FirstEnergy

2800 Pottsville Pike
PO Box 16001
Reading, PA 19612-6001

Darsh Singh, Esq.
(610) 212-8331
(330) 315-9263 (Fax)

November 21, 2022

VIA ELECTRONIC FILING

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

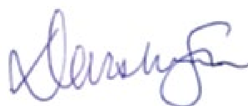
Re: Distribution System Improvement Charge – Implementation Order to Address all Issues Pertaining to the Distribution System Improvement Charge Calculations Required in the Pennsylvania Supreme Court's Decision in McCloskey v. PA. PUC, 255 A.3D 416 (PA. 2021)
Docket No. M-2012-2293611

Dear Secretary Chiavetta:

Enclosed herewith for filing in the above-captioned proceeding is Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company's Answer in Opposition to the Office of Consumer Advocate's Petition for Clarification and Reconsideration of the Supplemental Implementation Order approved by the Pennsylvania Public Utility Commission on October 27, 2022.

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

Very truly yours,



Darsh Singh

DS/dml

Enclosure

c: RA-PCDSICTAXES@pa.gov
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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).

Service by electronic mail, as follows:

Richard A. Kanaskie, Esquire
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120
rkanaskie@pa.gov

NazAarah I. Sabree
Small Business Advocate
Office of Small Business Advocate
555 Walnut Street
1st Floor, Forum Place
Harrisburg, PA 17101-1923
Ra-sba@pa.gov
tereswagne@pa.gov

John W. Sweet, Esquire
Elizabth R. Marx, Esquire
Ria M. Pereira, Esquire
Lauren N. Berman, Esquire
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net

Donna M.J. Clark
Vice President & General Counsel
Energy Association of PA
800 N. Third Street, Suite 205
Harrisburg, PA 17102-2025
dclark@energypa.org

Craig Berry, Esquire
Byran Marco, Esquire
Laura Storino, Esquire
Philadelphia Gas Works
800 W. Montgomery Avenue
Philadelphia, PA 19122
Craig.Berry@pgworks.com
Byran.marco@pgworks.com
Laura.storino@pgworks.com

JT Hand
PA – National Assn. of Water Companies
The York Water Company
130 E. Market Street
York, PA 17401
jth@yorkwater.com

Kenneth M. Kulak, Esquire
Brooke E. McGlinn, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
Ken.kulak@morganlewis.com
Brooke.mcglinn@morganlewis.com

Charis Mincavage, Esquire
Susan E. Bruce, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
cmincavage@mcneeslaw.com
sbruce@mcneeslaw.com

David F. Boehm, Esquire
Kurt J. Boehm, Esquire
Boehm Kurtz & Lowry
36 E. Seventh Street
Suite 1510
Cincinnati, OH 45202
dboehm@bkllawfirm.com
kboehm@bkllawfirm.com

Thomas J. Sniscak, Esquire
Whitney E. Snyder, Esquire
Hawke McKeon & Sniscak LLP
100 North 10th Street
Harrisburg, PA 17101
tjsniscak@hmslegal.com
wesnyder@hmslegal.com

Barry A. Naum
Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
bnaum@spilmanlaw.com
dwilliamson@spilmanlaw.com

Lindsay A. Baxter
Duquesne Light Co.
411 Seventh Avenue
Pittsburgh, PA 15219
lbaxter@duqlight.com

Kimberly A. Klock
Michael J. Shafer
PPL Electric Utilities Corp.
Two North Ninth Street
Allentown, PA 18101-4102
kklock@pplweb.com
mjshafer@pplweb.com

Erin L. Gannon
Senior Assistant Consumer Advocate
Christopher M. Andreoli
Assistant Consumer Advocate
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923
EGannon@paoca.org
CAndreoli@paoca.org

Adeolu A. Bakare, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
PO Box 1166
Harrisburg, PA 17108-1166
abakare@mwn.com

Amy E. Hirakis, Esquire
800 North 3rd Street, Suite 204
Harrisburg, PA 17102
ahirakis@nisource.com

Anthony C. Decusatis, Esquite
Morgan Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
adecusatis@morganlewis.com

Christopher M. Trejchel, Esquire
National Fuel Gas Distribution Corp.
PO Box 2081
Erie, PA 16512
trejchelc@srcx.com

Christopher M. Andreoli
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923
candreoli@paoca.org

Danielle Jouenne, Esquire
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
jouenned@ugicorp.com

Jonathan Nase, Esquire
Cozen O'Connor
17 North Second Street
Suite 1410
Harrisburg, PA 17101
jnase@cozen.com

Kimberly Joyce, Esquire
Aqua Pennsylvania
762 West Lancaster Avenue
Bryn Mawr, PA 19010
kajoyce@aquaamerica.com

Michael Perlow Jr.
Consultant
EKMLLC
443 Main Street
East Greenville, PA 18041
mike@michaelperlowjr.com

Scott J. Rubin, Esquire
Law Office of Scott J. Rubin
4627 Chandlers Forde
Sarasota, FL 34235-7118
Scott.j.rubin@gmail.com

Terrance J. Fitzpatrick
President and CEO
Energy Association of Pennsylvania
800 N. 3rd Street, Suite 205
Harrisburg, PA 17102
ngrear@energypa.org

David P. Zambito, Esquire
Cozen O'Connor
17 North Second Street
Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com

Jack Garfinkle, Esquire
Exelon Business Services Company
2301 Market Street
Legal Dept S23-1
Philadelphia, PA 19101
Jack.garfinkle@exeloncorp.com

Thomas Niesen, Esquire
Thomas Niesen & Thomas LLC
212 Locust Street, Suite 302
Harrisburg, PA 17101
tniesen@tntlawfirm.com

Jessica R. Rogers, Esquire
Suite 600
607 14th Street NW
Washington, DC 20005-2006
jrogers@postschell.com

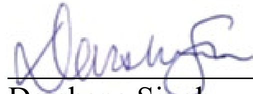
Krysia Kubiak, Esquire
Lindsay Baxter, Analyst
Duquesne Light Company
411 Seventh Avenue 16-1
Pittsburgh, PA 15219
kkubiak@duqlight.com
lbaxter@duqlight.com

Susan Simms Marsh, Esquire
Pennsylvania-American Water Company
852 Westley Drive
Mechanicsburg, PA 17055
Susan.marsh@amwater.com

Theodore S. Robinson, Esquire
Citizen Power
5274 Duncan Street
Pittsburgh, PA 15201
robinson@citizenpower.com

Theodore J. Gallagher, Esquire
Nisource Corporate Services Company
121 Champion Way, Suite 100
Canonsburg, PA 15317
tjgallagher@nisource.com

Dated: November 21, 2022



Darshana Singh
Attorney No. 330971
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
610-212-8331
singhd@firstenergycorp.com

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DISTRIBUTION SYSTEM IMPROVEMENT CHARGE – IMPLEMENTATION ORDER TO ADDRESS ALL ISSUES PERTAINING TO THE DISTRIBUTION SYSTEM IMPROVEMENT CHARGE CALCULATIONS REQUIRED IN THE PENNSYLVANIA SUPREME COURT'S DECISION IN *MCCLOSKEY V. PA. PUC*, 255 A.3D 416 (PA. 2021)	:	**Docket No. M-2012-2293611**

ANSWER OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA POWER COMPANY AND WEST PENN POWER COMPANY TO THE OFFICE OF CONSUMER ADVOCATE'S PETITION FOR CLARIFICATION OR RECONSIDERATION

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 this Answer in opposition to the Office of Consumer Advocate's ("OCA's") Petition for Clarification and Reconsideration of the Supplemental Implementation Order that was unanimously approved by the Pennsylvania Public Utility Commission ("PUC" or the "Commission") on October 27, 2022 (hereafter, "OCA Petition").

I. INTRODUCTION

In the Supplemental Implementation Order, the Commission carefully reviewed the comments submitted by parties[1] in response to its Secretarial Letter issued in this docket on April

[1] The parties submitting comments consisted of the OCA; electric, natural gas and water utilities; trade associations for energy and water utilities; and an association of eleven energy-intensive industrial consumers. The Companies

22, 2022. The Secretarial Letter solicited input on the changes that should be made to the current Distribution System Improvement Charge ("DSIC") Model Tariff to comply with Section 1301.1(a) of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 1301.1(a), as interpreted by the Pennsylvania Supreme Court in *McCloskey v. Pa. P.U.C.*, 255 A.3d 416 (Pa. 2021).[2] The Secretarial Letter underscored the Commission's determination that changes made to the formula for calculating the DSIC to comply with the Court's Opinion in *McCloskey* should "not require unduly complicated computations, but permit reasonable review and audit of DSIC charges and their supporting calculations."[3]

Based on its analysis of the parties' comments, the Commission directed utilities employing a DSIC[4] to file a proforma tariff supplement by December 1, 2022, that includes "the updated [DSIC] formula for calculation of the DSIC" as set forth in the new Model Tariff attached to the Supplemental Implementation Order ("New Model DSIC Tariff").[5] The Commission also directed that, upon approval of each utility's pro forma tariff supplement, the affected utilities should file their quarterly DSIC calculations and tariff updates by December 21, 2022, to become effective January 1, 2023.[6] The Commission stated that those dates were chosen so that the revised DSIC surcharge mechanism would be implemented without further delay and to ensure it is in

---

submitted their own detailed Comments in response to the Secretarial Letter. *See* Supplemental Implementation Order, pp. 5-6.

[2] A detailed procedural history of this proceeding is set forth in the Supplemental Implementation Order (pp. 2-5) and, therefore, will not be repeated here.

[3] Supplemental Implementation Order, pp. 4-5 (quoting the April 22, 2022, Secretarial Letter (p. 3)).

[4] The Philadelphia Gas Works and Pittsburgh Water and Sewer Authority were excluded from the requirement because they do not pay federal or state income taxes and, therefore, are not subject to 66 Pa.C.S. § 1301.1(a).

[5] Supplemental Implementation Order, p. 2.

[6] *Id.*

place during calendar year 2023,[7] while corresponding to the annual reconciliation period for DSIC costs and revenues.[8]

II. SUMMARY AND OVERVIEW

In its Petition, the OCA requests "clarification and reconsideration" of the Supplemental Implementation Order[9] and, as part of that request, seeks to postpone, for an unspecified time, the December 1, 2022, and December 21, 2022, deadlines, respectively, for filing a pro forma tariff supplement and filing quarterly DSIC calculations based on such tariff supplements following their approval.[10]

The OCA Petition should be denied because it fails to meet the established standard for granting reconsideration or clarification. The Petition seeks only to have the Commission address, for a second time, questions that were already considered and decided against the OCA. As a review of the Petition reveals, the OCA does not present any "new and novel arguments, not previously heard" nor does it articulate any "considerations" that were "overlooked or not addressed by the Commission," as required by the Commission's well-established standards.[11] In fact, in several instances, the Petition revisits issues that had been specifically identified in the Secretarial Letter that the OCA already addressed in its comments or had an opportunity to address and chose not to do so. Thus, contrary to the OCA's contentions, it is not seeking reconsideration to "reply" to other parties' comments but, rather, to belatedly and unilaterally supplement its own

[7] *Id.*
[8] *Id.*, Appendix A, Section 4.B. ("The DSIC is subject to annual reconciliation based on a reconciliation period consisting of the twelve months ending December 31 of each year . . .")
[9] The standard for determining whether "clarification" of a Commission order is warranted is not different from the standard for granting reconsideration, as this Commission held in *Application of PPL Elec. Util. Corp.*, Docket No. A-2009-2082652 *et al*., 2010 Pa. PUC LEXIS 1707 at 3-4 (Order entered April 22. 2010). *See also Energy Efficiency and Conservation Program*, Docket No. M-2008-2069887, 2009 Pa. PUC LEXIS 1158 at 3-4 (Order entered June 2, 2009). Because the same legal standard applies to both clarification and reconsideration, the relief sought by the OCA will be referred to hereafter in this Answer as a request for reconsideration.
[10] *See* OCA Petition, pp. 1, 3 and 9-10.
[11] *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1985) ("*Duick*").

previously-filed comments. The Commission should reject the OCA's contentions, which, in substance, are a veiled attempt to get a "second bite at the apple" after the deadline for filing comments has come and gone.

Additionally, the Commission is correct to set firm deadlines of December 1 and December 21, 2022, to file pro forma tariff supplements conforming to the New Model DSIC Tariff and to file DSIC calculations complying to the terms of the new supplements. As previously explained, failure to adhere to the existing schedule will create a significant disparity between the implementation of changes in the DSIC formula made to conform to Section 1301.1(a) and the reconciliation period for DSIC costs and revenues.

Under the schedule adopted by the Commission, the initiation of the approved changes in the DSIC formula will correspond to the reconciliation period. If the schedule is delayed, as the OCA proposes, either: (1) disruptive anomalies in the timing of DSIC changes relative to the reconciliation year will be introduced, which will frustrate the Commission's goals of avoiding "unduly complicated computations" and facilitating "reasonable review and audit of DSIC charges;" or (2) to avoid such anomalies in timing, the implementation of the New Model DSIC Tariff would have to be delayed for a year. Either outcome violates guidelines the Commission established in the Supplemental Implementation Order.[12]

III. ANSWER TO THE OCA'S SPECIFIC AVERMENTS

In the numbered paragraphs of its Petition, the OCA sets forth four purported reasons that it contends should support reconsideration.[13] None of those points are valid nor do they satisfy the *Duick* standard, as explained below.

---

[12] *Id*., pp. 2 and 4-5.
[13] Paragraph No. 1 of the OCA Petition quotes the holding of *Duick, supra*, which establishes the legal standard for granting reconsideration. The Companies agree that the passage has been quoted accurately but disagree with the

Paragraph Nos. 3, 4 and 6. In Paragraph No. 3, the OCA contends that the Commission should grant reconsideration to state that recognizing in the DSIC calculation property-related income tax deductions and credits associated with quarterly additions of DSIC-eligible utility plant "will *reduce* the [DSIC] rate or have no impact but not increase the [DSIC] rate." Significantly, there is no general statement within the four corners of the New Model DSIC Tariff that suggests the changes made to conform to Section 1301.1(a) would drive an increase in the DSIC rate. In short, the OCA is kicking over a straw man in an unsuccessful attempt to satisfy the rigorous legal standard established in *Duick*. The Supplemental Implementation Order is already clear on its face and, therefore, there is no valid basis to grant reconsideration on the grounds advanced by the OCA.

Relatedly, in Paragraph No. 4, the OCA contends that the New Model DSIC Tariff should be modified in two respects to preempt possible misinterpretation. Specifically, the OCA avers that the revised DSIC formula might be interpreted to suggest that changes made to comply with Section 1301.1(a) could yield a DSIC rate higher than it would have been without those changes. The OCA-proposed modifications are not based on a reasonable interpretation of the operative language, are unnecessary and, therefore, do not furnish any valid basis for granting reconsideration.

First, the OCA focuses on the term "STFT" [State Tax Flow Through], which is defined as the state income tax effects of flowing through the book-tax timing differences between accelerated tax depreciation and book depreciation. STFT is only used by utilities that employ

---

OCA's contention that the *Duick* standard has been satisfied in this case. Paragraph No. 2 of the Petition is a high-level summary of the four purported reasons advanced by the OCA to support reconsideration. Those points are expanded in the balance of the OCA's Petition, to which the Companies provide their response in Section III of this Answer.

"Method 1," as described at page 7 of the Supplemental Implementation Order.[14] The OCA contends that "STFT" should be preceded by a minus sign and not the plus sign shown in the New Model DSIC Tariff or, alternatively, should be shown in parentheses (the equivalent of a minus sign). The OCA argues that its proposed changes are needed to assure that, if Method 1 is used, STFT would only reduce the DSIC rate, not increase it.

The OCA's contention is incorrect and, in any event, unnecessary. The New Model DSIC Tariff clearly defines STFT as the state tax effect to be flowed through to customers based on the difference between tax and book deprecation associated with incremental DSIC-eligible plant. Tax depreciation is higher than book depreciation during the early years of the service life of new plant property. Eligible property is typically reflected in the DSIC calculation only during the early years of its service life – i.e., before it is rolled into rate base in a subsequent base rate case and the DSIC reset to zero.[15] Therefore, the formula in the New Model DSIC Tariff reflects the term "STFT" as a negative value. Changing the sign preceding STFT to a negative (or putting STFT in parentheses, which amounts to the same thing) would require subtracting a negative value or, algebraically, adding STFT to the recoverable fixed costs, not deducting it – i.e., the outcome the OCA says it wants to avoid. In any event, and more importantly, the formula and the associated definitions of each of its components in the New Model DSIC Tariff, together with the explanation of Method 1 in the Supplemental Implementation Order, clearly express the Commission's intention that STFT will reduce the fixed costs recoverable under the DSIC. Consequently, there is no valid basis to grant reconsideration as the OCA requests.

[14] If a utility chooses Method 2 to reflect the state-tax flow-through as an adjustment to the composite tax rate used to gross-up the PTRR [Pre-Tax Rate of Return], as the New Model DSIC Tariff permits, then the STFT component of the formula does not come into play at all.
[15] *See* 66 Pa.C.S. § 1358(b).

The second revision proposed by the OCA applies to Method 2, as defined at page 7 of the Supplemental Implementation Order. Under Method 2, the flow-through of book-tax timing differences associated with accelerated tax depreciation on DSIC-eligible additions would be recognized by employing an "effective" state tax rate to compute the gross-up factor used to derive the pre-tax rate of return.[16] Because an effective tax rate reflects the flow-through of state tax effects of accelerated tax depreciation, which typically exceeds book depreciation for new plant additions, the effective tax rate is lower than the statutory tax rate. Nonetheless, in Paragraph 4 of its OCA Petition, the OCA seeks reconsideration to make a new argument that the New Model DSIC Tariff should be revised to require that "either the effective tax rate or the statutory tax rate, *whichever is lower*, should be used to calculate the PTRR component."

The OCA's untimely proposal should be rejected for several reasons. First, it is difficult to conceive of circumstances where the effective tax rate would *not* be lower than the statutory rate. Consequently, the OCA's proposed addition is a moot point.[17] Moreover, the OCA devoted over five pages of its Comments filed on July 22, 2022 to describing its position that an "effective" tax rate (i.e., Method 2) should consistently be used to reflect book-tax timing differences related to accelerated tax depreciation of new DSIC-eligible plant additions. The OCA's Comments said nothing about mandating the lower of the effective tax rate or the statutory tax rate. The OCA had

---

[16] If a utility chooses Method 1 to reflect the state-tax flow-through as a separate element of the DSIC formula, the statutory tax rate must be used, and the effective tax rate is irrelevant.

[17] Because book-tax timing differences can reverse over the life of a unit of property, it is theoretically possible that, in later years of the tax life of such property, the reversal might cause book depreciation to exceed tax depreciation. Even if that extraordinary scenario could materialize, it would be inconsistent and inequitable to require a utility to toggle back and forth between the use of an effective tax rate under Method 2 and a statutory tax rate under Method 1 based solely upon which approach is perceived at the time to produce the maximum benefit to customers. In addition to violating fundamental principles of fairness, that approach directly contravenes the Commission's determination in the Supplemental Implementation Order (p. 7) that "either method [i.e., either Method 1 or Method 2] will calculate an identical DSIC surcharge." Furthermore, because DSIC-eligible property has a relatively long life, it is difficult to conceive of a scenario where enough DSIC-eligible plant would experience a "reversal" of the book-tax timing difference to cause the effective tax rate to exceed the statutory tax rate before such plant must be rolled-into the utility's rate base in a base rate case. *See* 66 Pa.C.S. § 1358(b).

the opportunity to fully articulate its position in its Comments but did not even mention the "lower of" effective or statutory tax rate proposal it is now advancing for the first time in its Petition. While reconsideration of this issue is not warranted under any circumstances, it definitely should not be granted to afford the OCA an opportunity to change its position from what the OCA previously presented in its Comments to this Commission.

In Paragraph No. 6 of its Petition, the OCA contends that recognizing the impact of Gross Receipts Tax ("GRT") on amounts billed under the DSIC by electric utilities – as the Commission has done since the inception of the DSIC – is a "further reason to clarify" that changes made to conform the DSIC formula to Section 1301.1(a) will only reduce the DSIC rate, not increase it. There is no logical connection between the Commission's allowing electric utilities to recover GRT and the alleged need to reconsider the Supplemental Implementation Order.

As the OCA concedes, it does not object to reflecting the recovery of GRT for electric utilities as a term of the DSIC formula. Moreover, the averments of Paragraph No. 6 of the Petition ignore (or misstate) the relevant law. The Commission's determination that the DSIC revenues of electric utilities are subject to GRT, which may be recovered as a legitimate cost of furnishing electric service, is not derived from the DSIC-specific sections of the Public Utility Code. Rather, there is a separate provision of the Code imposing this tax on "the gross receipts of electric distribution companies."[18]

Thus, as its name indicates, GRT must be paid on an electric distribution company's "gross receipts" whether those gross receipts are generated by base rates, the DSIC, or other rate adjustment mechanisms. In similar fashion, an allowance for recovery of GRT is an overlay on every dollar of an electric distribution company's "gross receipts" regardless of its source. The

[18] 66 Pa.C.S. § 2810(b).

Commission's determination that DSIC revenues (like every other source of the Companies' gross receipts) are subject to GRT and, therefore, are also subject to the generally-applicable provision for recovery of that tax, is based on separate, non-DSIC provisions of the Code. The OCA's effort to conflate those DSIC and non-DSIC statutory provisions is clearly wrong and should be rejected.

Paragraph No. 5. In both its April 22 Secretarial Letter and the Supplemental Implementation Order, the Commission emphasized that changes to the DSIC formula should "not require unduly complicated computations but permit reasonable review and audit of DSIC charges and supporting calculations."[19] This was an important guiding principle for developing the New Model DSIC Tariff, which the OCA acknowledged and affirmed in its July 22 Comments (p. 1) ("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.").

The Commission adopted revised DSIC language that was carefully crafted to achieve its goal by defining "DSI" (the original cost of Distribution System Improvements) to include, as an offset, only "associated accumulated deferred income taxes pertaining to property-related book/tax depreciation timing differences resulting from the use of accelerated depreciation resulting from the use of accelerated depreciation per Internal Revenue Code, 26 U.S. Code § 168."[20]

The definition of DSI (and very similar language defining STFT) captures income tax effects of the major book-tax timing differences generated by a utility's capital investment in new DSIC-eligible plant and equipment.

---

[19] Supplemental Implementation Order, p. 6. *See also id*., pp. 4-5.
[20] Similarly, the New Model DSIC Tariff defines "STFT" by reference only to "book-tax timing differences between accelerated tax depreciation and book depreciation net of federal tax."

The OCA's Comments filed on July 22 underscored that accelerated tax depreciation should be the focus of the changes to the DSIC formula to address Section 1301.1(a):

> [U]tilities charging the DSIC should begin tracking the ADIT balances that result from book-tax timing differences or DSIC-eligible plant such as, but not necessarily limited to, method and life differences related to the use of accelerated federal income tax depreciation.[21]

Elsewhere in its Comments, the OCA also highlights accelerated depreciation as the focus of changes to the DSIC formula to accommodate Section 1301.1(a): OCA Comments, p. 2 (referring to state income tax deductions "for state tax depreciation" and changes needed for "reflecting the impact of state tax depreciation deductions") and p. 3 (referring to "state allowed tax depreciation" that "reduce[s] the state taxable income" and "income deductions for tax depreciation that are not recognized using the utilities' current methods for calculating the DSIC").

The Companies addressed the issue of how to revise the DSIC formula to accommodate Section 1301.1(a), as interpreted by *McCloskey*, without unduly complicating the calculation, review and audit of the DSIC by offering language that defined "DSI" by reference to accelerated tax depreciation under Section 168 of the Internal Revenue Code. Other parties (e.g., the Energy Association of Pennsylvania and PPL Utilities) also followed the PUC's guiding principle by offering definitions of DSI similar to the one the Commission adopted. In short, the Commission considered, and balanced, the need to reflect the tax effects of adding new plant investment in the DSIC formula while also avoiding undue complication, which would violate the legislature's intent to create "a simplified framework . . . for a DSIC calculation" that does not entail "the in-depth investigation and review of base rates."[22]

[21] OCA Comments, p. 7.
[22] *See McCloskey (Columbia Gas) v. Pa. P.U.C.*, 127 A.3d 860, 870-71 (2015).

The OCA seeks reconsideration of the Supplemental Implementation Order for the purpose of deleting language from the definition of DSI that focuses the calculation of tax effects on timing differences related to accelerated depreciation and adopting the definition the OCA proposed in its Comments (p. 8) already considered by the Commission. The OCA contends that book-tax timing differences may include more than accelerated tax depreciation, and all such differences should be encompassed in the DSIC calculations.

There are many book-tax timing differences that are reflected in utilities' books of account for financial reporting purposes and some of those differences are generated by placing new plant in service. The OCA specifically mentions deductions for the repair allowance, which arise when expenditures are capitalized for book purposes but treated as expense for income tax purposes. However, introducing such additional book-tax timing differences would create significant complications for computing the DSIC and would create even greater complications for reviewing and auditing of the DSIC by the PUC. The possible impact on ADIT of trying to include all forms of property-related book-tax timing differences would be outweighed by the additional complications it would introduce to the computation, review and audit of each quarterly DSIC update. The OCA's proposal would, therefore, ignore the Commission's prudent admonition to avoid "unduly complicated computations" in order to facilitate "reasonable review and audit of DSIC charges and their supporting calculations."

The Commission has already considered how best to revise the DSIC formula to conform to Section 1301.1(a) while implementing the legislature's intent that the DSIC should be a "simplified framework" and the Commission's directive that DSIC calculations should not be "unduly complicated." The language adopted in the New Model DSIC Tariff achieves those goals. The OCA, by filing its Petition, is simply asking the Commission to address, for a second time, an

issue the Commission considered and properly resolved in the Supplemental Implementation Order in rejecting the same language OCA now offers again. As such, the OCA's contentions do not meet the *Duick* standard and, therefore, there is no valid basis for the Commission to reconsider its definition of the term "DSI."

Paragraph No. 7. At page 2 of the Supplemental Implementation Order, the Commission directs each utility employing a DSIC to file a pro forma tariff supplement by December 1, 2022, to reflect the changes to the DSIC formula set forth in the New Model DSIC Tariff. In addition, the Commission issued the following additional directives:

> 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. (Emphasis added; footnote omitted.)

Similarly, at page 13 of the Supplemental Implementation Order, the Commission echoed the directives from page 2 of that Order, as follows:

> The purpose of this Supplemental Implementation Order is to address the DSIC calculation and the DSIC model tariff to implement changes required by the *McCloskey* decision. The Commission has determined that to comply with the *McCloskey* decision jurisdictional utilities that have a DSIC mechanism *file an updated DSIC tariff and DSIC calculations consistent with the Model Tariff as attached as Appendix A.* The updated Model Tariff should be filed as the utility's fourth quarter 2022 quarterly DSIC filing with an issue date of December 1, 2022 to be effective January 1, 2023. (Emphasis added.)

Notwithstanding those unambiguous statements, the OCA contends that the Commission should grant reconsideration because Ordering Paragraph No. 2 might be misconstrued to make the implementation of the New Model DSIC Tariff by each utility merely optional, not mandatory. The focus of the OCA's argument is the second sentence of Ordering Paragraph No. 2, which

provides that, after a utility has filed the required pro form tariff supplement and the Commission has approved it, the utility "shall be permitted to implement the proposed tariff changes with its quarterly DSIC update effective January 1, 2023." The preceding sentence, which the OCA does not quote, states:

> **[IT IS ORDERED:]** 2. That all jurisdictional utilities with a Commission-approved DSIC mechanism file a pro forma tariff supplement reflecting the updated formula for calculation of the DSIC, as set forth in Appendix A, the New Model DSIC Tariff attached to this Implementation Order by December 1, 2022.

When Ordering Paragraph No. 2 is read in its entirety and in the context of the discussion in the body of the Supplemental Implementation Order, the Commission's intent is clear and unmistakable:

- By December 1, 2022, utilities must file pro form tariff supplements conforming to the New Model DSIC Tariff;
- The tariff supplement must bear an effective date of January 1, 2023;
- DSIC calculations must be filed by December 21, 2022, supporting the DSIC rate that will become effective on January 1, 2023, and those calculations must conform to the formula in the New Model DSIC Tariff;
- The tariff supplement filed by each utility may not be implemented until it has been approved by the Commission (to ensure that it does, in fact, conform to the Appendix A in the Supplemental Implementation Order);
- Upon approval by the Commission, each utility's tariff supplement will become effective on January 1, 2023, and the corresponding quarterly update of the DSIC rate, calculated in accordance with the approved tariff supplement, will be initiated on the same date.

Reading the relevant language of the Supplemental Implementation Order in its entirety and in context, it is clear that the alternative interpretation advanced by the OCA is unreasonable and does not furnish any valid basis for granting reconsideration of the Supplemental Implementation Order.

Moreover, the OCA ignores the consequences for a utility that fails to implement the Commission-approved New Model DSIC Tariff as of January 1, 2023. Once the new tariff supplement has been approved, it displaces the Commission authorization of the pre-existing DSIC rider in each utility's tariff. If a utility elects not to implement the *new* DSIC tariff supplement, it could not simply revert to the rider authorizing the pre-existing DSIC formula because those tariff provisions were superseded by the new, PUC-approved tariff supplement. A utility would have to choose either to implement the DSIC under the terms of the newly-approved tariff supplement or not charge any DSIC at all. No utility would choose to refrain from implementing the Commission-approved New Model DSIC Tariff – even assuming such a choice exists, which it does not – where the alternative is not being able to charge any DSIC at all.

Paragraph No. 8. The Commission's February 24, 2022 Order at Docket Nos. P-2015-2508942 *et al* granted the Companies' Petition for Interlocutory Review. In so doing, the Commission held that it was appropriate to establish a generic proceeding for the purpose described in the Material Question presented by the Companies, namely, "revising the Model Tariff adopted in [the Commission's August 2, 2012 Implementation Order] to comply with Section 1301.1(a) . . . as interpreted by the Pennsylvania Supreme Court."[23] The scope of the generic proceeding delineated in the February 24 Order is consistent with the limited scope of the remand by the Pennsylvania Supreme Court as stated in *McCloskey*:

[23] *See* Supplemental Implementation Order, p. 4 (emphasis added).

> Accordingly, we affirm the orders of the Commonwealth Court remanding these matters "to the PUC for the purpose of requiring [the Utilities] *to revise their tariffs and Distribution System Improvement Charge calculations* in accordance with Section 1301.1(a) pf the Public Utility Code, 66 Pa.C.S. § 1301.1. (Emphasis added.)

Neither the Pennsylvania Supreme Court, in *McCloskey*, nor this Commission, in the February 24 Order addressing the Court's remand, raised the issue of possible liability for refunds or how such refunds might be determined, if any were required. Both the Court and the Commission stated that the remand proceeding should determine only the tariff changes necessary to conform to Section 1301.1(a).

While the Secretarial Letter issued on April 22, 2022 solicited comments on a range of issues, including possible refunds, the Secretarial Letter did not – and could not – alter the scope of the generic proceeding, which was established by the Pennsylvania Supreme Court's remand directive and the February 24 Order and is limited to considering and approving changes to the DSIC tariff. Consequently, the Commission correctly determined in the 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."[24] The plain language of the Commission's finding, appropriately excluding issues related to refunds, could not be more clear, and to argue otherwise falls well short of the standards for reconsideration outlined in *Duick.*

The Commission should reject the OCA's effort to interject refunds by means of a Petition for Reconsideration. The OCA is not seeking reconsideration for a purpose that conforms to the *Duick* standard. Instead, it is using a Petition for Reconsideration to revisit a topic the OCA already discussed in its Comments filed on July 22, 2022, which the Commission considered.

[24] *Id.*, p. 2 (emphasis added).

Furthermore, in so doing, the OCA is also trying to substantially change its previously-stated position.

In its July 22 Comments, the OCA expressed its view that refunds should be required, but only for the periods subsequent to July 31, 2019. More importantly, the OCA acknowledged that determining refund liability was case-specific and fact-sensitive and, therefore, required utility-by-utility examination of the issue:

> It will be necessary to individually determine the refund amount for each utility that charged an overstated DSIC rate during that period [after July 31, 2019]. The OCA recognizes that not all utilities will owe refunds.[25]

Apparently, after filing its Comments, the OCA changed its thinking on this issue and now desires a broad generic proceeding for refunds. However, the OCA change of position does not alter the fact that issues relating to refunds are outside the scope of this proceeding. In any event, if refund liability is to be considered, it is best to address that issue on a case-by-case basis given the significant differences in each utility's situation - including whether any refunds may be owed at all – just as the OCA acknowledged in its earlier Comments. If the OCA now wants to promote a generic proceeding, reconsideration of the Supplemental Implementation Order is not the appropriate vehicle.

In summary, reconsideration of the Commission's determination is not warranted and, indeed, is not permitted under the *Duick* standard. The OCA has previously set forth its position in Comments to the Commission. Having done so, it is improper for the OCA, by way of a request for reconsideration, to revisit that issue in order to change its previously articulated position. The Commission correctly determined that all issues pertaining to refunds are outside the scope of this

[25] OCA Comments, p. 11.

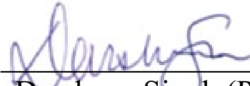
proceeding, and the OCA has not stated any valid reason for the Commission to reconsider that decision.

Paragraph No. 9. The averments of Paragraph No. 9 are a prayer for relief to which a detailed response is not required. The relief requested by the OCA in Paragraph No. 9 of its Petition should be denied for the reasons set forth in Sections II and III, above, and Section IV, below.

IV. CONCLUSION

The OCA has failed to set forth any valid basis for the Commission to grant reconsideration under the applicable requirement of the *Duick* standard, and the OCA's Petition for Clarification or Reconsideration should, therefore, be denied. Extending the deadlines for filing pro forma tariff supplements and conforming DSIC calculations beyond December 1 and December 21, 2022, respectively, as the OCA requests, will cause a serious disparity between the implementation of changes in the DSIC formula, as required by the *McCloskey* decision, and the reconciliation period for the DSIC. The Commission chose those dates to assure that DSIC calculations would not become unduly complicated and to "permit reasonable review and audit of DSIC changes." Those goals would not be attainable if the OCA's requested relief were granted.

Respectfully Submitted



Darshana Singh (Pa. No. 330971)
Tori L. Giesler (Pa. No. 207742)
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
Phone: 610.212.8331
tgiesler@firstenergycorp.com
singhd@firstenergycorp.com

Kenneth M. Kulak (Pa. No. 75509)
Brooke E. McGlinn (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5384 (bus)
215.963.5001 (fax)
ken.kulak@morganlewis.com
brooke.mcglinn@morganlewis.com

Counsel for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company

Dated: November 21, 2022