PENNSYLVANIA

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17120**

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| Public Meeting held February 24, 2022  Commissioners Present:  Gladys Brown Dutrieuille, Chairman  John F. Coleman, Jr., Vice Chairman  Ralph V. Yanora | |
| Petition of Metropolitan Edison Company for Approval of a Distribution System Improvement Charge  Office of Consumer Advocate  v.  Metropolitan Edison Company  Petition of Pennsylvania Electric Company for Approval of a Distribution System Improvement Charge  Office of Consumer Advocate  v.  Pennsylvania Electric Company    Petition of Pennsylvania Power Company for Approval of a Distribution System Improvement Charge  Office of Consumer Advocate  v.  Pennsylvania Power Company  Petition of West Penn Power Company for  Approval of a Distribution System Improvement Charge  Office of Consumer Advocate  v.  West Penn Power Company | P-2015-2508942  C-2016-2531040  P-2015-2508936  C-2016-2531060  P-2015-2508931  C-2016-2531054  P-2015-2508948  C-2016-2531019 |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition for Interlocutory Review and Answer to Material Question (Petition), filed by Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), Pennsylvania Power Company (Penn Power), and West Penn Power Company (West Penn) (collectively, the Companies) on January 31, 2022, in the above-captioned proceeding. On February 10, 2022, the Companies, the Office of Consumer Advocate (OCA), and the Office of Small Business Advocate (OSBA) filed respective briefs in support of the Petition.

In the Petition, the Companies request that the Commission review and answer the following material question in the affirmative:

In order to provide all interested parties notice and an opportunity to be heard, as due process requires, should the Commission initiate a generic proceeding within 60 days from a determination on this material question at Docket No. M-2012-2293611 for the purpose of revising the Model Tariff adopted in its Implementation Order entered at that docket number on August 2, 2012, to comply with Section 1301.1(a) of the Pennsylvania Public Utility Code as interpreted by the Pennsylvania Supreme Court in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021) and refer to that generic proceeding the remand proceedings for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company, at Docket Nos. P‑2015-2508942, P-2015-2508936, P-2015-2508931 and

P-2015-2508948, respectively?

Petition at 3.

For the reasons stated herein, we shall answer the material question in the affirmative, in part. Accordingly, we shall direct the initiation of a generic proceeding and shall hold the above docketed proceeding in abeyance pending the outcome of the generic proceeding, consistent with this Opinion and Order.

**History of the Proceeding**

This matter concerns the Commission’s approval of the Distribution System Improvement Charge (DSIC) Riders of the Companies and the subsequent decision of the Pennsylvania Supreme Court in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021) (*McCloskey/FirstEnergy*), remanding for further proceedings.

On February 14, 2012,Act 11 of 2012 (Act 11) was signed into law 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 or a city natural gas distribution operation to implement a 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 No. M-2012-2293611 (Order entered August 2, 2012) (*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 the Companies.

On February 16, 2016, each of the four companies filed Petitions, which included attached draft tariff supplements to add DSIC Riders in their respective tariffs with a proposed effective date of July 1, 2016. The OCA, the OSBA, and a group of industrial customers participated in the ensuing proceeding. On June 9, 2016, the Commission entered Orders finding that the Companies’ DSIC Riders conformed to the terms of the Model Tariff and, therefore, approved the DSIC Riders subject to further consideration of certain additional implementation issues referred to the Office of Administrative Law Judge (OALJ), which were subsequently resolved by settlement. *Petitions of Met-Ed, Penelec, Penn Power and West Penn, for Approval of DSICs*, Docket Nos. P-2015-2508942, *et al*. consolidated with *OCA v. Met-Ed, Penelec, Penn Power and West Penn*, Docket Nos. C-2016-2531040, *et al*. (Orders entered June 9, 2016).

Three days later, 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).

Previously, on April 28, 2016, the Companies had each filed proposed increases in base rates pursuant to Section 1308(d) of the Code, which were consolidated at Docket Nos. R-2016-2537349, *et al*. After Act 40 was enacted, the OCA submitted testimony in the base rate cases contending that Section 1301.1(a) required the Commission to revise the Companies’ previously-approved DSIC Riders to adopt the tax-related terms the Commission declined to adopt in the prior proceedings. The Companies submitted testimony opposing that change, and the issues were extensively briefed. By Order entered January 19, 2017, the Commission approved a settlement concluding the base-rate aspects of the proceeding. *Pa. PUC v. Met-Ed*, *et al*., Docket Nos. R‑2016‑2537349, *et al*. (Order entered January 19, 2017) (*Base Rate Order*). However, the Commission referred issues concerning the impact, if any, of Act 40 on the previously-approved DSIC Riders to this consolidated docket proceeding. *Base Rate Order* at 39.

In the Recommended Decision in this proceeding, issued on August 31, 2017, ALJ Joel H. 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 pertaining to Act 40, 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. Thereafter, the Parties filed various Exceptions and Replies to Exceptions to the Recommended Decision.

By Order entered April 19, 2018, in this proceeding (*April 2018 Order*), the Commission rejected the OCA’s proposals to add elements to the DSIC formula to include incremental changes in accumulated deferred federal income taxes (ADIT) and state tax depreciation deductions for accelerated depreciation. In the *April 2018 Order*, the Commission held that Act 40 did not change the terms of the DSIC and thus did not opine on any issues concerning how to implement the OCA’s proposals for recognizing incremental ADIT and state tax attributes in quarterly calculations of DSIC charges. *April 2018 Order* at 42-43.

The OCA appealed the *April 2018 Order* to the Commonwealth Court. On July 11, 2019, the Commonwealth Court reversed the *April 2018 Order* finding Section 1301.1 applied to the DSIC and altered the manner in which the DSIC had been previously calculated. *McCloskey v. Pa. PUC*, 219 A.3d 1216, 1225 (Pa. Cmwlth. 2019). The Companies and the Commission each filed petitions seeking review before the Pennsylvania Supreme Court, which were granted. Thereafter, the Supreme Court affirmed the Commonwealth Court’s Opinion and entered an accompanying Order remanding the cases to the Commission “for the purpose of requiring [the Utilities] to revise their tariffs and Distribution System Improvement Charge calculations in accordance with Section 1301.1(a) of the Public Utility Code, 66 Pa. C.S. § 1301.1.” *McCloskey/FirstEnergy*, 255 A.3d at 437.[[1]](#footnote-2)

On January 31, 2022, the Companies filed the instant Petition. The Companies, the OCA, and the OSBA filed respective briefs in support of the Petition on February 10, 2022. No Parties oppose the Petition.

**Discussion**

**Legal Standards**

During the course of a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise. The standards for interlocutory review are well established. *See* 52 Pa. Code § 5.302(a). Section 5.302(a) of the Commission’s Regulations requires that the petitioning party “state . . . the com­pelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of* *Bell Atlantic Corp. and GTE Corp.,* Docket No. A‑310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v.* *Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In* *re:* *Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985) (*Knights Limousine*).

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

(1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.

(2) Determine that the petition was improper and return the matter to the presiding officer.

(3) Decline to answer the question.

(4) Answer the question.

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

The interlocutory review standard has also been interpreted in *Knights Limousine*, where the Commission stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. The Commission has determined that such a showing may be accomplished by a petitioner by its proving that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R- 2009-2139884 (Order entered April 15, 2010).

# Positions of the Parties

In its Petition, the Companies argue that the Court’s decision in *McCloskey/FirstEnergy* necessarily impacts the terms of the Model Tariff adopted in the *Final Implementation Order* and has implications for all Pennsylvania utilities that employ a DSIC. The Companies assert that their existing Commission-approved DSIC Riders incorporate the terms of the Model Tariff. However, the Companies continue, the Court’s interpretation of Section 1301.1(a) of the Code requires a revision to the formula for calculating quarterly DSIC updates. According to the Companies, the formula will need to be supplemented by adding variables for ADIT and certain state tax attributes related to incremental increases in DSIC-eligible property. The Companies contend that changes to the DSIC Riders approved in this case would necessarily affect the revision of the Commission’s Model Tariff and, thus, would not be restricted to the Companies. Petition at 2.

The Companies proffer that prior to adopting the *Final Implementation Order* and the Model Tariff the Commission granted all interested parties notice and opportunity to be heard. The Companies submit that a similar procedure and initiation of a generic proceeding should be pursued to consider revisions to the Model Tariff and, by extension, to the DSIC Riders of entities that employ a DSIC. When a generic proceeding is initiated, the Companies request that this proceeding be referred to and consolidated with that proceeding. The Companies argue that granting interlocutory review and answering the material question in the affirmative will avoid delay and unnecessary expenditure of resources by the Parties to resolve an issue that the Commission may later determine should be addressed in a generic, state-wide proceeding. Petition at 2-3.

In their brief in support of the Petition, the Companies argue that continuing this proceeding in its current procedural posture would raise significant due process concerns for DSIC-eligible utilities that are not parties to this case. As such, the Companies request that the Commission grant the Petition, hold these remand proceedings in abeyance and answer the material question in the affirmative. Companies Brief at 2.

The Companies explain that Section 1353(b)(1) of the Code, 66 Pa. C.S. § 1353(b)(1), provides that “a petition for commission approval of a [DSIC] shall include … [a]n initial tariff that complies with a model tariff adopted by the commission.” The Companies assert that consistent with the directives in the *Final Implementation Order* and Section 1353(b)(1) of the Code, the Companies’ DSIC Riders approved by the Commission incorporated the terms of the Model Tariff. Specifically, the Companies note that Section 2.D. of the DSIC Riders includes a formula for calculating quarterly updates to the DSIC that was obtained from the Model Tariff and that Section 2.B.2. of the DSIC Riders incorporates the Model Tariff language which tracks Section 1357(b) of the Code pertaining to pre-tax return.[[2]](#footnote-3) Companies Brief at 5-6.

The Companies argue that under the interpretation of Section 1301.1(a) of the Code adopted in *McCloskey/FirstEnergy* the formula for calculating quarterly DSIC updates would need to be supplemented by adding variables for: (1) the state income tax effects of book-tax timing differences created by placing in service eligible property included in the DSIC calculation; and (2) ADIT that reflects the book-tax timing differences created by placing in service eligible property included in the DSIC calculation. Additionally, the Companies contend that such revisions to the formula for calculating the DSIC should not require unduly complicated computations but should permit reasonable review and audit of DSIC charges and their supporting calculations. Companies Brief at 6-7.

According to the Companies, the statutory provisions that control the process for Commission approval of a DSIC were properly implemented in a generic state-wide basis as contemplated in Section 1353(a) of the Code. As such, the Companies assert that within the statutory and regulatory framework established in the Subchapter B of the Chapter 13 of the Code, a decision in these remand proceedings would not be restricted to the Companies alone and would necessarily result in a revision of the Commission’s Model Tariff. Companies Brief at 7-8.

The Companies argue that deciding the remand issues in a Companies-specific proceeding would yield a final order susceptible to due process challenges by parties that did not receive notice and an opportunity to participate. Such a process would result in a re-litigation of issues with associated delays and redundant expenditures of money and resources. Accordingly, the Companies contend that its Petition satisfies the compelling reason standard for granting interlocutory review because it will prevent substantial prejudice and expedite the conduct of the proceeding. Additionally, the Companies argue that prior Commission precedent supports the grant of the Petition. *Id*. at 8 (citing *AT&T Communications of Pa., LLC, et al. v. Armstrong Telephone Company – Pennsylvania, et al.*, Docket Nos. C-2009-2098380, *et al.*, 2009 Pa. PUC LEXIS 1752 (Order entered July 23, 2009) (Commission granted interlocutory review to consider whether complaint proceedings challenging access charges of specific intrastate rural local exchange carriers (RLEC) should be referred to a broad-based, statewide investigation of all RLEC access charges)).

In its brief, the OCA supports the Petition arguing that it would provide certainty and avoid duplicative litigation regarding existing and proposed DSIC rates for other Pennsylvania utilities across all industries. The OCA notes that twenty-six utilities including the five utilities subject to the remand in *McCloskey/FirstEnergy*, have Commission approval to charge DSIC rates. OCA Brief at 3, Attachment A.

The OCA reiterates the arguments of the Companies that the statutory provisions controlling the process for Commission approval of a DSIC were implemented in a series of implementation orders on a generic basis, including the approval of the Model Tariff in the *Final Implementation Order*. Thus, the OCA submits it would be appropriate for the needed changes to be addressed in a generic proceeding rather than within a proceeding addressing only the Companies. The OCA contends that the generic proceeding would allow all stakeholders to participate in a decision having implications for utilities in all industries. Additionally, the OCA states that it would create a proceeding through which all existing DSIC tariffs and rates can be brought into compliance with Section 1301.1(a) of the Code. OCA Brief at 4.

The OCA also supports the request for the Commission to initiate a generic proceeding within sixty days because Section 1301.1 became effective in August 2016. The OCA notes that, since then, utilities have charged DSIC rates that were not calculated in compliance with Section 1301.1. According to the OCA, the necessary changes to the DSIC computation and the procedure for calculating refunds and crediting customers should be determined without unreasonable delay to cease overcollections, minimize amounts to be refunded, provide certainty for impacted utilities, afford relief to customers. OCA Brief at 4.

In its brief, the OSBA also supports the relief requested in the Petition, arguing that *McCloskey/FirstEnergy* has implications for all regulated utilities employing a DSIC. The OSBA agrees that a generic proceeding is a much more appropriate method to address the impacts on the Model Tariff adopted in the *Final Implementation Order*. OSBA Brief at 6.

The OSBA emphasizes that the Commission has already established a generic docket proceeding for all Secretarial Letters, Implementation Orders, and working groups regarding implementation of Act 11 and issues involving implementation of the DSIC. Additionally, the OSBA argues that, although the Supreme Court’s remand directive was specific to the Companies, its holding was not and implicates all regulated utilities that employ a DSIC. Specifically, the OSBA contends that *McCloskey/FirstEnergy* requires changes to be made to the Model Tariff. The OSBA states that if a generic proceeding is not established, then litigation would proceed in this matter based on facts and a record specific to the Companies. In contrast, the OSBA continues, establishing a generic proceeding would afford all interested stakeholders adequate notice and a meaningful opportunity to be heard on how to revise the Model Tariff and DSIC riders in light of *McCloskey/FirstEnergy*. OSBA Brief at 7, 10-11.

**Disposition**

Upon review, we shall grant interlocutory review and answer the material question in the affirmative, in part. Here, the Companies have established that in the absence of granting the requested relief some harm would result to other utilities and stakeholders which would not be reparable through the normal avenue of relief available within the context of this remand proceeding which is only applicable to the Companies. Thus, we shall direct the establishment of a generic proceeding to address calculation revisions to the Model Tariff and any issues resulting from the required revisions within the existing generic proceeding at Docket No. M-2012-2293611. However, we shall deny the Companies’ request to refer this pending remand proceeding to the generic proceeding but rather hold this proceeding in abeyance as discussed below.

The Parties herein have sufficiently shown that the relief sought should be granted now, rather than later, because it would help expedite the resolution of the Model Tariff revisions applicable to all twenty-six Pennsylvania utilities having Commission approval to impose DSIC charges. The resulting revisions to the DSIC calculations and the potential refund of overcharges which may date back to August 2016 will have wide ranging implications which cannot be fully addressed within the context of this remand proceeding limited to the Companies. Moreover, the revisions to the Model Tariff will impact any future utilities seeking Commission approval to impose DSIC charges. In this regard, we agree that establishing a generic proceeding would be a more efficient use of the Commission and stakeholder’s resources rather than individually and separately addressing compliance with Section 1301.1(a) for each utility employing a current and future DSIC. Additionally, the generic proceeding will afford proper notice and opportunity for participation for all potential stakeholders and thus allay any potential due process concerns that might otherwise result from a Commission determination of the issues in this proceeding limited to the Companies.

In denying the portion of the material question requesting referral of this proceeding to the generic proceeding, we find that it would be a more efficient use of Commission resources to hold this proceeding in abeyance pending the outcome of the issues resolved in the generic proceeding. Accordingly, we direct that this pending remand proceeding be held in abeyance and that the Companies file monthly status reports with the Commission and the OALJ after the commencement of the generic proceeding.

We further direct the Commission’s Secretary’s Bureau in consultation with the Bureau of Technical Utility Services within sixty days of entry of this Opinion and Order to issue a secretarial letter with appropriate notices to all jurisdictional water and wastewater utilities, electric distribution companies, natural gas distribution companies and city natural gas distribution operations and all appropriate stakeholders establishing a generic proceeding at Docket No. M-2012-2293611 to address all issues pertaining to the DSIC calculations required in the *McCloskey/FirstEnergy* decision.

**Conclusion**

For the reasons set forth above, we shall answer the material question in the affirmative, in part, establish a generic proceeding at Docket No. M-2012-2293611, and hold this proceeding in abeyance pending the outcome of the generic proceeding, consistent with the discussion in this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That with regard to the Petition for Interlocutory Review and Answer to Material Question filed by the Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company on January 31, 2022, we shall answer the following portion of the material question in the affirmative:

In order to provide all interested parties notice and an opportunity to be heard, as due process requires, should the Commission initiate a generic proceeding within 60 days from a determination on this material question at Docket No. M-2012-2293611 for the purpose of revising the Model Tariff adopted in its Implementation Order entered at that docket

number on August 2, 2012, to comply with Section 1301.1(a) of the Pennsylvania Public Utility Code as interpreted by the Pennsylvania Supreme Court in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021)?

2. That the Commission’s Secretary’s Bureau in consultation with the Bureau of Technical Utility Services within sixty (60) days of entry of this Opinion and Order issue a secretarial letter with appropriate notices to all jurisdictional water and wastewater utilities, electric distribution companies, natural gas distribution companies and city natural gas distribution operations and all appropriate stakeholders establishing a generic proceeding at Docket No. M-2012-2293611 to address all issues pertaining to the distribution system improvement charge calculations required in the Pennsylvania Supreme Court’s decision in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021).

3. That the above-docketed proceeding is held in abeyance pending the resolution of the generic proceeding established under Ordering Paragraph No. 2, above. Further, that the Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company shall file monthly status reports with the Commission and the Office of Administrative Law Judge following the establishment of the generic proceeding.

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Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 24, 2022

ORDER ENTERED: February 24, 2022

1. *McCloskey/FirstEnergy* was a consolidated case involving the Companies and Newtown Artesian Water Company (Newtown Artesian). The separate remand proceeding involving Newtown Artesian has been stayed pending the conclusion of this remand proceeding. *Pa. PUC v. Newtown Artesian Water Co.*, Docket No. R‑2017‑2624240 (Order Staying Proceeding issued November 19, 2021) at 4-5. [↑](#footnote-ref-2)
2. Pre-tax return: The pre-tax return shall be calculated using the statutory state and federal income tax rates, the Company’s actual capital structure and actual cost rates for long-term debt and preferred stock as of the last day for the three-month period ending one month prior to the effective date of the DSIC and subsequent updates.

   66 Pa. C.S. § 1357(b). [↑](#footnote-ref-3)