

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

Public Meeting held May 8, 2025

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Kathryn L. Zerfuss
John F. Coleman, Jr., Concurring In Result Only
Ralph V. Yanora, Concurring In Result Only

Pennsylvania Public Utility Commission

R-2024-3052357

v.

Pike County Light & Power Company (Gas)

Pennsylvania Public Utility Commission

R-2024-3052359

v.

Pike County Light & Power Company (Electric)

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Interlocutory Review and Answer to Material Question (Second Petition) of the Commission's Bureau of Technical Utility Services (TUS or Petitioner), filed by the Commission's Law Bureau pursuant to

Section 5.302(a) of the Commission’s Regulations, 52 Pa. Code § 5.302(a), on April 10, 2025, in the above-captioned proceeding. The Law Bureau filed the Petition in response to two separate Orders of Administrative Law Judges (ALJs) Marta Guhl and Alphonso Arnold III, both issued on March 26, 2025, Granting the Applications of the Office of Consumer Advocate (OCA) for the Issuance of Subpoenas at the separate Docket Nos. R-2024-3052357 (*Subpoena Order – Gas*) and R-2024-3052359 (*Subpoena Order – Electric*) (collectively, *Subpoena Orders*). On April 18, 2025, the OCA filed a brief in opposition to the Second Petition. On April 21, 2025, the Petitioner, through the Law Bureau, filed a brief in support of the Second Petition.

In its Second Petition, TUS seeks the Commission review of, and answer to, the following proposed Material Question:

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 Quarterly Earnings Reports (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?

Second Petition at 1.

TUS avers that interlocutory review will prevent substantial prejudice by preventing the OCA from obtaining TUS’s sensitive and privileged workpapers and requests that the Commission reverse the *Subpoena Orders* and rescind the subpoenas. Alternatively, TUS requests that the Commission issue an Order on its previously filed Objections to the OCA’s Applications for the Issuance of Subpoenas.¹

¹ As discussed below, on March 28, 2025, the Law Bureau, on behalf of TUS, filed Objections to the OCA’s Applications for the Issuance of Subpoenas filed on March 18, 2025, at Docket Nos. R-2024-3052357 and R-2024-3052359 (Objections).

For the reasons discussed below, we shall grant interlocutory review and answer the Material Question in the affirmative.

Accordingly, we shall grant the Second Petition; rescind the *Subpoena Orders*; and return the matter to the Office of Administrative Law Judge (OALJ).

I. Background and History of the Proceeding

On December 30, 2024, Pike County Light & Power Company (Pike or Company) filed Supplement No. 127 to Tariff Gas – Pa. P.U.C. No. 6, containing changes in gas rates, rules, and regulations, with a proposed annual revenue increase of \$905,900 (Supplement No. 127) (Gas Tariff Case) to become effective February 28, 2025. On January 8, 2025, the OCA filed a Formal Complaint and Public Statement in response to the Gas Tariff Case. By Order entered January 23, 2025, the Commission suspended Supplement No. 127 by operation of law until October 15, 2025.

Additionally, on January 14, 2025, Pike filed Supplement No. 105 to Tariff Electric – Pa. P.U.C. No. 8, containing changes in electric rates, rules, and regulations, with a proposed annual revenue increase of \$2,143,900 (Supplement No. 105) (Electric Tariff Case) to become effective on March 15, 2025. On January 24, 2025, the OCA filed a Formal Complaint and Public Statement in response to the Electric Tariff Case. By Order entered February 7, 2025, the Commission suspended Supplement No. 105 by operation of law until October 15, 2025.

For the Gas Tariff Case, the Company proposed an overall increase of 35% in total gas revenues, based on a proposed return on equity (ROE) of 10.20%, for an

overall rate of return of 8.59% on its requested rate base balance. Regarding its claimed ROE, Pike stated, as follows:

For revenue requirement purposes, we rounded the [ROE] from the Gas Distribution System Improvement Charge (DSIC) Eligible Utilities Return on Equity Summary, as published for September 18, 2024. The Company is willing to accept the generic ROE return made by the [C]ommission in order to minimize rate case costs to its customers.

Pike St. 2 - Gas at 23.

For the Electric Tariff Case, the Company proposed an overall increase of 29.1% in total electric revenues, based on a proposed ROE of 9.75%, for an overall rate of return of 8.37% on its rate base balance. As to its requested ROE, Pike stated, as follows:

For revenue requirement purposes, we rounded the [ROE] from the Electric Distribution System Improvement Charge (DSIC) Eligible Utilities Return on Equity Summary, as published for September 18, 2024. The Company is willing to accept the generic ROE return made by the [C]ommission in order to minimize rate case costs to its customers.

Pike St. 2 – Electric at 20-21.

On February 20, 2025, the OCA propounded its Fifth Set of Interrogatories – OCA-5-4 – in the Gas Tariff Case, requesting that the Company provide

support, including Commission precedent, for the proposed ROE of 10.20%.² On March 3, 2025, Pike provided the following response to OCA-5-4:

Refer to the “DSIC Charge Return on Equity” attachment provided. [3] The Company stated in the testimony that the 10.20% is the rounded return on equity from the Gas Distribution System Improvement Charge (“DSIC”) Eligible Utilities Return on Equity Summary, which is included on page 15 of 30 on the PDF file. The return on equity published is 10.15%. This report is published on the Pennsylvania Public Utility Commission’s website under the “Filing & Resources” section, then under the “Reports” you will see “Quarterly Earnings Summary Reports.” This report is published every quarter with the commission approved return on equity number.

Subpoena Application – Gas at 4.

Additionally, in the Gas Tariff Case, the OCA propounded an interrogatory – OCA-5-5 – requesting Commission precedent for the ROE return made by the Commission. On March 3, 2025, Pike provided the following response to OCA-5-5:

Counsel notes that as a legal matter, [Commission] decisions do not constitute precedent. Pike’s counsel will address this as a legal matter in briefing. Accordingly, Pike provides the

² Discovery requests made between the parties, such as the interrogatories propounded by the OCA, are not ordinarily filed with the Commission. Accordingly, for citation purposes, we shall reference the OCA’s Application for the Issuance of Subpoena – Gas Tariff Case, filed on March 18, 2025 (Subpoena Application – Gas); and the OCA’s Application for the Issuance of Subpoena – Electric Tariff Case, filed on March 18, 2025 (Subpoena Application – Electric) (collectively, Subpoena Applications).

³ The referenced attachment was to the Quarterly Earnings Report (QER) contained in the *Bureau of Technical Utility Services Report on the Quarterly Earnings of Jurisdictional Utilities For the Year Ended June 30, 2024*, Docket No. M-2024-3051104 (Public Meeting held October 10, 2024) (*June 2024 QER*). Subpoena Application – Gas at 4.

basis for the proposed use of the Commission’s published quarterly return on equity:

The Company has used the Commission’s published quarterly return on equity as an attempt to save rate case expense for rate payers. As previously explained, the Company will provide a rebuttal expert if other parties deem it necessary to present rate of return expert witnesses.

Subpoena Application – Gas at 5.

Regarding the Electric Tariff Case, the OCA propounded its Sixth Set of Interrogatories – OCA-6-4 requesting that the Company provide support for the proposed ROE of 9.75%. On March 3, 2025, Pike provided the following response to OCA-6-4:

Refer to the “DSIC Charge Return on Equity” attachment provided.^[4] The Company stated in the testimony that the 9.75% is the rounded return on equity from the Electric Distribution System Improvement Charge (“DSIC”) Eligible Utilities Return on Equity Summary, which is included on page 15 of 30 on the PDF file. The return on equity published is 9.75%. This report is published on the Pennsylvania Public Utility Commission’s website under the “Filing & Resources” section, then under the “Reports” you will see “Quarterly Earnings Summary Reports.” This report is published every quarter with the commission approved return on equity number.

Subpoena Application – Electric at 4.

Additionally, on February 20, 2025, in the Electric Tariff Case, the OCA propounded an interrogatory – OCA-6-5 – requesting Commission precedent for the ROE return made by the Commission. On March 3, 2025, in response to OCA-6-5, Pike referred to its response to OCA-6-4 for details. Subpoena Application – Electric at 4.

⁴ The referenced attachment was to the *June 2024 QER*.
Subpoena Application – Electric at 4.

On March 18, 2025, the OCA filed its Subpoena Application – Gas, pursuant to 52 Pa. Code § 5.421, to obtain the workpapers from TUS from its QERs. The OCA averred that the Subpoena Application – Gas was necessary because Pike did not provide support for its proposed ROE of 10.20%, but merely cited to the analysis of TUS in the *June 2024 QER* without providing the documents utilized in TUS’s analysis. Specifically, the OCA sought the workpapers related to the *June 2024 QER* and the *Bureau of Technical Utility Services Report on the Quarterly Earnings of Jurisdictional Utilities For the Year Ended September 30, 2024*, Docket No. M-2025-3053025 (Public Meeting held February 6, 2025) (*September 2024 QER*). Subpoena Application – Gas at 5.

The proposed subpoena in the Subpoena Application – Gas ordered the production of the following:

1. Workpapers used to develop the report titled “Bureau of Technical Utility Services Report on the Quarterly Earnings of Jurisdictional Utilities for the Year Ended June 30, 2024,” including the Excel files, in native format with links and formulae intact, and all linked Excel files, supporting the [Discount Cash Flow (DCF)] and [Capital Asset Pricing Model (CAPM)] results which are provided in Attachment G of the Report on the Quarterly Earnings of Jurisdictional Utilities for the Year Ended June 30, 2024.
2. Workpapers used to develop the report titled “Bureau of Technical Utility Services Report on the Quarterly Earnings of Jurisdictional Utilities for the Year Ended September 30, 2024,” 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 Attachment G of the Report on the

Quarterly Earnings of Jurisdictional Utilities for the Year
Ended September 30, 2024.

Subpoena Application – Gas at Exh. A.

Also, on March 18, 2025, the OCA filed its Subpoena Application – Electric, pursuant to 52 Pa. Code § 5.421, to obtain the workpapers from TUS from its QERs. The OCA averred that the Subpoena Application – Electric was necessary because Pike did not provide support for its proposed ROE of 9.75% but merely cited to the analysis of TUS in the *June 2024 QER* without providing the documents utilized in TUS’s analysis. Specifically, the OCA sought the workpapers related to the *June 2024 QER* and the *September 2024 QER*. Subpoena Application – Electric at 5.⁵

In both Subpoena Applications, the OCA proposed expedited treatment, seeking a shortened response period for filing objections to the proposed subpoenas, to five days instead of the ten days provided in Section 5.421(f) of our Regulations, 52 Pa. Code § 5.421(f). Additionally, both Subpoena Applications contained certificates of service indicating service on Mr. Paul Diskin, Bureau Director of TUS, and the Law Bureau. Both Subpoena Applications also contained Notices to Plead requiring responses to be filed within five days. Subpoena Application – Gas at 8-9; Subpoena Application – Electric at 8-9.

⁵ The proposed subpoena in the Subpoena Application – Electric was similar to the subpoena in the Subpoena Application – Gas with the exception of the reference to the attachments in the *June 2024 QER* and the *September 2024 QER*. In the Subpoena Application – Electric, the OCA proposed ordering the production of the workpapers supporting the ROE results produced by the Discounted Cash Flow (DCF) model and the Capital Asset Pricing Model (CAPM), as provided in Attachment G in both the *June 2024 QER* and the *September 2024 QER*. Subpoena Application – Electric at Exh. A.

According to the OCA, the expedited treatment was necessary because the litigation schedule set a deadline of April 3, 2025, for the submission of direct testimony by the Parties. The OCA argued that under the ten-day deadline for response set forth in 52 Pa. Code § 5.421(f), the OCA's expert witness would not have sufficient time to incorporate any responses into the direct testimony. Subpoena Application – Gas at 8-9; Subpoena Application – Electric at 8-9.

On March 26, 2025, the ALJs issued the *Subpoena Order – Gas* and the *Subpoena Order – Electric* and granted both Subpoena Applications. *Subpoena Order – Gas* at 4; *Subpoena Order – Electric* at 4. As will be discussed in more detail, below, the ALJs found that TUS, through the Law Bureau, did not object or otherwise respond to the Subpoena Applications. Moreover, the ALJs determined that expedited consideration was appropriate in order for the OCA to satisfy the deadline of April 3, 2025, for the submission of direct testimony. *Subpoena Order – Gas* at 4; *Subpoena Order – Electric* at 4.

Next, the ALJs addressed the grounds for the subpoenas and found that the OCA adequately specified the general relevance, materiality, and scope of the requested documentary evidence. Specifically, the ALJs determined that the requested workpapers will help the OCA's expert witness in analyzing the Company's proposed ROE. *Subpoena Order – Gas* at 4; *Subpoena Order – Electric* at 4 (citing 52 Pa. Code § 5.421(b)(1), (2)).⁶

⁶ There is no indication on the service pages of the *Subpoena Orders* or in the Commission's records that the *Subpoena Orders* were served on TUS or the Law Bureau.

On March 28, 2025, TUS filed Objections to the Subpoena Application – Gas and the Subpoena Application – Electric.⁷ In its Objections, TUS made the following five arguments:

- (1) The Subpoena Applications should be stricken because they are procedurally deficient.
- (2) The Subpoena Applications should be denied because Pike’s reliance on the Commission’s QER does not make the calculation of the DISC ROE relevant or material in this rate case proceeding.
- (3) The Subpoena Applications should be denied because they seek disclosure of privileged materials.
- (4) The *Subpoena Orders* granting the Subpoena Applications should be rescinded immediately.

Objections at 4-11.

Also, on March 28, 2025, the OCA filed Affidavits of Service of the Subpoenas and the respective *Subpoena Orders* indicating acceptance of service by TUS on March 28, 2025.

On March 31, 2025, TUS filed a consolidated Petition for Interlocutory Review of Discovery Matters pursuant to 52 Pa. Code § 5.304 (First Petition). In its First Petition, TUS argued that the ALJs did not rule on its timely filed Objections to the Subpoena Applications and have not rescinded the errant *Subpoena Orders*. TUS averred that if it is required to provide privileged workpapers to the OCA, the OCA will be permitted to seek further discovery into the derivation of the QERs, to include depositions of Commission staff. Additionally, TUS asserted that based on the

⁷ In its Objections, TUS states that it was not served with the *Subpoena Orders* and did not receive copies until the OCA emailed them on the day after they were issued – on March 27, 2025. Objections at 2.

exigencies and substantive implications presented by the ALJs' *Subpoena Orders*, as well as the ALJs' failure to address TUS's timely filed Objections, the Commission should reverse those orders, rescind the subpoenas, and direct the presiding ALJs to issue a new ruling, after considering TUS's timely filed Objections. Thus, TUS submitted that granting its request will prevent substantial prejudice by preventing the OCA from obtaining TUS's sensitive, privileged workpapers. First Petition at 3.

On April 1, 2025, the ALJs convened a status conference related to the Subpoena Applications, TUS's Objections, and the First Petition, at which counsel for Pike, the OCA, the Law Bureau, and the Commission's Bureau of Investigation and Enforcement (I&E) appeared. Tr. at 233-35.⁸

On April 2, 2025, the ALJs issued an Order denying the First Petition (*First Petition Order*) finding it procedurally deficient.⁹ In the *First Petition Order*, the ALJs stated that the First Petition was filed pursuant to Section 5.304 of our Regulations, 52 Pa. Code § 5.304, which concerns interlocutory review of discovery matters. However, the ALJs reasoned, the First Petition did not seek review of a discovery matter but pertained to the *Subpoena Orders* issued in response to the Subpoena Applications made by the OCA pursuant to Section 5.421 of our Regulations, 52 Pa. Code § 5.421. Thus, the ALJs determined that TUS was not seeking review of a discovery matter and that the First Petition should have been made pursuant to Section 5.302 of our Regulations, 52 Pa. Code § 5.302. *First Petition Order* at 3.

⁸ Pike and I&E indicated that they were not taking any position on the Subpoena Applications, the Objections, or the First Petition. Tr. at 236-37, 248.

⁹ The *First Petition Order* incorrectly states that the OCA served the subject subpoenas on TUS on March 26, 2025. *First Petition Order* at 2. As noted above, the OCA filed an Affidavit of Service of the Subpoenas evidencing service on TUS as of March 28, 2025.

Additionally, the ALJs found that the First Petition was deficient because it did not contain a material question or a request for certification of a material question for interlocutory review by the presiding officers. Finding nothing in Section 5.304 that would allow a party to bypass the certification of a material question, the ALJs denied the First Petition. *First Petition Order* at 3-5.

On April 7, 2025, the OCA filed a Brief in Opposition to Certification of Interlocutory Review (OCA Brief – First Petition), in which it supported the denial of the First Petition in the *First Petition Order*. The OCA asserted that it was filing this brief to preserve its rights if the Commission were to order interlocutory review. In its brief, the OCA made the following four arguments:

- (1) The Commission should not *sua sponte* consider the First Petition to have been filed under 52 Pa. Code § 5.302.
- (2) Certification by the ALJs is required under the Commission’s regulations for interlocutory review of the *Subpoena Orders*.
- (3) 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.
- (4) The *Subpoena Orders* should be upheld because the documents required in the OCA’s Subpoena Applications are relevant and public.

OCA Brief – First Petition at 4-13.

As noted above, on April 10, 2025, TUS filed the pending Second Petition seeking interlocutory review of the *Subpoena Orders* and requesting that the Commission answer the Material Question in the affirmative. On April 18, 2025, the OCA filed a brief in opposition to the Second Petition (OCA Brief – Second Petition). On

April 21, 2025, the Petitioner filed a brief in support of the Second Petition (TUS Brief-Second Petition).

II. Discussion

A. Legal Standards

As a preliminary matter, we note that any issue we do not specifically delineate 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); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

During a proceeding, and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise. The standards for interlocutory review are well established. *See* 52 Pa. Code § 5.302(a). Section 5.302(a) of the Commission’s Regulations requires that the petitioning party “state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The pertinent consideration is whether interlocutory review is necessary to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process.

Joint Application of Bell Atlantic Corp. and GTE Corp., Docket No. A-310200F0002, *et al.* (Opinion and Order entered June 14, 1999) (*Jt. Application of Bell Atlantic Corp.*); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Opinion and Order entered February 11, 1999) (*Pa. PUC v. Frontier*); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985) (*Knights Limousine*).

Pursuant to 52 Pa. Code § 5.303, the Commission may take one of the following courses of action on requests for interlocutory review and answer to a material question:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Opinion and Order entered October 23, 2009) at 3 (*Re: Philadelphia Gas Works*).

Under case law construing Section 5.302(a), the “compelling reasons” for interlocutory review are the reasons establishing that such review is necessary to either prevent substantial prejudice or to expedite the conduct of the proceeding. In other words, a petition under Section 5.302(a) must allege compelling reasons why any alleged prejudice flowing therefrom could not be rectified during the normal Commission review process. *Joint Application of Bell Atlantic Corp.; Pa. PUC v. Frontier; Knights Limousine Service, Inc.*

The Commission has stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. Such a showing may be made by a petitioner by establishing that,

without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R-2009-2139884 (Opinion and Order entered April 15, 2010).

As noted, generally, petitions for interlocutory review regarding evidentiary matters within the ALJ's authority are not favored. The Commission will generally leave questions regarding the relevance and admission of evidence to the sound discretion of the ALJ to provide all parties, the presiding officer, and the Commission, with a full opportunity to develop the record, brief issues, and present arguments at each stage. *See Re: Philadelphia Gas Works; See also Jo Anna Warren Williamson v. Duquesne Light Company*, Docket No. C-2009-2138578 (Opinion and Order entered February 10, 2011) (“[T]he admission of evidence is generally a matter within the sound discretion of the ALJ, and the ALJ’s rulings thereon will not be reversed in the absence of a clear abuse of discretion or error of law.”)

B. *Subpoena Orders*

As discussed above, on March 26, 2025, the ALJs issued the *Subpoena Orders*, wherein they granted the OCA’s Subpoena Applications in both the Gas Tariff and the Electric Tariff Cases. More specifically, the ALJs stated, as follows:

[W]e find that [the] OCA adequately specified the general relevance, materiality and scope of the documentary evidence sought, including, specifying the documents desired, and adequately listed the facts to be proved by the documents in sufficient detail to indicate the necessity of the documents. As OCA explained, the [*June 2024 QER*] and

[*September 2024 QER*] workpapers will assist its expert witness in analyzing Pike’s proposed return on equity.

Subpoena Order – Gas at 4; *Subpoena Order – Electric* at 4 (citing 52 Pa. Code § 5.421(b)(1), (2)).

Regarding the request for expedited treatment, the ALJs reasoned that the Subpoena Applications were served on the Law Bureau on March 18, 2025, and TUS did not object to the OCA’s request for expedited consideration within the five-day time period for responses set forth in the Notices to Plead. Additionally, the ALJs referenced the deadline of April 3, 2025, for the submission of direct testimony and determined that under the original ten-day response period to the subpoena requests, the OCA may not have adequate time to address the *June 2024 QER* and the *September 2024 QER* workpapers in its direct testimony. *Subpoena Order – Gas* at 4; *Subpoena Order – Electric* at 4 (citing 52 Pa. Code § 1.2(c) (pertaining to waiver of the Commission’s Regulations when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party)).

C. Second Petition and Briefs in Support and Opposition

1. Second Petition

In its Second Petition, TUS argues that the ALJs erred in granting the OCA’s Subpoena Applications and that, in order to prevent substantial prejudice to the interests of TUS and the Commission, TUS requests the reversal of the *Subpoena Orders* and the rescission of the OCA’s subpoenas. According to TUS, its requested relief is necessary to prevent the OCA from accessing TUS’s sensitive and privileged workpapers. Alternatively, TUS requests that the Commission issue an Order on its timely filed Objections. Second Petition at 3.

As noted above, TUS submits in its proposed Material Question that the ALJs committed error in issuing the subpoenas to obtain the workpapers of TUS supporting the information and calculations in the Commission's published QERs. TUS avers that these workpapers are: not relevant to the underlying rate proceeding; protected from disclosure by the deliberative process privilege; and exempt from discovery as the product of Commission advisory staff. Second Petition at 1.

As an initial matter, TUS asserts that the ALJs issued the *Subpoena Orders* before TUS had filed timely objections in accordance with the ten-day response timeframe required under 52 Pa. Code § 5.421(f). TUS contends that the *Subpoena Orders* were never served on TUS and were issued without any prior notification that the applicable responsive ten-day timeframe was being waived. According to TUS, the ALJs permitted the mere request for an abbreviated response period to act as a waiver that automatically shortened the prescribed response period. TUS argues that the ALJs' actions were procedurally deficient and violated the due process rights of TUS. Second Petition at 1-2.

TUS notes that the ALJs convened a conference hearing on April 1, 2025, to address the Subpoena Applications, TUS's Objections, and the First Petition. However, TUS asserts that, to date, the ALJs have failed to rule on the Objections even though such a ruling was required no later than April 7, 2025, pursuant to 52 Pa. Code § 5.42(f). Second Petition at 2.

TUS argues that there are four compelling reasons for granting its interlocutory review requests. First, TUS contends that it serves in an advisory role to the Commissioners in preparing the published QERs, and to the OALJ in rate proceedings. Second, TUS argues that Pike's reliance on the Commission's QERs in its requested base rate increases does not make TUS's calculation of the DSIC ROE relevant to a base rate proceeding. Third, TUS proffers that the workpapers being sought 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. Second Petition at 2-3.

In its fourth argument, TUS submits that the OCA's subpoenas were issued not to elicit testimony at hearing, but rather to obtain the production of documents from a non-party during the discovery phase of the litigation. According to TUS, parties to litigation are not permitted to obtain materials which are the product of, or within the control of, the Commission's advisory or adjudicatory staff. TUS contends that because it serves in an advisory role to the Commission in rate proceedings such as these, compelling TUS to provide its workpapers conflicts with the prohibition on using discovery against Commission advisory staff. Second Petition at 3 (citing 52 Pa. Code §§ 5.321(d) and 5.349(e)).

In summary, TUS argues that the ALJs actions in failing to timely rule on the Objections, in violation of 52 Pa. Code § 5.421(f), will cause harm to TUS and the Commission by permitting the release of sensitive and privileged material. TUS avers that such harm would not be reparable through normal procedural avenues because, once the material is disclosed, the harm cannot be undone. Second Petition at 3.

2. OCA Brief in Opposition

In its Brief in Opposition to the Second Petition, filed on April 18, 2025, the OCA argues that the *Subpoena Orders* should be upheld and that TUS's proposed Material Question should be answered in the negative. The OCA asserts four arguments in support of its position. OCA Brief – Second Petition at 15.

First, the OCA argues that the *Subpoena Orders* properly required the documents in the Subpoena Applications to be produced because they are relevant and

material to Pike's rate cases and are not privileged. Regarding relevancy and materiality, the OCA submits that it is seeking to ensure that its experts have access to all of the evidence required to fully support their positions so that the OCA can satisfy its obligations to provide the Commission with a full and complete evidentiary record. The OCA submits that the exchange of workpapers supporting a position on rate of return is a regular part of practice in rate case proceedings.¹⁰ The OCA contends that its 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 pertaining to the requested ROE for ratemaking purposes. OCA Brief – Second Petition at 3-5.

Regarding privilege, the OCA argues that TUS has provided no support for its claim of deliberative process privilege for the requested workpapers. Rather, the OCA asserts that all the information provided by TUS regarding the workpapers indicates that they contain purely factual information, as well as some mathematical formulae, without explaining how the mathematical formulae are sufficient to constitute privileged material. According to the OCA, the workpapers are the Excel version of the same PDF document that is publicly available as the QER published by the Commission. The OCA presumes that 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. As such, the OCA submits that TUS has failed to demonstrate that the deliberative process privilege is applicable to the documents requested by the OCA in the Applications. OCA Brief – Second Petition at 5-7.

Alternatively, the OCA argues that if the Commission accepts TUS's arguments pertaining to privilege, the proper remedy is the production of a privilege log

¹⁰ The OCA states that the exchanged spreadsheets often contain the type of data that the OCA anticipates are contained in the documents requested in its Subpoena Applications, such as data regarding stock prices, dividends, growth rates, betas, 10-year Treasury bond yields, and total market ROE that are components of the calculation of the DCF and CAPM ROE analyses. OCA Brief – Second Petition at 6.

identifying the cells in the Excel files requested by the OCA, which contain the privileged information. Thereafter, the OCA continues, the presiding officer could conduct 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. OCA Brief – Second Petition at 8 (citing *Pa. State Police v. ACLU of Pa.*, 300 A.3d 386, 388, n.9 (Pa. 2023)).

In its second main argument, the OCA contends that Parties can request the production of documents from Commission advisory staff under the Commission’s Regulations through the issuance of subpoenas. Addressing TUS’s argument pertaining to limits on issuing such subpoenas without requesting the deposition of a Commission employee, the OCA contends that 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. OCA Brief – Second Petition at 9-10.

Additionally, the OCA argues that it used the correct tool of discovery, a subpoena pursuant to 52 Pa. Code § 5.421, instead of merely issuing a request for documents under 52 Pa. Code § 5.349 (pertaining to requests for documents, entry for inspections and other purposes on another party). The OCA also contends that, if TUS’s interpretation of the Commission’s Regulations is correct, parties to proceedings before the Commission and the 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. According to the OCA, this would result in the absurd requirement of deposing a Commission employee, with the associated fees and costs, when it is only the production of documents being sought. The OCA adds that TUS’s interpretation would encourage parties to use requests under the Right-to-Know-Law, 65 P.S. §§ 67.101, *et seq.*, as a means of discovery in Commission proceedings. OCA Brief – Second Petition at 10.

In its third main argument, the OCA contends that the ALJs adequately addressed TUS's Objections to the Subpoena Applications. The OCA contends that TUS misstates the requirement under 52 Pa. Code § 5.421(f) to require a ruling by the ALJs in response to the Objections when the Commission's Regulations only require the presiding officer to "address" the Objections. Here, the OCA submits that TUS's Objections were addressed by the ALJs at the April 1, 2025, status conference and, thus, TUS did not suffer prejudice or harm when the ALJs did not rule on them. OCA Brief – Second Petition at 11-12.

Regarding its fourth main argument, the OCA submits that 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. The OCA argues that TUS failed to comply with the five-day time period set forth in the Notices to Plead of the Subpoena Applications. According to the OCA, TUS failed to timely object and to preserve its objections in response to expedited treatment before the request was ruled on. OCA Brief – Second Petition at 12-13.

Additionally, the OCA argues that TUS was not prejudiced by the OCA's request for expedited treatment. In support, the OCA asserts that TUS's Objections were heard by the ALJs at the status conference on April 1, 2025, TUS has not provided the subpoenaed documents, and TUS has not pleaded that the ALJs' decisions to grant the Subpoena Applications would have been different had the Objections been timely filed before the *Subpoena Orders*. OCA Brief – Second Petition at 13-14.

The OCA adds that, assuming TUS appropriately pled violation of its due process rights, TUS's claimed procedural injury has been cured. According to the OCA, TUS was able to mount a vigorous restatement of its Objections during the April 1, 2025 status conference and raised the same arguments in its First and Second Petitions. At present, the OCA continues, TUS has the opportunity to be heard by the Commission

in bringing the instant Second Petition, which further cures any alleged violation of its procedural due process rights. OCA Brief – Second Petition at 14 (citing *Phillips v. Pa. DOT, Bureau of Driver Licensing*, 80 A.3d 561, 569 (Pa. Cmwlth. 2013) and *Application of Pa. DOT to alter the public crossing of the tracks of CSX Transportation, Inc.*, Docket No. A-2020-3022825 (Opinion and Order on Reconsideration entered Nov. 10, 2022)).

3. TUS Brief in Support

In its Brief in Support of the Second Petition, filed on April 21, 2025, TUS submits that the Commission should reverse the *Subpoena Orders* because they improperly granted the OCA access to documents which are privileged and exempt from disclosure. Additionally, TUS argues that the ALJs violated TUS’s due process rights by shortening the regulatory prescribed response time, with no notice, effectively preventing TUS from filing objection to the subpoena requests. TUS Brief – Second Petition at 7-11.

TUS contends that the ALJs failed to give TUS the required ten days to object to the OCA’s requests for subpoenas. TUS Brief – Second Petition at 7 (citing 52 Pa. Code §§ 5.421(b)(3) and (f)). According to TUS, the ALJs violated these provisions by improperly ruling on the Subpoena Applications on March 26, 2025, before TUS’s ten-day deadline to respond expired. Additionally, TUS proffers that prior to their rulings, the ALJs failed to provide any notice that they were shortening the prescribed response time. Moreover, TUS states that after the Subpoena Orders were issued on March 26, 2025, TUS filed Objections on March 28, 2025, as allowed by Commission Regulations, but that the ALJs never ruled on those Objections, in violation of 52 Pa. Code § 5.421(f). TUS Brief – Second Petition at 7-8.

TUS further contends that the target of the subpoenas are the foundational workpapers supporting a final Commission action, which are exempt from disclosure. According to TUS, the records are exempt because they are: (1) not relevant to Pike's asserted base rate ROEs; (2) protected by the deliberative process privilege; and (3) the product of Commission advisory staff. TUS asserts that its workpapers are not relevant to the OCA's evaluation of Pike's base rate increase requests because the workpapers support the Commission's approved generic industry-wide DSIC ROEs. TUS contends that such workpapers do not support any specific utility's proposed base rate ROE and that it is Pike's burden to prove, within the four corners of the rate case, that its requested base rate increases, including its chosen ROEs, are appropriate. TUS adds that Pike must provide support for its proposals and emphasizes that the Company instead chose to cite to DSIC ROEs found in a prior, unrelated Commission action. According to TUS, this does not make TUS's workpapers supporting that action relevant to a base rate proceeding. TUS Brief – Second Petition at 8-9.

In addition, TUS argues that its workpapers are protected from disclosure by the deliberative process privilege. TUS Brief – Second Petition at 9-10 (citing *Darlene Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 33 (Pa. Cmwlth. 2001) (*Darlene Joe*); and *Commonwealth v. Pa. PUC*, 331 A.2d 598, 601 (Pa. Cmwlth. 1975) (*Commonwealth v. Pa. PUC*). TUS submits that the workpapers constitute technical staff reports supporting the draft QERs, which the Commission uses to establish the generic DSIC ROEs for gas and electric utilities. TUS asserts that the workpapers are part and parcel of the Commission's deliberations regarding the setting of appropriate DSIC ROEs. Thus, TUS avers that the workpapers are foundational to a final, unrelated Commission action and, as such, are not subject to disclosure. TUS Brief – Second Petition at 9-11.

As a final matter, 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.

TUS Brief – Second Petition at 11 (citing 66 Pa.C.S. § 308.2(a)(3)). Under the Commission’s Regulations, TUS states that parties to litigation cannot obtain through discovery, materials which are the product of Commission advisory staff.

TUS Brief – Second Petition at 11 (citing 52 Pa. Code §§ 5.321(d) and 5.349(e)).

Although TUS acknowledges that the Subpoena Applications were not requests for the production of documents between parties, TUS asserts that it amounts to the same on a non-party, with the subpoena simply being the vehicle to effect discovery. Accordingly, TUS contends that compelling TUS to provide its workpapers to the OCA clearly conflicts with the Commission’s Regulations and the corresponding need to maintain impartiality in matters under adjudication. TUS Brief – Second Petition at 11-12.¹¹

D. Disposition

Upon review, we agree with TUS that the issuance of the *Subpoena Orders* prior to the expiration of the ten-day response period required in Section 5.421(f) of our Regulations was procedurally deficient. Compounding this procedural error, the Objections were not addressed within the ten-day period prescribed under 52 Pa. Code § 5.421(f). Under these circumstances, we find that the failure to address the timely filed

¹¹ In its Brief in Support, TUS also argues that the Commission’s review of the Second Petition does not require a stay of Pike’s base rate proceedings. TUS Brief – Second Petition at 12. Additionally, TUS provides responses to the assertions of the OCA pertaining to access of Pike’s answers to the interrogatories of I&E and to the arguments that the OCA was simply responding to directives of the Commission’s staff in requesting the subpoenas. TUS Brief – Second Petition at 12-13, Appendix I.

arguments of TUS, which allege substantial prejudice both to TUS and the Commission if the subpoenas remain in force, appear to have impacted the due process rights of TUS.¹²

As an initial matter, we note that Section 5.421(b)(3) of our Regulations provides that a written application for a subpoena “[m]ust 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). The Notices to Plead in both Subpoena Applications contained a five-day response requirement which did not comply with our Regulation. Notwithstanding the request for expedited treatment and thereby a waiver of the response period, a party has responsibility to adhere to our Regulations until the express grant of a waiver request.¹³ Accordingly, we reject the OCA’s argument that TUS had an obligation to file opposition to the OCA’s expedited treatment request within five days in order to preserve its ten-day objection period, because our Regulations do not impose such a burden. *See* OCA Brief – Second Petition at 11-12. We agree with TUS that the OCA’s request for an abbreviated response period did not absolve the ALJs of their responsibility to communicate their decision to adopt a shortened response period. TUS Brief – Second Petition at 7. To be sure, parties may not modify the regulatory response times prescribed by our Regulations, absent express approval of a requested waiver. *See*, 52 Pa. Code § 1.91.

¹² In making this determination, we reject the OCA’s argument that the opportunity for TUS to raise its arguments at the status conference on April 1, 2025, cured any due process concerns. Upon review of the status conference transcript, we find that the Objections were not properly addressed to sufficiently satisfy the intent of the regulatory requirement that the presiding officers address and resolve the objections within ten days, pursuant to 52 Pa. Code § 5.421(f). Moreover, the status conference, which took place six days after the ALJs had already issued the *Subpoena Orders*, did not culminate in an order that resolved TUS’s pending objections.

¹³ In such a situation involving a waiver request of our Regulations, it would have been appropriate to state in a Notice to Plead that the requested abbreviated response deadline is being made subject to the presiding officers’ direction and approval.

An application for a waiver of the Commission’s Regulations is governed by Section 1.91 of our Regulations, which provides in pertinent part:

(a) A request for waiver of, or exception to, any provision of this chapter or Chapter 3 or 5 (relating to special provisions; and formal proceedings) or a regulation or requirement with which the document tendered is in conflict or does not conform may accompany a pleading, submittal or other document subject to rejection under § 1.4 (relating to filing generally). The request shall show the nature of the waiver or exception desired and set forth the reasons in support thereof. Unacceptable filings may be returned by the Commission with an indication of the deficiencies thereof and the reasons for nonacceptance and return.

(b) *Unless the Commission expressly orders, acceptance for filing will not waive a failure to comply with this title or other applicable requirements, and the failure may be cause for striking all or any part of the filings.*

52 Pa. Code § 1.91 (emphasis added).

At the status conference hearing held on April 1, 2025, ALJ Guhl addressed the Notices to Plead, as proposed by the OCA, and noted that neither the Law Bureau nor TUS filed any responses or objections within the five-day response period requested by the OCA. Tr. at 234-35. However, the ALJs did not expressly grant the request for expedited treatment until the issuance of the *Subpoena Orders*, which was after the expiration of the five-day response period.

In the *Subpoena Orders*, the ALJs relied on 52 Pa. Code § 1.2(c) to grant the OCA’s expedited waiver request. Section 1.2(c) provides: “[t]he Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, *if the waiver does not adversely affect a substantive right of a party.*” 52 Pa. Code § 1.2(c) (emphasis added). Here, it was not

possible for the ALJs to make a full evaluation about the impact on the substantive rights of TUS because the application of the waiver operated to prevent TUS from timely asserting its arguments within the period prescribed in our Regulations. That is, the ALJs effectively determined that the waiver of 52 Pa. Code § 5.421(f), shortening the time period for responding to subpoenas to five days, did not operate to impact the substantive rights of TUS when no objections were received within the same shortened time period of five days. We agree with TUS that such an application of our Regulations operated to deny it due process.

Under these circumstances, we find that TUS did not waive its right to file any Objections within the timeframe set forth in 52 Pa. Code § 5.421(f).¹⁴ Accordingly, we find that TUS timely filed its Objections on March 28, 2025, within ten days of being served with the Subpoena Applications.

Additionally, we find that TUS's substantive arguments contained in its Objections were not addressed by the ALJs and remain pending. In its Objections, Second 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.

¹⁴ We acknowledge that the Law Bureau and TUS were served with the Subpoena Applications on March 18, 2025. However, pursuant to 52 Pa. Code § 1.91(b), their acceptance of the documents did not operate as a waiver of the ten-day response period to subpoenas under 52 Pa. Code § 5.421(f).

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 Nos. R-2021-3027385 and R-2021-3027386 (Opinion and 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. *See Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Supp. Implementation Order entered September 21, 2016) at 5-7. We therefore find that for the purposes of the Subpoena Applications, TUS's 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. 66 Pa.C.S. § 308.2(a)(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. 52 Pa. Code

§§ 5.321(d) and 5.349(e). TUS acknowledges that the OCA's Subpoena Applications¹⁵ 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 inspection or as a bill of discovery. *Cohen v. Pelagatti*, 493 A.2d 767, 770 (Pa Super. 1985). The OCA, in the Subpoena Applications, requests 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 the OCA seeks 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, derives the DSIC ROEs that appear in the QERs that the Commission votes on at Public Meeting. As such, TUS argues that the OCA's request for its workpapers implicates the deliberative process privilege, which protects

¹⁵ 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).

the government from disclosing confidential deliberations of law or policymaking, reflecting opinions, recommendations, or advice.¹⁶

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*.

Accordingly, we shall grant the Second Petition, answer the Material Question in the affirmative, rescind the *Subpoena Orders*, and return this matter to the OALJ.

III. Conclusion

Upon review, we shall: (1) grant the Second Petition; (2) answer the Material Question in the affirmative, pursuant to 52 Pa. Code § 5.303(a)(4); (3) rescind the *Subpoena Orders*; and (4) return this matter to the OALJ, all consistent with this Opinion and Order; **THEREFORE,**

¹⁶ As noted above, TUS cites to *Darlene Joe*, 782 A.2d at 33; and *Commonwealth v. Pa. PUC*, 331 A.2d at 601 (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).

IT IS ORDERED:

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 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 Quarterly Earnings Reports (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?

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 this matter shall be returned to the Office of Administrative Law Judge.

BY THE COMMISSION

A handwritten signature in cursive script that reads "Matthew L. Homsher".

Matthew L. Homsher
Secretary

(SEAL)

ORDER ADOPTED: May 8, 2025

ORDER ENTERED: May 9, 2025