


COMMONWEALTH OF PENNSYLVANIA



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November 10, 2022

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

Re: Implementation of Act 11 of 2012 Distribution  
System Improvement Charge Calculations Required  
by 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:

Attached for electronic filing please find the Office of Consumer Advocate's Petition for Clarification and Reconsideration of the Order entered October 27, 2022 in the above-referenced proceeding. The OCA has attached the verification of Patrick M. Cicero, Consumer Advocate, pursuant to the requirements of 52 Pa. Code § 1.36.

Copies have been served as indicated on the enclosed Certificate of Service.

Respectfully submitted,

/s/ Erin L. Gannon  
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Certificate of Service

\*337528

CERTIFICATE OF SERVICE

Implementation of Act 11 of 2012 :  
Distribution System Improvement Charge :  
Calculations Required by the Pennsylvania : Docket No. M-2012-2293611  
Supreme Court’s decision in *McCloskey v.* :  
*Pa. PUC*, 255 A.3d 416 (Pa. 2021) :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate’s Petition for Clarification and Reconsideration, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 10<sup>th</sup> day of November 2022.

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Dated: November 10, 2022  
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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Act 11 of 2012	:	
Distribution System Improvement Charge	:	
Calculations Required by the Pennsylvania	:	Docket No. M-2012-2293611
Supreme Court’s decision in <i>McCloskey v.</i>	:	
<i>Pa. PUC</i> , 255 A.3d 416 (Pa. 2021)	:	

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OFFICE OF CONSUMER ADVOCATE’S  
PETITION FOR CLARIFICATION AND RECONSIDERATION OF  
OCTOBER 27, 2022 ORDER

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The Office of Consumer Advocate (OCA) hereby submits this Petition pursuant to Sections 5.572 and 5.41 of the Public Utility Commission’s regulations. *See* 52 Pa. Code §§ 5.572, 5.41. The matters raised by the OCA bear on the upcoming December 1, 2022 deadline for compliance with the Supplemental Implementation Order and, because there is no Public Meeting scheduled prior to that deadline, the OCA respectfully requests that the Commission act on this Petition by notational vote. To provide time for its consideration of the clarifications requested herein, the OCA also requests that the Commission reconsider its December 1<sup>st</sup> deadline.

I. INTRODUCTION

On July 21, 2021, the Pennsylvania Supreme Court held that application of Section 1301.1 requires a change to the calculation of Distribution System Improvement Charge (DSIC) rates, to include income tax deductions and credits to reduce the rates. *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021) (*McCloskey*); 66 Pa. C.S. § 1301.1. The Court remanded the underlying proceedings involving the four FirstEnergy companies and Newtown Artesian Water Company to the Public Utility Commission (Commission or PUC) for the purpose of requiring the First Energy

companies and Newtown to revise their DSIC calculations and tariffs to comply with Section 1301.1. *McCloskey 2021* at 437. Currently, twenty-six utilities, including those five utilities, have Commission approval to charge DSIC rates. Three additional utilities have DSIC Petitions pending before the Commission. *See* Appendix A.

Following the submission of Comments by stakeholders, on October 27, 2022 the Commission entered a Supplemental Implementation Order addressing the changes required by the *McCloskey* decision. It found that the Comments showed general agreement on the changes that must be made to the DSIC calculation and the DSIC model tariff. The Commission directed each utility to (1) file a pro forma tariff supplement reflecting the updated formula for calculation of the DSIC (attached as Appendix A to the Order) and (2) utilize the new calculation in its quarterly DSIC updates effective on January 1, 2023.<sup>1</sup> Order at 2.

The OCA supports the Commission's goal to get the revised DSIC calculations and tariffs in place without unnecessary delay but believes there are several areas of the October 27<sup>th</sup> Order that require clarification or reconsideration as outlined below. In light of this, the OCA also submits that the Commission should modify its December 1<sup>st</sup> deadline to allow time for its consideration of the matters raised by the OCA.

1. As set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 PaPUC 553 (1985), the standards for granting a petition for reconsideration are as follows:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein it was stated that “[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them ...”. **What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.** Absent such matters being presented, we consider it unlikely that a

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<sup>1</sup> The Commission excluded Pittsburgh Water and Sewer Authority (PWSA) and Philadelphia Gas Works (PGW) from this requirement because they do not subject to state or federal income taxes and provided different deadlines for Newtown Artesian Water Company and Columbia Water Company because those utilities file quarterly updates on a different schedule. Order at 2, n.2, 6.

party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.

56 PaPUC at 559 (quoting *Pennsylvania R.R. Co. v. Pa. PUC*, 118 Pa. Super. 380, 179 A. 850 (1935) (emphasis added).

2. In this Petition, the OCA raises points not previously heard or considered and which the Commission may have overlooked or not addressed. Specifically, because the Commission did not request reply comments or hold stakeholder meetings to address the issues in this proceeding, this Petition is the first instance in which any of the concerns outlined here could be raised. The OCA seeks to clarify or have the Commission reconsider certain matters including that:

- the impact of including state and federal income tax deductions and credits in the calculation of the DSIC will reduce the rate or have no impact, but in no circumstance should the rates increase
- Section 1301.1(a) requires all federal income tax deductions and credits related to investment included in the DSIC rate, not limited to accelerated tax depreciation
- the requirement to file DSIC calculations consistent with the changes required by the new model tariffs compulsory rather than permissive
- there is a forum for developing a record on the refunds that may be required due to the *McCloskey* decision

As discussed below, the standard for clarification or reconsideration before this Commission is clearly met.

## II. REQUESTS FOR CLARIFICATION AND RECONSIDERATION

3. Section 1301.1(a) provides in relevant part:

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**.

66 Pa. C.S. § 1301.1(a) (emphasis added). The OCA requests that the Commission clarify that the changes to the DSIC calculation to incorporate income tax deductions and credits will **reduce** the

rate or have no impact but not increase the rate.<sup>2</sup> While the OCA also recommends clarifications to specific components of the DSIC calculation, it would provide certainty both for the utilities applying the new calculations and the parties reviewing the utilities' filings for the Commission to make that overarching clarification.

4. For the inclusion of state income tax deductions and credits, the Commission adopted two methods. Order at 7. The first is to calculate the State Tax Flow Through (STFT) as a separate component of the DSIC formula using the unadjusted statutory state income tax rate (Method 1). The second, and Commission-preferred method, is to include STFT by using an effective tax rate to modify the revenue conversion factor/tax multiplier/gross-up used to calculate the PTRR component of the DSIC formula (Method 2). *Id.* at 6-7. The Commission reflects Method 1 in the DSIC formula as follows:

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

The OCA recognizes that, as explained in the FirstEnergy Comments, the DSIC state income tax is itself a deduction from federal taxable income, that it impacts federal taxes. FE Comments at 8. That net state/federal tax effect should not, however, increase the DSIC rate. For clarity and consistency with the Section 1301.1(a) requirement to reduce the rate, under Method 1, STFT should be reflected in the formula as a negative, either “- STFT” or “(STFT)”.

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

or

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

For Method 2, the OCA requests that the Commission clarify that either the effective tax rate or statutory tax rate, whichever is lower, should be used to calculate the PTRR component. This will

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<sup>2</sup> In rendering its determination on the application of Section 1301.1(a) to the DSIC, the Pennsylvania Supreme Court emphasized that “while some aspects of Section 1301.1, including subsection (b), highlights and addresses the likely increase in revenue resulting from the elimination of the [consolidated tax adjustment], the first sentence clearly indicates the intent to ‘reduce rates.’” *McCloskey* at 21.

serve the same purpose of ensuring that the inclusion of income tax deductions in the DSIC formula will reduce the DSIC rate.

5. To include federal income tax deductions and credits in the DSIC calculation, Commenters agreed the amount of net DSIC plant investment should be reduced by the directly related Accumulated Deferred Income Taxes (ADIT). Order at 8. The Commission adopted an expanded definition of the Distribution System Improvement (DSI) component proposed by the Energy Association of Pennsylvania:

**DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation and associated accumulated deferred income taxes pertaining to property-related book/tax depreciation timing differences resulting from the use of accelerated depreciation per Internal Revenue Code, 26 U.S. Code § 168.**

Order at 8, 10. Section 168 of the Internal Revenue Code is limited to accelerated tax depreciation. Section 1301.1(a) contains no limitation on the types of federal income tax deductions/credits that must be included in the DSIC calculation beyond requiring them to be “related” to the investment being recovered in the rate. 66 Pa. C.S. § 1301.1(a). Removing the reference to Section 168, “depreciation,” and “accelerated tax depreciation” would clarify that, consistent with Section 1301.1(a), *all* federal income tax deductions related to DSIC-eligible infrastructure investment must be included in the DSIC rate, such as repairs deductions. The DSI definition should read as follows:

**DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation and related accumulated deferred income taxes.<sup>3</sup>**

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<sup>3</sup> Removing the limitation on the types of federal income tax deductions included in the DSIC formula can be achieved by adding “and related accumulated deferred income taxes” to the definition of DSI, as suggested, or by adding specificity to the lengthier definition proposed by EAP:

**DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation and associated accumulated deferred income taxes pertaining to (1) property-related book/tax depreciation timing differences resulting from the use of accelerated depreciation and (2) other tax deductions such as for repairs deductions on DSIC-eligible property per the provisions of the Internal Revenue Code.**



The OCA's definition is consistent with the directive in Section 1301.1(a) that, "[i]f 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." 66 Pa. C.S. § 1301.1(a). Further, the OCA's definition avoids the need to update the model tariff in response to future changes to the Internal Revenue Code. For these reasons, the OCA requests the Commission clarify or reconsider its adoption of the DSI definition proposed by EAP.

6. In adopting the EAP model tariff, the Commission added for the first time a new component to the DSIC formula and definition for Gross Receipts Tax (GRT). Order at 10. Based on the OCA's review, seven of the nine electric utilities with approved or pending DSICs include GRT in the DSIC formula in their tariff, or do not include it in their tariff but show its inclusion in the workpapers supporting their quarterly DSIC calculations.<sup>4</sup> The OCA does not object to bringing the model tariff into compliance with existing Commission practice. Including GRT in the DSIC calculation, however, serves to increase the DSIC rate. This is further reason to clarify that including income tax deductions and credits that are related to DSIC-eligible investment will reduce the DSIC rates (not increase them), as addressed in Paragraphs 3 through 5 above.

7. In Ordering Paragraph 2, the Commission directs all utilities with a Commission-approved DSIC to, first, file a pro forma tariff supplement reflecting the updated formula for calculation of the DSIC by December 1, 2022 (with an effective date of January 1, 2023).

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<sup>4</sup> Electric distribution utilities with GRT in their tariffs: Duquesne Tariff Electric - Pa. PUC No. 25 (Supp. 51) at 139; Met-Ed Tariff Electric - Pa. PUC No. 52 (Supp. 30) at 177; Penelec Tariff Electric - Pa. PUC No 81 (Supp. 30) at 184; Penn Power Tariff Electric - Pa. PUC No. 36 (Supp. 23) at 162; West Penn Power Tariff Electric - Pa. PUC No. 40 (Supp. 22) at 207; PPL Tariff Electric – Pa. PUC No. 201 (Supp. 344) at 19Z.18. Pike County Light & Power Co. also includes a GRT component in its proposed DSIC tariff (Petition for approval of a DSIC filed at No. P-2022-3022285). PECO includes GRT in its supporting calculations: PECO Electric DSIC Quarterly Update, M-2022-3031451, Att. 2 at 1 (eff. Apr. 1, 2022).

Upon Commission approval of the pro forma supplement, the utility **shall be permitted** to implement the proposed tariff changes with its quarterly DSIC update effective January 1, 2023.

Order at 14 (emphasis added). This two-step process is also discussed earlier in the Order. There, the Commission states that the second step is compulsory:

Upon Commission approval of the pro forma supplement, each utility **shall** file its quarterly DSIC calculations and corresponding tariff updates by December 21, 2022, to be effective on January 1, 2023. The updated DSIC calculations will therefore be made with each utility's fourth quarter 2022 quarterly DSIC filing. In this way, the DSIC surcharge mechanism will be in place for 2023 and avoid any further delay in implementing the changes required by the *McCloskey* decision.

Order at 2 (emphasis added) (footnote omitted). For consistency and clarity, the OCA suggests that the words "be permitted" should be removed from Ordering Paragraph 2.

8. The OCA's final request for clarification addresses refunds. In its February 2022 Order affirming a Petition for Interlocutory Review and Answer to Material Question in the FirstEnergy proceeding, one of the two remanded proceedings from *McCloskey*, the Commission directed that a generic proceeding would be established "to address all issues pertaining to the distribution system improvement charge calculations required in the Pennsylvania Supreme Court's decision in [*McCloskey*]." *Petition of Metropolitan Edison Company for Approval of a Distribution System Improvement Charge*, P-2015-2508942, Order at 2 (Feb. 22, 2022) (FE Order). In the generic proceeding, the Commission identified refunds as one of four key topics:

- Determination of the revisions to the DSIC calculations and the potential refund/recoupment of overcharges dated back to August 2016, the date that Act 40 added Section 1301.1 to the Code:
  - Should a refund/recoupment be required;
  - Timing of any required refund/recoupment (When should the recoupment begin?)
  - Amortization period of any refund/recoupment;
  - Impact of the refund/recoupment on the utilities DSIC cap for each utility;

- Should interest be applied, and if so, at what rate and the weighting for when interest is to be applied

Order at 4-5 (quoting the April 22, 2022 Secretarial Letter). In its Order, the Commission states:

Based on the comments received, issues related to refunds that may be required due to the *McCloskey* decision are beyond the scope of this implementation proceeding and cannot be made on the record before the Commission in this proceeding.

Order at 2. The Commission does not otherwise address refunds in the body of its Order or in the Ordering Paragraphs. The OCA seeks clarification in what venue refunds will be addressed. Will the Commission initiate a generic proceeding? The OCA supports a generic proceeding for the same reasons that the Commission determined to initiate the current generic proceeding:

twenty-six Pennsylvania utilities [have] 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 [FirstEnergy] Companies.

...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] 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.

FE Order at 15. The refund issues include, among other things, what are the refund and refund repayment periods, should interest be applied and at what rate. The resolution of these issues has implications for utilities in all industries. The OCA submits that creating a proceeding through which all serve to allow all stakeholders to participate would be a more efficient use of the Commission and stakeholder's resources than individually and separately addressing refund issues for 26 utilities. The Commission's action regarding the Tax Cuts and Jobs Act (M-2018-2641242)

provides a helpful template. There, the Commission initiated a generic proceeding to address the impact of the Act and the method for adjusting rates going forward and retroactively. *Tax Cuts and Jobs Act of 2017*, Order (May 17, 2018). Importantly, as in the TCJA generic proceeding, utilities subject to possible refunds would be required to provide the data that the Commission did not have available to develop a record in the current proceeding on which the refund issues could be addressed. If not in a generic proceeding, the OCA requests clarification on what venue will be afforded for addressing issues related to refunds stemming from the *McCloskey* decision.

9. So as to allow the needed time for the Commission's consideration of the requests for clarification and reconsideration outlined above, the OCA requests that the Commission reconsider its December 1, 2022 deadline and establish a new deadline for filing pro forma tariffs once it determines the merits of the requests made in this Petition.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the OCA respectfully requests that the Commission clarify or reconsider its Opinion and Order in the above-captioned proceeding as requested above. As stated above, the matters raised in this Petition bear on the upcoming December 1, 2022 deadline for compliance with the Supplemental Implementation Order and, because there is no Public Meeting scheduled prior to that deadline, the OCA respectfully requests that the Commission act on this Petition by notational vote.

Respectfully submitted,

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Dated: November 10, 2022

Counsel for:  
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Consumer Advocate

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of Act 11 of 2012	:	
Distribution System Improvement Charge	:	
Calculations Required by the Pennsylvania	:	Docket No. M-2012-2293611
Supreme Court's decision in <i>McCloskey v.</i>	:	
<i>Pa. PUC</i> , 255 A.3d 416 (Pa. 2021)	:	

VERIFICATION

I, Patrick M. Cicero, Consumer Advocate, hereby state that the facts above set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

DATED: November 10, 2022

Signature:



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