

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

Pennsylvania Public Utility Commission
v.
Pike County Light & Power Company (Gas)

Public Meeting held May 8, 2025
3052357-OSA
Docket Nos. R-2024-3052357, R-2024-3052359

Pennsylvania Public Utility Commission
v.
Pike County Light & Power Company
(Electric)

JOINT MOTION OF CHAIRMAN STEPHEN M. DeFRANK AND
COMMISSIONER KATHRYN L. ZERFUSS

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Interlocutory Review and Answer to Material Question (Petition) of the Commission's Bureau of Technical Utility Services (TUS) filed on April 10, 2025. The Petition seeks interlocutory review of two separate orders of Administrative Law Judges Marta Guhl and Alphonso Arnold III issued on March 26, 2025, which granted the Office of Consumer Advocate's (OCA) subpoena applications in both the electric and gas tariff supplement proceedings of Pike County Light & Power Company (Pike).¹

In its subpoena applications, the OCA seeks to obtain workpapers from TUS from its Quarterly Earnings Reports (QER) for the years ended June 30, 2024 and September 30, 2024. The OCA avers that the subpoena applications are necessary because Pike proposed a 10.20% return on equity (ROE) in its gas tariff supplement proceeding and a 9.75% ROE in its electric tariff supplement proceeding based on rounded ROEs from the gas and electric Distribution System Improvement Charge (DSIC) Eligible Utilities Return on Equity Summary set forth in the June 2024 QER. The OCA further avers that Pike cites to the analysis of TUS in the June 2024 QER without providing the documents utilized in TUS's analysis.

When issuing the March 26, 2025 subpoena orders, the presiding ALJs granted the OCA's subpoena applications in an expedited manner without first ruling on the OCA's request for expedited treatment. TUS's Objections to the subpoena applications were filed on March 28, 2025, after the issuance of the ALJs' subpoena orders but within the ten-day response period to subpoena applications as permitted by the Commission's regulations.² Accordingly, we agree that the ALJs' issuance of the subpoena orders was procedurally deficient and that the subpoena orders should be rescinded.

¹ Pike's Supplement No. 127 to its Tariff Gas – Pa. P.U.C. No. 6 seeks a proposed annual revenue increase of \$905,900. Pike's Supplement No. 105 to its Tariff Electric – Pa. P.U.C. No. 8 seeks a proposed annual revenue increase of \$2,143,900.

² 52 Pa. Code § 5.421(f).

Due to this procedural deficiency, TUS's substantive arguments contained in its Objections were not addressed by the ALJs and remain pending. In its Objections, Petition, and related supporting brief, TUS raises three substantive issues.

First, TUS argues that the QER workpapers are not relevant because the Commission determines the ROE for DSIC purposes and not to substantiate a utility's request to increase rates in a rate base filing. We conclude that TUS's workpapers relating to the information and calculations in the QERs are irrelevant in the context of this rate proceeding.

We note at the outset that Pike does not rely on TUS's workpapers to support Pike's methodology for its requested ROE. Rather, Pike merely utilized the published DSIC ROE for its requested ROE in the tariff supplement proceedings. The analysis and reasoning of TUS in developing the QER is therefore not relevant to the basis for Pike's claimed ROE.

Moreover, we have previously found that that the DSIC ROE is different from a ROE established in a base rate proceeding. We explained that the Commission determines the DSIC ROE on a quarterly basis and it is industry-specific, rather than a company-specific ROE set in a rate case. *See Pa. PUC v. Aqua Pa., Inc.*, Docket No. R-2021-3027385 (Order entered May 12, 2022), at 178. Additionally, the publicly released QER clearly states that the ROE the Commission sets in the report is for DSIC purposes.

The purpose of the quarterly DSIC calculations is to provide an incentive to public utilities to invest in their infrastructure between base rate cases, while still placing a cap on public utility overearnings. *Implementation of Act 11 of 2012: Supplemental Implementation Order*, Docket No. M-2012-2293611 (Order entered September 21, 2016), at 5-7. We therefore find that for the purposes of the subpoena applications, TUS' methodology for creating the DSIC ROEs was not intended to serve as a substitute for the parties' positions and various calculations in formulating a ROE as part of a record developed in a base rate case and accordingly, is not relevant.

Next, TUS argues that its workpapers are exempt from disclosure because, in both the Commission's DSIC ROE proceedings and Pike's base rate proceedings, TUS serves the Commission in an advisory capacity.³ TUS notes that the Commission's regulations regarding discovery specify that they shall not apply to materials that are the product of Commission advisory staff.⁴ TUS acknowledges that the OCA's subpoena applications⁵ were not requests for the production of documents between parties but asserts that it amounts to the same result, with the subpoena simply being the vehicle to effect discovery.

The essence of a subpoena's function is to aid in the resolution of litigation. *City of Erie v. Cappabianca*, 879 A.2d 823, 825 (Pa. Cmwlth. 2005), citing *Commonwealth v. Polak*, 263 A.2d 354, 356 (Pa. 1970). The object of a subpoena *duces tecum* is the production of evidence to be used before a court and not to require the production of information merely for the party's

³ 66 Pa.C.S. § 308.2(a)(3).

⁴ 52 Pa. Code §§ 5.321(d) and 5.349(e).

⁵ The OCA's subpoena applications were filed pursuant to 52 Pa. Code § 5.421, which falls under Subpart E of the Commission's regulations and not Subpart D (related to Discovery).

inspection or as a bill of discovery. *Cohen v. Pelagatti*, 493 A.2d 767, 770 (Pa Super. 1985). The subpoena applications request TUS's workpapers for the OCA's inspection to enable its expert witness to determine how the Commission authorized ROE for DSIC purposes. Even if the information requested by the OCA was relevant, which we determine it is not, the clear purpose of the subpoena applications is to effectuate discovery on behalf of the OCA. We therefore find, under these circumstances, that issuance of the subpoenas for the production of this information from a non-party to the proceedings and a bureau that acts in an advisory capacity to the Commission is not warranted.

As a final matter, TUS argues that the subpoena applications should be denied as they seek the disclosure of materials protected by the deliberative process privilege. TUS alleges that the OCA's request for its workpapers extends beyond seeking purely factual information and, rather, attempts to examine how the Commission, with the advice of TUS and the Law Bureau, derive the DSIC ROEs that appear in the QERs that the Commission votes on at Public Meeting. As such, TUS argues that OCA's request for its workpapers implicates the deliberative process privilege, which protects the government from disclosing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.⁶

We agree with TUS that its workpapers constitute the analysis of TUS's staff while creating a technical staff report, which informs the Commission's deliberations and final determination on the published staff report, including the DSIC ROEs for each industry. Accordingly, we find that TUS's workpapers are technical staff reports protected from disclosure under the deliberative process privilege pursuant to *Commonwealth v. Pa. PUC*, 331 A.2d 598 (Pa. Cmwlth. 1975).

THEREFORE, WE MOVE:

1. That the Petition for Interlocutory Review and Answer to Material Question of the Commission's Bureau of Technical Utility Services, filed pursuant to 52 Pa. Code § 5.302(a), on April 10, 2025, is granted.

2. That the Material Question, as stated below, is answered in the affirmative:

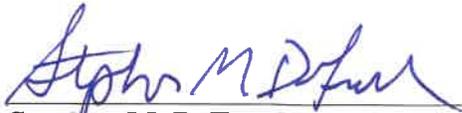
Did the ALJs err in granting OCA's request for issuance of a subpoena on TUS in order to obtain TUS's workpapers that support the information and calculations set forth within the Commission's published QERs when those workpapers are (i) not relevant to the underlying rate proceeding; (ii) protected from disclosure by the deliberative process privilege; and (iii) exempt from discovery as the product of Commission advisory staff?

⁶ TUS cites to *Darlene Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 33 (Pa. Cmwlth. 2001); and *Commonwealth v. Pa. PUC*, 331 A.2d 598, 601 (Pa. Cmwlth. 1975) (holding that Commission technical staff reports utilized by the Commission to determine the appropriateness of utility tariff charges are exempt from disclosure as a matter of the Commission's deliberative process).

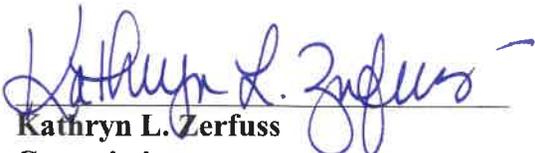
3. That the Orders of Administrative Law Judges Marta Guhl and Alphonso Arnold III, both issued on March 26, 2025, granting the Applications of the Office of Consumer Advocate for the Issuance of Subpoenas at Docket Nos. R-2024-3052357 and R-2024-3052359 are rescinded.

4. That the Office of Special Assistants draft an Opinion and Order consistent with this Joint Motion.

Date: May 8, 2025



Stephen M. DeFrank
Chairman



Kathryn L. Zarfuss
Commissioner