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May 31, 2012

VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

RE: Implementation of Act 11 of 2012; Docket No. M-2012-2293611

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission are the original and fifteen (15) copies of the Comments of the Industrial Energy Consumers of Pennsylvania ("IECPA"), Columbia Industrial Intervenors ("CII"), Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Philadelphia Area Industrial Energy Users Group ("PAIEUG"), Philadelphia Industrial and Commercial Gas Users Group ("PICGUG"), PP&L Industrial Customer Alliance ("PPLICA"), and West Penn Power Industrial Intervenors ("WPPII") *(collectively, "Industrial Customer Groups") in the above-referenced proceeding.*

Please date stamp the extra copy of this transmittal letter and Comments, and kindly return them to our messenger for our filing purposes.

Very truly yours,

McNEES WALLACE & NURICK LLC

By Charis Mincavage
Charis Mincavage

Counsel to Industrial Energy Consumers of Pennsylvania, Columbia Industrial Intervenors, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, Philadelphia Area Industrial Energy Users Group, Philadelphia Industrial and Commercial Gas Users Group, PP&L Industrial Customer Alliance, and West Penn Power Industrial Intervenors

Enclosures
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Act 11 of 2012	:	Docket No. M-2012-2293611

COMMENTS OF THE INDUSTRIAL CUSTOMER GROUPS

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Dated: May 31, 2012

I. INTRODUCTION

On May 10, 2012, the Pennsylvania Public Utility Commission ("PUC" or "Commission") issued a Tentative Implementation Order ("Tentative Order") proposing guidelines for the Commission's implementation of Act 11 of 2012 ("Act 11"). Specifically, the Tentative Order sets forth the procedures for adoption of a Distribution System Improvement Charge ("DSIC") by fixed utilities throughout the Commonwealth. The Comments included herein address certain elements of the Tentative Order that affect Large Commercial and Industrial ("C&I") customers of these utilities.

The Industrial Energy Consumers of Pennsylvania ("IECPA") is an association of energy-intensive industrial companies operating facilities across the Commonwealth of Pennsylvania. IECPA's members consume in excess of 25% of the industrial electricity in Pennsylvania and employ approximately 41,000 workers. Also sponsoring these Comments are the following coalitions of industrial customers receiving service from many of the Commonwealth's electric distribution companies ("EDCs") and natural gas distribution companies ("NGDCs"): Columbia Industrial Intervenors ("CII"), Met-Ed Industrial Users Group ("MEIUG"), Penelec Industrial Customer Alliance ("PICA"), Penn Power Users Group ("PPUG"), Philadelphia Area Industrial Energy Users Group ("PAIEUG"), Philadelphia Industrial and Commercial Gas Users Group ("PICGUG"), PP&L Industrial Customer Alliance ("PPLICA"), and West Penn Power Industrial Intervenors ("WPPII") (collectively, "Industrial Customer Groups"). Because the cost of electricity and natural gas is a substantial aspect of the operating budgets of the members of the Industrial Customer Groups, the Commission's implementation of the DSIC is of particular concern to the Industrial Customer Groups.

II. COMMENTS

Initially, the Industrial Customer Groups would like to thank the PUC for proposing a number of customer safeguards as part of the DSIC implementation process. The Industrial Customer Groups strongly agree that a DSIC should only be approved after stakeholders are notified and have an opportunity to provide meaningful feedback on the proposed DSIC. In addition, the Commission appropriately stresses the importance of customer notification with respect to modifications after DSIC approval. Moreover, once a DSIC is adopted, the PUC would properly monitor a utility's quarterly filings to ensure that a utility is not collecting an excessive rate of return, which is especially important in light of recent events.[1]

Although many of the Commission's proposals within the Tentative Order appropriately address customer concerns, the Industrial Customer Groups submit that several additional issues must also be attended to as part of the Commission's Final Order in order to ensure that customers are adequately protected as part of any DSIC implementation. Specifically, the Industrial Customer Groups urge the Commission to implement the following proposals as part of any Final Order: (1) transmission voltage, bypass, and negotiated rate customers are not true "distribution" customers and therefore should not be subject to a DSIC; (2) the DSIC can be applied to customer classes equally but only if done so based upon the portion of the benefit received by each class from the resulting infrastructure improvement; (3) DSIC filings should be submitted on a staggered schedule, beginning January 1, 2013, to promote and allow for meaningful stakeholder participation; and (4) the main purpose of the DSIC should first be to

[1] There is legitimate concern regarding excessive returns given the recently released audit report of UGI Utilities, Inc. ("UGI"). *See Focused Management and Operations Audit of UGI Utilities, Inc., UGI Central Penn Gas, Inc., and UGI Penn Natural Gas, Inc.*; Docket Nos. D-2011-2221061, D-2011-2221062, and D-2011-2221063. Although UGI has not had a base rate case in over fifteen years, its quarterly earnings reports reflect consistently strong returns. Interestingly, however, UGI, even with these strong returns, has made no movement in improving its infrastructure. *See* Statement of Commissioner Gardner, *Focused Management and Operations Audit of UGI Utilities, Inc., UGI Central Penn Gas, Inc., and UGI Penn Natural Gas, Inc.*; Docket Nos. D-2011-2221061, D-2011-2221062, and D-2011-2221063.

repair aging, existing infrastructure. The following Comments provide more detail with respect to each of these proposals.

A. Because Transmission Voltage, Bypass, and Negotiated Rate Customers Are Not True "Distribution" Customers, These Customers Should Not Be Required to Remit the Costs of a DSIC.

In the Tentative Order, the Commission explicitly states that the DSIC may only be applied as a percentage of customers' distribution rates; however, the Commission does not define "distribution customers." As discussed more fully herein, customers receiving service via: (1) only transmission voltage levels; (2) a natural gas bypass; and (3) negotiated rates should not be considered true "distribution" customers subject to the DSIC. To apply the DSIC to transmission voltage or bypass customers would unjustly, unreasonably, and inappropriately result in non-distribution customers remitting costs to improve a fixed utility's distribution system from which these customers do not receive service. With respect to customers receiving negotiated rates, application of the DSIC to these customers would defeat the purpose of the negotiated rate. Moreover, the Commission has discretion not to apply the DSIC to these customers. For these reasons, the Industrial Customer Groups seek clarification in the Commission's Final Order that transmission voltage, bypass, and negotiated rate customers are exempt from the DSIC.

Pursuant to Act 11, the purpose of the DSIC is to allow fixed utilities to "repair, improve or replace eligible property that is part of the utility's *distribution* system." 66 Pa. C.S. § 1351 (emphasis added). Moreover, the PUC recognizes the limited purpose of the DSIC by specifically indicating in the Tentative Order that the DSIC should "be applied to *distribution* revenues only." *See* Tentative Order, p. 17. Accordingly, the combination of the language of Act 11 and the application of the DSIC rates confirms that the underlying basis of the DSIC is to allow the fixed utility to collect revenue for improvement of its distribution system from those customers who would benefit from such improvements. Moreover, the Commission may use its discretion to only apply the DSIC to those customers it reasonably believes qualify as "distribution" customers. *See Popowsky v. Pennsylvania Public Utility Commission*, 550 Pa. 449, 706 A.2d 1197 (1997) (indicating the Commission's discretion to interpret legislative acts reasonably).

In this instance, transmission voltage customers would not receive any benefit from the application of the DSIC. Specifically, transmission voltage customers are those who receive "service from the Company's standard high-tension lines, where the customer installs, owns, and maintains, any transforming, switching and other receiving equipment required." *See* PECO Energy Company Electric Service Tariff, Supplement No. 36 to Electric PA. P.U.C. No. 4, Sixth Revised Page No. 51. As a result, transmission voltage customers do not connect directly to an EDC's distribution system, but rather, receive electricity service directly from transmission lines. Transmission voltage customers install their own distribution lines that are distinct from the EDC's system. To charge these customers, who otherwise place no burden on an EDC's distribution system, and similarly, receive no benefit from any upgrades to the EDC's distribution system, would be unjust, unreasonable, and outside the intent of Act 11.

Similarly, some customers receiving natural gas service have chosen to connect through a direct pipeline to an interstate pipeline, thereby "bypassing" a NGDCs' distribution system. In doing so, bypass customers have invested substantial sums of money on these pipeline projects in order to allow for such a direct connection. In turn, an NGDC may receive benefit from such a bypass through the decreased pressure placed on its own distribution system. In such an instance, however, the bypass customer may continue to coordinate with the NGDC for purposes of the operation of this pipeline. Unfortunately, in such an instance, a customer who has "bypassed" the NGDC's distribution system, provided relief for the NGDC through such removal from the distribution system, and would receive no benefit from improvements to the distribution system may still be required to remit the DSIC due to a tenuous connection with the NGDC, such as utilizing the NGDC for purposes of operating the bypass pipeline. Accordingly, application of the DSIC to such customers cannot be supported under the intent of Act 11.

Although a customer receiving a negotiated rate from a fixed utility may still be utilizing that utility's distribution system, the negotiated rate customer is in a comparable situation to a bypass customer. In order to obtain a negotiated rate, a customer must provide, among other things, proof that the customer has a reasonable alternative to receiving service from the fixed utility. Such alternative service could be in the form of a bypass or a change to a different form of energy (*e.g.*, switching from natural gas to oil). For a negotiated rate customer, if the customer had followed through with this alternative energy source, the customer would have most likely been removed from the utility's distribution system. Because, however, the customer chose to remain with the fixed utility, premised upon the belief that the negotiated rate would render the decision the more cost-effective measure, the customer now faces an increase to this rate in the form of a DSIC. In other words, if the customer had known that the addition of a DSIC would be included as part of any negotiated rate, the customer may have determined that the alternative fuel source would have provided the more cost-effective alternative. Moreover, such the addition of the DSIC would result in an inappropriate modification of the customer's previously negotiated contract. Accordingly, to now include an unplanned and unexpected surcharge in the negotiated rates of customers who may have otherwise chosen to remove themselves from a fixed utility's distribution system is inappropriate and unreasonable.

Application of the DSIC to a negotiated rate also defeats the purpose of such a rate. As noted previously, a customer may have chosen to continue to burn natural gas, thereby remaining on a natural gas utility's distribution system, as opposed to switching to burning oil, based on the negotiated rate offered by the NGDC. Imposing the DSIC on negotiated rate customers would be contrary to the purpose of the negotiated rate, which was to retain Large C&I customers on the NGDC's system by offering competitive rates.

In addition, applying the DSIC to negotiated rate customers may result in adverse consequences for other customers on a utility's system. The purpose of the negotiated rate is to ensure that a Large C&I customer remains on the utility's system. If the addition of the DSIC results in such a customer choosing to switch to an alternative fuel arrangement, all remaining NGDC customers would be forced to absorb the costs of losing a Large C&I customer on the system. Because retaining Large C&I customers as NGDC customers is beneficial for both the NGDC and other customers, the DSIC should not apply to negotiated rate customers.

For the aforementioned reasons, the Industrial Customer Groups submit that transmission voltage, bypass, and negotiated rate customers should not be considered "distribution" customers under the requirements of Act 11. Accordingly, the Commission should utilize its discretion to find that the DSIC should not be applied to these customers.

B. The DSIC Should Apply Equally Among Only Those Customer Classes Who Benefit From the Infrastructure Improvement.

The Tentative Order notes that Act 11 provides for the DSIC to be applied equally among all customer classes. *See* Tentative Order, p. 18. While the Tentative Order initially interprets this language to not allow for variations of DSIC rates based on customer class (either on a calculation of the DSIC percentage or the underlying DSIC-eligible property), the PUC invites comments on this issue. *See id.* at 18-19. The Industrial Customer Groups submit that the PUC's tentative conclusion is not based on an appropriate interpretation of the Act as it relates to existing statutory law and PUC regulations regarding cost causation and non-discrimination requirements, or general ratemaking principles as set forth in Chapter 13 of the Public Utility Code. Rather, a more appropriate interpretation of Act 11, which would ensure protection of the public interest, requires that this provision be interpreted as applying the DSIC equally, but only to those customer classes who would benefit from the repair of the underlying infrastructure. In other words, if certain customers, whether they be residential, commercial, or industrial, would be totally unaffected by the infrastructure improvement undertaken by the utility, then the costs of these project should not be allocated to such a customer class or collected from them via the DSIC.

Charging the costs of infrastructure repair to only those customers who benefit from the repair is consistent with statutory law. According to the Public Utility Code, "[n]o public utility shall, as to rates,...subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage." 66 Pa. C.S. § 1304. If the DSIC is imposed on all customer classes "equally," *i.e.*, without regard to the underlying benefit, utilities would be unreasonably discriminating against those customers who are confined to a section of the distribution system that would not receive repair in contravention of the Public Utility Code. *See id.* Such customers would be subsidizing customers of all other classes who are benefiting from the repairs. This cross-subsidization would be counter to current law when one class, *e.g.*, the Large C&I class, would be subject to a DSIC in circumstances where none of the repairs are related to infrastructure utilized by Large C&I customers. *See* 66 Pa. C.S. § 2807(e)(7)(indicating that cross-subsidization among customer classes should be prohibited in the context of default service).

Moreover, the effects of this inappropriate cross-subsidization would more likely be felt by Large C&I customers. On many NGDC and EDC systems, the number of residential customers significantly outnumber Large C&I customers. As a result, there is a significant likelihood that a disproportionate amount of the repairs made to a fixed utility's distribution system would benefit residential customers, even though Large C&I customers would be required to assist in the funding of these repairs. As a result, Act 11 should be interpreted in a manner that is consistent with other aspects of the Public Utility Code, *i.e.*, only applying the DSIC equally among customer classes who would benefit from the underlying infrastructure repair in order to ensure that inappropriate cross-subsidization does not occur.

In addition, the application of a DSIC to only those customers who benefit from these repairs would align with cost causation principles. As the Commission is aware, incurring costs based on the benefits received is a fundamental aspect of utility ratemaking. *See Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010 (Pa. Commw. Ct. 2006). If cost causation principles are applied to Act 11, customers should not be required to remit costs for infrastructure replacement that only benefits other customer classes. The DSIC may be imposed equally on all customer classes, consistent with the language of Act 11, but still be allocated to only those customers receiving service from the improved section of the distribution system.

In order to avoid cross-subsidization and unreasonable discrimination among customer classes, the Industrial Customer Groups recommend imposing the DSIC equally but only among those customer classes who benefit from the specific infrastructure improvement funded by the DSIC. This application of the DSIC is consistent with current statutory law, as well as cost causation principles.

C. Utilities Seeking to Implement a DSIC Should Be Placed on a Staggered Schedule to Encourage and Ensure Meaningful Stakeholder Participation in the Implementation and Monitoring Process.

The Commission acknowledges in its Tentative Order that all fixed utilities (*i.e.*, electric, natural gas, and wastewater) could effectively submit DSIC filings on January 1, 2013. *See* Tentative Order, p. 10. Considering the breadth and depth of large EDC and NGDC utilities alone (*i.e.*, 11 EDCs and 16 NGDCs), having all of these filings occur on the same date, with the resulting implementation process occurring over the same timeframe, would place a significant burden on the time and resources of those stakeholders seeking to ensure meaningful participation in the implementation process. Specifically, if all utilities were to submit DSIC proposals on or around January 1, it would be extremely difficult for customer representatives to thoroughly evaluate the proposals. Moreover, these implementation plans would most likely follow similar schedules for purposes of the procedural schedule, thereby placing additional constraints on the participation of stakeholders in what could potentially be overlapping evidentiary hearings.

To that end, the Industrial Customer Groups recommend that the PUC implement a staggered schedule that would require utilities seeking to implement a DSIC to file on a specific date, similar to the process current used for natural gas Purchased Gas Cost filings. Importantly, nothing in Act 11 prohibits such a staggered schedule. This process will ensure adequate time for stakeholder review; enable full and meaningful participation in evidentiary hearing; and allow appropriate timelines to address new and novel issues that may arise during the implementation procedure. In addition, this staggered schedule for initial filings would assist stakeholders in their review of quarterly reports and annual optimization plans, which could otherwise occur at similar times if all DSICs are approved at once. Considering that the DSIC is a new mechanism for EDCs and NGDCs, a staggered implementation schedule would ease the transition for all interested parties.

D. The Main Purpose of the DSIC Should Be to Repair Existing Utility Infrastructure Rather Than System Expansion.

In the Model Tariff that supplements the Tentative Order, the Commission lists the DSIC-eligible property for each fixed utility. *See* Tentative Order, Appendix A. The Commission does not address, however, whether utilities should follow any particular procedure in their determination regarding the order in which eligible property should be repaired. As an additional customer protection, and for increased reliability purposes, the Industrial Customer Groups recommend that the PUC instruct utilities to begin by replacing their existing, aging infrastructure, rather than utilizing the DSIC for purposes of expansion projects.

The legislature's purpose in its approval of a DSIC for fixed utilities, which is reflected in Act 11, was to promote more reliable distribution systems throughout the Commonwealth. *See* 66 Pa. C.S. § 1353(a)(stating that utilities may petition the Commission for a DSIC "in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service"). The most important repairs, as indicated by the Act, are those made to aging infrastructure that is likely to present serious reliability issues. For this reason, the Industrial Customer Groups request that the PUC clarify in the Final Order that utilities must prioritize the repair of their infrastructure pursuant to the DSIC in order to ensure that the DSIC is initially used for purposes of repairing existing infrastructure.

WHEREFORE, the Industrial Energy Consumers of Pennsylvania, Columbia Industrial Intervenors, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, Philadelphia Area Industrial Energy Users Group, Philadelphia Industrial and Commercial Gas Users Group, PP&L Industrial Customer Alliance, and West Penn Power Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission consider and adopt, as appropriate, the foregoing Comments.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By ______________________

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