

COMMONWEALTH OF PENNSYLVANIA



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September 20, 2017

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

RE: Petition of Metropolitan Edison Co. for Approval of a DSIC Docket Nos. P-2015-2508942, C-2016-2531040	Petition of Pennsylvania Power Co. for Approval of a DSIC Docket Nos. P-2015-2508931, C-2016-2531054
Petition of Pennsylvania Electric Co. for Approval of a DSIC Docket Nos. P-2015-2508936, C-2016-2531060	Petition of West Penn Power Co. for Approval of a DSIC Docket Nos. P-2015-2508948, C-2016-2531019

Dear Counsel:

Attached for electronic filing is the Office of Consumer Advocate's Exception in the above-referenced proceeding.

Copies have been served in accordance with the attached Certificate of Service.

Respectfully,

/s/ Erin L. Gannon

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Attachments

cc: Honorable Joel H. Cheskis, ALJ
Certificate of Service

CERTIFICATE OF SERVICE

Petition of Metropolitan Edison Co. for Approval : Docket Nos. P-2015-2508942,
of a Distribution System Improvement Charge : C-2016-2531040

Petition of Pennsylvania Electric Co. for Approval : Docket Nos. P-2015-2508936,
of a Distribution System Improvement Charge : C-2016-2531060

Petition of Pennsylvania Power Co. for Approval : Docket Nos. P-2015-2508931,
of a Distribution System Improvement Charge : C-2016-2531054

Petition of West Penn Power Co. for Approval : Docket Nos. P-2015-2508948,
of a Distribution System Improvement Charge : C-2016-2531019

I hereby certify that I have this day served a true copy of following document, the Office of Consumer Advocate's Exceptions, 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 20th day of September 2017.

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Metropolitan Edison Co. for Approval of a Distribution System Improvement Charge	:	Docket Nos.	P-2015-2508942, C-2016-2531040
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	:		
Petition of West Penn Power Co. for Approval of a Distribution System Improvement Charge	:	Docket Nos.	P-2015-2508948, C-2016-2531019

**EXCEPTION OF THE
OFFICE OF CONSUMER ADVOCATE**

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Dated: September 20, 2017

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I. INTRODUCTION

On July 26, 2017, Administrative Law Judge (ALJ) Joel H. Cheskis issued a Recommended Decision addressing the resolution of issues emanating from proceedings involving the requests of four FirstEnergy companies to increase base rates and implement a Distribution System Improvement Charge (DSIC). See Petitions of Metropolitan Edison Co., Pennsylvania Electric Co., Pennsylvania Power Co., and West Penn Power Co. for Approval of a DSIC, Docket Nos. P-2015-2508942, *et al.*, Recommended Decision (July 26, 2017) (Recommended Decision or R.D.). The ALJ recommended that the Commission require the Companies to account for related federal and state income tax deductions and credits in the computation of current or deferred income tax expense in the DSIC to reduce rates, pursuant to Section 1301.1 of the Public Utility Code. R.D. at 1, 45-46; 66 Pa. C.S. § 1301.1. The ALJ also recommended that, as a means to comply with Section 1301.1, the FirstEnergy companies should be required to utilize the OCA's first proposal in this proceeding, applicable to state income tax expense.¹ Id. at 33, 46.

The Office of Consumer Advocate (OCA) submits that ALJ Cheskis has provided the Public Utility Commission (Commission) with a thorough and well-reasoned Recommended Decision. The OCA supports the ALJ's conclusions and respectfully submits this Exception for the limited purpose of ensuring that the proper evidentiary standard is applied with regard to every aspect of the proceeding.² To that end, if the Commission adopts the ALJ's recommendation that the Commission require the Companies to include related state and federal

¹ No issue has been raised with regard to the OCA's proposed method for incorporating federal income tax deductions in the DSIC calculation, *i.e.* the addition of an Accumulated Deferred Income Taxes (ADIT) offset.

² As necessary, the OCA will file Reply Exceptions addressing any Exceptions filed by the FirstEnergy companies.

income tax deductions and credits in their DSIC computation, the OCA requests the following clarification:

- The OCA does not have the burden of proof as to establishing that its proposals to incorporate the impact of Section 1301.1 on the computation of the FirstEnergy companies' DSIC rates should be adopted; rather, the OCA has the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of its proposals.

If the Commission does not adopt the ALJ's recommendation pertaining to the Companies' compliance with Section 1301.1, the OCA nonetheless requests that the Commission clarify, as specified above, that the OCA does not bear the burden of proof with regard to its proposals.

Therefore, the OCA files the following Exception pursuant to Section 5.533 of Commission's regulations. 52 Pa. Code § 5.533.

II. EXCEPTION

OCA Exception No. 1: The Order Should Clarify That OCA Does Not Have the Burden of Proof as to Establishing That Its Proposals To Incorporate The Impact of Section 1301.1 on the Companies' DSICs Should Be Adopted.

The ALJ determined that “[a] party that offers a proposal not included in the original filing bears the burden of proof for such proposal.” R.D. at 15, 31, 49. The ALJ noted that the FirstEnergy companies “continue to have the burden to demonstrate that their DSICs are just and reasonable and should be approved.” Id. at 16. With regard to accounting for related state income tax deductions and credits in the computation of deferred income tax expense to reduce DSIC rates pursuant to Section 1301.1 of the Public Utility Code, however, the ALJ found that “OCA has the burden to prove that one of its proposed methods should be adopted to incorporate that impact into the calculation of the Companies’ DSIC.” Id.; 66 Pa. C.S. § 1301.1. For the reasons set forth below, the Commission should clarify that the OCA does not bear the burden of proof as to its proposals relating to the FirstEnergy companies’ compliance with Section 1301.1.

The ALJ cited Pa. PUC v. Metropolitan Edison Co., 2007 Pa. PUC LEXIS 5, Docket No. R-00061366 (Order entered Jan. 11, 2007) to support his determination that the OCA has the burden of proof. R.D. at 15-16, 31, 49. In Metropolitan Edison 2007, the Commission stated that it is not reasonable to place the burden of proof on the utility with respect to an issue that the utility did not include in its general rate filing and, frequently, that the utility would oppose. Id. at *112. The facts differ here because there has been a change in the law and the OCA challenged the Companies’ compliance with the new law. Moreover, the OCA has not raised a new issue; it has challenged the Companies’ proposed method for calculating income tax expense. The Companies are the parties seeking affirmative relief in the form of Commission

approval of a DSIC calculation that recovers income tax expense and their method for calculating that income tax expense.

The Commission also stated, in Metropolitan Edison 2007, that “the burden of proof must be on a party to a general rate increase case who proposes a rate increase beyond that sought by the utility.” Id. Here, the OCA did not propose a rate increase beyond that sought by the utilities. The OCA simply proposed methods to ensure that the DSICs comply with the Section 1301.1, which would either decrease (or cause no change to) the DSIC rate.

Importantly, the ALJ failed to acknowledge that the burden of proof differs from the burden of going forward. The Commission has stated that the utility’s burden of proof as to establishing that its rate request is just and reasonable does not shift to the party challenging the utility’s request in a rate proceeding. See Pa. PUC v. Aqua Pennsylvania, Inc., 2004 Pa. PUC LEXIS 39 at *8-9 (Order entered Aug. 5, 2004) (Section 315 reveals a legislative intent that the utility carries the burden of proving the justness and reasonableness of both proposed and existing rates). In Pa. PUC v. Breezewood Telephone Co., 1991 Pa. PUC LEXIS 45 at *9-10, Docket No. R-901666 (Order entered Jan. 31, 1991), the Commission provided:

With respect to rate proceedings before the Commission, Section 315 of the Public Utility Code, 66 Pa. C.S. § 315, provides that the burden of proof shall be upon the utility. Clearly, although the burden of going forward with the evidence may shift, the burden of proof does not shift to an intervenor challenging a requested rate increase. However, the Commission has indicated that where a party proposes an adjustment to a ratemaking claim of a utility, the proposing party does bear the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of the adjustment.

(citing Pa. PUC v. PECO, Docket No. R-891364 at 42, 53-54 (Order entered May 16, 1990)).

With regard to the burden of going forward, the Commission has stated that, upon the utility’s establishment of a *prima facie* case, the burden of going forward can shift. Pa. PUC v.

Superior Water Co., Inc., 2009 Pa. PUC LEXIS 1055 at *19-20, Docket No. R-2008-2039261 (Order entered Feb. 5, 2009). The intervenor must sustain the burden of going forward if it proposes a rate design that differs from the rate design proposed by the utility. Id. The burden of going forward is satisfied by presenting some evidence or analysis of the reasonableness of the proposal. Id. at 18 (citing Breezewood at *10).

Consistent with the cases cited above, when the Commission first addressed the OCA's arguments regarding the calculation of income tax expense in the DSIC pre-Act 40, it distinguished the burden of going forward and applied the burden of proof to the utility seeking approval of its DSIC calculation. See Petition of Columbia Gas of Pa., Inc. for Approval of a Distribution System Improvement Charge, Docket No. P-2012-2338282 at 7-8, 58 (Order entered May 22, 2014). The burden of proof in the instant DSIC proceeding should be assigned to the utility, as it was in Columbia Gas.

In summary, because the OCA proposed a change to the FirstEnergy companies' method for calculating the DSIC, the OCA has the burden of demonstrating the reasonableness of that proposal, rather than the burden of proof, which remains on the utilities. Therefore, the Commission should clarify that the OCA does not have the burden of proof as to its methods for calculating the deferred state income tax expense to reduce rates relating to Section 1301.1 as asserted by the ALJ in the Recommended Decision.

The OCA notes that the evidentiary burden applied by the ALJ was **more stringent** than the burden of demonstrating the reasonableness of the OCA's recommended methods for computing state income tax deductions and credits in the DSIC calculation. Even under that more stringent standard, the ALJ determined that the OCA satisfied that burden with substantial record evidence. R.D. at 31-33. While the OCA disagrees with the ALJ's application of the

burden of proof, that disagreement does not bear on the ALJ's fact finding and ultimate legal conclusion that the Section 1301.1 applies to the DSIC and related state and federal income tax deductions and credits must be included in its computation to reduce DSIC rates. Id. at 33-34. The OCA fully supports the ALJ's recommendations in all other respects.

III. CONCLUSION

The OCA respectfully requests that the Commission state in its Order that the OCA does not have the burden of proof with regard to its proposed methods of computing state income tax deductions and credits in the FirstEnergy companies' DSIC calculations; instead, the OCA has the burden of presenting some evidence or analysis demonstrating the reasonableness of its recommendations. With that clarification, the OCA submits that the Commission should uphold the ALJ's Recommended Decision and direct the FirstEnergy companies to account for related federal and state income tax deductions and credits in the computation of current or deferred income tax expense to reduce DSIC rates. With regard to the specific method for calculating state income tax expense, the OCA submits that the Commission should adopt the ALJ's recommendation to require the Companies to adopt the first method proposed by the OCA in this proceeding.

Respectfully submitted,



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