

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

FILED ELECTRONICALLY VIA E-FILE

Pennsylvania Public Utility	:	
Commission, et al.	:	
Complainants	:	
	:	Docket Nos. R-2024-3052357
v.	:	R-2024-3052359
	:	
Pike County Light & Power Company,	:	
Respondent	:	

**OBJECTION OF THE BUREAU OF TECHNICAL UTILITY SERVICES
TO THE APPLICATIONS OF THE OFFICE OF CONSUMER ADVOCATE FOR
ISSUANCE OF SUBPOENA**

Pursuant to Section 5.421(f) of the Commission’s regulations, 52 Pa. Code § 5.421(f), the Bureau of Technical Utility Services (TUS) of the Pennsylvania Public Utility Commission (Commission) hereby objects to the matching Applications for Issuance of Subpoena (Applications) filed in the above-captioned cases on March 18, 2025 by complainant Office of Consumer Advocate (OCA).¹ The Applications ask the presiding Administrative Law Judges to issue a subpoena requiring TUS, through its Director, Paul Diskin, to provide OCA with “workpapers used to develop” the Reports on the Quarterly Earnings of Jurisdictional Utilities (QERs) for the years ended June 30, 2024 and September 30, 2024. OCA also requests expedited treatment of the Applications, including requiring TUS to file its response within five (5) days. For the reasons described below, TUS respectfully requests that Your Honors strike the

¹ The Applications differ slightly in that one addresses Pike’s proposed electric tariff while the other addresses Pike’s gas tariff. However, they are identical in their reasoning relative to OCA’s request for TUS’ QER workpapers, and in this filing, TUS shall refer to the Applications interchangeably.

Applications based on technical deficiency, or, in the alternative, deny the Applications on the basis of scope, relevance and privilege. TUS further requests that Your Honors deny OCA's request for expedited treatment and rescind the Orders issued yesterday, which were issued without the benefit of TUS' position, in violation of the Commission's regulations and due process.

I. BACKGROUND

On December 30, 2024, Pike County Light & Power Company (Pike) filed Supplement No. 127 to Tariff Gas – Pa. P.U.C. No. 6, with the Pennsylvania Public Utility Commission, to become effective on February 28, 2025. With this filing, Pike proposed to increase rates to produce additional annual operating revenues of \$905,900 per year or an overall increase of 35.8% in total gas revenues, based on a proposed return on equity of 10.20% for an overall rate of return of 8.59% on its requested rate base balance. Pike supported its proposed return on equity (ROE) of 10.20 % by rounding up the Distribution System Improvement Charge (DSIC) Return from Attachment G, Line (7) of the QER for year ended June 30, 2024 (June 2024 QER), which is 10.15 %. Pike posits that, in lieu of presenting expert testimony proposing an ROE, it is willing to accept the generic DSIC ROE return set forth in the June 2024 QER.

On January 8, 2025, the OCA filed a Formal Complaint and Public Statement to protect the interests of consumers in the Company's service territory and to ensure that the Company is permitted to implement only a level of rates that is just and reasonable and in accordance with sound ratemaking principles. On January 17, 2025, Pike filed

Supplement No. 128 to Tariff Gas – Pa. P.U.C. No. 6 with the Commission to voluntarily postpone the effective date of the tariff filing to March 15, 2025. Pike filed the suspension postponement so the gas tariff case can run concurrently with a request for increase in rates from the Company’s gas customers.

On February 6, 2025, the Commission issued an Order that initiated an investigation into the lawfulness, justness, and reasonableness of the proposed rate increase and the Company’s existing rates, rules, and regulations, assigned this matter to the OALJ for further proceedings as appropriate, and suspended the effective date of the tariff until October 15, 2025. The matter was assigned to presiding ALJs Marta Guhl and Alphonso Arnold III.

Pursuant to the Commission’s regulations at 52 Pa. Code §§ 5.321, 5.331 and 5.341, OCA propounded discovery on Pike, asking for the utility to provide a more detailed rationale for its proposed ROE, but Pike simply pointed to the analysis performed by TUS in the June 2024 QER as support for its recommendation without providing the documents utilized in TUS’s analysis. OCA claims that it must obtain TUS’ workpapers underlying the June 2024 QER (and the QER for year ended September 30, 2024) to ascertain how Pike’s proposed ROE was calculated and thereby assess its reasonableness. Specifically, OCA notes that “Attachment G, p. 23 of the *June 2024 QER* includes information which indicates that 16 DCF observations, and at least one CAPM observation, are made in support of the DSIC Return of 10.15%” but “there is no indication in the *June 2024 QER* how the value of 10.15% was selected from the “Market Indicated Common Equity Cost Rate Range.” Application, ¶ 20. Therefore,

OCA seeks production of TUS’ “workpapers” including “the Excel files, in native format with links and formulae intact, supporting the DCF and CAPM results which are provided in Attachment G of the *June 2024 QER*.”

For the reasons stated below, TUS respectfully requests the presiding ALJs to deny the Applications and rescind the March 27, 2025 Orders that were issued in the above-captioned proceedings, which prematurely granted the Applications.

II. OBJECTIONS

A. THE APPLICATIONS SHOULD BE STRICKEN BECAUSE THEY ARE PROCEDURALLY DEFICIENT

Section 5.421(b)(3) of the Commission’s regulations required OCA’s Applications to “contain a notice that a response or objection to the application shall be filed with the Commission and presiding officer *within 10 days* of service of the application.” 52 Pa. Code § 5.421(b)(3) (emphasis added). Based on this regulation, which was never waived, **TUS’ objections are due today, March 28, 2025.**² OCA’s Applications did include a Notice to Plead, however that notice incorrectly—and intentionally—advises that TUS was required “to file a written response or objection within 5 days” to the Applications. This misstatement of the law and reduction in the applicable standard response timeframe for applications for the issuance of a subpoena was clearly intentional as it matches OCA’s request that TUS be required to respond to the Applications within

² OCA’s Applications were served on TUS by email on March 18, 2025.

five (5) days. Accordingly, TUS respectfully requests that Your Honors strike the Applications because OCA's Notice to Plead intentionally misstates the time to respond.

B. THE APPLICATIONS SHOULD BE DENIED BECAUSE PIKE'S RELIANCE ON THE COMMISSION'S QER DOES NOT MAKE THE CALCULATION OF THE DSIC ROE RELEVANT OR MATERIAL IN THIS RATE CASE PROCEEDING

Under the law, the utility is entitled to recovery of its reasonably incurred expenses and a fair return on its investment. The Commission evaluates each utility's request for a rate increase based on those criteria. During a base rate case investigation, the burden of proof is always on the public utility which means that it is incumbent that it present evidence in support of the rate increase. Other parties, like the OCA, have the ability to contest the utility's requested rate increase and are afforded the opportunity to review the company's records and the evidence supporting their proposed rate request and present their views on whether the increase is in the public interest. Consequently, OCA stated that in its Prehearing Memorandum, it provided notice to parties that it intended to submit expert testimony on issues pertaining to rate of return. OCA Prehearing Memorandum at 8.

Thereafter, OCA propounded discovery requests on Pike —specifically, its Fifth Set of Interrogatories— requesting Pike to provide workpapers or other documents supporting its proposed ROE of 10.20%. Since Pike supposedly did not provide any relevant or pertinent workpapers or other documents to support its proposed ROE of 10.20%, OCA asserts that it is unable to perform a fully detailed analysis of Pike's cost of equity proposal and determine whether Pike's overall requested rate of return is appropriate and reasonable for use in establishing Pike's revenue requirement and resultant rates. Applications at 5.

OCA asserts that since Pike seems to rely on the DSIC ROE set forth in the Commission’s June and September 2024 QERs, it is necessary for TUS to provide its workpapers used to develop the DSIC ROE set forth in the June and September 2024 QER. OCA further asserts that in a proceeding wherein a utility supports its ROE request through the use of a cost of capital witness, it routinely requests the workpapers of that witness in order to understand the basis for the witness’s recommendation. *See* 52 Pa. Code Section 5.321. Accordingly, OCA seeks to subpoena TUS’s workpapers because they supposedly relate to the claim of Pike that it is entitled to an ROE of 10.20%.

Under Section 5.321(c) of the Commission’s regulations, 52 Pa. Code § 5.321(c) (relating to scope of discovery), “a party may obtain discovery regarding any matter... which is relevant to the subject matter involved in the pending action[.]” In this instant matter, which is an investigation into Pike’s proposed rates, it needed to supply supporting data with the proposed tariff(s). However, the particular QER information that OCA seeks from TUS is irrelevant to the instant rate case.

After reviewing the financial data filed by jurisdictional utilities pursuant to 52 Pa. Code, Chapter 71 (Financial Report), §§ 71.1 – 71.9 and other publicly-available data, TUS prepares a draft QER for consideration at a Commission public meeting. The publicly released QER clearly states that the Commission determines the ROE is for DSIC purposes and not to substantiate a utility’s request to increase its rates in a requested rate base filing. As such, the QER is published to fulfill the Commission’s broad regulatory oversight responsibilities, and to set forth the Commission allowed ROE for DSIC purposes, not to establish the ROE of any specific utility in a rate case.

In this proceeding, the OCA asserts that it seeks to understand the basis for TUS's selection of 10.15% as the Commission approved DSIC ROE and, therefore, must request TUS's workpapers. However, the fact that Pike has chosen to adopt the unorthodox position of relying on the DSIC ROE published in the Commission's QERs in lieu of presenting its own independent expert witness testimony that sets forth a ROE that substantiates the proposed new rates and proves that the requested rate increase is needed does not draft the Commission or its advisory Staff, here TUS, into supporting its rate case. OCA is free to challenge Pike's reliance on the QER; and indeed, OCA avers that it has sought discovery and exposed Pike's position as having no foundation. Yet, OCA should not be allowed to use Commission advisory staff to bolster its challenge to Pike's proposed rate increase.

In the case of general rate cases, TUS serves as the advisory bureau to the Commission as it performs the initial analysis of the rate filing and makes a recommendation as to whether to suspend, approve, or issue an option order. This should be TUS' only involvement in a contested base rate case. For that matter, the Commission (of which TUS is a constituent bureau) is not a party to these dockets and takes no position with respect to Pike's proposed ROE. Indeed, the Commission is charged with adjudicating utility rate case filings and ultimately setting a ROE which may differ from the ROE proposed by the utility in its base rate case filing. Thus, neither the Commission nor its advisory Staff should take any action that seemingly endorses the position of any

party.³ Compelling TUS to provide its workpapers to an interested party, for that party to exploit in litigation and support its position, conflicts with the Commission's need to maintain objectivity in the dockets.

C. THE APPLICATIONS SHOULD BE DENIED BECAUSE THEY SEEK DISCLOSURE OF PRIVILEGED MATERIALS

Almost all the data contained in TUS' spreadsheets is published verbatim in the QERs and already available to OCA.⁴ As such, OCA has the option to submit the Commission's QER reports under 52 Pa. Code § 5.406. However, OCA is not seeking purely factual information in its subpoena. Rather, in seeking TUS' "worksheets" (a term which OCA leaves undefined), OCA seeks to examine the inner workings through which the Commission, with TUS and the Law Bureau's advice, derives the DSIC ROEs that appear in the QERs. This inquiry broaches into the deliberative process of the Commission and should be firmly resisted at the outset:

The deliberative process privilege permits the government to withhold documents containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. The deliberative process privilege benefits the public and not the officials who assert the privilege. The privilege recognizes that if governmental agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer. For the deliberative process privilege to apply, certain requirements must be met.

³ It is for this reason that Section 5.321(d) of the Commission's regulations, 52 Pa. Code § 5.321(d), excepts "discovery sought of Commissioners or Commission staff serving in an advisory or adjudicatory capacity" from the scope of permitted discovery.

⁴ Pursuant to 52 Pa. Code 71.7, a public utility is required to serve a copy of its filed financial report with the Office of Special Assistants, the Bureau of Investigation and Enforcement, the Office of Consumer Advocate and the Small Business Advocate. The other data used that by TUS to calculate the range of the DSIC ROE is from public and subscription sources that are available to the OCA.

First, the communication must have been made before the deliberative process was completed. Secondly, the communication must be deliberative in character. It must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Information that is purely factual, even if decision-makers used it in their deliberations is usually not protected.

Joe v. Prison Health Servs., Inc., 782 A.2d 24, 33 (Pa. Cmwlth. 2001).

As stated above, when preparing a draft QER for official action by the Commission at a public meeting, TUS prepares a spreadsheet which captures the financial data provided by the utilities as well as data gathered by TUS from public and subscription sources. The spreadsheets also contain mathematical functions that TUS uses to analyze this data and calculate, among other things, the CAPM and DCF results. Upon official action taken by the Commission on the draft QER at the public meeting, the QER is released at public meeting. Thus, in compiling QERs for Commission review and approval, TUS acts in an advisory capacity, as contemplated by the Public Utility Code. See, 66 Pa.C.S. § 308.2(a)(3) (authorizing the Commission to establish a bureau to “[c]onduct financial reviews, earnings analyses and other financial studies.”). Thus, TUS’ spreadsheets are part and parcel of the Commission’s deliberative process and therefore privileged.

D. THE ALJS’ ORDERS GRANTING THE APPLICATIONS SHOULD BE RESCINDED IMMEDIATELY

On March 26, 2025, the presiding ALJs issued twin orders granting the Applications (Subpoena Orders) in these dockets.⁵ The Subpoena Orders reason that OCA had stated an adequate case for issuance of subpoenas and for expedited treatment and averred that TUS did not object to either. The Subpoena Orders were issued prematurely, without due process and should be rescinded immediately.

The Subpoena Orders note that Section 5.421(b)(3) of the Commission's regulations, 52 Pa. Code § 5.421(b)(3), provides that OCA's Applications "must contain a notice that a response or objection to the application shall be filed with the Commission and presiding officer within 10 days of service of the application." Subpoena Orders at 2, n.2; 52 Pa. Code § 5.421(b)(3). Thus, the Subpoena Orders recognize that ten (10) days' notice was required but, inexplicably, retroactively adopt OCA's request that TUS' time to object be shortened to five (5) days. Thus, the Subpoena Orders deprive TUS of due process and flagrantly disregard the Commission's procedural rules.⁶

Finally, OCA could have, and should have, initiated third-party discovery as soon as it learned that Pike intended to rely on the QERs as the basis for its proposed ROE, which was March 3. Applications, ¶¶ 11-15. Pursuant to Section 5.331(b), 52 Pa. Code § 5.331(b), "[a] party shall initiate discovery as early in the proceedings as reasonably

⁵ TUS is not included in the service list appended to the Subpoena Orders, and only received copies of the Subpoena Orders when they were emailed to counsel by OCA the morning of March 27, 2025.

⁶ See, *Gary Eckenrode*, No. C-2012-2337839, 2013 WL 4414583, at *4 (Aug. 1, 2013) ("Under Section 5.421 of the regulations, subpoenas must be in written form with enough specificity to determine relevance, materiality and scope of the testimony or documents sought. 52 Pa. Code § 5.421(b)(1). The opposing party has 10 days within the service of the subpoena to file objections to the request. 52 Pa. Code § 4.421(f).")

possible.” Instead, OCA waited until March 10 to confer with counsel about procedure and until March 18 to file its Applications. The OCA, in an attempt to add credence to its defective Applications, represents that counsel for the Commission collaborated on the “best approach” for gaining access to the information. Application ¶ 29. The OCA’s representation is disingenuous at best and should be ignored. A single telephone conversation with counsel about a procedural question in a case in which TUS is not even a party in no way constitutes “notice” that would excuse OCA from providing the required ten (10) day interval to respond, or justify expedited treatment of its Applications. The OCA could also have requested an extension of the discovery period. In short, OCA’s current predicament is one of its own making. Also, a presiding officer should only waive a requirement within the regulations if the waiver does not adversely affect a substantive right of a party. Per the Commission’s regulations regarding subpoenas, TUS had a minimum of ten days to respond. The OCA is well aware of the litigation schedule established by the ALJs in this proceeding. The OCA’s delay in determining its litigation position cannot be used as the basis to justify an emergency or exigent circumstance resulting in the modification of the substantive right of TUS to respond to the Applications within the appropriate ten day timeframe.

WHEREFORE, for all the foregoing reasons, the Bureau of Technical Utility Services of the Pennsylvania Public Utility Commission respectfully requests that Your Honors issue an order striking OCA's Applications because they are procedurally improper. Alternatively, the Applications should be denied as they seek records that are outside the scope of discovery, irrelevant and privileged. Finally, OCA's request for expedited treatment should be denied and the Subpoena Orders should be rescinded.

Respectfully submitted,

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Date: March 28, 2025

VERIFICATION

I, Paul Diskin, hereby state that the facts above set forth are true and correct (or 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).

A handwritten signature in cursive script that reads "Paul Diskin". The signature is written in black ink and is positioned above a horizontal line.

Paul Diskin
Director, Bureau of Technical Utility Service
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Dated: March 28, 2025