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November 21, 2022

Rosemary Chiavetta, Esq., Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, Pennsylvania 17120

**Re: Answer of the Energy Association of Pennsylvania to the Office of Consumer Advocate's Petition for Clarification and Reconsideration of Commission's October 27, 2022 Supplemental Implementation Order, Docket M-2012-2293611**

Dear Secretary Chiavetta:

Attached for electronic filing please find the Answer of the Energy Association of Pennsylvania to the Office of Consumer Advocate's Petition for Clarification and Reconsideration of the Order entered October 27, 2022 in the above-referenced proceeding.

Sincerely,

A handwritten signature in blue ink that reads "Donna M.J. Clark".

Donna M.J. Clark  
Vice President & General Counsel

Enclosure

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**ANSWER OF THE ENERGY ASSOCIATION OF PENNSYLVANIA  
TO THE OFFICE OF CONSUMER ADVOCATE’S PETITION FOR CLARIFICATION  
AND RECONSIDERATION OF COMMISSION’S OCTOBER 27, 2022  
SUPPLEMENTAL IMPLEMENTATION ORDER**

**I. Introduction**

Pursuant to 52 Pa. Code § 5.572(e), the Energy Association of Pennsylvania (“EAP”)<sup>1</sup> hereby files its Answer to the Office of Consumer Advocate’s (“OCA”) Petition for Clarification and Reconsideration of the Supplemental Implementation Order (Docket No. M-2012-2293611) (“Order”) entered on October 27, 2022 by the Pennsylvania Public Utility Commission (“PUC” or “Commission”).

As discussed below, EAP respectfully asks the Commission to dismiss OCA’s Petition. EAP urges the Commission to refrain from unnecessarily complicating the revised distribution

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<sup>1</sup> EAP is a trade association whose members include major electric and natural gas distribution utilities operating in the Commonwealth including Citizens’ Electric Company, Duquesne Light Company, Metropolitan Edison Company, PECO Energy Company, Pennsylvania Electric Company Pennsylvania Power Company, Pike County Light & Power Company, PPL Electric Utilities Company, UGI Utilities, Inc., Wellsboro Electric Company, West Penn Power Company, Columbia Gas of Pennsylvania, National Fuel Gas Distribution Corp., Peoples Natural Gas Company LLC, Philadelphia Gas Works, and Valley Energy Inc.

system improvement charge (“DSIC”) calculation<sup>2</sup> and to maintain the timeline outlined in the Order enabling utilities to begin 2023 with a DSIC surcharge mechanism that adheres to the Pennsylvania Supreme Court decision in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021). EAP contends that the points for clarification/reconsideration detailed by OCA in its Petition do not meet the standards set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 PaPUC 553 (1985). The *Duick* standard does not permit a petitioner to raise questions that were considered and decided by Commission Order, such that the petitioner obtains a second opportunity to argue properly settled deliberations. *City of Pittsburgh v. Pa. Dep’ of Transp.*, 490 Pa. 264, 416 A.2d 461 (1980).

As determined by the Commission in its Order, certain issues, i.e., those related to refunds that may be required by *McCloskey*, are beyond the scope of this implementation proceeding and for others, relating to individual tariff filings, the Commission provides that it will review the filings and any claims made in those particular proceedings and resolve any controversies that may arise. Order at pp. 2 and 13. In either of those situations, parties will have the opportunity to be heard in future proceedings and the Commission will issue a decision based on the complete factual record created in that individual proceeding. EAP’s Answer as provided below will not address the substantive merits of any issue raised by OCA.

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<sup>2</sup> The OCA agreed with this approach in its Comments (filed on July 22, 2022 at Docket No. M-2012-2293611), wherein it stated: “The threshold question at issue in this proceeding is how to graft into the DSIC calculation the state income tax effects and ADIT in a clear and transparent manner without undue complication.” OCA Comments at 1.

## II. Background and Results of Generic Proceeding

The Commission issued its Order following a generic proceeding<sup>3</sup> initiated to obtain input from interested stakeholders on the revisions to the current model DSIC tariff<sup>4</sup> as required by the *McCloskey* decision. In that appeal, the Pennsylvania Supreme Court affirmed a lower court decision interpreting Section 1301.1(a) of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1301.1(a), to require that the calculation of DSIC rates include both state income tax deductions and accumulated deferred federal income taxes (“ADIT”) associated with DSIC-eligible plant additions.

In its Order, the Commission considered the various and extensive comments filed by stakeholders together with specific suggestions on how to revise the current model DSIC tariff<sup>5</sup>; established a revised model DSIC tariff attached as Appendix A to the Order; required utilities with a Commission-approved DSIC to file a pro forma tariff by December 1, 2022, reflecting the updated formula for calculation of the DSIC pursuant to the revised model DSIC tariff; and provided that “[u]pon Commission approval of the pro forma supplement, the utility shall be permitted to implement the proposed tariff changes with its quarterly DSIC update effective

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<sup>3</sup> The Commission determined to hold a generic proceeding after consideration of a Petition for Interlocutory Relief and Answer to Material Question filed by the FirstEnergy companies operating in Pennsylvania. The Commission Order dated February 24, 2022, granted, in part, the Petition for Interlocutory Relief and instructed the Commission’s Secretary’s Bureau to work with the Bureau of Technical Utility Services to invite jurisdictional utilities and appropriate stakeholders to address all issues pertaining to the DSIC calculations now required by the *McCloskey* decision. Thereafter on April 22, 2022, the Commission issued a Secretarial Letter which included a number of key topics to be addressed by the generic proceeding. Comments addressing the key topics were filed on or about July 22, 2022 by OCA, a variety of trade organizations including EAP, NAWC and IECPA, and individual utilities.

<sup>4</sup> The Commission approved the current model DSIC tariff in 2016. *See, Supplemental Implementation Order Re: Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (September 15, 2016).

<sup>5</sup> Specifically, the April 22, 2022 Secretarial Letter sought comments on key topic areas regarding: (1) changes to the model DSIC tariff to incorporate ADIT and state income tax depreciation adjustments; (2) effects of book-tax timing differences for these adjustments; (3) potential refund/recoupment of overcharges dated back to the August 2016 effective date of Act 40; and (4) reconciliation standards for timing differences related to ADIT and book tax timing differences.

January 1, 2023”. *See*, Ordering Paragraph 2 at p. 14. By its Order, the Commission assures that a revised DSIC surcharge mechanism will be effective as of January 1, 2023 and avoids “any further delay in implementing the changes required by the *McCloskey* decision.” Order at p. 2.

In contrast, the OCA’s Petition for Clarification and Reconsideration asks the Commission to modify the December 1 deadline to clarify and reconsider fact-specific issues as part of this generic proceeding. Granting the OCA Petition would inevitably delay implementation of the changes required by the *McCloskey* decision beyond January 1 to the detriment of customers and utilities alike in order to resolve concerns already addressed by the Order or otherwise not ripe for consideration in a generic proceeding. Order at pp. 2 and 13. EAP maintains that the Commission’s Order allows for adjudication of such issues, if and when they arise, in particular DSIC tariff filings involving an actual dispute and with the benefit of a developed record. Order at p. 13. EAP believes that by its Order, the Commission has acted prudently to address the overarching revisions required under *McCloskey* and has recognized that further proceedings might be warranted in individual company filings related to updating the DSIC calculation.

EAP respectfully submits that the Commission should dismiss OCA’s Petition for Clarification and Reconsideration of its October 27 Supplemental Implementation Order.

### **III. OCA’s Request for Clarification and Reconsideration does not meet the Legal Standard under *Duick***

The standard for granting reconsideration is the “new or novel arguments” standard set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. PUC 553, 559 (1982). As the Commission stated in *Duick*:

“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 said 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.”

EAP maintains that the points raised by OCA in its Petition are not new or novel and have been considered by the Commission in its Order, i.e., the Commission has either resolved them in its Order or determined that they are better resolved in future proceedings that allow for the development of a factual record particular to the utility making the DSIC filing.

Initially, it is worth reiterating that the instant proceeding is a generic one which the Commission commenced to gather input from stakeholders to inform the Commission as it implemented revised DSIC calculations in accordance with the Supreme Court’s interpretation of Section 1301.1(a) of the Public Utility Code, 66 Pa. C.S. § 1301.1(a) in *McCloskey*. In general, the Commission sought input with respect to needed revisions to the model DSIC tariff in place since the fall of 2016. It determined to do so, after a request by the FirstEnergy companies<sup>6</sup>, in a generic setting versus a proceeding or proceedings involving particular parties, recognizing the due process concerns, i.e., opportunity to be heard, that would arise if the model tariff revisions were established in a setting that did not easily accommodate the various impacted parties. The Commission’s Order achieves that goal with input from stakeholders. It enables utilities to make

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<sup>6</sup> See Supra at fn. 3.

tariff filings, effective on January 1, 2023, which align with the *McCloskey* decision AND which are subject to approval by the Commission. *See*, Order at p. 13.

**A. The Points Raised by OCA Do Not Meet the *Duick* Standard for Reconsideration**

EAP contends that none of the points identified by OCA for clarification or reconsideration in its Petition meet the *Duick* standard for reconsideration. As further support for its position, EAP emphasizes that the issuance of the Commission’s Supplemental Implementation Order does not foreclose OCA from challenging DSIC calculations or pursuing refunds that may be warranted under the *McCloskey* decision. The Commission Order is not a final adjudication of a controversy, rather it implements the *McCloskey* decision and establishes a revised calculation for the model DSIC tariff to be used in future DSIC tariff filings.

1. The initial two points raised by OCA that the inclusion of state and federal income tax deductions and credits in the DSIC calculation should not result in a rate increase and that Section 1301.1(a) is not limited to accelerated tax depreciation are not necessary to clarify/reconsider in the generic proceeding initiated to develop a revised model DSIC tariff.

With respect to this issue raised by OCA in its Petition at Paragraphs 3 and 4, EAP notes that neither of these issues need to be incorporated as a variable into the modified DSIC calculation. Again, these issues are not ripe for consideration in the context of a generic proceeding. In Paragraph 3, OCA asks the Commission to clarify that under no circumstance should the inclusion of state and federal income tax deduction and credits in the calculation of the DSIC result in a rate increase under 66 Pa. C.S. § 1301.1(a). Here, the Commission is not currently reviewing a DSIC filing and, to the extent that would happen in a future filing, the Commission would address the issue in resolving an actual dispute. There is no need for the

Commission to clarify or reconsider its Order so as to opine on a concern that is not relevant in the context of this generic proceeding and its goal to develop a revised Model DSIC Tariff.<sup>7</sup>

2. OCA's request for clarification of the DSI definition was addressed and resolved by the Order.

With respect to the definition of Distribution System Improvement ("DSI"), OCA is not raising a new or novel concern as to meet the *Duick* standard for reconsideration, as this issue was clearly considered by the Commission when it determined to incorporate the definition of DSI proposed by EAP into the revisions of the Model DSIC tariff. Order at pp. 8 – 9.

3. OCA's request for clarification regarding the inclusion of the Gross Receipts Tax ("GRT") in the DSIC calculation is not necessary to clarify/reconsider in the generic proceeding initiated to develop a revised model DSIC tariff.

OCA notes in its petition that the GRT is either already incorporated into an individual company's DSIC formula, or otherwise shown "in the workpapers supporting" the DSIC calculations. OCA goes on to note that it does "not object to bringing the model tariff into compliance with existing Commission practice." Petition at Paragraph 6. This statement of fact is then used to infer that the inclusion of GRT will increase the DSIC rate and, based on that, should be reconsidered by the Commission under this proceeding. EAP submits that whether any one component increases or decreases a DSIC rate is best evaluated with the totality of information filed during an individual utility's proceeding, and not the basis for reconsideration under *Duick* in this proceeding.

4. OCA's request for clarification of Ordering Paragraph 2 does not involve a new and novel issue.

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<sup>7</sup> Moreover, the language cited from the *McCloskey* decision by OCA in footnote two of its Petition does not support a change to the revised DSIC calculation adopted by the Commission in its Order. Rather the cited language was from the Supreme Court's analysis and ultimate rejection of an argument that certain sections in 1301.1 were in conflict and thus ambiguous.



Paragraph 7 of OCA's Petition is a request to make the changes required by the approved pro forma supplement compulsory rather than permissive by deleting the words "be permitted" from Ordering Paragraph 2. Such a clarification appears unnecessary. It is understood that a utility will adhere to its Commission approved pro forma supplement and that, if it fails to do so, the tariff filing can be disapproved or challenged. Further, the clarification sought seems to overlook the Commission's conclusion that some utilities, such as Columbia Water Company, may have reasons to include variances from the Model Tariff in their filings. The Commission requires that any such variance be accompanied by an explanation which, it is presumed, would be subject to disapproval or challenge. EAP believes this clarification also does not meet the *Duick* standard as a "new and novel" argument and that the proposed resolution does not account for the fact that the Commission recognized that the filings themselves may raise issues that are more fairly determined in individual proceedings.

5. The OCA's request for clarification concerning identification of a particular procedure in which to resolve issues relating to the issue of refunds under *McCloskey* is not a new and novel issue and should not delay the process established in the Commission's Order to implement a revised model DSIC tariff.

EAP contends that the OCA request for clarification and reconsideration concerning "a forum for developing a record on refunds that may be required due to the McCloskey decision" was also considered and answered in the Commission's Order. This is not a "new and novel" argument as required under the *Duick* standard. The Order clearly states that "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 p. 2. The Commission determined that the instant forum was not the appropriate vehicle for addressing the refund issue. Thus, this point is not subject to clarification

or reconsideration under *Duick*. EAP maintains that the implementation of a DSIC surcharge mechanism that adheres to the changes required by the *McCloskey* decision should not be delayed to address issues that the Commission has determined can be resolved in future proceedings.


6. The OCA asks the Commission to reconsider the deadline for utility filings of updated pro forma tariffs with the assumption that the foregoing need be reconsidered. This is not a “new or novel” issue, but one adjudicated by the Commission in its Order by setting the date at December 1, 2022 following its review and consideration of the essential issues and stakeholder feedback in the general proceeding.

Given that the previous five points do not meet the *Duick* standard, there is no need to further delay implementation of the Commission’s Order requiring pro forma tariffs that reflect the updated DSIC calculation by December 1, 2022. As indicated *supra*, granting any portion of the OCA Petition would inevitably delay implementation of the changes required by the *McCloskey* decision beyond January 1 to the detriment of customers and utilities alike.

#### IV. Conclusion

For the reasons set forth above, EAP requests that the Commission dismiss the OCA Petition for Clarification and Reconsideration and maintain the timelines and processes established in its Supplemental Implementation Order at Ordering Paragraph 2. The points raised in OCA's Petition do not present any "new or novel" arguments and thus do not meet the *Duick* standard.

Respectfully submitted,

  
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BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Answer of the Energy Association of Pennsylvania :  
to the Office of Consumer Advocate's Petition for : Docket No. M-2012-2293611  
Clarification and Reconsideration :

**CERTIFICATE OF SERVICE**

I hereby certify that I have, on this day, served true and correct copies of the Answer of the Energy Association of Pennsylvania to the Office of Consumer Advocate's Petition for Clarification and Reconsideration in the above captioned matter upon the following persons and in accordance with the requirements of 52 Pa. Code § 1.54.

**VIA ELECTRONIC MAILING**

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*Donna M. J. Clark*

Date: November 21, 2022

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