**PENNSYLVANIA**

**PUBLIC UTLIITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held April 19, 2018

Commissioners Present:

Gladys M. Brown, Chairman

Andrew G. Place, Vice Chairman

Norman J. Kennard

David W. Sweet. Statement, dissenting

John F. Coleman, Jr.

Petition of Metropolitan Edison Company for P-2015-2508942

Approval of a Distribution System Improvement

Charge

Office of Consumer Advocate C-2016-2531040

v.

Metropolitan Edison Company

Petition of West Penn Power Company for P-2015-2508948

Approval of a Distribution System Improvement

Charge

Office of Consumer Advocate C-2016-2531019

v.

West Penn Power Company

Petition of Pennsylvania Electric Company for P-2015-2508936

Approval of a Distribution System Improvement

Charge

Office of Consumer Advocate C-2016-2531060

v.

Pennsylvania Electric Company

Petition of Pennsylvania Power Company for P-2015-2508931

Approval of a Distribution System Improvement

Charge

Office of Consumer Advocate C-2016-2531054

v.

Pennsylvania Power Company

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), Pennsylvania Power Company (Penn Power), and West Penn Power Company (West Penn) (collectively, the Companies) and the Office of Consumer Advocate (OCA), filed on September 20, 2017, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Joel H. Cheskis, issued on August 31, 2017, relative to the above-captioned proceeding. The OCA filed Replies to Exceptions and the Companies filed Replies to Exceptions on October 2, 2017. For the reasons set forth herein, we shall (1) grant, in part, and deny, in part, the Companies’ Exceptions; (2) deny the OCA’s Exceptions; and (3) adopt, in part, and reverse, in part, the ALJ’s Recommended Decision, consistent with this Opinion and Order. Moreover, we find that Act 40 does not apply to the DSIC calculation. Accordingly, the Companies are not required to include ADIT and state income tax in the DSIC calculation under the newly enacted Act 40.

**I. History of the Proceeding**

On February 14, 2012,Governor Corbett signed into lawAct 11 of 2012, (Act 11), which amended Chapters 3, 13 and 33 of the Public Utility Code (Code). 66 Pa. C.S. § 101, *et seq.* Act 11, *inter alia*, permits jurisdictional water and wastewater utilities, electric distribution companies, and natural gas distribution companies (NGDC) or a city natural gas distribution operation to implement a distribution system improvement charge (DSIC) to recover reasonable and prudent costs incurred to repair, improve, or replace certain eligible distribution property that is part of the utility’s distribution system outside of a traditional rate case proceeding. As a precondition to the implementation of a DSIC, Act 11 requires a utility to file a Long-Term Infrastructure Improvement Plan (LTIIP) with the Commission in accordance with Section 1352 of the Code. On August 2, 2012, the Commission entered its Order in *Implementation of Act 11 of 2012,* Docket Number M-2012-2293611 (*Final Implementation Order*), which established procedures and guidelines necessary to implement Act 11 and included a Model Tariff for DSIC filings.

On September 18, 2015, in accordance with the *Final Implementation Order,* Penelec filed a Petition with the Commission seeking approval of its LTIIP at Docket No. P-2015-2508936. Similarly, on October 19, 2015, Met-Ed, West Penn and Penn Power filed Petitions with the Commission seeking approval of their LTIIPs at Docket Nos. P-2015-2508942, P-2015-2508948, and P-2015-2508931, respectively. By separate Orders dated February 11, 2016, the Commission approved the LTIIP Petitions filed by Penelec, Met-Ed, West Penn and Penn Power (collectively referred to as “the First Energy Companies” or “the Companies”).

On February 16, 2016, each of the four companies filed a Petition, which included an attached draft tariff supplement to add a DSIC Rider in their respective tariffs with a proposed effective date of July 1, 2016.

On February 26, 2016, the OCA filed Formal Complaints, Public Statements and Answers to the Petitions.

On March 7, 2016, Petitions to Intervene were filed in response to each Petition jointly by Citizens for Pennsylvania’s Future (CPF) and the Environmental Defense Fund (EDF), as well as by Met-Ed Industrial Users Group (MEIUG), West Penn Power Industrial Intervenors (WPPII), Penelec Industrial Customer Alliance (PICA), and the Penn Power User’s Group (PPUG) (collectively referred to as “the Large Users Groups”), the respective Large Users Groups for each company, in the proceedings relevant to them.

On March 9, 2016, the Office of Small Business Advocate (OSBA) filed a Notice of Appearance, Notice of Intervention, Answer and Public Statement in response to each proceeding, and the Pennsylvania State University (PSU) filed a Petition to Intervene in the case involving West Penn.

On April 1, 2016, AK Steel Corporation (AK Steel) also filed a Petition to Intervene in the case involving West Penn. Eve McCauley and Michelle Perry filed individual Complaints on April 4, 2016 and April 18, 2016, respectively.

The First Energy Companies filed Answers to the Complaints and Answers to the Petitions for Intervention.

On June 9, 2016, the Commission entered separate Orders granting the four individual Petitions filed by the Companies.[[1]](#footnote-2)

In the *June 2016 DSIC Orders*, we determined that the Petitions complied with the requirements of Act 11 and the *Final Implementation Order.* We found that the Petitions were consistent with applicable law and Commission policy and allowed the tariffs to go into effect on July 1, 2016. However, we also referred some matters to the Office of Administrative Law Judge (OALJ) for hearing and preparation of a Recommended Decision regarding various issues raised in response to the Petitions. Specifically, we referred the following issues to the OALJ:

a. Whether certain customers taking service at transmission voltage rates should be included under the DSIC;

b. Whether other customers should also be exempt from the DSIC;

c. If revenues associated with the riders in Pennsylvania Power Company’s tariff are properly included as distribution revenues;

d. The Petition for Intervention of Penn Power Users Group;

e. The Joint Petition for Intervention of the Citizens for Pennsylvania’s Future and the Environmental Defense Fund; and

f. The Joint Motion to Compel of the Citizens for Pennsylvania’s Future and the Environmental Defense Fund and the Commission waives the fifteen (15) day timeframe restriction set forth in 52 Pa. Code § 5.342.

On June 20, 2016, each of the First Energy Companies filed a tariff supplement adding its DSIC Rider to its tariff.

On July 13, 2016, we issued a Secretarial Letter informing the Companies’ that their respective DSIC Riders complied with the terms of the DSIC Orders.

On July 26, 2016, CPF and EDF filed a Joint Notice of Withdrawal in each proceeding.

A Prehearing Conference was held on August 10, 2016. Counsel for the Companies, the OSBA, the OCA, the Large Users Group, and PSU participated. Counsel for AK Steel was unable to participate but remained on the Commission’s service list for the proceeding. At the Prehearing Conference, the Companies proposed consolidation of the four proceedings as it would promote administrative efficiency and avoid delays and duplicative efforts that would cause the unnecessary expenditure of time and resources. The Parties in attendance at the Prehearing Conference supported the Companies’ proposal and the cases were consolidated.

On February 2, 2017, the Companies, the OCA, the OSBA and the Large Users Groups filed a Joint Petition for Settlement of Pending Issues (Settlement) requesting that the Settlement be approved in its entirety without modification. The following documents were attached to the DSIC Settlement: Exhibits 1 through 4, comprising Revised Tariff Supplements for each Company, in both clean and redlined versions, as well as Statements A through D, comprising Statements in Support of the Settlement from the Companies, the OCA, the OSBA, and the Large Users Groups, respectively. AK Steel and PSU included letters indicating they do not oppose the Settlement.

On February 8, 2017, the Companies filed a Motion for Admission of Testimony and Exhibits in Support of the Settlement. On February 16, 2017, the Parties jointly filed proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs in Support of the Settlement.

On April 28, 2016, a separate proceeding was held regarding the Companies’ requests for increases in their base rates.[[2]](#footnote-3) The base rate case requests were consolidated and litigated together.

On June 12, 2016, Act 40 was signed into law, effective in sixty days or on August 11, 2016. Act 40 added Section 1301.1 to the Code and states as follows:

**1301.1. Computation of income tax expense for rate-making purposes.**

**(a) Computation.—**If an expense or investment is allowed to be included in a public utility’s rates for ratemaking purposes, the related income tax deductions and credits shall also be included in the computation of current or deferred income tax expense to reduce rates. If an expense or investment is not allowed to be included in a public utility’s rates, the related income tax deductions and credits, including tax losses of the public utility’s parent or affiliated companies, shall not be included in the computation of income tax expense to reduce rates. The deferred income taxes used to determine the rate base of a public utility for ratemaking purposes shall be based solely on the tax deductions and credits received by the public utility and shall not include any deductions or credits generated by the expenses or investments of a public utility’s parent or any affiliated entity. The income tax expense shall be computed using the applicable statutory income tax rates.

**(b) Revenue use.—**If a differential accrues to a public utility resulting from applying the ratemaking methods employed by the commission prior to the effective date of subsection (a) for ratemaking purposes, the differential shall be used as follows:

(1) Fifty percent to support reliability or infrastructure related to the rate base eligible capital investment as determined by the commission; and

(2) Fifty percent for general corporate purposes.

**(c) Application.**—The following shall apply:

(1) Subsection (b) shall no longer apply after December 31, 2025.

(2) This section shall apply to all cases where the final order is entered after the effective date of this section.

66 Pa. C.S. § 1301.1(a)-(c).

On September 30, 2016, the Companies and the OCA filed Main Briefs on the treatment of ADIT under Act 40 in the Companies’ DSIC Rider Petition. The Companies and the OCA filed Reply Briefs on October 14, 2016.

On October 14, 2016, the Parties filed Partial Settlements on the consolidated base rate case proceedings. The only issue that was not resolved in the Partial Settlements was the treatment of ADIT in each of the First Energy Company’s DSIC Riders.

On January 19, 2017, we issued an Opinion and Order on the consolidated base rate proceedings.[[3]](#footnote-4) In our *January 2017 Order,* we approved the Partial Settlements, but determined that issues regarding the application of Section 1301.1 pertaining to the inclusion of ADIT in the calculation of the DSIC Riders should be addressed in the instant proceeding involving the Companies’ DSICs. *January 2017 Order* at 38. We stated:

Because the contested issue involves the DSIC calculation, it should be considered in the context of all of the issues directly related to the DSIC. As of the date of this Opinion and Order, ALJ Cheskis has not yet issued a Recommended Decision in the DSIC proceeding and no evidentiary hearings have been conducted.

*Id.* at 38-39. We further stated: “Given the status of the DSIC proceeding, there is adequate time to resolve the contested issue within the DSIC proceeding.” We also transferred the relevant parts of the record concerning the OCA’s claim regarding the calculation of ADIT in the companies’ DSICs, including briefs and written testimonies submitted by the Parties on this issue.[[4]](#footnote-5) *Id.* at 39.

Consistent with the *January 2017 Order,* a Prehearing Conference was held on March 6, 2017. Counsel for the Companies, the OSBA, the OCA, the Large Users Group, and PSU participated.

On March 21, 2017, the OCA filed supplemental direct testimony. On April 13, 2017, and May 1, 2017, all Parties filed supplemental rebuttal and supplemental surrebuttal testimonies, respectively. On May 1, 2017, the Companies filed their rejoinder testimony.

The evidentiary hearing was held on May 12, 2017. Counsel for the Companies, the OSBA, the OCA, the Large Users Group, and PSU participated in the evidentiary hearing. During the hearing, the Companies and the OCA presented written testimony and exhibits for admission into the record. R.D. at 7-8. As there were no objections, the testimony and/or exhibits were admitted into the record during the hearing. The transcript from the evidentiary hearing consists of forty-eight pages.

The Companies and the OCA filed Main Briefs on June 5, 2017 and Reply Briefs on June 21, 2017.[[5]](#footnote-6) The record closed on June 21, 2017, upon receipt of the Reply Briefs.

In the Recommended Decision, issued on August 31, 2017, ALJ Cheskis recommended that the Settlement of the issues from the Companies’ DSIC proceeding be approved in its entirety because it is in the public interest and supported by substantial evidence. Regarding the contested issue from the Companies’ base rate proceeding, ALJ Cheskis recommended that the Companies be directed to account for related income tax deductions and credits in the computation of current or deferred income tax expense to reduce rates when an expense or investment is allowed to be included in a public utility’s rates for ratemaking purposes as proposed by the OCA. R.D. at 1, 8, 28-29, 33-34, and 43‑45.

The Parties filed Exceptions and Replies to Exceptions as previously noted.

**II. Discussion**

As we proceed in our review of the various positions espoused in this proceeding, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania* *v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Moreover, any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

The ALJ made forty-three Findings of Fact, R.D. at 8-14, and reached twenty-two Conclusions of Law, R.D. at 46-50. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

**1. Contested Issue**

**A. Burden of Proof**

**1.** **ALJ’s Recommendation**

The ALJ found that the Companies have the burden of demonstrating that their DSICs are just and reasonable and should be approved consistent with Section 315 of the Code, 66 Pa. C.S. § 315.[[6]](#footnote-7) The ALJ stated this includes accounting for related income tax deductions and credits in the computation of current or deferred income tax expense to reduce rates when an expense or investment is allowed to be included in a public utility’s rates for ratemaking purposes. R.D. at 16. The ALJ reasoned that this proceeding was initiated by the Companies’ filing of petitions for approval of a DSIC. The ALJ explained that the Commission approved the Companies’ LTIIP Petitions on February 11, 2016. The ALJ also explained that the Companies then filed proposed tariff supplements or Petitions to implement a DSIC Rider into their respective tariffs, with an effective date of July 1, 2016. The ALJ noted that issues arising from these filings form the initial basis of the instant proceeding. The ALJ further noted that in the *January 2017 Order*, in disposing of the Companies’ base rate proceedings, the Commission referred the OCA’s claim regarding the calculation of ADIT in the Companies’ DSIC Riders to this proceeding. As such, the ALJ concluded that the underlying DSIC proceeding in which the Companies, as the petitioners, have the burden is not final, and issues relating to the Companies’ DSIC arise from the underlying rate proceeding in which the Companies also have the burden of proof. R.D. at 15.

The ALJ concluded, however, that the OCA has the burden of proving that one of its proposed methods should be adopted to incorporate that impact into the calculation of the Companies’ DSIC. *Id*. at 16. In support of this conclusion, the ALJ cited to several proceedings that stood for the proposition that a party that offers a proposal not included in the original filing bears the burden of proof regarding such proposal. *Id*. at 15-16 (citing *Pa. PUC v. Metropolitan Edison Co*. (*Met-Ed*), Docket No. R-00061366 (Order entered January 11, 2007); *Joint Petition of Metropolitan Edison Co. and Pennsylvania Electric Co. for Approval of their Default Service Programs*, Docket Nos. P-2009-2093053 and P-2009-2093054 (Order entered November 6, 2009)).

**2.** **Exceptions and Replies**

The OCA filed one Exception regarding the burden of proof standard the ALJ applied. The OCA requests that the Commission clarify that the OCA does not have the burden of proof to establish that its proposals to incorporate the impact of Section 1301.1 on the Companies’ DSICs should be adopted. OCA Exc. at 3. The OCA excepts to the ALJ’s finding that the “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*. (citing R.D. at 16). The OCA avers that the facts here differ from the facts in *Met-Ed*, because the law has changed, and the OCA is challenging the Companies’ compliance with the new law. The OCA also avers that it is not raising a new issue but, rather, is challenging the Companies’ proposed method for calculating income tax expense. OCA Exc. at 3. The OCA states that it is not proposing a rate increase beyond that sought by the Companies but is simply proposing methods to ensure that the DSICs comply with Section 1301.1, which would either decrease or cause no change to the DSIC rate. *Id*. at 4.

The OCA continues that the ALJ failed to acknowledge the difference between the burden of proof and the burden of going forward. The OCA notes that the Commission has stated that a utility’s burden of proof in establishing its rate request is just and reasonable does not shift to the party challenging a utility’s request in a rate proceeding. *Id*. (citing *Pa. PUC v. Aqua Pennsylvania, Inc*. (*Aqua Pennsylvania*), Docket No. R-00038805 (Order entered August 5, 2004)). The OCA avers that the Commission has indicated that upon a utility’s establishment of a *prima facie* case, the burden of going forward can shift. OCA Exc. at 4-5 (citing *Pa. PUC v. Superior Water Co., Inc*. (*Superior Water*), Docket No. R-2008-2039261 (Order entered February 5, 2009)). The OCA states that a party proposing a rate design that differs from the rate design proposed by a utility has the burden of going forward, which is satisfied by presenting some evidence or analysis of the reasonableness of the proposal. OCA Exc. at 5 (citing *Pa. PUC v. Breezewood Telephone Co*., 1991 Pa. PUC Lexis 45 at \*9-10). The OCA explains that the Commission properly distinguished between the burden of going forward and applied the burden of proof to the utility seeking approval of its DSIC calculation in the *Columbia DSIC Order* at 7-8. OCA Exc. at 5. The OCA fully supports the ALJ’s recommendation in all other respects. *Id*. at 6.

In response, the Companies state that the OCA has the burden of proof on all aspects of the contested issue and the Companies do not bear any portion of the burden of proof. The Companies aver that changing the DSIC calculation as the OCA proposes also requires changing the DSIC formula, the Model Tariff that incorporates that formula, and the *Final Implementation Order* that approved the Model Tariff. As a result, the Companies believe that the OCA is making a collateral attack on a final Commission Order and, therefore, that the OCA has the burden of proof on all aspects of the contested issue. The Companies agree with the ALJ’s determination that the OCA has the burden of proof to show that its proposals to revise the DSIC formula are lawful, just, reasonable, appropriate, and would not needlessly complicate the Commission’s review, administration, and auditing of the DSIC. Companies’ R. Exc. at 6. However, the Companies argue that by failing to extend this reasoning to all aspects of the contested issue, the ALJ erred in finding that the DSIC is a “proposed rate.” The Companies contend that this proposition is erroneous because it confuses a monetary charge with the entire DSIC adjustment mechanism and assumes that the monetary charge is at issue and the DSIC adjustment mechanism is not. *Id*. at 7.

The Companies further explain their position that the “rate” for each Company is its entire DSIC Rider, and the Riders were approved in the DSIC Orders and are currently in effect. For that reason, the Companies aver that the real object of the OCA’s proposal is not the Companies’ DSIC Riders but the Model Tariff and the *Final Implementation Order* approving it. *Id*. The Companies state that pursuant to Section 316 of the Code, the Commission’s findings and conclusions in the *Final Implementation Order* are “prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby.” *Id*. (citing 66 Pa. C.S. § 316).

The Companies also filed an Exception objecting to the ALJ’s finding that the Companies bear the burden of proof to establish that the terms of their Commission-approved DSIC Riders conform with the law and are “just and reasonable.” The Companies aver that they do not have the burden of proving the justness and reasonableness of DSIC Riders that the Commission has already found conform to the Model Tariff and the *Final Implementation Order*. Companies’ Exc. at 10. The Companies contend that the OCA’s proposal to revise the terms of the Commission-approved DSIC formula challenges an existing, approved rate and, consequently, the OCA has the burden of proof. *Id*. at 11.

In reply to the Companies’ first Exception, the OCA states that the ALJ correctly found that the Companies bear the burden of proving that their DSIC Riders are just and reasonable and conform with Act 40. OCA R. Exc. at 1. The OCA agrees with the ALJ’s analysis that the underlying DSIC proceeding in which the Companies have the burden of proof is not final, and issues related to the Companies’ DSIC arise from the underlying rate proceeding in which the Companies also have the burden of proof. The OCA avers that the Companies bear the burden of proof as to whether the DSIC Riders are proposed or existing pursuant to Section 315 of the Code, 66 Pa. C.S. § 315. OCA R. Exc. at 2-3 (citing *Aqua Pennsylvania*). The OCA continues that the Companies are the proponents of Commission action because they are seeking a final order approving their DSIC Riders. The OCA believes the Companies cannot evade this by arguing that the OCA should, instead, be challenging the Commission’s *Final Implementation Order*. The OCA comments that the *Final Implementation Order* does not dispose of the OCA’s challenge to the calculation of income tax deductions and credits in any individual utility’s DSIC, which is why the OCA has raised and litigated the issue in individual DSIC implementation cases. The OCA asserts that it is now, post Act 40, challenging the Companies’ calculation of the DSIC Rider in the implementation proceeding initiated by those Companies. OCA R. Exc. at 3.

The OCA additionally argues that the burden of going forward will shift to the OCA, as a party who proposed a change to the Companies’ method for calculating the DSIC Rider, if the Companies establish a *prima facie* case that their method for calculating the DSIC Rider complies with Act 40. OCA R. Exc. at 4. The OCA states that its burden of going forward is satisfied by presenting some evidence or analysis of the reasonableness of the proposal. *Id*. at 5 (citing *Superior Water*). The OCA avers that it has met that burden by presenting the testimony of Ralph C. Smith and analysis showing that the DSIC in its current form does not account for federal deferred income taxes and state income tax deductions generated by DSIC investment as required by the newly enacted Section 1301.1. OCA R. Exc. at 5 (citing OCA St. 1 at 110; OCA St. 1-Supp. at 2-3; OCA St. 1SR-Supp. at 3-9). The OCA submits that although the ALJ applied the wrong burden of proof to the OCA, the ALJ found that the OCA met its burden and, accordingly, the burden of going forward shifts back to the Companies to rebut the OCA’s evidence by a preponderance of the evidence. OCA. R. Exc. at 5. The OCA opines that the Commission should adopt the ALJ’s determination that the Companies failed to meet their burden of proof. OCA R. Exc. at 6.

**3.** **Disposition**

Initially, we note that there is one contested issue before us in this proceeding – whether Act 40 requires the Companies to include federal and state income tax deductions generated by DSIC investment in their DSIC calculation. In reaching a determination on this issue, we engaged in statutory interpretation to decide whether Act 40 applied to the DSIC. As explained in more detail herein, because we decided that Act 40 does not apply to the DSIC, we did not find it necessary to reach a determination on the OCA’s proposed calculations for including federal and state income tax deductions generated by DSIC investment in the Companies’ DSICs. Because statutory construction is a legal issue, the burden of proof standard is not dispositive of the outcome herein.[[7]](#footnote-8)

Nevertheless, we will discuss the burden of proof standards to provide clarification and to address the Parties’ positions. In DSIC proceedings involving ADIT issues, we have found that public utilities have the burden of proving the justness and reasonableness of their DISCs. The standard that public utilities, such as the Companies in this proceeding, must satisfy is set forth in Section 315(a) of the Code, which provides:

**Reasonableness of rates.**–In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceeding upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

66 Pa. C.S. § 315(a). The burden of proof does not shift to parties challenging a requested rate surcharge. Rather, the burden of proof remains with the public utility throughout the course of the rate proceeding. *See Petition of PPL Electric Utilities Corporation for Approval of a Distribution System Improvement Charge*, Docket No. P‑2012-2325034, at 9 (Order entered April 9, 2015); *Petition of Peoples TWP, LLC for Approval of a Distribution System Improvement Charge*, Docket No. P-2013-2344595, at 12 (Order entered August 21, 2014).[[8]](#footnote-9)

Although the utility bears the burden of proving that its proposed rate surcharge is just and reasonable, a party that advances a proposal that the utility did not include in its filing carries the burden of proof as to that contrary proposal. *Petition of Duquesne Light Company*, Docket No. P-2012-2301664 (Order entered January 25, 2013); *Joint Default Service Plan for Citizens’ Electric Company and Wellsboro Electric Company (Citizens’ Electric)*, Docket Nos. P-2009-2110798, *et al*. (Order entered February 25, 2010); *Met-Ed, supra*. Section 315(a) cannot reasonably be read to place the burden of proof on the utility regarding an issue the utility did not include in its filing and which, frequently, the utility would oppose. *Met-Ed* at 67. A utility does not have the burden of proving the legality/illegality or reasonableness/unreasonableness of a proposal it did not include in its filing. *Citizens’ Electric* at 9. Had we reached the issue regarding the OCA’s proposed calculations, this is the standard we would have applied to that evidentiary issue. In this vein, we agree with the ALJ that the OCA had the burden to prove that one of its proposed methods should be adopted to incorporate that impact into the Companies’ DSIC calculation.

In this case, the OCA is advancing a proposal that the Companies did not include in their DSIC calculation. The OCA proposes that the Companies be required to account for ADIT in their DSIC calculation based on Act 40 and proposes specific calculations that account for related state income tax deductions and credits in the computation of current or deferred income tax expense to reduce rates when an expense or investment is allowed to be included in rates. The Companies did not include this proposal or these calculations in their DSIC because the Companies’ position is that Act 40 does not require the inclusion of ADIT and state income tax adjustments to the DSIC calculation.

**B. Section 1301.1**

**1.** **ALJ’s Recommendation**

In the Recommended Decision, ALJ Cheskis found that Section 1301.1 requires the Companies’ to include in their DISCs federal and state income tax deductions and credits generated by DSIC investment to ensure that the Companies’ DSICs are just, reasonable, in the public interest and consistent with the Code. R.D. at 22. The ALJ reasoned that Section 1301.1 was enacted by the General Assembly after *McCloskey* *v. Pa. PUC (McCloskey)*, 127 A.3d 860 (Pa. Cmwlth. 2015),[[9]](#footnote-10) was issued and, accordingly, Section 1301.1 governs the facts in this proceeding. R.D. at 24-25. The ALJ also determined that the first sentence in Section 1301.1(a) is clear and unambiguous, as it requires that the impact of any tax deductions and credits related to an expense or investment that is allowed to be included in a public utility’s rates for ratemaking purposes shall be included in the computation of current or deferred income tax expense to reduce rates. As such, the ALJ concluded that the Companies must modify their DSIC calculation to include federal and state income tax deductions generated by DSIC investment, and that the discretion afforded to the Commission in *McCloskey* no longer applies under the newly enacted Act 40. R.D. at 25. The ALJ stated that because the plain language of Section 1301.1 is discernible under 1 Pa. C.S. § 1921(b), it was not necessary to look to the contemporaneous legislative history to ascertain the General Assembly’s intent. R.D. at 26. The ALJ explained that the Code’s definition of “rate” is broad and includes the DSIC. The ALJ cited to the following definition for “rate” in Section 102 of the Code: “Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility . . . made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility.” R.D. at 28 (citing 66 Pa. C.S. § 102).

**2. Exceptions and Replies**

In their second Exception, the Companies argue that the DSIC, in its current form, fully and properly accounts for federal deferred income taxes and state income tax deductions associated with “eligible property.” Companies’ Exc. at 11. The Companies state that *McCloskey* affirmed the Commission’s determination that the DSIC mechanism properly accounts for federal ADIT and state income tax deductions associated with “eligible property” in setting rates, and the Commonwealth Court agreed that the Commission did not ignore those tax effects in the rate-setting process. The Companies contend that *McCloskey* and the *Columbia Order* it affirmed established fundamental principles that were unaffected by Act 40. First, the Companies aver that *McCloskey* established that the “rate” to be examined for conformity with the law and applicable ratemaking principles is the entire DSIC mechanism within the Model Tariff and adopted as a utility’s DSIC Rider upon Commission approval. Companies’ Exc. at 13.

Second, the Companies aver that the DSIC “rate” expressly accounts for all ADIT and state income tax effects of a utility’s property, including those associated with quarterly additions of “eligible property.” The Companies explain that the DSIC mechanism requires a utility to submit each calendar quarter a calculation of its rate of return on equity based on the totality of the components comprising the utility’s revenue requirement, including rate base, taxes, depreciation, and operating and maintenance expenses. The Companies continue that this calculation represents the cumulative ADIT and state tax effects related to all utility property, including each quarterly addition of “eligible property.” The Companies state that the product of the calculation is used in setting the utility’s rates because if the utility’s achieved equity return exceeds the equity return allowed for DSIC purposes (the “earnings cap”), the utility must reduce its DSIC charge to zero. *Id*. at 14.

Third, the Companies argue that the Court in *McCloskey* found that the quarterly earnings cap calculation conforms to the rate-setting process the Commission uses in non-general base rate cases. *Id*. The Companies aver that the quarterly non-general base rate case analyses account for all of the utility’s ADIT and property-related state income tax effects, including those generated by quarterly additions of DSIC-eligible property. *Id*. at 14-15. Therefore, the Companies assert that even if Act 40 applied to the DSIC, the DSIC includes ADIT and property-related state income tax effects as a significant component of the rate-setting process conducted each quarter to determine whether the DSIC may be charged or whether it must be reduced to zero. *Id*. at 15.

In response, the OCA states that the ALJ properly found that Act 40 requires a change to the DSIC calculation because Act 40’s requirements are not met by the earnings cap. The OCA avers that in *McCloskey*, the Commonwealth Court approved the Commission’s decision that Columbia Gas was not required to account for related ADIT and state income tax deductions in the calculation of the DSIC rate. OCA R. Exc. at 6. The OCA points out that in so doing, the Court noted the General Assembly’s authority to remove the Commission’s discretion to allow utilities to continue to use this practice and observed that the General Assembly could have expressly incorporated such a prohibition on the Commission’s discretion when it enacted Act 11. *Id*. (citing *McCloskey* at 870-871). The OCA continues that the General Assembly has since taken such action by enacting Act 40, which, in the OCA’s opinion, requires that related income tax deductions and credits be included in the calculation of current or deferred income tax expense to reduce rates. OCA R. Exc. at 7.

The OCA disagrees with the Companies’ position that the earnings cap’s function to reduce rates to zero satisfies Section 1301.1, because according to the OCA, the earnings cap is not part of the “computation of current or deferred income tax expense.” OCA R. Exc. at 7-8. The OCA avers that the earnings cap does not prevent the Companies from charging a DSIC rate that is calculated as if the Companies have not received income tax deductions. Accordingly, the OCA concurs with the ALJ’s determination that the Companies must change their DSIC computation to comply with Act 40. *Id*. at 8. The OCA further states that the addition of ADIT and the state income tax deductions to the DSIC calculation are not the only way Act 40 impacts the Companies. The OCA submits that under Act 40, consumers will lose the benefit of the consolidated tax savings adjustment when calculating whether a utility is overearning, which will benefit the Companies. The OCA believes that when read in its entirety, Act 40 balances these impacts by requiring that “related tax deductions and credits” be included in the calculation to reduce rates. *Id*. at 9.

In their third Exception, the Companies aver that Act 40 does not apply to the DSIC. The Companies state that Act 40 applies only to base rates and was enacted to eliminate the use of consolidated tax adjustments (CTAs) in calculating utility base rates. *Id*. The Companies cite to the opening statement of Representative Godshall during the Public Hearing regarding House Bill 1436, as follows: “House Bill 1436 would eliminate the consolidated tax approach and adopt a standalone approach used by a majority of the states and the Federal Energy Regulatory Commission.” Companies’ Exc. at 15 n. 33 (citing Public Hearing in Re: House Bill 1436, Pennsylvania House of Representatives Consumer Affairs Committee, Sept. 29, 2015 (H.B. 1436 Hearing), Tr. at 4-5 (Opening Statement of Chairman Robert Godshall). The Companies state that since CTAs are reflected only in base rate calculations and not in the calculation of charges under Section 1307 adjustment mechanisms, there is strong contemporaneous evidence that Act 40 was intended to apply only to base rates. Companies’ Exc. at 15-16. The Companies also note Representative Godshall’s remarks on the House floor that Section 1301.1 “applies to base rate cases” and “would only go into effect when a utility comes in for a base rate case.” Companies’ Exc. at 16 (citing House of Representatives Legislative Journal, Feb. 8, 2016 (Legislative Journal), at 117).

Additionally, the Companies aver that the words of Section 1301.1 are not explicit in several respects. The Companies argue that textual evidence within the four corners of Act 40 satisfies the prerequisite for considering the factors Section 1921(c), 1 Pa. C.S. § 1921(c), lists for ascertaining legislative intent. The Companies cite to Act 40’s use of the terms “rate base” and “final order.” The Companies state that the term “rate base” is not in any of the DSIC-related sections in Act 11, because the DSIC is designed to reflect a subset (“fixed costs” of “eligible property”) of the elements that would be included in “rate base” in a base rate case. Companies’ Exc. at 17. However, the Companies indicate that the concept of “rate base” is highly relevant in proceedings to establish base rates, because all of the other elements that are included in a utility’s “rate base,” such as cash working capital, prepaid expenses, materials and supplies, unamortized investment tax credits, customer advances, contributions in aid of construction and customer deposits, are identified, quantified and added, or deducted, as appropriate, to determine a utility’s investment on which it may earn a return. Accordingly, the Companies contend that Act 40’s reference to “deferred income taxes used to determine the rate base of a public utility for ratemaking purposes” is relevant only in the context of a base rate case. *Id*. at 17-18.

The Companies further aver that Act 40 provides that it applies to cases in which “the final order is entered after the effective date of this section.” The Companies argue that the term “final order” does not appear in Section 1307 of the Code or in any DSIC-related Code Sections but is easily discerned in the context of a general base rate case, as Section 1308(d) requires the Commission to enter a “final decision and order” before the end of the statutory suspension period. The Companies believe that because the term “final order” is associated with base rate cases, the legislature’s use of the term “final order” in Act 40 supports the conclusion that Act 40 applies only to base rates. Companies’ Exc. at 18. In support of their position, the Companies cite to Representative Godshall’s remarks, as follows: “[T]his section applies to base rate cases where the PUC finally [issues] an [order] after the effective date.” *Id*. (citing Legislative Journal at 117). The Companies continue that the “final order” language in Act 40 adds substantial evidence that Act 40’s terms are not explicit and the factors in Section 1921(c)(1)-(8) should be considered. Companies’ Exc. at 18.

In its Replies to Exceptions, the OCA avers that the ALJ correctly found that the plain, unambiguous language of Section 1301.1 applies to the DSIC because the DSIC is a rate that recovers utility investment and income tax expense related to that investment. OCA R. Exc. at 9. In support of its position, the OCA cites to the first sentence of Section 1301.1(a), which provides: “If an expense or investment is allowed to be included in a public utility’s rates for ratemaking purposes, the related income tax deductions and credits shall also be included in the computation of current or deferred income tax expense to reduce rates.” *Id*. (citing 66 Pa. C.S. § 1301.1(a)). The OCA states that “rate” is a technical word defined in Section 102 of the Code, 66 Pa. C.S. § 102, and when technical words are defined in a statute, they “shall be construed according to such peculiar and appropriate meaning or definition.” OCA R. Exc. at 10 (citing 1 Pa. C.S. § 1903(a)).

The OCA continues that when enacting legislation, it is presumed that the General Assembly is familiar with existing law and, therefore, it must be presumed that in passing Act 40, the General Assembly was aware of the recent Commonwealth Court decision in *McCloskey* finding it unnecessary to account for federal and state income tax deductions in calculating the DSIC. OCA R. Exc. at 10. (citing *Commonwealth v. Ramos*, 623 Pa. 420, 428, 83 A.3d 86, 91 (Pa. 2013)). The OCA submits that if the General Assembly did not wish to disturb the Commission’s prior Orders pertaining to DSIC and the Court’s decision in *McCloskey*, it could have specifically excluded the DSIC computation from Act 40’s mandates, or it could have limited the effect of the first sentence of Section 1301.1(a) to base rates only or to CTAs specifically. OCA R. Exc. at 10-11.

The OCA disagrees with the Companies’ arguments that Section 1301.1 is ambiguous. OCA R. Exc. at 11. The OCA contends that the term “rate base” is relevant to the DSIC because the DSIC provides recovery of depreciation and pretax return on plant investment “not previously included in rate base.” *Id*. (citing *Final Implementation Order* at 29). The OCA submits that the same plant investment will be rolled into the rate base on which the utility earns depreciation and pretax return in its new base rates. OCA R. Exc. at 11-12 (citing *Final Implementation Order*, Appendix A at 8; 66 Pa. C.S. §§ 1357(a)(3), 1358(b)(1)-(2)). The OCA states that the Companies also ignore that, in addition to the DSIC, Act 11 established the fully projected future test year mechanism (FPFTY). The OCA explains that because the FPFTY enables utilities to include plant investment in rate base that is made after new base rates are in effect, when the utility could otherwise recover return of and on the same plant investment in the DSIC, these mechanisms must be coordinated to prevent double recovery. OCA. R. Exc. at 12.

Moreover, the OCA contends that the Companies’ argument regarding the term “final order” fails, because cases under Section 1308(d) of the Code are not the only cases where a final order is entered. OCA R. Exc. at 12. The OCA states that a final Commission Order is a technical term, defined in the Rules of Appellate Procedure, that “disposes of all claims and of all parties” for purpose of judicial review. *Id*. at 12-13 (citing 42 Pa. C.S. § 763(a)(1)). The OCA notes that the Commission enters final orders in non-general rate cases and in cases disposing of all claims involving DSIC-related issues. OCA R. Exc. at 13. The OCA further disagrees with the Companies’ position that Act 40’s application to the DSIC conflicts with Section 1357 of the Code. The OCA contends that using an effective tax rate in the DSIC calculation does not change the applicable statutory state income tax rate. OCA R. Exc. at 13-14.

In their fourth Exception, the Companies contend that under the effective date provision of Act 40, Section 1301.1 does not apply to the DSIC Riders. Companies’ Exc. at 19. The Companies aver that the *Final Implementation Order* is the only Order that could logically be considered a “final order” that demarcates the effective date of Act 40, since the *Final Implementation Order* established the Model Tariff that utilities establishing a DSIC were required to adopt. Companies’ Exc. at 19-20. Through this reasoning, the Companies argue that because the *Final Implementation Order* was entered on August 2, 2012, its terms would be unaffected by Act 40. Companies’ Exc. at 20.

In reply, the OCA states that the ALJ correctly found that Section 1301.1 applies to the DSIC Riders because the Final Order approving them will be issued after Act 40’s effective date. The OCA disagrees with the Companies’ argument that the *Final Implementation Order* is the “final order” in this case within the meaning of Act 40. OCA R. Exc. at 14. The OCA avers that the Companies misstate the function and effect of the Model Tariff. According to the OCA, the Model Tariff is not a regulation or otherwise a binding norm, but is simply an example, and the Commission will consider and has approved initial DSIC tariffs that differ from the Model Tariff. *Id*. at 15. The OCA asserts that the “final order” under Act 40 for purposes of the Companies’ DSIC rate is any order that approves the Companies’ DSIC rate and disposes of all claims and all parties, and such an Order has not yet been issued. *Id*. at 15-16.

**3. Disposition**

Based on our review of the Parties’ positions, the applicable law, and the record in this proceeding, we disagree with the ALJ’s conclusion that Section 1301.1 requires the Companies’ DSICs to include federal and state income tax deductions and credits generated by DSIC investment. We find that the language in Section 1301.1 is ambiguous regarding whether Act 40 applies to the DSIC. Statutory language is considered ambiguous when a pertinent provision is susceptible to more than one reasonable interpretation or when the language is vague, uncertain, or indefinite. *Adams Outdoor Advertising, L.P. v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006); *Barash v. Pa. PUC*, 516 Pa. 142, 532 A.2d 325, 332 (Pa. 1987). In this case, based on the Parties’ positions and our reading of Section 1301.1, the statutory language is susceptible to more than one reasonable interpretation. The OCA argues that the language in the first sentence of Section 1301.1(a) clearly provides that Act 40 applies to the DSIC because Act 40 applies to rates as broadly defined in Section 102 of the Code, and the DSIC is a rate that recovers utility investment and income tax expense related to that investment.

However, the OCA’s position does not account for the language in the third sentence of Section 1301.1(a), which provides as follows:

The deferred income taxes used to determine the rate base of a public utility for ratemaking purposes shall be based solely on the tax deductions and credits received by the public utility and shall not include any deductions or credits generated by the expenses or investments of a public utility’s parent or any affiliated entity.[[10]](#footnote-11)

66 Pa. C.S. § 1301.1(a). This provision explains how the deductions and credits in the first sentence of Section 1301.1(a) should be calculated. It refers back to the first two sentences of Section 1301.1(a) and specifically uses the term “rate base” and not the general term “rate.” The term “rate base” is a technical term that is used in general base rate cases.[[11]](#footnote-12) The use of both the terms “rate” and “rate base” creates an ambiguity in the meaning of Section 1301.1 and supports the Companies’ position that the language in Section 1301.1 is ambiguous and, therefore, should be analyzed under Section 1921(c), 1 Pa. C.S. § 1921(c),[[12]](#footnote-13) to ascertain the intention of the General Assembly.

In this case, our examination of the contemporaneous legislative history and the language of Section 1301.1 yields the clear intent of the legislature in enacting Act 40, as well as the occasion and necessity for the statute and the mischief to be remedied. In enacting the amendments to the Code to provide for the computation of income tax expense for ratemaking purposes, Representative Godshall remarked that the bill under consideration specifically requires “a public utility’s Federal income tax expense be calculated on a stand-alone basis . . . in rate proceedings before the Pennsylvania Public Utility Commission.” Representative Godshall stated, “this section applies to base rate cases where the PUC finally [issues] an [order] after the effective date” and “would only go into effect when a utility comes in for a base rate case.” Additionally, Representative Longietti remarked that the bill “simply follows what the vast majority of states currently do, which is allow regulated utilities to be judged on a stand-alone basis when it comes to ratemaking.” Legislative Journal at 117. During the public hearing on the bill, Representative Godshall explained the following:

Currently, a ratemaking policy dictated by the Courts and not the General Assembly requires a consolidated income tax expense approach. Under this approach, the combined tax expense of the regulated utility and its unregulated affiliates is used when setting rates through a base rate case at the PUC. While this method may seem to benefit utility ratepayers, general ratemaking policy prohibits consideration of actions of an unregulated affiliate when setting rates of a regulated entity and effectively results in a subsidy to utility ratepayers by an unregulated entity. House Bill 1436 would eliminate the consolidated tax approach and adopt a standalone approach used by a majority of the states and the Federal Energy Regulatory Commission.

H.B. 1436 Hearing, Tr. at 4-5.[[13]](#footnote-14) Based on our analysis of the legislative intent, the intended purpose of Section 1301.1 was to move away from Pennsylvania’s past practice of requiring a consolidated tax adjustment to a public utility’s tax expenses when setting rates in a base rate proceeding. The legislative history does not include a discussion of an intent to change the DSIC calculation or to eliminate the Commission’s discretion regarding the DSIC calculation.

Accordingly, we conclude that Act 40 has not changed the Court’s decision in *McCloskey*, the Commission’s prior decisions in DSIC proceedings, or the Commission’s discretion regarding the DSIC calculation. As we previously determined, the DSIC in its current form fully and properly accounts for federal deferred income taxes and state income tax deductions associated with “eligible property.” In our *Final Implementation Order*, we explained that an ADIT adjustment to the DSIC calculation is unnecessary because consumers will remain protected against over-earnings by the earnings cap provision under Section 1358(b)(3) of the Code, 66 Pa. C.S. § 1358(b)(3). *Final Implementation Order* at 39; *see also* *Petition of PPL Electric Utilities Corporation for Approval of a Distribution System Improvement Charge*, Docket No. P-2012-2325034 (Order entered April 9, 2015) (*PPL DSIC Order*)). ADIT changes are included in earnings cap calculations and are considered in the determination of the total effect of the DSIC rate. The earnings cap is the accurate approach as it captures the potential magnitude and complexity of ADIT and other costs without necessarily requiring the DSIC to be treated like a Section 1308(d) base rate proceeding. The inclusion of ADIT and state income tax adjustments to the DSIC calculation as proposed by the OCA would add unneeded complexity to the DSIC calculation and is not necessary to ensure that the DSIC rates will be just and reasonable. A utility’s quarterly earnings reports, which are used to determine its achieved rate of return for earnings cap purposes, reflect a wide variety of individual adjustments that would be considered in a base rate proceeding, including state income tax deductions. Accordingly, we conclude that the earnings cap will ensure that customers will not be charged DSIC rates that are unjust or unreasonable. *See* *PPL DSIC* *Order* at 36-37; *Columbia* *DSIC Order* at 46. For these reasons, we shall grant the Companies’ Exceptions and reverse the Recommended Decision consistent with our conclusion that the Companies are not required to include ADIT and state income tax in the DSIC calculation under the newly enacted Act 40.

**C.** **The OCA’s Proposed Methods Regarding State Income Taxes in the DSIC Calculation**

**1. Positions of the Parties**

As earlier indicated, while the contested issue in the Companies’ base rate proceeding involves the modification of the existing DSIC calculation to include federal income tax deductions generated by DSIC investment, the OCA, in its supplemental testimony, argued that Act 40 requires the Companies to modify their DSIC calculation to include state income tax deductions generated by DSIC investment. OCA S.B. at 1, 12; Tr. at 22. In line with its argument, the OCA proposed two modifications/calculations that include state income tax deductions related to DSIC-eligible investments in the existing DSIC formula. According to the OCA, both methods reduce the DSIC by the amount the utility’s state income tax decreases as a result of state income tax deductions related to the DSIC-eligible property. OCA S.B. at 12. OCA’s witness, Mr. Smith, explained both methods stating:

One method is to use an “effective tax” rate. This converts the impact of the state income tax deductions related to DSIC investment, which is the dollar amount by which taxable income is reduced, to a percentage that can be used in the Company’s existing DSIC calculation.

Another method to recognize the impact of the deductions is to have a separate calculation of the amount of state income tax expense that is reflected in the DSIC revenue requirement. Here, the amount is not converted to a percentage and the unadjusted statutory state income tax rate is used in the calculation. Either method will produce the same DSIC rate.

While either method will serve to include related income tax deductions and credits in the computation of current or deferred income tax expense to reduce DSIC rates, I recommend using the effective tax rate method because it does not alter the Companies’ existing DSIC formula.

OCA S.B. at 12-13. Consequently, the OCA proposed two calculations for adoption in the instant proceeding. According to the OCA, the first calculation or its “proposed preferred method,” would only adjust the revenue conversion factor (or tax multiplier)[[14]](#footnote-15) used to calculate the pre-tax rate of return (PTRR) in the DSIC formula to flow-through the state income tax deductions related to DSIC. This proposed preferred method, which the OCA indicated would not change the existing DSIC formula contained in the Companies’ existing tariffs, is as follows:

DSIC = (DSI\*PTRR)+Dep+e[[15]](#footnote-16)

PQR

OCA S.B. at 13.

The OCA averred that its second proposed method would change the existing DSIC formula contained in the Companies’ DSIC tariffs because a separate component would be added to the formula to provide for the allowance of income taxes and to reflect the impact of state income tax deductions on DSIC-eligible property. This second proposed method for calculating the DSIC is as follows:

DSIC = (DSI\*ROR)+Dep+e+IT

PQR

where “IT” is the allowance for income taxes and “ROR” is the weighted cost of capital or rate of return, exclusive of income taxes.

OCA S.B. at 13. In addition, although Act 11 requires that the pre-tax return be calculated using the statutory income tax rate, the OCA did not see any problem with the use of the “effective” tax rate in its proposed preferred method. The OCA argued that contrary to the Companies’ claim, the use of an effective tax rate in the DSIC calculation does not change the applicable statutory state income tax rate. Finally, the OCA dismissed the Companies’ disagreement with the use of the effective rate, stating that Act 40 trumps Act 11. OCA S.M.B. at 14-16.

The Companies, on the other hand, stated that the DSIC formula in the *Final Implementation Order* and the Model Tariff expressly provides that the allowed rate of return on equity must be “grossed up” by the *statutory* federal and state income tax rates to determine the PTRR. FE S.B. at 11-12. The Companies argued the revenue conversion factor used to calculate the PTRR must reflect the composite federal and state statutory income tax rates, recognizing that state income tax is deductible for federal income tax purposes. According to the Companies, the revenue conversion factor, which is 1.709211797, is calculated using the following formula: Revenue Conversion Factor = 1/1 - (0.35x (1-0.0999)) + 0.09999, where 0.35 or 35% is the statutory federal income tax rate and 0.0999 or 9.9% is the statutory state income tax rate. *Id.* at 12. The Companies further argued that in the DSIC formula, the weighted average cost rate of common equity is multiplied by 1.709211797 to calculate the pre-tax weighted average cost rate of common equity. *Id.* (citing Companies’ St. 1-R at 6-7). First Energy contended that there is nowhere in Act 11, either in the calculation of the PTRR or otherwise, that allows the inclusion of state income tax deductions or credits because they are accounted for in the calculation of the earnings cap and not in the quarterly DSIC adjustments. FE S.B. at 12-13.

From a practical standpoint, the Companies believe that the OCA’s proposed preferred method, which the Companies view as hypothetical, would be very difficult to implement and would be at odds with the guidelines established in Act 11 for calculating the DSIC. The Companies asserted that this contravenes the Commission’s intent to keep the DSIC a straightforward and simple mechanism that is easy to calculate and audit and does not require a full case analysis. *Id.* at 13-16. First Energy argued that “[t]he simplistic – and hypothetical – calculation provided in Mr. Smith’s Supplemental Surrebuttal Testimony cannot be translated into a workable revision to the DSIC formula reflecting state income tax deductions and credits, as Mr. Smith erroneously contends.” *Id.* at 18. Therefore, First Energy requested that the Commission reject the OCA’s proposed modifications to the existing DSIC calculation. *Id.* at 18-19.

**2. ALJ’s Recommendation**

In discussing the burden of proof regarding this issue, the ALJ stated that while the Companies have the burden to demonstrate that their DSIC calculations comply with all applicable laws and regulations pursuant to Section 315 of the Code, the OCA has the burden to demonstrate that its preferred proposed method that considers the impact of state income taxes on the Companies’ DSIC calculations should be adopted. To that end, the ALJ found there is substantial record evidence in this case to demonstrate the adoption of the OCA’s proposed preferred method. R.D. at 31. The ALJ’s recommendation stems from the fact that unlike federal income tax deductions, state income tax deductions are flowed through in utility rates on a current basis. *Id.* at 29. According to the ALJ, under normalization accounting, ADIT is deducted from rate base because it is assumed to represent a source of non-investor supplied capital. However, due to the timing differences regarding state income taxes, they are not “normalized” but are flowed-through directly to customers in calculating state income tax expense. *Id.*

In this regard, the ALJ agreed with the OCA’s argument that the proposed preferred method would not change the existing DSIC formula contained in the Companies’ tariffs but would only adjust the revenue conversion factor used to calculate the pre-tax rate of return in the DSIC formula. The ALJ stated that the tax multiplier in the proposed preferred method would reflect the actual amount of state income taxes that First Energy would pay on DSIC income.[[16]](#footnote-17) *Id.* at 31. The ALJ also agreed with the OCA’s argument refuting First Energy’s contention that using an effective tax rate is inconsistent with Section 1357(b)(1) of the Code which requires the use of the state income tax rate. According to the ALJ, using an effective tax rate in the DSIC calculation does not change the applicable statutory income tax rate. R.D. at 31.

In addition, the ALJ discounted many of the Companies’ responses to the OCA’s proposal, stating that the Companies’ arguments fail to consider the fact that Act 40 was enacted after the *Final Implementation Order* and after *McCloskey*. For instance, the ALJ stated that the modifications proposed by the OCA resulted from the enactment of Act 40. Specifically, the ALJ agreed with the OCA’s testimony that “the Companies’ position ignores that the law has changed[, and] Act 40 no longer requires the inclusion of federal and state tax deductions in the DSIC rate.” R.D. at 31-32 (citing OCA S.B. at 15). According to the ALJ, the General Assembly required the modification of the Companies’ existing DSIC to comply with Act 40. R.D. at 32.

Next, the ALJ rejected the Companies’ argument that the OCA’s proposals are contrary to the legislative history. The ALJ noted that “where the plain language of the statute is discernible, as is the case here, there is no need to look at legislative history,” and “a review of legislative history is only a factor in interpreting a statute when the words of the statute are not explicit.” *Id.* (citing 66 Pa. C.S. §§ 1921(b) and (c)).

Finally, the ALJ rejected the Companies’ argument that contrary to the intent of the Commission to keep the DSIC calculation simple and straight-forward, the OCA’s proposals are complex and would be difficult to implement. According to the ALJ, neither of the OCA’s proposals appear to be so complex that the DSIC would no longer be straightforward and easy to calculate and audit. While acknowledging that adopting the proposals would require some additional effort on the part of the Companies and may even require additional efforts to audit, the ALJ believes doing so is necessary to comply with Act 40. The ALJ also acknowledged that although the proposals may need to be developed and refined, the compliance filing phase of this proceeding would be a great avenue to do so. With this, the ALJ concluded that adopting the OCA’s proposal is not the “broad, costly time-consuming inquiry required in general base rate cases, but necessary to comply with Section 1301.1.” R.D. at 32-33. Accordingly, the ALJ recommended the adoption of the OCA’s proposed preferred method that incorporates related state income tax deductions and credits in the computation of current or deferred income tax expenses to reduce rates when an expense or investment is allowed to be included in rates, pursuant to Act 40. R.D. at 34.

**3. Exceptions and Replies**

In their final Exception, the Companies reiterate their argument that the OCA’s proposals relating to ADIT and the state income tax calculation contradict the existing statutory provisions relating to the DSIC. The Companies contend that the OCA’s proposals are impractical to implement and would add excessive and unnecessary complexities to the calculation, administration and auditing of the existing DSIC. Companies’ Exc. at 20. According to the Companies, the statutory language clearly indicates that the legislature intended Act 40 to apply to base rates and not the DSIC surcharge. The Companies contend the OCA’s proposals contradict or implicate two provisions or elements (“eligible property or DSI” and “pretax return or PTRR”) in the Commission-approved DSIC formula which are identified and defined in Sections 1351 and 1357 of the Code. Companies’ Exc. at 20-21 (citing 66 Pa. C.S. §§ 1351, 1357(b)). The Companies state that because the OCA was unable to adequately explain how the proposed methods can be implemented or incorporated into the existing DSIC calculation, they should be rejected. Companies’ Exc. at 20 (citing Companies’ S.M.B. at 9-13; Companies’ S.R.B. 16-17).

**a. Accumulated Deferred Income Tax (ADIT)**

In addressing the ADIT issue, the Companies aver that because the quarterly DSIC calculation is not the same as a base rate calculation, the OCA’s attempt to incorporate the ADIT, which is a separate line item that is deducted from rate base in a base rate case, in its proposed DSIC formula is a misnomer. Companies’ Exc. at 21. The Companies also question the OCA’s contention that the ADIT should be treated as a deduction in establishing the value of “eligible property.” The Companies point out two problems with the OCA’s explanation. First, they aver that contrary to the OCA’s proposal, the definition of “eligible property” in Section 1351 of the Code does not authorize a separate line item deduction for ADIT. Second, Section 1357, which shows how quarterly DSIC charges should be calculated, does not include any term in the DSIC formula that would reflect ADIT. *Id.*

The Companies explain that Section 1357(a)(1) and (3) provide that the “[DSIC] charge shall be calculated to recover the fixed cost of eligible property,” which, “shall consist of depreciation and pretax return.” *Id.* The Companies further note that Section 1357(b) provides that “eligible property” is to be included in the calculation of quarterly DSIC charges at its “original cost,” and that there is no provision in Section 1357 for deducting ADIT or any other amounts from the original cost. The Companies maintain the DSIC formula does not authorize the kind of deductions the OCA is trying to force-fit into the DSIC calculation. *Id.* at 21-22. The Companies explain ADIT also does not fit into the definition of “pretax return.” According to the Companies, even if ADIT were viewed as an additional source of capital that the federal government provides for a limited time at no cost to a utility, nothing in Section 1357(b)(1) and (2) reflects an additional source of capital other than “long-term debt and preferred stock” and “equity” in computing “pretax return.” *Id.* at 22.

In Reply, the OCA argues that rate base is directly related to DSIC-eligible property. OCA R. Exc. at 16-17. The OCA explains that the DSIC recovers incremental investment on which the utility earns depreciation and pretax return that is rolled into the utility rate base, so the utility can recover depreciation and pretax return on the same investment through base rates. OCA R. Exc. at 17 (citing 66 Pa. C.S. §§ 1357(a)(3), 1358(b)(1)-(2)). The OCA avers that the Companies’ argument fails to acknowledge the overlap between rate base and the DSIC’s original cost of eligible property. According to the OCA, the Commission has recognized the need to distinguish the incremental investment recovered through the DSIC with the investment recovered in base rates through the FPFTY provision. The OCA explains that the FPFTY allows the inclusion of plant investment in rate base that is made after the new base rates are in effect, when the utility could otherwise recover return of and on the same plant investment in the DSIC. OCA R. Exc. at 17-18.

The OCA also contest the Companies’ argument that because Act 11 does not specifically address ADIT, it should not be included in the DSIC calculation. The OCA argues that just as the Gross Receipts Tax (GRT) was not specifically identified in Act 11 but is included in First Energy’s DSIC calculation, ADIT does not have to be specifically identified in the statute to be included in the OCA’s proposed DSIC calculation. *Id.* at 18. According to the OCA, the Commonwealth Court’s determination that the Commission *could* approve a DSIC that did not include ADIT and state income tax deductions does not mean that adjustments cannot be made regarding ADIT and state income taxes in the DSIC calculation under Act 11. The OCA concludes that the enactment of Act 40 requires the inclusion of ADIT and state income taxes in the DSIC calculation. *Id.* at 18-19.

**b. State Income Tax Deductions**

Continuing with their argument that the two approaches proposed by the OCA would add enormous complexity to the DSIC calculation, including its administration and auditing, the Companies also find fault with the OCA’s proposed preferred method related to state income-tax deductions. The Companies posit that similar to the ADIT, the OCA found it even more difficult to clearly explain how the proposed preferred method fit into the statutory terms for calculating the DSIC. Companies’ Exc. at 22. The Companies assert the OCA’s other proposed approach would create two significant changes to the existing DSIC formula. First, the tax component would have to be eliminated from the calculation of “pretax return” and then an entirely new factor would have to be added to the existing DSIC formula to provide for a free-standing calculation of income taxes. The Companies aver that the OCA is requesting in the calculation of a quarterly DSIC charge a similar calculation of the return component related to state income taxes in base rate cases. According to the Companies, in using the OCA’s approach, because the level of state income taxes is a deduction in computing federal income taxes, the calculation of federal income taxes would also need to be revised. First Energy contends that because this free-standing calculation is complex and statutorily unauthorized, the OCA’s witness could not even recommend it as the OCA’s “preferred” approach. *Id.* at 22-23.

To this end, the Companies believe the OCA’s proposed preferred method for calculating the state income taxes is as complicated as the free-standing income tax calculation approach described above. In the proposed preferred method, the OCA recommended that the revenue conversion factor used to “gross up” the allowed equity return to a pre-tax level, should reflect the “actual amount of state income taxes that will be paid on the DSIC income.” *Id.* at 23 (citing OCA St. 1-Supp. at 2). According to the Companies, despite recommending this approach, the OCA’s witness, Mr. Smith, failed to specify any specific changes to the DSIC formula and failed to provide any calculation using the Companies’ data to establish that this approach can be implemented in conformance with the Commission’s directive that a rate adjustment clause should not require a full base rate revenue requirement computation. Companies’ Exc. at 23.

The Companies also point out the defects in the revenue conversion factor in the proposed preferred method, which they believe is an “effective” state income tax rate to gross-up the return component of the DSIC formula. The Companies’ witness, Mr. Fullem, explained the defects inherent in the “effective tax rate” approach as follows:

If, however, Mr. Smith intends that the revenue conversion factor applied to the weighted average equity cost rate should reflect an “effective” state tax rate on DSIC income, then his recommendation is contrary to both the Commission’s Model Tariff, which specifies that “statutory” tax rates must be used, and Section 1357(b)(1), which does not mention the use of an “effective” tax rate but, instead, states that “the pre-tax return shall be calculated using the Federal and State income tax rates.”

*Id.* at 23-24 (citing OCA St. 1-Supp. at 2). According to the Companies, an “effective” tax rate is different from the “statutory” tax rate because the effective tax rate is typically derived by dividing the actual income taxes paid (in this instance, state income taxes) by net income before income taxes, as determined for financial reporting purposes. Companies’ Exc. at 24 (citing Companies’ St. 1-R, Supp. at 8).

The Companies further note that the statutory state tax rate would be different from the effective tax rate if taxable income calculated for state income tax purposes is different from pre-tax net income calculated for financial purposes. With this, the Companies believe the OCA’s approach would require a three-step process: first, deductions attributable to adding DSIC-eligible property (mostly, accelerated forms of depreciation) would have to be determined and calculated; second, book depreciation, which is reflected (and already deducted for tax purposes) under the Model Tariff’s DSIC formula, must be subtracted from the projected tax depreciation; and third, the resulting net deduction would have to be converted from a dollar amount to a revenue conversion factor stated as a percentage and applied to the after-tax weighted average return rate to “gross-up” that tax rate to a pre-tax level. Based on the above, the Companies conclude that the OCA’s proposed calculations of state income tax deviate from the straight-forward mechanism the Commission envisioned in a DSIC calculation. Companies’ Exc. at 24-25 (citing Companies’ St. 1-R, Supp. at 10; Companies’ St. 1-RJ, Supp. at 4-5).

Next, the Companies argue the calculation proposed by the OCA double counts book depreciation in calculating the “effective” state tax rate. Companies’ Exc. at 25 (citing Companies’ I.B at 16-17). The Companies contend that although the ALJ minimized the complexities of implementing the OCA’s proposed preferred method by indicating that the difficulties could be worked out in the “compliance filing phase” of this proceeding, it is not entirely clear how that can be done without conducting another evidentiary proceeding at the compliance filing phase to reach a workable solution, assuming there is one. The Companies aver there is no practical way of translating the OCA’s proposals to a workable formula. Companies’ Exc. at 26 (citing R.D. at 32; Companies’ St. 1-RJ at 4-5).

Finally, the Companies aver that the Recommended Decision is based on an inaccurate assumption on the part of the ALJ that the Companies conceded to the OCA’s proposed preferred method as simple enough to implement. The Companies reiterate their argument that because the OCA’s witness, Mr. Smith, used hypothetical numbers to support the application of his proposed preferred method rather than using actual Company-specific data, it is practically impossible to implement the methodology. The Companies conclude by stating that “the R.D. misunderstood and, therefore, mischaracterized, the Companies’ position. Companies’ Exc. at 27 (citing R.D. at 33).

In Reply, the OCA argues that the use of an effective tax rate in the DSIC calculation *does not change* the applicable statutory income tax rate, just as calculating an average tax rate or marginal tax rate does not change the applicable statutory tax rate. OCA R. Exc. at 21. According to the OCA, because the statutory state income tax rate is still used in the calculation of pre-tax return and because even though only one of its proposed methods adjusts the statutory state income tax rate, there is no inconsistency in the use of the statutory tax rate pursuant to Section 1357(b)(1), because both methods still produce the same DSIC rate. *Id.* Further, responding to the Companies’ contention that the proposed methods complicate the DSIC calculation and would require a three-step process, the OCA responds that Act 11 provides for reconciliation when a company’s informed estimates are different from the actual adjustment for state income tax deductions. The OCA argues that the additional steps in its proposal will not change the timelines of the Companies’ recovery of DSIC-eligible investment, especially because the rates can be put into effect, subject to refund or recoupment, if they are contested. *Id.* at 22.

Next, the OCA asserts that the Companies’ claim that the use of an effective tax rate will result in a double count of the book depreciation is misleading because the proposed methods are only intended to capture the impact of the additional state income tax deductions related to DSIC investments that are not included in the existing calculation of the DSIC rate or in the depreciation expense. *Id.* at 22-23.

Finally, addressing the Companies’ argument that the ALJ’s recommendation downplays the complexities involved in adopting the OCA’s proposed preferred method, the OCA argues that the Companies’ argument is misplaced because Act 40 changed the existing calculation in the *Final Implementation Order* and *McCloskey*. The OCA avers that because Act 40 requires the modification of the existing DSIC calculation, the ALJ correctly recommended adoption of the OCA’s proposed preferred method. The OCA concludes that it is willing to work with the Companies to implement the method recommended by the ALJ in his Recommended Decision. *Id.* at 23-24.

**4. Disposition**

Upon review, we see no need to reach a detailed resolution on the Parties’ positions regarding the OCA’s proposed methodologies involving ADIT and state income tax calculations of the DSIC in this proceeding due to our earlier determination herein that Act 40 does not apply to the DSIC calculation.

We note, however, that although the OCA argues that the use of an effective tax rate in its proposed preferred method *does not change* the applicable statutory income tax rate, the use of an effective tax rate proposed by the OCA contradicts Act 40, which clearly states that “the income tax expense shall be computed using the applicable statutory income tax rates.” 66 Pa. C.S. § 1301.1(a). Further, Act 11 and the Commission’s Model Tariff also require the use of the statutory income tax rate in the calculation of income tax expense. 66 Pa. C.S. § 1357(b)(1). Therefore, while we acknowledge the OCA’s explanation that the effective tax rate does not change the Companies’ existing DSIC formula and produces the same DSIC rate, we are also cognizant of the fact that the effective tax rate is not exactly the same as the statutory tax rate. Act 40 and Act 11 specifically indicate that the statutory tax rate should be used in the computation of income tax expense.

**2. Discussion of the Settlement**

The Settlement[[17]](#footnote-18) pertains to the matters we referred to the OALJ for resolution in our *June 2016 DSIC Orders).*[[18]](#footnote-19) Each Party filed a statement in support of the Settlement, including tariff supplements. On May 12, 2017, a joint motion for admission of testimony and exhibits in support of the Settlement was granted.

The policy of the Commission is to encourage settlements, and the Commission has stated that settlement rates are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §§ 5.231, 69.401. A full settlement of all the issues in a proceeding eliminates the time, effort and expense that otherwise would have been used in litigating the proceeding, while a partial settlement may significantly reduce the time, effort and expense of litigating a case. A settlement, whether whole or partial, benefits not only the named parties directly, but, indirectly, all customers of the public utility involved in the case.

Regulatory proceedings are expensive to litigate, and the reasonable cost of such litigation is an operating expense recovered in the rates approved by the Commission. Partial or full settlements allow the parties to avoid the substantial costs of preparing and serving testimony and the cross-examination of witnesses in lengthy hearings, the preparation and service of briefs, reply briefs, exceptions and replies to exceptions, together with the briefs and reply briefs necessitated by any appeal of the Commission’s decision, yielding significant expense savings for the company’s customers. For this and other sound reasons, settlements are encouraged by long-standing Commission policy.

Despite the policy favoring settlements, the Commission does not simply rubber stamp settlements without further inquiry. In order to accept a settlement such as that proposed here, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. PUC v. York Water Co.*, Docket No.

R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C. S. Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991). Upon review, we find that the Settlement is in the public interest because it satisfactorily addresses the issues the Commission directed be addressed in this proceeding as well as additional issues identified by the Parties. Therefore, we shall adopt ALJ Cheskis’ recommendation approving the Settlement without modification. *See* R.D. at 43-45, 50.

**III. Conclusion**

Based on our review of the record, the Parties’ positions, and the applicable law, we shall deny the OCA’s Exceptions, grant, in part, the Companies’ Exceptions, and modify the ALJ’s Recommended Decision, consistent with this Opinion and Order. We find that Act 40 does not apply to the DSIC calculation and, accordingly, that the Companies are not required to include ADIT and state income tax in the DSIC calculation under the newly enacted Act 40; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions filed by the Office of Consumer Advocate on September 20, 2017, are denied.

2. That the Exceptions filed by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company on September 20, 2017, are granted, in part.

3. That the Recommended Decision of Administrative Law Judge Joel H. Cheskis, issued on August 31, 2017, is adopted, in part, and reversed, in part, consistent with this Opinion and Order.

4. That the Joint Petition for Settlement of Pending Issues filed by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, West Penn Power Company, the Office of Consumer Advocate, the Office of Small Business Advocate, the Met-Ed Industrial Energy Users Group, the Penelec Industrial Customer Alliance, the Penn Power Users Group, and the West Penn Power Industrial Intervenors on February 2, 2017, is granted, and the Settlement is approved in its entirety without modification.

5. That the Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company are authorized to file the tariff supplements attached to the Joint Petition for Settlement of Pending Issues as Exhibits 1-4 to be effective in accordance with the terms of the Joint Petition for Settlement of Pending Issues.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: April 19, 2018

ORDER ENTERED: April 19, 2018

1. *See, e.g.,* *Petition of Metropolitan Edison Company for Approval of a Distribution System Improvement Charge,* Docket Number P-2015-2508942 (Opinion and Orders entered June 9, 2016) *(June 2016 DSIC Orders*)*.* [↑](#footnote-ref-2)
2. The lead Docket Nos. for each Company filing were: R-2016-2537349 (Met-Ed), R-2016-2537352 (Penelec), R-2016-2537355 (Penn Power), and R-2016-2537359 (West Penn). [↑](#footnote-ref-3)
3. *See* *Pa. PUC, et al. v. Metropolitan Edison Co., et al.,* Docket Nos. R‑2016-2537349, *et al*. (Order entered January 19, 2017) *(January 2017 Order).* [↑](#footnote-ref-4)
4. *See Pa. PUC, et al. v. Metropolitan Edison Co., et al,* Docket Nos.

   R-2016-2537349, et al. (Opinion and Order entered May 18, 2017) *(May 2017 Order).* [↑](#footnote-ref-5)
5. On June 5, 2016, the Large Users Group and PSU submitted letters to the Commission stating that they would not be filing Main Briefs. [↑](#footnote-ref-6)
6. Section 315 of the Code provides the following:

   **(a) Reasonableness of rates.—**In any proceeding upon the motion of the commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility. The commission shall give to the hearing and decision of any such proceeding preference over all other proceedings, and decide the same as speedily as possible.

   66 Pa. C.S. § 315(a). [↑](#footnote-ref-7)
7. *Holland v. Marcy*, 584 Pa. 195, 883 A.2d 449 (Pa. 2005) (statutory interpretation is purely a question of law). [↑](#footnote-ref-8)
8. There is no similar burden placed on parties that challenge a proposed rate component. *See* *Berner v. Pa. PUC*, 382 Pa. 622, 631, 116 A.2d 738, 744 (1955). [↑](#footnote-ref-9)
9. *McCloskey* involved the OCA’s appeal of the Commission’s determination in *Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge*, Docket No. P-2012-2338282 (Order entered May 22, 2014) (*Columbia Order*). In *McCloskey*, the Commonwealth Court affirmed the Commission’s decision in the *Columbia Order* that the public utility was not required to include an ADIT adjustment in its DSIC calculation. The Court held that even without the inclusion of specific additional base rate adjustments in the ADIT calculation, the utility’s DSIC surcharge mechanism was consistent with Act 11. The Court reasoned that applicable law only requires the DSIC surcharge mechanism, as a whole, to be just and reasonable. *McCloskey*, 127 A.3d at 868. The Court found that with the imposition of the earnings rate cap, the overall effect of the calculated DSIC rate was just and reasonable. *Id*. at 871. [↑](#footnote-ref-10)
10. Under Section 1921(a), 1 Pa. C.S. § 1921(a), every statute shall be construed to give effect to all of its provisions. [↑](#footnote-ref-11)
11. “Rate base” is defined in Section 102 of the Code as follows: “The value of the whole or any part of the property of a public utility which is used and useful in the public service.” 66 Pa. C.S. § 102. [↑](#footnote-ref-12)
12. Section 1921(c), 1 Pa. C.S. § 1921(c), provides the following:

    **(c)  *Matters considered in ascertaining intent.* —** When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

    (1) The occasion and necessity for the statute.

    (2) The circumstances under which it was enacted.

    (3) The mischief to be remedied.

    (4) The object to be attained.

    (5) The former law, if any, including other statutes upon the same or similar subjects.

    (6) The consequences of a particular interpretation.

    (7) The contemporaneous legislative history.

    (8) Legislative and administrative interpretations of such statute. [↑](#footnote-ref-13)
13. In reviewing the additional testimony presented during the H.B. 1436 Hearing, Pennsylvania had been following the “actual taxes paid” doctrine as explained in *Barasch v. Pa. PUC (Barasch)*, 507 Pa. 561, 493A.2d 653. In *Barasch*, the Pennsylvania Supreme Court held that a utility was not permitted to use separate-return calculations for its federal and state income taxes, because the tax calculations failed to account for the tax benefits realized by the utility by participation in a consolidated return filed by the utility’s corporate parent. [↑](#footnote-ref-14)
14. The OCA averred that the tax multiplier would reflect the actual amount of state income taxes that the utility would pay on the DSIC income. OCA S.B. at 13. [↑](#footnote-ref-15)
15. The terms in the calculation are defined in the Model Tariff and are cited by the OCA in OCA’s St. 1SR-Supp. at 9:

    DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation.

    Dep = Depreciation expense related to DSIC-eligible property.

    e = Amount calculated under the annual reconciliation feature or Commission audit

    PQR = Projected quarterly revenues for distribution service (including all applicable clauses and riders) from existing customers plus netted revenue from any customers which will be gained or lost by the beginning of the applicable service period. [↑](#footnote-ref-16)
16. According to the ALJ, the mechanics of the pre-tax rate of return are not included in the Companies’ tariff riders but are provided in the calculations supporting each Company’s quarterly DSIC updates. R.D. at 31 (citing OCA Exh. LA-ME-1). [↑](#footnote-ref-17)
17. The terms and conditions of the Settlement are set forth on pages 34 through 45 of the Recommended Decision. [↑](#footnote-ref-18)
18. In the *June 2016 Order*, the Parties requested that the Commission determine: 1) whether certain customers taking service at transmission voltage rates should be included under the DSIC; 2) whether other customers should be exempt from the DSIC; and 3) whether revenues associated with the riders in Penn Power’s tariff are properly included as distribution revenues. R.D. at 43 (citing *June 2016 DSIC Orders* at 21). [↑](#footnote-ref-19)