

COMMONWEALTH OF PENNSYLVANIA



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April 18, 2025

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission
v
Pike County Light & Power Company
Docket Nos. R-2024-3052357; R-2024-3052359

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Brief in Opposition to the Petition for Interlocutory Review in the captioned proceedings.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Respectfully submitted,

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Certificate of Service

CERTIFICATE OF SERVICE

Pennsylvania Public Utility Commission :
v. : Docket No. R-2024-3052357
Pike County Light & Power Company :
Gas :

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v. : Docket No. R-2024-3052359
Pike County Light & Power Company :
Electric :

I hereby certify that I have this day served a true copy of the following document, OCA Brief in Opposition to the Petition for Interlocutory Review, 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 18th day of April, 2025.

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Pursuant to 52 Pa. Code Section 5.302(b), the Office of Consumer Advocate (OCA) submits the following Brief in Opposition to the Petition for Interlocutory Review and Answer to Material Question (Petition)¹ submitted by the Pennsylvania Public Utility Commission's (Commission's) Bureau of Technical Utility Services (TUS) on April 10, 2025. While the OCA takes no position on whether the Petition satisfies the "compelling reason" standard for a request for interlocutory review, the OCA opposes the primary and alternative relief requested in the Petition and recommends the Commission answer the material question in the negative.

I. BACKGROUND

On March 18, 2025, the OCA filed Applications for Issuance of Subpoena (Applications) in the gas and electric rate increase requests of Pike County Light & Power Company (Pike or Company) at the above-listed dockets, pursuant to 52 Pa. Code Section 5.421. In the Applications, the OCA requested that Administrative Law Judges (ALJs) Marta Guhl and Alphonso Arnold III order the issuance of a subpoena for TUS to produce the workpapers² which support Attachments F and G of the Report on the Quarterly Earnings of Jurisdictional Utilities for the Year Ended June 30, 2024 (June 2024 QER) and the Report on the Quarterly Earnings of Jurisdictional Utilities for the Year Ended September 30, 2024 (Sept. 2024 QER)³. The OCA further requested that the Applications receive expedited treatment, with the period for objections being shortened from 10 to five days and, therefore, the OCA included in its Notice to Plead a notice that responsive objections should be filed and served within five days of the filing date of the Applications.

¹ In the Petition, TUS treats the OCA's Applications as identical. The OCA, therefore, submits the instant Brief as a consolidated responsive filing to the Petition.

² In TUS's Objections to the OCA's Applications (Objections), TUS states that the terms used by the OCA in its Applications regarding "worksheets" is left undefined. Objections at 8. In the Application, the OCA defined "workpapers" as "including the Excel files, in native format with links and formulae intact, and all linked Excel files, supporting the DCF and CAPM results which are provided in" Attachments F and G of the Reports on the Quarterly Earnings of Jurisdictional Utilities for the years ending June and September 2024 and did not use the term "worksheets." Applications at 7, 11-12.

³ Such reports are frequently referred to as the "Quarterly Earnings Reports" or "QERs."

Applications at ¶¶ 27-31. In the Applications, the OCA stated that the procedural schedule established in these dockets required the OCA to submit its Direct Testimony on April 3, 2025, which required a timely response from TUS in order to include the subpoenaed documents in its case-in-chief. No objections or responses were filed with the Commission in response to the OCA's Applications by March 23, 2025, or the close of the noticed five-day pleading period.

On March 26, 2025, the ALJs issued Orders granting the OCA's Applications (*March 26 Orders*), including granting the OCA's request for expedited treatment as well as the OCA's request for issuance of subpoenas.

On March 27, 2025, the OCA provided TUS with the *March 26 Orders* and issued subpoenas via electronic mail and perfected service of the subpoenas on March 28, 2025, with in-person delivery.⁴

On March 28, 2025, TUS filed its belated Objections, objecting to both the *March 26 Orders* granting the OCA's request for expedited treatment as well as the issuance of subpoenas.

On March 31, 2025, the OCA filed an Affidavit of Service, indicating that it served the subpoenas on TUS on March 28, 2025.

Also on March 31, 2025, TUS filed a Petition for Interlocutory Review of Discovery Matters (March 31 Petition), seeking interlocutory review of the *March 26 Orders* pursuant to 52 Pa. Code Section 5.304, pertaining to interlocutory review of discovery matters, which identified reasons for interlocutory review. Petition at ¶ 5. On April 1, 2025, ALJs Guhl and Arnold convened

⁴ TUS states in the Petition that the "ALJs issued Orders granting OCA's Applications (Subpoena Orders) that were never served on TUS." Petition at ¶ 2. To be clear, the OCA's Applications were served on TUS on March 18, 2025, in the manner required under Section 5.421(c) of the Commission's regulations. 52 Pa. Code § 5.421(c). The *March 26 Orders* were served on TUS on March 28, 2025, by the OCA in the manner required under Section 5.421(d)(1) of the Commission's regulations, though they were not served on TUS by ALJs Guhl and Arnold. 52 Pa. Code § 5.421(d)(1). Service on TUS of the Applications, *March 26 Orders*, and subpoenas was sufficient under the Commission's regulations.

a status conference to hear oral argument on the Applications, Objections, and Petition. Counsel for the OCA and TUS participated in the argument.

On April 2, 2025, ALJs Guhl and Arnold issued Orders which denied certification of TUS's Petition (*April 2 Orders*).⁵

Notwithstanding the ALJs' denial of the instant Petition in the *April 2 Orders*, on April 7, 2025, the OCA filed, pursuant to 52 Pa. Code Section 5.304(d), a consolidated Brief in response to the Petition and in opposition to the Petition's request for certification of interlocutory review of discovery matters (OCA's April 7 Responsive Brief).

On April 10, 2025, TUS filed the instant Petition.

Pursuant to 52 Pa. Code Section 5.302(b), the OCA files this timely consolidated Brief in opposition to TUS's Petition and addresses the merits of the material question presented.

II. ARGUMENT

A. **The *March 26 Orders* should be upheld given that the documents required in the OCA's Applications for Subpoena are relevant and public.**

1. **The requested documents are relevant and material to the Pike rate cases.**

TUS argues in the Petition that Pike's "reliance on the Commission's QERs in its requested base rate increases does not make TUS's calculation of the distribution system improvement charge (DSIC) return on equity (ROE) relevant to a base rate proceeding." Petition at ¶ 8. While the OCA agrees that the DSIC ROE is not relevant to the determination of an appropriate return

⁵ ALJs Guhl and Arnold ruled that the Petition was procedurally deficient because (1) it sought interlocutory review of an order granting an application for issuance of a subpoena, which is not itself a discovery ruling and should be brought under 52 Pa. Code Section 5.302 instead of under Section 5.304; and (2) if, assuming *arguendo* that the *March 26 Orders* had been rulings on a discovery matter, the Petition did **not** (a) meet the condition of Section 5.304(a)(1) because the Commission did not order interlocutory review of the *March 26 Orders*; (b) meet the condition of Section 5.304(a)(2) because TUS failed to request the ALJs to certify a question to the Commission, as is required; **or** (c) meet the condition of Section 5.304(a)(3) because deposition of a Commissioner or Commission employee is **not** at issue in the OCA's Applications or *March 26 Orders*. *April 2 Orders* at 3-5 (*citing* 52 Pa. Code §§ 5.302(a), 5.304(a); *citing also Application of First Class Transportation, Inc.*, Docket Nos. P-2015-2501758 *et al* (Order entered Feb. 25, 2016) at 5).

on equity for ratemaking purposes, when a public utility claims that it is appropriate, TUS's calculation of the DSIC ROE becomes relevant. As stated in the Applications, Pike did not submit an independent analysis to support its requested return on equity in its requests for rate relief. Applications at ¶¶ 7-16. Rather, Pike selected the Commission-authorized return on equity for purposes of the DSIC for electric and natural gas distribution utilities and "rounded" that value to produce its recommended return on equity for ratemaking purposes. *March 26 Orders* at 2. Therefore, the determination by ALJs Guhl and Arnold that the workpapers requested by the OCA in the Applications are relevant to the Pike rate case proceeding should stand. See *Wilmer Baker v. Sunoco Pipeline, L.P.*, Docket No. C-2018-3004294 (Order entered Sept. 23, 2020)⁶ at 15 ("the Code and Commission Regulations vest the Commission's ALJs with authority to preside over the receipt and render determinations on the relevance of evidence at hearings.") (citing 66 Pa. C.S. § 331(d)(3); 52 Pa. Code §§ 5.483, 5.403).

The OCA owes an obligation to the Commission and the ALJs as a steward of the evidentiary record, which requires ensuring that sufficient evidence is presented for the Commission to reach an order based in substantial evidence. 2 Pa. C.S. § 704. A quantitative analysis regarding why the June 2024 QER presents an inadequate basis for the selection of an appropriate return on equity for Pike is material to the OCA's case-in-chief and in satisfying its obligations to the ALJs and Commission to provide relevant, competent evidence sufficient to reach a conclusion regarding an appropriate return on equity. Absent such a basis, the OCA's witness must support their argument without a financial analysis which specifically addresses the deficiencies of utilizing the DSIC for ratemaking purposes.

⁶ Available at: <https://www.puc.pa.gov/pcdocs/1678249.docx/>.

The OCA seeks to ensure that its experts have access to all of the evidence required to fully support their positions so that it can satisfy its obligations to provide the Commission with a full and complete evidentiary record; the OCA's expert on rate of return issues informed the OCA that the requested workpapers would assist her analysis and review of Pike's as-filed position. For these reasons, the documents sought by the OCA's Applications are relevant and material to its analysis of Pike's requested return on equity for ratemaking purposes. *See Pa. PUC. v. Peoples Natural Gas Co.*, 62 PaPUC 56 (Aug. 26, 1986) ("the relevancy test should be liberally applied when considering discovery requests"). Furthermore, TUS has presented no basis to overturn the determination by ALJs Guhl and Arnold that the workpapers requested by the OCA are relevant and material to the Pike rate cases. Therefore, the Commission should answer subpart (i) of the stated material question in the negative.

2. The requested documents are not privileged.

TUS claims that "the workpapers OCA seeks are part of the Commission's deliberative process with respect to the derivation of the DSIC ROEs that appear in the QERs and are, therefore, exempt from disclosure under the deliberative process privilege." Petition at ¶ 9. Up to this point, TUS has provided no support as to the basis of its claim of deliberative process privilege with respect to the requested workpapers, not in its Objections, statements at the April 1 status conference, or either of its petitions for interlocutory review. Rather, all information provided by TUS regarding the workpapers indicates that the requested workpapers contain purely factual information as well as some mathematical formulae, without explanation as to how the mathematical formulae are sufficient to constitute privileged material. Objections at 9.

The OCA requested typical workpapers for rate of return analyses in its Applications, not draft reports, communications regarding such drafts, other such documents, or a deposition of a Commission employee, as TUS asserted despite the clear and narrow request provided in the

Applications. Tr. 240-41, 246, 249. The exchange of workpapers supporting a position on rate of return is a regular part of practice before the Commission in litigation of Section 1308(d) proceedings, including in the instant proceedings, wherein Pike requested the OCA's workpapers in the Company's Set 1 to the OCA. These spreadsheets often contain the type of data that the OCA anticipates are contained in the documents requested in the Applications, such as data regarding stock prices, dividends, growth rates, betas, 10-year Treasury bond yields, and total market return on equity that are components of the calculation of the discount cash flow (DCF) and capital asset pricing model (CAPM) return on equity analyses.⁷ Accordingly, the OCA has no basis to conclude that the requested spreadsheets would contain any material which could be considered to be a confidential expression of opinion, recommendation, or advice.

Rather, TUS pleaded that the only information contained in the QERs which is not available from publicly available sources, subscription sources, or the reports of jurisdictional utilities are the mathematical functions that underlie TUS's DCF and CAPM analyses. Objections at 9. However, some of these functions are already discernable because TUS provides its DCF and CAPM equations in the QERs. Additionally, where, as here, the data contained in a requested document is purely factual, even if it was relied upon in deliberations, that data does not fall within the deliberative process privilege. *McGowan v. Pa. DEP*, 103 A.3d 374, 386-87 (Pa. Cmwlth. 2014).

Furthermore, TUS has neither pleaded nor argued any basis which supports the inference that the mathematical functions somehow contain an expression of opinion, advice, or

⁷ The OCA mentions these specific data because they are identified by TUS as the components of the DCF and CAPM analyses that underlie each QER. *See, e.g.*, Sept. 2024 QER at 16-17. Further, the Commission has published the parameters for the QER's calculations in a series of Secretarial Letters at Docket Nos. M-2012-2293611 and M-2012-2317272. *See, e.g., ROE Working Group*, Docket No. M-2012-2293611 (Sec. Letter dated April 17, 2013), available at: <https://www.puc.pa.gov/pcdocs/1225184.docx>. The publication of these criteria constitutes a waiver in whole or in part of the privilege which TUS asserts applies in this proceeding.

recommendation for the Commission. Objections at 8-9; Tr. 246-47. The deliberative process privilege only prevents disclosure of information which contains ““confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice,”” and the party claiming the privilege must submit evidence of specific facts demonstrating how the information relates to deliberations. *Pa. PUC v. Nase*, 302 A.3d 264, 272-73 (Pa. Cmwlth. 2023) (quoting *Smith v. Pa. DEP*, 161 A.3d 1049, 1067 (Pa. Cmwlth. 2017)). These workpapers presumably should match and support the publicly available QER. Effectively, the workpapers are the Excel version of the very same PDF document that is publicly available. Presumably, the only difference between the documents is that in the Excel version the viewer would be able to see the live formulae, data inputs, and the results of the mathematical computations. TUS has failed to demonstrate that the deliberative process privilege is applicable to the documents requested by the OCA in the Applications.

To the extent that TUS argued at the April 1, 2025, status conference that the OCA was requesting drafts of the June and Sept. 2024 QERs to examine the development of the June and Sept. 2024 QERs, that argument is belied by the contents of the OCA’s Applications and the *March 26 Orders*. See also Tr. 249. As stated previously, the OCA requested specific documents, none of which were identified in the Applications as drafts that would reflect the development of the figures ultimately included in the June and Sept. 2024 QERs over time. Drafts of the June and Sept. 2024 QERs would not be relevant to the instant proceeding because Pike did not request a return on equity contained in a draft of the June and Sept. 2024 QERs. Attachments F and G, pages 18, 20-23, 25-26 clearly contain printouts from Excel spreadsheets. The OCA is merely requesting access to the spreadsheets in native format with links and formulae intact, and all linked Excel files, from which the printouts were made for the publicly available versions of the June and Sept. 2024 QERs,

not prior versions of those spreadsheets or other drafts of the June and Sept. 2024 QERs. Applications at ¶¶ 18, 20-21, 24.

In sum, despite asserting the position that the deliberative process privilege protects from disclosure of the workpapers underlying the June and Sept. 2024 QERs, TUS pleaded no evidence or information sufficient to meet that burden. *Nase, supra*. Rather, TUS's arguments are merely that the requested workpapers contain mathematical formulae without indicating how or why such formulae contain confidential recommendations, advice, or opinions for use in a deliberative decision by the Commission. Objections at 8-9. Therefore, TUS's claim that the documents requested by the OCA in the Applications are immune from discovery under the deliberative process privilege is unsupported and belied by the processes resulting in the publication of QERs.⁸ Because the deliberative process privilege does not prevent disclosure of the documents requested by the OCA in its Applications and TUS did not plead that another privilege applies, ALJs Guhl and Arnold's decision in the *March 26 Orders* that the requested documents be provided to the OCA is in accordance with law and fact and should be upheld and subpart (ii) of the material question presented by TUS should be answered in the negative.

B. Parties can request production of documents from Commission advisory staff under the Commission's regulations through the issuance of a subpoena.

In the Petition, TUS argues that parties to a proceeding before the Office of Administrative Law Judge (OALJ) cannot request production of documents "which are the product of or within the control of Commission advisory or adjudicatory staff." Petition at ¶ 10. In support of this argument, TUS cites to Sections 5.321(d) and 5.349(e) of the Commission's regulations, which

⁸ Should the Commission accept TUS's unsubstantiated claim of privilege, the proper remedy is the production of a privilege log identifying the cells in the Excel files requested by the OCA which contain privileged information and an *in camera* review of those cells to determine whether the deliberative process privilege applies or if the cells merely contain factual information without deliberation. *See, e.g., Pa. State Police v. ACLU of Pa.*, 300 A.3d 386, 388, n. 9 (Pa. 2023) (*citing Pa. State Police v. ACLU of Pa.*, 189 A.3d 37 (2018)) (*in camera* review of a document which a party claims is covered by privilege is appropriate where the "words on the page" implicate the privilege).

provide that the subchapter of the Commission’s regulations regarding discovery “does not apply to discovery sought of Commissioners or Commission staff serving in an advisory or adjudicatory capacity” and that parties cannot submit a request for documents that are “official files of the Commission, or materials which are the product of or within the control of Commission advisory or adjudicatory staff.” *Id.* (citing 52 Pa. Code §§ 5.321(d), 5.349(e)).

At the outset, as stated by the OCA at the April 1 status conference, the OCA did not request the production of documents through the subchapter of the Commission’s regulations regarding discovery, or Subchapter D. Tr. 249-50; *see generally* Applications. Specifically, the OCA applied for issuance of a subpoena under Section 5.421 of the Commission’s regulations, which falls under Subchapter E of the Commission’s regulations and, therefore, is not prohibited under Section 5.321(d); rather, the only means by which a party to a proceeding before the OALJ can request discovery of Commission staff is exactly how the OCA did in this proceeding. *See* 52 Pa. Code § 5.421.

TUS’s argument that an ALJ cannot enter an order granting issuance of a subpoena for the production of documents (i.e., a subpoena *duces tecum*) that does not request the deposition of a Commission employee (i.e., a subpoena *ad testificandum*) due to the prohibition on requesting documents from Commission staff in Section 5.349(e) was raised for the first time in the Petition. Petition at ¶ 10. TUS did not raise this argument in its Objections, at the April 1 status conference, or in its March 31 Petition. Furthermore, the OCA is aware of no Commission or ALJ order which agrees with the position asserted in the Petition and counsel for TUS does not cite to any. *See, e.g., Pa. PUC v. HIKO Energy LLC*, Docket No. C-2014-2431410 (Order entered Dec. 30, 2014)⁹ at 11-16 (ALJ denied application for a subpoena for the production of documents without reference

⁹ Available at: <https://www.puc.pa.gov/pcdocs/1335327.docx/>.

to Section 5.349(e) of the Commission’s regulations). The Commission’s regulations do not plainly state that a subpoena may only be issued for the deposition of a Commission employee and not for the production of documents in the possession of a Commission employee.

Further, TUS’s argument should be rejected for two reasons. First, the prohibition in Section 5.349(e) for requesting documents “which are the product of or within the control of Commission advisory or adjudicatory staff” only applies to request brought under “[t]his section.” See 52 Pa. Code § 5.349(e) (emphasis added). As stated *supra* and in the Applications, the OCA did not issue a request for production of documents under Section 5.349(e), but under 5.421, which means that the prohibition contained in Section 5.349(e) does not apply to the OCA’s Applications, as they were brought under a different section. As such, the OCA used the correct tool of discovery, a subpoena, instead of merely issuing a request for documents under Section 5.349(e).

Second, if TUS’s interpretation of the Commission’s regulations is correct, parties to proceedings before the Commission and OALJ would be left with no means of discovery in the Commission’s regulations to seek the production of documents from a Commission employee without also seeking a deposition of that employee. As stated by the OCA at the April 1 status conference, the OCA is not seeking a deposition of a Commission employee, only the relief requested in its Applications, which is for the production of documents. Tr. 240-41. TUS’s interpretation of the Commission’s regulations would create absurdity by requiring the deposition of a Commission employee, along with the remittance of fees and costs associated with that deposition, for the mere production of documents. Further, TUS’s interpretation would encourage parties to use requests under the Right-to-Know Law (RTKL), 65 P.S. Sections 67.101-67.3104, as a means of discovery in proceedings before the Commission to avoid being forced to seek

deposition of a Commission employee when there is no need for one. Either way, TUS's interpretation goes against the public interest and should not be adopted by the Commission.

TUS's arguments advanced in the Petition are inconsistent with the Commission's regulations and the public interest. Petition at ¶ 10. Therefore, these arguments should be rejected. The OCA respectfully requests that the Commission answer subpart (iii) of TUS's stated material question in the negative.

C. The ALJs adequately addressed TUS's Objections.

In the Petition, TUS claims that the ALJs "failed to rule on TUS's Objections even though they were required to issue a ruling no later than April 7, 2025." Petition at ¶ 6, 11 (*citing* 52 Pa. Code § 5.421(f)). TUS misstates the applicable law. Namely, Section 5.421(f) requires the ALJ to "**address** an objection within 10 days of the assignment of any objection" to an application for issuance of a subpoena, not "rule on" them. 52 Pa. Code § 5.421(f) (emphasis added). On April 1, 2025, the ALJs convened a status conference to take argument on TUS's late-filed Objections. *See April 2 Orders* at 3 ("The parties were informed through email that the purpose of the status conference was to hear arguments regarding the Applications and Objections thereto."). At the status conference, TUS was given the opportunity to offer argument in support of its Objections, an opportunity which TUS took. Tr. 237-39, 246-47. Despite hearing TUS's arguments, the ALJs did not rescind the *March 26 Orders* as part of the *April 2 Orders*, indicating that TUS's Objections and arguments in support of its Objections were insufficient to warrant rescinding the issuance of subpoenas. *See April 2 Orders*.

The ALJs' treatment of the Exceptions is sufficient to satisfy the requirements of Section 5.421(f). TUS's Objections were **addressed** at the April 1 status conference. *See Address*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/address> (last accessed April 15, 2025) ("to direct the efforts or attention of" or "to deal with"). By contrast, in other

places, the Commission requires presiding officers to “rule on” the action of a party. 52 Pa. Code §§ 5.342(g)(1), 5.363, 5.371(c). This distinction demonstrates that ALJs Guhl and Arnold sufficiently acted on TUS’s Objections because they were not required to rule on them but to address them, despite TUS’s arguments to the contrary. Petition at ¶¶ 6, 11. As such, TUS has not suffered any prejudice or harm, its contentions to the contrary in the Petition should be rejected, and its request for alternative relief in the form of the issuance of an order on its untimely Objections should be denied.

D. TUS’s Objections to expedited treatment were not timely, and TUS was not prejudiced by the OCA’s request for, or the ALJs’ grant of, expedited treatment, and any argument to the contrary should be rejected.

In the Petition, TUS claims that the ALJs’ issuance of the March 26 Orders was “procedurally deficient and violative of TUS’s due process rights.” Petition at ¶ 2. TUS’s position is supported by neither law nor fact. Rather, in the *March 26 Orders*, ALJs Guhl and Arnold cited to 52 Pa. Code Section 1.2(c), which permits that a presiding officer “may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party,” with “this subpart” including Section 5.421, as well. *March 26 Orders* at n. 3. As set forth more fully below, no procedural or substantive rights of a party were affected by the grant of expedited treatment and, therefore, TUS’s argument should be rejected.

With the OCA’s Application, the OCA included a Notice to Plead, as required by the Commission’s regulations pertaining to subpoenas. 52 Pa. Code §5.421(b)(3). The Notice to Plead stated that responses should be provided to the ALJs within five days of the filing and service of the Applications, which were duly served on TUS and counsel for TUS. *March 26 Orders* at 2. TUS and counsel for TUS, therefore, had adequate notice that the ALJs may issue an order on an expedited basis, pursuant to the OCA’s request for expedited treatment. TUS did not timely file its Objections within the five-day time frame established in the Notice to Plead, nor did TUS

otherwise timely indicate that it objected to the expedited treatment requested in the Applications. Had TUS objected to expedited treatment within the five-day time period to the request for expedited treatment, the parties and ALJs would have had adequate notice that TUS sought to object to the OCA's Applications. 52 Pa. Code § 5.421(f) (providing the subject of a subpoena *may* object but includes no *requirement* to do so). TUS failed to timely object and, thereby, failed to preserve its objections to the request for expedited treatment before the request was ruled on.

Furthermore, at the April 1, 2025, status conference, TUS argued that the OCA could have filed an application for a subpoena as early as January 17, 2025. Tr. 238. TUS's argument should be rejected because the statement is unsupported by law, unsupported by fact, is ad hominem criticism that serves merely to distract, and because TUS was not prejudiced by the OCA's request for expedited treatment.¹⁰

Finally, and importantly, TUS was not prejudiced by the OCA's request for expedited treatment. TUS's Objections were heard by the ALJs at the status conference on April 1, 2025. TUS expeditiously and timely filed the March 31 Petition as well as the instant Petition. TUS has not provided the subpoenaed documents even though, under the *March 26 Orders*, the workpapers should have been provided to the OCA on March 31, 2025.¹¹ Petition at ¶ 4. "To establish a due process violation, a claimant must show prejudice of the type that would call into question the fairness or the outcome of the" decision of ALJs Guhl and Arnold. *Caba v. Weaknecht*, 64 A.3d 39, 66 (Pa. Cmwlth. 2013). TUS has not pleaded that the decision of ALJs Guhl and Arnold would have been different had the Objections been timely filed and considered before the *March 26 Orders* were issued; rather, after ALJs Guhl and Arnold assessed and considered TUS's Objections

¹⁰ For further explanation of the OCA's position, see the OCA's April 7 Responsive Brief, at pages 6-9.

¹¹ As noted herein, and as demonstrated in proof of service filed by the OCA on March 31, 2025, the OCA perfected in-person service on March 28, 2025. Three calendar days after such date would be March 31, 2025.

and heard argument at the April 1 status conference, ALJs Guhl and Arnold did not rescind the *March 26 Orders*. Therefore, TUS has suffered no procedural or substantive injury as a result of the grant of the OCA's request for expedited treatment.

Assuming *arguendo* that TUS has appropriately pled that its procedural due process rights were violated when the ALJs issued the *March 26 Orders*, TUS's claimed procedural injury has been cured. Where a party claims that a notice was misleading but the record indicates that the party "was fully aware of the factual and legal predicate" for the claims which will be addressed at hearing prior to the hearing, a hearing is convened, and the party is able to be fully informed of the facts and is able to mount a vigorous response at the hearing, then any defect is cured. *Phillips v. Pa. DOT, Bureau of Driver Licensing*, 80 A.3d 561, 569 (Pa. Cmwlth. 2013). TUS was able to mount a vigorous restatement of its Objections at the April 1 status conference and raised the same issues in its Objections that were raised in both of its Petitions for interlocutory review, as in *Phillips*. Furthermore, TUS has the opportunity to be heard by the Commission in bringing the instant Petition, which further cures any alleged violation of its procedural due process rights. *Cf. Application of Pa. DOT to alter the public crossing of the tracks of CSX Transportation, Inc.*, Docket No. A-2020-3022825 (Order on Reconsideration entered Nov. 10, 2022)¹² at 25 ("granting reconsideration will cure the allegations that CSXT's due process rights were violated").

Because TUS had the opportunity to be heard on its Objections by both ALJs Guhl and Arnold as well as the Commission, any alleged due process violation has been cured, and TUS's arguments to the contrary should be rejected.

¹² Available at: <https://www.puc.pa.gov/pcdocs/1764375.pdf>.

III. CONCLUSION

Therefore, the OCA respectfully requests that the decision of ALJs Arnold and Guhl in the *March 26 Orders* to require TUS to tender the requested documents to the OCA be upheld, the material question raised in TUS's Petition be answered in the negative, and the primary and alternative relief requested in the Petition be denied.

Respectfully submitted,

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