

July 22, 2022

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

VIA ELECTRONIC FILING

Re: Distribution System Improvement Charge – Implementation Order 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, 225 A.3d 416 (Pa. 2021); Docket No. M-2012-2293611

Dear Secretary Chiavetta:

Please find enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") the Comments of the Industrial Energy Consumers of Pennsylvania, in the above-referenced matter.

This document was filed electronically with the Commission on this date. All parties are being served a copy of this document in accordance with the enclosed Certificate of Service.

Please contact me if you have any questions concerning this filing.

Sincerely,

SPILMAN THOMAS & BATTLE, PLLC

By 

Derrick Price Williamson
Barry A. Naum

BAN/sds

Enclosures

c: RA-PCDSICTAXES@pa.gov (Word version)
Erin Laudenslager, Bureau of Technical Utility Services (via E-mail)
David Huff, Bureau of Technical Utility Services (via E-mail)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Distribution System Improvement Charge – Implementation Order 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, 225 A.3d 416 (Pa. 2021) :
:
: **Docket No. M-2012-2293611**
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the following parties to this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by participant).

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Dated: July 22, 2022

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Distribution System Improvement	:	
Charge – Implementation Order to	:	
address all issues pertaining to the	:	Docket No. M-2012-2293611
distribution system improvement charge	:	
calculations required in the Pennsylvania	:	
Supreme Court's decision in <i>McCloskey v.</i>	:	
Pa. PUC, 225 A.3d 416 (Pa. 2021)	:	

**COMMENTS OF
INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA**

On April 22, 2022, the Pennsylvania Public Utility Commission's ("PUC" or "Commission") Secretarial Letter in the above-referenced docket requested comments on the implementation of Distribution System Improvement Charge ("DSIC") calculations in accordance with Section 1301.1(a) of the Public Utility Code ("Code"), 66 Pa. C.S. § 1301.1, and the decision of the Pennsylvania Supreme Court in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021). The Commission invited comments on four main topics, including the question of whether there should be revisions to the DSIC calculations for refund/recoupment of overcharges dated back to August 2016, the date that Act 40 added Section 1301.1 to the Code. On May 12, 2022, the Energy Association of Pennsylvania filed a Petition for an Extension of Time to File Comments. The Petition was granted on May 18, 2022, by Secretarial Letter extending the deadline to file Comments to July 22, 2022.

The Industrial Energy Consumers of Pennsylvania ("IECPA")¹ is an association of energy-intensive industrial consumers of electricity and natural gas taking service from regulated utilities in Pennsylvania, including: Duquesne Light Company; Metropolitan Edison Company; PECO Energy Company; Pennsylvania Electric Company; PPL Electric Utilities Corporation; West Penn Power Company; UGI Utilities, Inc.; Columbia Gas of Pennsylvania, Inc.; and Peoples Natural Gas Company LLC. IECPA offers these Comments in response to the Secretarial Letter in the above-referenced matter on issues of particular importance to its members. The fact that IECPA does not address each and every topic presented by the Secretarial Letter should not be construed as either support or opposition to those issues as stated in the Secretarial Letter, and IECPA reserves the right to respond to other Comments as they pertain to any element of the order.

1. Revisions to the DSIC Calculations and the Potential Refund/Recoupment of Overcharges Dated Back to August 2016.

a. Should a refund/recoupment be required?

IECPA fully supports refund of overcharges by utilities dating back to August 2016, the date that Act 40 added Section 1301.1 to the Code. In the event that utilities have over-recovered DSIC-related costs, it is only appropriate that those over-recoveries be refunded to customers. Based on the findings by the Pennsylvania Supreme Court's decision in *McCloskey*, utilities have been improperly neglecting to include calculations to account for tax deductions and credits that otherwise would have resulted in a reduction of rates charged to customers under DSIC surcharges from that point until now (and into the future, until the changes now contemplated by the PUC take effect).²

¹ For the purpose of this matter, IECPA's membership consists of: Air Products & Chemicals, Inc.; Benton Foundry, Inc.; Carpenter Technology Corporation; Cleveland-Cliffs Inc.; East Penn Manufacturing Company; Keystone Cement Company; Knouse Foods Cooperative, Inc.; Linde, Inc.; Marathon Petroleum Corporation; Proctor & Gamble Paper Products Company; and United States Gypsum Company.

² See *McCloskey v. Pa. PUC*, 255 A.3d 416, 427 (Pa. 2021)

If utilities are permitted to keep the over-recoveries, then they will have received an improper revenue windfall that they were not statutorily entitled to recover.³ Indeed, as the Court's decision in *McCloskey* indicates, they have already done so since 2016.⁴ Those overpayments in revenues represent significant outlays of money that ratepayers were deprived of for the last six years; these are funds that those ratepayers could have, and should have, had the ability to invest as those customers deemed fit. For large trade-exposed industrial and manufacturing entities such as IECPA members, those investments could have included expanded (or better sustained) operations within the Commonwealth, which would have increased Pennsylvania's industrial and manufacturing competitive position both nationally and globally, including the potential increased (or sustained) employment of jobs and the additional contribution to Pennsylvania's tax revenues and charitable organizations that did not otherwise occur.

b. What mechanism should be employed for refund/recoupment of overcharges to be returned to customers, and should interest be included?

IECPA supports the creation of a uniform mechanism for refunding overcharges to customers, plus interest. The Commission is well-versed in this type of mechanism. Specifically, IECPA supports a refund mechanism similar to the one approved by the Commission to refund utilities' accumulated tax savings as a result of the TCJA.⁵ To account for the significant TCJA

³ *Id.* at 436 (Holding that "Section 1301.1(a), as applied to a DSIC, requires the inclusion of tax deductions and credits specific to the infrastructure expenses and investments which the DSIC is intended to recover.").

⁴ To the extent there are arguments a refund is inappropriate because the Commission is prohibited from retroactive or single-issue ratemaking, IECPA notes that an exception to this rule applies in the case of expenses that are extraordinary, substantial, and nonrecurring. *See Philadelphia Electric Co. v. Pa. Public Utility Commission*, 502 A.2d 722, 728 (Pa. Cmwlth. 1985). This was most recently acknowledged by the Commission in the context of the recent Tax Cuts and Jobs Act of 2017 ("TCJA") proceeding(s). Here, the exclusion of tax deductions and credits from the DSIC rates for nearly six years is extraordinary, substantial, and nonrecurring, and thus should be treated outside of a general rate proceeding and flowed back to ratepayers, as previously noted by the Commission. *See Tax Cuts and Jobs Act of 2017*, Docket No. M-2018-2641242, Temporary Rates Order (May 17, 2018) ("Temporary Rates Order").

⁵ *See* Footnote 4 for initial discussion of TCJA; *see also* Temporary Rates Order.

tax rate changes and their effects on consumer rates, the Commission issued specific orders for each utility directing that they "file temporary rates, pursuant to Section 1310(d), in the form of a negative surcharge that reflects the annual reduction in federal tax expense and associated revenue requirement for each utility[,]" that was set to begin on July 1, 2018.⁶ The utilities, however, began recognizing tax savings from the TCJA on January 1, 2018.⁷ For those six months of tax savings, the utilities were required to establish a "deferred regulatory liability" account that would accrue interest at the residential mortgage lending rate specified by the Secretary of Banking in accordance with the Loan Interest and Protection Law (41 P.S. §§ 101, *et seq.*).⁸ The rate treatment of that amount plus accrued interest was to be addressed in each utility's next base rate case.⁹ If the utility did not file a general rate base case within three years of the order, "to avoid an unreasonable delay in dealing with such funds[,]" the utility was required to file a petition to "propose a just and reasonable disposition of the accumulated funds in the deferred regulatory liability account."¹⁰

Unlike the TCJA over-recovery, which only lasted for six months (and was only retained by utilities for a maximum of three years), utilities have already been receiving overcharges related to the DSIC since 2016. As such, some of these overcharges have been improperly retained by utilities for almost six years. All of the DSIC overcharges should be refunded as soon as possible

⁶ *Id.* at 17; 66 Pa. C.S. § 1310(d) provides: "[w]henver the commission, upon examination of any annual or other report, or of any papers, records, books, or documents, or of the property of any public utility, shall be of opinion that any rates of such public utility are producing a return in excess of a fair return upon the fair value of the property of such public utility, used and useful in its public service, the commission may, by order, prescribe for a trial period of at least six months, which trial period may be extended for one additional period of six months, such temporary rates to be observed by such public utility as, in the opinion of the commission, will produce a fair return upon such fair value, and the rates so prescribed shall become effective upon the date specified in the order of the commission."

⁷ Temporary Rates Order at 18.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

through a negative surcharge on customer bills, similar to the way in which TCJA tax savings were handled by this Commission. Since these overcharges date back to 2016, the Commission should require each utility to calculate interest accrued from that earliest date. As a starting point, IECPA would recommend that the Commission consider using the average of the residential mortgage lending rate specified by the Secretary of Banking in accordance with the Loan Interest and Protection Law from 2016, as it recently did in the TCJA matter,¹¹ until the date of the Commission's order.

Instead of waiting to refund the over-recovery until each utility's next base rate case, however, each utility should be required to file a petition within sixty (60) days of the Commission's order in this investigation, or by January 1, 2023, whichever date occurs first, proposing a negative surcharge to return to customers any over-recovery, plus interest, that each utility has accrued from its DSIC since 2016. Additionally, to avoid unreasonable delay in returning these funds to customers, utilities should be limited to amortizing the negative surcharge return to no longer than a 12-month period, beginning no later than January 1, 2023. This will ensure that the over-recovered charges, which properly belong to customers, are returned to customers in a timely manner while also providing each utility with a reasonable period of amortization through which to refund the accrued overcharges plus interest.

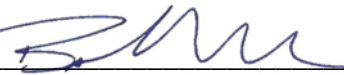
In the event that utilities are currently receiving over-recovery through existing DSIC rates, then each utility should be ordered to file temporary rates, pursuant to Section 1310(d), in the form of a negative surcharge that reflects unaccounted for taxes and credits on its current DSIC surcharge. The temporary rates should be remain effective until each utility files a DSIC

¹¹ See Temporary Rates Order.

reconciliation that includes the appropriate tax deductions and credits required by Section 1301.1
of the Code.

Respectfully submitted,

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Dated: July 22, 2022