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E-File

November 21, 2022

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17120-3265

**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:

Enclosed for filing on behalf of PPL Electric Utilities Corporation (“PPL Electric”) is PPL Electric’s Answer to the Office of Consumer Advocate’s November 10, 2022 Petition for Clarification and Reconsideration of the Order entered October 27, 2022 in the above-captioned proceeding.

Pursuant to 52 Pa. Code § 1.11, the enclosed document is to be deemed filed on November 21, 2022, which is the date it was filed electronically using the Commission’s E-filing system.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in blue ink that reads "Kimberly A. Klock". The signature is fluid and cursive, written over a light blue horizontal line.

Kimberly A. Klock

Enclosure

cc via email: Certificate of Service
RA-PCDSICTAXES@pa.gov
Office of Special Assistants (ra-OSA@pa.gov)

CERTIFICATE OF SERVICE

(Docket No. M-2012-2293611)

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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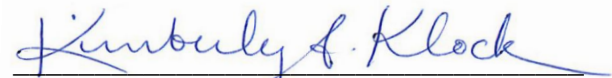
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Date: November 21, 2022



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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 *McCloskey v. Pa.* :
PUC, 255 A.3d 416 (Pa. 2021) :

**ANSWER OF PPL ELECTRIC UTILITIES CORPORATION TO
THE PETITION FOR CLARIFICATION AND RECONSIDERATION FILED BY
THE OFFICE OF CONSUMER ADVOCATE**

PPL Electric Utilities Corporation (“PPL Electric” or the “Company”), pursuant to 52 Pa. Code §§ 5.61 and 5.572, hereby respectfully submits this Answer to the Petition for Clarification and Reconsideration (“Petition”) filed by the Office of Consumer Advocate (“OCA”) on November 10, 2022, in the above-captioned proceeding.

As explained herein and in the Answer filed by the Energy Association of Pennsylvania (“EAP”) on behalf of its members, including PPL Electric,¹ the Pennsylvania Public Utility Commission (“Commission”) should deny the OCA’s Petition.

I. INTRODUCTION AND BACKGROUND

1. PPL Electric is a public utility that provides electric distribution and provider of last resort services in Pennsylvania subject to the regulatory jurisdiction of the Commission. PPL Electric furnishes electric distribution, transmission, and provider of last resort electric supply services to approximately 1.4 million customers throughout its certificated service territory, which includes all or portions of 29 counties and encompasses approximately 10,000 square miles in eastern and central Pennsylvania.

¹ PPL Electric supports the Answer filed by the EAP and respectfully submits its own Answer to expand on the arguments set forth in the EAP’s Answer.

2. By Secretarial Letter entered April 22, 2022, the Commission requested comments on how to address issues pertaining to the distribution system improvement charge (“DSIC”) calculations required in the Pennsylvania Supreme Court’s decision in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021). The Commission invited comment from interested parties on a list of bulleted issues and key topics prior to holding a working group meeting in order to provide a forum for discussion and feedback from stakeholders.

3. On or about July 22, 2022, Comments were filed by: (1) PPL Electric; (2) EAP; (3) Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”), and West Penn Power Company (“West Penn”) (collectively, “FirstEnergy”); (4) the Office of Consumer Advocate (“OCA”); (5) the National Association of Water Companies (“NAWC”); (6) Columbia Water Company (“CWC”); (7) Philadelphia Gas Works (“PGW”); and (8) the Industrial Energy Consumers of Pennsylvania (“IECPA”). Duquesne Light Company (“Duquesne Light”) also filed a Letter in Lieu of Comments.

4. On October 27, 2022, the Commission issued its Supplemental Implementation Order, directing each utility to file a *pro forma* tariff supplement reflecting the Commission’s updated formula for calculating the DSIC, as set forth in Appendix A of the Supplemental Implementation Order, no later than December 1, 2022, to become effective January 1, 2023.

5. On November 10, 2022, the OCA filed its Petition seeking clarification and reconsideration of the Supplemental Implementation Order.

6. For the reasons explained below, the OCA’s Petition should be denied.

II. LEGAL STANDARDS

7. The Commission’s standard for reviewing petitions for reconsideration following final orders is set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559, 1982

Pa. PUC LEXIS 4 (Opinion and Order Upon Reconsideration dated Dec. 17, 1982) (emphasis added):

A petition for rehearing, under the provisions of 66 Pa C.S. § 703(f), properly must seek the reopening of the record for the introduction of additional evidence of some sort. As grounds therefore it must allege newly discovered evidence, not discoverable though the exercise of due diligence prior to the close of the record. *Public Utility Commission v Reading Co.* (1975) 21 Pa Cmwlt 334, 338, 345 A2d 311; *Mobilfone v Pennsylvania Pub. Utility Commission* (1975) 24 Pa Cmwlt 243, 355 A2d 611; *Abramson v Pennsylvania Pub. Utility Commission* (1980) 489 Pa 267, 414 A2d 60.

...

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.

8. Consequently, for a petition to warrant reconsideration by the Commission, it must demonstrate new and novel arguments that were raised below by the petitioner, but not previously considered by the Commission. The Commission has cautioned that the last portion of the operative language of the *Duick* standard -- “by the Commission” -- focuses on the deliberations of the Commission, not the arguments of the parties. *See Pa. PUC v. PPL Elec. Utils. Corp.*, Docket No. R-2012-2290597, p. 3 (Order entered May 22, 2014). Therefore, a petition for reconsideration cannot be used to raise new arguments or issues that should have been, but were not, previously raised.

9. A petition seeking relief under the *Duick* standard may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order in whole or part. Importantly, however, the *Duick* standard does not permit a petitioner to raise issues and arguments considered and decided below such that the petitioner obtains a second opportunity to argue properly resolved matters. *Id.*

10. Further, as explained by the Pennsylvania Supreme Court, petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Dep't of Transp.*, 490 Pa. 264, 416 A.2d 461 (1980).

11. As explained in the following section, the OCA's Petition should be denied.

III. ARGUMENT

12. The OCA raises six issues that it believes warrant clarification or reconsideration by the Commission. Specifically, the OCA:

- a. Proposes to modify Methods 1 and 2 for including state income tax deductions and credits, so that State Tax Flow Through ("STFT") does not increase the DSIC rate (OCA Petition ¶¶ 3-4);
- b. Recommends that the definition of Distribution System Improvement ("DSI") be revised, so that all federal income tax deductions related to DSIC, such as repairs deductions, are included (OCA Petition ¶ 5);
- c. Notes the inclusion of Gross Receipts Tax ("GRT") in the DSIC formula (although the OCA does not oppose the GRT's inclusion) (OCA Petition ¶ 6);
- d. Proposes to change "shall be permitted to file" to "shall file" when referencing the public utilities' obligation to file DSIC compliance tariff supplements (OCA Petition ¶ 7);

- e. Recommends that the Commission initiate a generic proceeding to address refunds or, at the very least, clarify in which proceeding the refund issues will be addressed (OCA Petition ¶ 8); and
- f. Proposes that the Commission reconsider its December 1, 2022 deadline for public utilities to file their DSIC compliance tariff supplements, and establish a new deadline. (OCA Petition ¶ 9).

13. In this Answer, PPL Electric addresses the merits of the OCA’s arguments regarding state income tax deductions and credits, the definition of DSI, and refunds.

A. THE OCA’S PROPOSED CHANGES TO COMMISSION’S METHODS 1 AND 2 ARE FLAWED AND UNSUPPORTED

14. The OCA avers that the DSIC state income tax is itself a deduction from federal taxable income and, therefore, impacts federal taxes. (OCA Petition, p. 4.) According to the OCA, “That net state/federal tax effect should not, however, increase the DSIC rate.” (OCA Petition, p. 4.) As a result, the OCA proposes changes to the two methods that the Commission adopted for including state income tax deductions and credits. For Method 1, the OCA argues that STFT should be reflected in the formula as a negative rather than a positive. (OCA Petition, p. 4.) For Method 2, the OCA contends that “either the effective tax rate or statutory tax rate, whichever is lower, should be used to calculate the [Pre-Tax Rate of Return (“PTRR”)] component.” (OCA Petition, p. 4.)

15. The OCA’s proposed changes should be rejected.

16. First, the focus should be on the aggregate impact of federal and state income tax deductions, not a single component thereof, such as STFT. Section 1301.1(a) of the Public Utility Code states, in pertinent part, that “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). The statute does not provide that every income tax deduction or credit must reduce the DSIC rate on its own. Rather, all of those income tax deductions and credits, in aggregate, must reduce the DSIC rate.² In its Petition, the OCA presents no evidence that a single component of the DSIC calculation, such as STFT, would make the DSIC charge higher than if the DSIC charge included no income tax deductions and credits.³ Thus, the basis for the OCA's recommendations is inherently flawed.

17. Second, the OCA's proposal would prevent public utilities from recovering their tax expenses fully over the lives of their DSIC-eligible assets. With respect to flow-through property for accelerated depreciation, the statutory and effective tax rates over the life of an asset will be the same. However, in the earlier years, the effective tax rate will be lower than the statutory tax rate, and in the later years, the effective tax rate will be higher than the statutory tax rate. Consequently, there must be consistent use of the statutory tax rate or the effective tax rate over the life of an asset, otherwise the public utility will not fully recover the related tax expense.⁴ Yet, under the OCA's proposal, the DSIC would be recalculated every quarter to input either the statutory tax rate or the effective tax rate, whichever one would produce a lower DSIC rate. Therefore, if adopted by the Commission, the OCA's proposal would fundamentally ensure that public utilities under-recover their tax expenses.

18. For these reasons, the Commission should reject the OCA's proposed changes to Methods 1 and 2.

² For example, state income taxes are a deduction for determining federal income tax. Therefore, a decrease in state taxes through accelerated tax depreciation will lower the deduction for federal tax purposes and, all else equal, increase federal income taxes. The net result will be a reduction in overall taxes, which fully complies with the statute.

³ Notably, the OCA does not oppose the inclusion of Gross Receipts Tax ("GRT") in the DSIC calculation, which, as the OCA states, "serves to increase the DSIC rate." (OCA Petition, p. 6.)

⁴ PPL Electric also prefers the use of a statutory tax rate because it provides transparency by showing the proper statutory tax rate being applied in addition to any permanent adjustments (i.e., STFT) that impact the tax computation for the revenue requirement.

B. THE COMMISSION SHOULD REJECT THE OCA’S PROPOSED CHANGES TO THE DEFINITION OF “DSI”

19. The OCA also proposes that the Commission change its newly-adopted definition of DSI. (OCA Petition, p. 5.) In the Supplemental Implementation Order, the Commission adopted the following definition of DSI, which was proposed by the EAP in its Comments:

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.

Supplemental Implementation Order, p. 10. According to the OCA, the end of the new definition should be changed to the following:

DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation and related accumulated deferred income taxes.

(OCA Petition, p. 5.) The OCA contends that its definition should have been adopted because it reflects all federal income tax deductions related to DSIC, such as repairs deductions. (OCA Petition, p. 6.)

20. The Commission should deny the OCA’s proposed changes to the definition of DSI.

21. The OCA never stated in its Comments that the definition of DSI should include all federal income tax deductions related to DSIC, such as repairs deductions. The following passage is the entirety of what the OCA said in its Comments, regarding its proposed change to DSI’s definition:

Reflecting incremental ADIT related to book-tax timing differences created by placing in service eligible property included in the DSIC should in most cases simply require a reduction to rate base to reflect the DSIC related ADIT. Specifically, the tariff definition of the original cost of eligible distribution system improvement projects (“DSI”) should be modified to read “DSI = original cost of eligible distribution system improvement

projects net of accrued depreciation **and the related accumulated deferred income taxes.**” (emphasis indicates new language.)

(OCA Comments, p. 8.) Nothing is mentioned about including repairs deductions and other federal income tax deductions.

22. In addition, the Supreme Court’s *McCloskey* decision solely dealt with the OCA’s argument that ADIT and state income tax deductions should be reflected in the DSIC calculation. *See McCloskey v. Pa. PUC*, 255 A.3d 416, 420 (Pa. 2021). As such, the scope of this proceeding to implement the *McCloskey* decision should be limited to those issues. Nevertheless, on reconsideration, the OCA raises this new issue as to whether other federal income tax deductions, such as repairs deductions, should be reflected in the DSIC.

23. Moreover, the OCA cites this newly-raised issue as justification for delaying a rate decrease for customers effective January 1, 2023. (OCA Petition, p. 9.) The OCA’s issue with the definition of DSI should be raised in individual DSIC proceedings where the parties can present evidence and fully brief their legal arguments, not in this narrow proceeding to implement the *McCloskey* decision.

24. Based on the foregoing, the Commission should reject the OCA’s proposed changes to the definition of DSI.

C. THE COMMISSION SHOULD DENY THE OCA’S REQUEST FOR CLARIFICATION ON REFUNDS

25. The OCA also asks the Commission for clarification on the “venue” in which “refunds will be addressed,” such as the OCA’s preferred option of a “generic proceeding” or some other type of proceeding. (OCA Petition, p. 8.) Also, the OCA requests that the Commission initiate a generic proceeding to address refunds or, at the very least, clarify in which proceeding the refund issues will be addressed. (OCA Petition, p. 9.)

26. The OCA’s request for clarification should be denied.

27. The Commission already stated in its Supplemental Implementation Order 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.” Supplemental Implementation Order, p. 2.

28. Further, there are major legal questions that need to be addressed, including the threshold question of whether the PUC even possesses the legal authority to retroactively apply Section 1301.1(a) and award refunds based on that statute. As PPL Electric explained on page 6 of its Comments, retroactive application of the new DSIC formula raises several legal issues, including, but not limited to, Section 1301.1(c) of the Public Utility Code’s restriction on when Section 1301.1 can be applied,⁵ retroactive ratemaking,⁶ single-issue ratemaking,⁷ Commission-made rates,⁸ and the four-year statute of limitations for refunds under Section 1312(a) of the Public Utility Code.⁹

29. And even if the PUC does have that power, there are many company-specific factual questions that need to be decided. (*See* PPL Electric Comments, p. 7.) For example, refunds under Section 1312(a) of the Public Utility Code are discretionary.¹⁰ Public utilities would have different factual justifications for why the PUC should exercise that discretion and not award

⁵ 66 Pa. C.S. § 1301.1(c) (stating that the statute “shall apply to all cases where the final order is entered after the effective date of this section”)

⁶ *See Popowsky v. Pa. PUC*, 868 A.2d 606, 609 (Pa. Cmwlth. 2004) (“The PUC clearly may not establish rates which are calculated to retroactively recover surpluses or refund deficits created by inaccuracies in its prior rate authorizations.”) (citation omitted).

⁷ *See Pa. Indus. Energy Coalition v. Pa. PUC*, 653 A.2d 1336, 1350 (Pa. Cmwlth. 1995) (“Single-issue ratemaking is similar to retroactive ratemaking and, in general, is prohibited if it impacts on a matter that is normally considered in a base rate case.”).

⁸ *See Cheltenham & Abington Sewerage Co. v. Pa. PUC*, 25 A.2d 334, 336 (Pa. 1942); *West Penn Power Co. v. Pa. PUC*, 100 A.2d 110, 114 (Pa. Super. 1953).

⁹ 66 Pa. C.S. § 1312(a).

¹⁰ *See Emporium Water Co. v. Pa. PUC*, 859 A.2d 20, (Pa. Cmwlth. 2004) (“[T]he Commission’s authority to order refunds pursuant to Section 1312(a) of the Code is discretionary.”); *Nat’l Fuel Gas Distrib. Corp. v. Pa. PUC*, 464 A.2d 546, 555-56 (Pa. Cmwlth. 1983) (“Whether to require a refund under Code Section 1312 of monies previously collected by a utility is a matter charged by Subsection (a) of that provision to the sound discretion of the Commission and the principle last stated is, as we will indicate, directly controlling in the instant case.”).

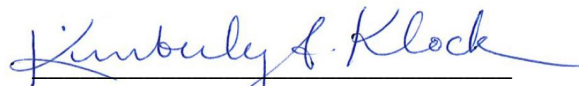
or limit the amount of refunds. Additionally, as explained in PPL's Comments, performing a refund calculation on a quarterly basis for the past six years would be overly complicated and burdensome. (*See* PPL Electric Comments, p. 7.) There would be no one-size-fits-all approach, as many utilities have had their DSIC rates rolled into base rates since 2016, while others have not. (*See* PPL Electric Comments, p. 7.) Thus, the refund issue is best addressed, if at all, in individual proceedings.

30. For these reasons, the Commission should deny the OCA's request for clarification on refunds.

IV. CONCLUSION

WHEREFORE, for all the foregoing reasons, and for the reasons set forth in the Answer of the Energy Association of Pennsylvania, PPL Electric Utilities Corporation respectfully requests that the Pennsylvania Public Utility Commission deny the Petition for Clarification and Reconsideration filed by the Office of Consumer Advocate.

Respectfully submitted,



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Date: November 21, 2022

Attorneys for PPL Electric Utilities Corporation

VERIFICATION

I, BETHANY L. JOHNSON, being the Director of Regulatory Affairs at PPL Services Corporation, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect PPL Electric Utilities Corporation 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.

Date: 11/21/2022

Bethany L. Johnson
Bethany L. Johnson (Nov 21, 2022 15:49 EST)

Bethany L. Johnson