Answers

In its Petition, I&E requests that the Commission reconsider the *July 2023 Order*, arguing that the Commission failed to provide the Parties an opportunity to submit a response to the OCA's Comments. Petition at 3. Specifically, I&E contends that the Parties were denied due process because the Commission allowed other interested parties to comment on the Settlement but failed to provide I&E and GAP an opportunity to be heard in response to any comments received when it failed to provide a timeframe for reply comments. *Id.* at 4-5. Moreover, I&E refers to the *July 2023 Order* to argue that, based on the "extensive discussion and substantial weight" placed on the OCA's Comments, the Parties were "prejudiced" by their inability to file reply comments. *Id.* at 5 (citing *July 2023 Order* at 20-27, 32). Accordingly, I&E requests that the Commission grant the Petition and provide I&E the opportunity to file reply comments. *Id.* at 5.

In its Answer in Support, GAP avers that I&E's Petition should be granted because the due process rights of both I&E and GAP were violated by the Commission's reliance on the OCA's Comments in the Joint Motion and the *July 2023 Order*. Further, GAP asserts that the allegations in the OCA's Comments could have been addressed but the Parties were not provided the ability to do so. Moreover, GAP argues that allowing for comments on a settlement but not allowing the parties that bear the burden of proving that the settlement is just, reasonable, and in the public interest an opportunity to respond deprives the parties of the ability to carry their burden of proof. GAP Answer at ¶ 8. Furthermore, GAP refers to the *Duick* standard for the two-step process for granting reconsideration to argue that the *July 2023 Order* did not address due process for the Parties beyond noting that no replies to the OCA's Comments were filed even though replies were not authorized, and a time allowance was not provided. GAP Answer at ¶ 9 (citing *July 2023 Order* at 4). Accordingly, GAP asserts that the deprivation of the right to be heard in response to the OCA's Comments, while still placing the burden on the Parties, deprived I&E and the Company of the right to due process. *Id.*

In its Answer to the Petition, the OCA also refers to the *Duick* standard for the two-step process for granting reconsideration, but notes that it does not object to an opportunity for I&E and GAP to file replies to the OCA’s Comments and, if reply comments by the Parties “would shed light onto the reasonableness of the [S]ettlement the OCA supports the Parties’ ability to file them.” OCA Answer at ¶¶ 14-16 (citing *Duick*). However, the OCA offers that if the Parties are allowed to file reply comments, then the OCA’s Comments should be considered again, including the Company’s “apparent failure to rectify its misconduct in light of the fact that this is the third time that GAP is before the Commission on a negotiated settlement for substantially similar conduct.” *Id.* at ¶ 17 (citing *Pa. PUC, Bureau of Investigation and Enforcement v. Great American Power, LLC*, Docket No. M-2018-2617335 (Order entered July 11, 2019); *Pa. PUC, Bureau of Investigation and Enforcement v. Great American Power, LLC*, Docket No. M-2016-2536806 (Order entered April 20, 2017)). Accordingly, the OCA maintains that the Settlement is “patently insufficient to deter and dissuade future misconduct by GAP.” *Id.* Moreover, the OCA provides that if the Commission reconsiders the *July 2023 Order*, which remands this matter back to I&E, then it should consider whether it should modify the Settlement to include additional modifications rather than rejecting it outright, thereby holding the Company accountable for its conduct. OCA Answer at ¶ 18.

Disposition

As discussed, *supra*, petitions for reconsideration are governed by *Duick*, which requires a two-step analysis: (1) determine whether a party has offered new and novel arguments, or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order; and (2) evaluate the new or novel argument, or overlooked consideration, in order to determine whether to modify our previous decision. In our view, I&E has not presented any new or novel arguments, nor

identified considerations that appear to have been overlooked or not previously addressed.

In its Petition, I&E argues that, essentially, the Commission failed to provide the Parties an opportunity to reply and be heard in response to the OCA’s Comments and, therefore, the Parties were denied due process. Petition at 3-4. I&E also refers to the *July 2023 Order* to contend that given the “extensive discussion and substantial weight” on the OCA’s Comments, I&E and GAP were prejudiced by their inability to file reply comments. *Id.* at 5 (citing *July 2023 Order* at 20-27, 32).

As previously noted, in the *March 2023 Order*, we directed that notice of the Order and the proposed Settlement be published in the *Pennsylvania Bulletin*, consistent with the requirement of 52 Pa. Code § 3.113(b)(3).⁵ The *March 2023 Order*

⁵ The Commission’s Regulations at 52 Pa. Code § 3.113(b) provide that:

- (b) Under 65 Pa.C.S. Chapter 7 (relating to Sunshine Act), the Commission’s official actions resolving informal investigations will be as follows:

* * *

- (3) When the utility, or other person subject to the Commission’s jurisdiction, has committed to undertake action to address or remedy a violation or potential violation of the act or to resolve another perceived deficiency at the utility, in the form of a settlement with the Commission staff or other resolution of the matter, the Commission’s consideration of the settlement or approval of the utility’s action will occur at public meeting. Except for staff reports and other documents covered by a specific legal privilege, documents relied upon by the Commission in reaching its determination shall be made part of the public record. Before the Commission makes a final decision to adopt the settlement or to approve

was published in the *Pennsylvania Bulletin*, 53 Pa. B. 1629 (March 18, 2023), and, consistent with the *March 2023 Order*, comments on the proposed Settlement were due twenty-five days after the *March 2023 Order* was published.⁶ While neither the *March 2023 Order*, nor the Regulations provide for a reply comment opportunity or timeframe, the Commission has not rejected the filing of reply comments or similar responsive filings if they are filed in a reasonable time and in compliance with our procedural regulations. In other proceedings, parties have filed responses to comments involving settlements and the Commission has accepted and considered those filings. See *Pa. PUC, Bureau of Investigation and Enforcement v. Columbia Gas of Pennsylvania, Inc.*, Docket No. M-2022-3012079, (Opinion and Order entered August 3, 2023); *Pa. PUC, Bureau of Investigation and Enforcement v. PECO Energy Company*, Docket No. M-2021-3014286, (Opinion and Order entered December 8, 2022). In fact, the Commission has a long history of liberally construing its procedural regulations regarding filings to afford not only the parties, but also interested persons and entities who would like to participate in proceedings before the Commission, with the opportunity to do so in order to provide the Commission with varying positions on the issue(s). By offering such varying positions, the Commission is able to make a more informed decision in a proceeding. Therefore, we encourage entities, including I&E, if it so chooses, to pursue procedural compliant methods to make appropriate filings, such as replies to comments in settlement proceedings.⁷

the utility's action, the Commission will provide other potentially affected persons with the opportunity to submit exceptions thereon or to take other action provided for under law.

52 Pa. Code § 3.113(b).

⁶ As previously noted, on April 12, 2023, the OCA filed timely Comments in response to the *March 2023 Order*.

⁷ Upon review of the Commission's case management system, there is no indication that any party attempted to file a response to the OCA's comments in this matter.

Accordingly, we do not find I&E's contention, that I&E and GAP were denied due process and were unfairly prejudiced, persuasive. Moreover, we do not find I&E's arguments to demonstrate a consideration that has not previously been considered or has been overlooked by the Commission.

Based on our review of I&E's Petition, we find no reason to reconsider our determination, as set forth in the *July 2023 Order*, that denied the Settlement and referred this matter to I&E for such further proceedings as deemed necessary. The Petition contains no new or novel arguments, or considerations that we previously overlooked, that would persuade us to revise the *July 2023 Order*.

III. Conclusion

Based upon our review of I&E's Petition, the Answers of the OCA and GAP, the *July 2023 Order*, the Settlement, and the applicable law, we shall deny the Petition, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration filed by the Commission's Bureau of Investigation and Enforcement, on July 21, 2023, seeking reconsideration of the Opinion and Order entered July 6, 2023, is denied, consistent with this Opinion and Order.

2. That a copy of this Opinion and Order shall be served upon Great American Power, LLC.

3. That a copy of this Opinion and Order shall be served upon the Commission's Bureau of Investigation and Enforcement.

4. That a copy of this Opinion and Order shall be served upon the Office of Consumer Advocate.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: September 21, 2023

ORDER ENTERED: September 21, 2023