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July 22, 2022

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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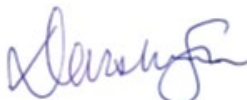
**Re: Distribution System Improvement Charge – Implementation Order to
Address all Issues Pertaining to the Distribution System Improvement
Charge Calculations Required in the Pennsylvania Supreme Court’s
Decision in McCloskey v. PA. PUC, 255 A.3D 416 (PA. 2021)
Docket No. M-2012-2293611**

Dear Secretary Chiavetta:

Pursuant to the Pennsylvania Public Utility Commission’s Secretarial Letter dated April 22, 2022, in the above-captioned proceeding, enclosed herewith for filing are the Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Darsh Singh

DS/dml

Enclosure

c: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DISTRIBUTION SYSTEM	:	
IMPROVEMENT CHARGE –	:	
IMPLEMENTATION ORDER TO	:	
ADDRESS ALL ISSUES PERTAINING	:	Docket No. M-2012-2293611
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)	:	

**COMMENTS OF METROPOLITAN EDISON COMPANY,
PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA
POWER COMPANY AND WEST PENN POWER COMPANY**

By Secretarial Letter issued April 22, 2022 in the above-captioned proceeding (“Secretarial Letter”), the Pennsylvania Public Utility Commission (“Commission” or “PUC”) solicited comments on revisions to the formula for calculating the Distribution System Improvement Charge (“DSIC”) necessary to comply with the Pennsylvania Supreme Court’s July 21, 2021 Opinion and Order¹ construing Section 1301.1(a) of the Public Utility Code.² Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”) and West Penn Power Company (“West Penn”) (collectively the “Companies”) submit these Comments in accordance with the Secretarial Letter.

¹ *McCloskey v. Pa. P.U.C.*, 255 A.3d 416 (Pa. 2021) (hereafter, “*McCloskey/FirstEnergy*”).

² 66 Pa.C.S. § 1301.1. Hereafter, all references to a “Section” are to sections of the Pennsylvania Public Utility Code (“Code”), 66 Pa.C.S. §§ 101 et seq., unless stated or the context indicates otherwise.

I. INTRODUCTION

A. BACKGROUND

The DSIC is an automatic adjustment charge revised quarterly that provides utilities (electric, natural gas, water and wastewater) “timely recovery of the reasonable and prudent costs incurred to repair, improve or replace eligible property in order to ensure and maintain adequate efficient safe, reliable and reasonable service.”³ Section 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 Commission adopted a Model Tariff in its Implementation Order for Act 11 of 2012 entered August 2, 2012,⁴ and stated that a utility seeking to implement a DSIC must demonstrate that its proposed DSIC provisions conform to the Model Tariff. The current Model Tariff includes the following formula for calculating quarterly updates to the DSIC:

$$\text{DSIC} = \frac{((\text{DSI} * \text{PTRR}) + \text{Dep} + e)}{\text{PQR}}$$

Where:

- DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation.
- PTRR = Pre-tax return rate applicable to DSIC-eligible property.
- Dep = Depreciation expense related to DSIC-eligible property.
- e = Amount calculated under the annual reconciliation feature or Commission audit, as described below.
- 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.

³ 66 Pa.C.S. § 1353(a).

⁴ *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Aug. 2, 2012) (“Implementation Order”), pp. 30-31 and Appendix A (Model Tariff) to that Order.

Additionally, the Model Tariff tracks Section 1357(b) of the Code and, therefore, states as follows:

Pre-tax return: The pre-tax return shall be calculated using the statutory state and federal income tax rates, the Utility'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.

The Commission initiated this generic proceeding "to provide a forum for discussion and feedback" concerning revisions to the Model Tariff needed to implement the Order of the Pennsylvania Supreme Court in *McCloskey/FirstEnergy*.⁵ Specifically, the Court construed Section 1301.1 of the Code as modifying the terms of Sections 1351 and 1357-1358 to require the DSIC calculation to include tax attributes identified in the first and third sentences of Section 1301.1(a), which state, respectively, as follows:

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.

* * *

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.

Consequently, the Secretarial Letter states that, under the Court's holding, the DSIC formula should be supplemented by adding variables "to recognize incremental Accumulated Deferred Income Taxes ("ADIT") and state tax depreciation deductions for accelerated depreciation" related to increases in DSIC-eligible property.⁶ Accordingly, as detailed further below, the Companies propose variables intended to supplement the DSIC formula to capture

⁵ Secretarial Letter, p. 3.

⁶ See Secretarial Letter, p. 3.

incremental ADIT and accelerated depreciation deductions exceeding book depreciation. The Companies have also proposed a variable to reflect that, in some circumstances, a gross receipts tax is applicable.

In response to other topics raised in the Secretarial Letter, the Companies aver that no reconciliation process, beyond that already reflected in the Model Tariff (i.e., reconciliation of DSIC revenues and DSIC costs) is necessary. And, lastly, no refund or other form of recoupment should be required for the reasons outlined in Section IV below.

B. PROCEDURAL HISTORY

On February 16, 2016, the Companies petitioned the Commission to approve tariff riders (“DSIC Riders”) incorporating the terms of the PUC’s Model Tariff. The Office of Consumer Advocate (“OCA”), Office of Small Business Advocate and a group of industrial customers participated in the proceeding. On June 9, 2016, the Commission entered Orders finding that the Companies’ DSIC Riders conformed to the Model Tariff and approved them.⁷ No party proposed revising the DSIC formula to include incremental changes in accumulated deferred federal income taxes (“ADFIT”) and state tax deductions for accelerated depreciation because that issue had been resolved by the Commission and the Commonwealth Court in prior proceedings.⁸ Three days after entry of the DSIC Approval Orders, Act 40 of 2016 (“Act 40”) added Section 1301.1 to the Code.

⁷ PUC approval was subject to consideration of peripheral implementation issues that were referred to the Office of Administrative Law Judge and subsequently resolved by settlement. *See Petitions of Metropolitan Edison Co., Pennsylvania Elec. Co. Pennsylvania Power Co. and West Penn Power Co, for Approval of a Distribution Sys. Improvement Charge*, Docket Nos. P-2015-2508942 *et al.* consolidated with *Office of Consumer Advocate v. Metropolitan Edison Co., Pennsylvania Elec. Co. Pennsylvania Power Co. and West Penn Power Co.*, Docket Nos. C-2016-2531040 *et al.* (Opinions and Orders entered Jun. 9, 2016) (“DSIC Approval Orders”).

⁸ *See Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution Sys. Improvement Charge*, Docket No. P-2012-2338282 (Opinion and Order entered May 22, 2014) (“Columbia Gas Order”), *aff’d*, *McCloskey v. Pa. P.U.C.*, 127 A.3d 860 (Pa. Cmwlth. 2015) (“*McCloskey/Columbia*”). *McCloskey/Columbia* was an appeal from a Commission Order approving a DSIC for Columbia Gas of Pennsylvania, Inc. Similar issues were also decided in an unreported opinion issued the same day in the OCA’s appeal from a Commission Order approving a DSIC for Little Washington Wastewater Company. *McCloskey v. Pa. P.U.C.*, No. 1358 C.D. 2014 (Nov. 3, 2015).

Consequently, the Companies' DSIC Riders were approved by PUC orders entered prior to the effective date of Act 40.

The proceeding that culminated in *McCloskey/FirstEnergy* was initiated by complaints filed by the OCA against each of the Companies in base rate cases filed in April 2016. In the consolidated base rate proceeding, the OCA raised traditional rate-case issues and also sought to change the formula for quarterly calculations of the DSIC to include incremental tax effects related to additions of DSIC-eligible plant in service.

The base rate portion of that case was concluded by a settlement among the parties. In its order approving the settlement, the Commission referred the OCA's DSIC challenge to the docket at which it had approved the Companies' DSIC Riders.⁹ In the referral proceeding, the Commission ruled that the OCA's proposed changes to the DSIC formula should be rejected.¹⁰ The OCA appealed to the Commonwealth Court of Pennsylvania, which issued a three-judge panel opinion reversing the Commission's decision.¹¹ The PUC and the Companies sought, and were granted, review by the Pennsylvania Supreme Court. Following briefing and argument, a divided Court affirmed the Commonwealth Court in *McCloskey/FirstEnergy*.

After the Pennsylvania Supreme Court issued its opinion and remand order, the Commission granted the Companies' Petition for Interlocutory Review and answered the proposed Material Question in the affirmative. In so doing, the Commission determined that a generic proceeding is the appropriate vehicle to address changes in the Model Tariff in response to the holding in *McCloskey/FirstEnergy*.

⁹ *Pa. P.U.C. v. Metropolitan Edison Co. et al.*, Docket Nos. R-2016-2537349, et al., 2017 WL 395349 at *23-25 (Jan. 19, 2017).

¹⁰ *Petitions of Metropolitan Edison Company et al for Approval of a Distribution System Improvement Charge*, Docket Nos. P-2015-2508942 et al (Opinion and Order entered April 19, 2019).

¹¹ *See McCloskey v. Pa. P.U.C.*, 219 A.3d 1216, 1225 (Pa. Cmwlth. 2019).

II. THE COMMISSION'S SECRETARIAL LETTER

The Commission issued the Secretarial Letter “to provide a forum for discussion and feedback from stakeholders as the Commission begins its implementation of DSIC calculations in accordance with Section 1301.1(a) of the Public Utility Code, 66 Pa. C.S. § 1301.1, [and] *McCloskey/FirstEnergy*, 255 A.3d at 437.” To that end, the Commission has invited interested persons to provide comments and address key topics before it initiates “a working group meeting” to address changes to the DSIC Model Tariff.

In a series of bullets at page 3 of the Secretarial Letter, the Commission has identified the major topics it would like commenters to address. The overarching issue involves the changes to the Model Tariff needed to implement the Pennsylvania Supreme Court’s directive that the DSIC calculation should recognize book-tax timing differences created by accelerated tax depreciation when DSIC-eligible property is placed in service.¹² As specified by the Commission, this entails amending or supplementing elements of the formula for calculating quarterly DSIC updates to properly reflect: (1) the state income tax flow-through effects of book-tax timing differences created by accelerated depreciation deductions that exceed book depreciation; and (2) the change in ADFIT that reflects the normalization of book-tax timing differences created by accelerated depreciation deductions that exceed book depreciation.¹³ The Commission cautioned that revisions to the DSIC formula should “not require unduly complicated computations” and should “permit reasonable review and audit of DSIC changes and their supporting calculations.”¹⁴

The Commission also asked commenters to address whether a “reconciliation process” should be established for “timing differences” in order to determine “the proper level of ADIT and

¹² Secretarial Letter, p. 3, first bullet.

¹³ Secretarial Letter, p. 3, first and second bullets.

¹⁴ Secretarial Letter, p. 3, second bullet.

state income taxes for book-tax timing issues created by placing in service eligible property included in the DSIC.”¹⁵

Finally, the Commission is seeking comments on whether refunds and/or recoupment should be required based on the changes in the DSIC Model Tariff adopted in this proceeding and, if so, when the period subject to “refund/recoupment” would begin (including whether refund exposure might date back to the August 11, 2016 effective date of Sections 1301.1(a) and (b)); the “impact of any refund/recoupment on the utilities’ DSIC cap;” whether interest should apply to any refunds or recoupment; and the interest rate and weighting factor(s) that might be used if interest were imposed.¹⁶

Issues pertaining to changes in the DSIC formula and DSIC Rider, including whether any reconciliation process is needed, are addressed in Section III, below. Issues pertaining to refunds and/or recoupment are addressed in Section IV, below.

III. CHANGES TO THE DSIC FORMULA AND OTHER TERMS OF THE MODEL TARIFF

A. Changes To The DSIC Formula

As explained in the Secretarial Letter, the principal changes to the DSIC formula set forth in the Model Tariff involve adding variables to the DSIC calculation to capture the effects of book-tax timing differences generated by utilities’ use of accelerated forms of tax depreciation permitted under Section 168 of the Internal Revenue Code and applicable Treasury Regulations (hereafter “Section 168 accelerated depreciation”).

The book-tax timing differences resulting from the use of Section 168 accelerated depreciation for federal taxes are subject to the normalization requirements of Sections 168(f)(2)

¹⁵ Secretarial Letter, p. 3, fourth bullet.

¹⁶ Secretarial Letter, p. 3, third bullet.

and 168(i)(9) in setting rates and are reflected as changes to deferred taxes and ADFIT for ratemaking purpose. The book-tax timing differences resulting from Section 168 accelerated depreciation deductions for Pennsylvania income taxes are flowed-through in setting rates and, therefore, reduce the utility's state income tax liability. The effects of Section 168 accelerated depreciation deductions for federal and state income tax purposes can be recognized by adding to the DSIC formula the elements described below.

First, to reflect the change in ADFIT relating to book-tax timing differences created by the use of Section 168 accelerated depreciation that results from new eligible property going into service, to the extent such additional ADFIT is not already reflected in the utility's base rates, a term can be added to reflect such changes as a deduction from the original cost of eligible property. This change would be made in the description of the term "DSI," as follows (added language shown as underscored):

DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation and associated accumulated deferred federal income taxes pertaining to property-related book/tax depreciation timing differences resulting from the use of Section 168 accelerated depreciation.

Second, a term can be added to reduce the tax component of the pre-tax rate of return to reflect the flow-through of book-tax timing differences that result from Section 168 accelerated depreciation deductions exceeding book depreciation, to the extent such additional tax deductions are not already reflected in the utility's base rates. However, because the gross-up of the return rate to a pre-tax level is calculated using a composite federal and state tax rate that includes the statutory state income tax rate and because state income tax is itself a deduction from federal taxable income, a reduction in state income tax that results from flowing through Section 168 accelerated depreciation will understate applicable federal taxes. Therefore, the terms for state tax

flow-through (“STFT”) must include the net federal/state tax effect, which requires adjusting the STFT to include the associated increase in federal income tax. The changes described above would be made by: (1) adding the variable “STFT” to the DSIC formula; and (2) adding a definition for STFT. Each proposed revision is shown below:

$$\text{DSIC} = \frac{(\text{DSI} * \text{PTRR} + \text{STFT} + \text{Dep} + e)}{\text{PQR}}$$

$$\text{STFT} = \underline{\text{(State Tax Flow Through) Pre-tax flow-through calculated on book-tax timing differences from accelerated depreciation in excess of book depreciation, net of federal tax.}}$$

In addition to the revisions needed to recognize book-tax timing difference from Section 168 accelerated depreciation in excess of book depreciation, this proceeding offers an opportunity to formally incorporate a term for Gross Receipts Tax (“GRT”) into the DSIC formula. The Model Tariff did not include such a term, presumably because it was meant to apply to all utility groups, while only electric distribution companies (“EDCs”) are subject to GRT. However, individual EDCs included a term in their DSIC Riders to reflect the gross-up for GRT because they are liable for GRT on their gross receipts from all sources, including DSIC revenue. The Companies propose that the revised Model Tariff formally include this term “if applicable” (to reflect the fact that not all utilities are subject to GRT). This revision would be reflected by: (1) adding a GRT gross-up term to the DSIC formula; and (2) adding a defined term “T” (for the GRT rate). Each proposed revision is shown below:

$$\text{DSIC} = \frac{(\text{DSI} * \text{PTRR} + \text{STFT} + \text{Dep} + e) \times 1/(1-T)}{\text{PQR}}$$

$$\text{T} = \underline{\text{If applicable, Pennsylvania Gross Receipts Tax rate in effect during the billing month, expressed in decimal form.}}$$

Finally, the Companies also propose a technical correction to the term “PQR” in the Model Tariff to reflect the manner in which that term is currently applied, as shown below:

PQR = Projected quarterly revenues for distribution service (including all applicable clauses and riders) from existing applicable customers ~~plus netted revenue from any customers which will be gained or lost by the beginning of the applicable service period.~~

B. A Reconciliation Process Is Not Necessary And Should Not Be Adopted

No reconciliation beyond that already reflected in the Model Tariff (i.e., reconciliation of DSIC revenues and DSIC costs) is necessary. All of the elements needed to calculate DSIC costs related to eligible property can be reasonably ascertained at the time of each quarterly calculation of the DSIC, including the elements for the deduction of ADFIT from the original cost of eligible property and the STFT that reduces the pre-tax return rate. There is no need to reconcile “timing differences” because any “timing differences” will already have been reflected in the calculation of the applicable revised terms of the DSIC formula, as explained above.

IV. REFUNDS SHOULD NOT BE REQUIRED

In the Secretarial Letter, the Commission has sought comments regarding the possibility of whether a refund or other form of recoupment should be required, along with any associated timing, amortization period, impact on the utilities’ DSIC cap, and the possible application of interest.¹⁷ The Companies do not believe that the Commission should require refunds for two principal reasons.

First, as a threshold matter, Act 40 expressly provides that it does not apply except in those cases where a “final order” has been entered after the effective date of this section (i.e., August 11, 2016). The Supreme Court did not address this provision, and there does not appear to be any case

¹⁷ Secretarial Letter, p. 3.

in which a “final order” has been entered with respect to the Companies’ DSIC after Section 1301.1 became law.¹⁸ In light of this procedural history, amounts collected under the Companies’ existing DSICs are not subject to the provisions of Act 40 and available for refund.

Second, while Section 1312 of the Code provides that the Commission has authority to require refunds,¹⁹ Pennsylvania appellate decisions provide that the authority to require refunds is an exercise of the Commission’s judicial function and is within its equitable jurisdiction. *Lancaster Ice Mfg. v. Pa. P.U.C.*, 138 A.2d 262 (Pa. Super. 1958) (“In reparations the Commission’s jurisdiction is equitable in nature (citation omitted) and the Commission is not without discretion in exercising its equitable powers. *Magee Carpet Co. v. Pa. P.U.C.*, 174 Pa. Superior Ct. 438, 102 A.2d 229.”). In *Magee Carpet*, 102 A.2d at 235, the Superior Court held:

We find nothing in the language of section 313(a) [predecessor of Section 1312] which makes it mandatory for the Commission to award refunds under a defective fuel adjustment clause, although it has the “power and authority” to do so. Within the limits prescribed by statute, the Commission undoubtedly has discretion as to the period to be covered by refunds. While refunds must necessarily be capable of exact determination under the Commission’s order, the period for which they may be allowed is not so fixed by statute that the Commission has no discretionary power in this respect. We think this is true notwithstanding that the complaints were filed against the fuel adjustment clause before its effective date, and that as a general principle the burden was upon the utility to sustain its reasonableness. (citations omitted).²⁰

¹⁸ As noted *supra*, the Commission approved the Companies’ DSIC Riders prior to Act 40 becoming effective.

¹⁹ Section 1312 provides in relevant part:

If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.

²⁰ The current section 1312 is the same as prior Section 313.

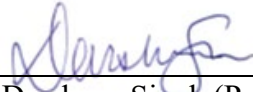
When the DSIC was first approved by the Commission for use by water companies, the Commission found that one important reason for implementing the DSIC was to reduce the frequency of *utility* base rate cases by providing a mechanism to recover the fixed costs of infrastructure replacement property between base rate cases. That purpose was well served because the availability of the DSIC has extended the interval between base rate cases both for water utilities and, since the enactment of Act 11 of 2012, other utilities as well. In the absence of the DSIC formula approved by the Commission in the Model Tariff and affirmed by the Commonwealth Court in *McCloskey I*, some of the utilities eligible to use the DSIC may have decided to file additional base rate cases to recover their full cost of plant and equipment placed in service between the rate cases to avoid the deficiency in revenues that refunds would impose.

In assessing the refund issue, it is significant that, in other situations where a rate is found to be unlawful, it is based on a finding that a utility was not entitled to recover the underlying costs at all (e.g., imprudently incurred fuel costs or cost of plant that was not used and useful). That would not have been the case here. The plant that constituted eligible property for DSIC purposes has not been challenged as imprudent or otherwise improper investment, and it is entitled to be included in rate base.

V. CONCLUSION

The Companies appreciate the opportunity the Commission has provided to offer these Comments and look forward to working with the Commission and interested stakeholders as this matter moves forward.

Respectfully Submitted,



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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 Distribution System :
Improvement Charge Calculations Required : Docket No. M-2012-2293611
in the Pennsylvania Supreme Court’s Decision :
in McCloskey v. PA. PUC, 255 A.3D 416 :
(PA. 2021) :**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing document upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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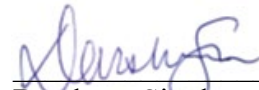
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Dated: July 22, 2022



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