

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

**Petition of the Pennsylvania Office of
Consumer Advocate for Clarification and
Reconsideration of the Pennsylvania
Public Utility Commission's Supplemental
Implementation Order entered October
27, 2022**

**Public Meeting held March 2, 2023
2293611-LAW
Docket No. M-2012-2293611**

DISSENTING STATEMENT OF COMMISSIONER KATHRYN L. ZERFUSS

Before the Commission is the Petition for Clarification and Reconsideration of the Pennsylvania Office of Consumer Advocate (Petition) regarding the Commission's Supplemental Implementation Order entered on October 27, 2022 in this docket.¹ The *Supplemental Implementation Order* revised the Model Tariff adopted by the Commission on August 2, 2012 to update the formula used to calculate eligible utilities' Distribution System Improvement Charge (DSIC) and required all jurisdictional utilities with a Commission-approved DSIC rate to file a *pro forma* tariff supplement reflecting the updated DSIC calculation by December 1, 2022. The Commission further ordered that each utility file, upon Commission approval of the *pro forma* supplement, its quarterly DSIC calculations and corresponding tariff updates by December 21, 2022, to be effective on January 1, 2023.

The *Supplemental Implementation Order* derived from the Pennsylvania Supreme Court's July 21, 2021 Opinion in *McCloskey v. Pa. Pub. Util. Comm'n*, 255 A.3d 416 (Pa. 2021) (*McCloskey*). In that case, the Supreme Court held that Section 1301.1(a) of the Public Utility Code, 66 Pa.C.S. § 1301.1(a), applies to the calculation of a utility's DSIC rate, and thus, utilities must include in the computation of their DSIC rates the income tax deductions and credits associated with DSIC-eligible expenses or investments. The Supreme Court remanded the matter to the Commission for further proceedings consistent with its ruling.

¹ *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. Pub. Util. Comm'n, 255 A.3d 416 (Pa. 2021), Docket No. M-2012-2293611 (Supplemental Implementation Order entered October 27, 2022) (Supplemental Implementation Order).*

To comply with the Supreme Court's interpretation of Section 1301.1(a) in *McCloskey*, the Commission issued a Secretarial Letter to initiate a generic proceeding to revise the Model DSIC Tariff and to provide interested parties notice and an opportunity to be heard. The April 22, 2022, Secretarial Letter sought comments addressing the following topics:

- Changes to be made to the current Model DSIC Tariff, including the necessary computation, reconciliation and other language to implement the directive of the Supreme Court to recognize incremental Accumulated Deferred Income Taxes (ADIT) and state tax depreciation deductions for accelerated depreciation in quarterly calculations of DSIC charges;
- Elements of the formula required for calculating quarterly DSIC updates needed to determine (1) the state income tax effects of book-tax timing differences created by placing in service eligible property included in the DSIC calculation and (2) ADIT that reflects the book-tax timing differences created by placing in service eligible property included in the DSIC, and to do so that such revisions to the formula for calculating the DSIC do not require unduly complicated computations but permit reasonable review and audit of DSIC charges and their supporting calculations;
- 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; and
- Standards to establish a reconciliation process for timing differences and issues for determining the proper level of ADIT and state income taxes for book-tax timing issues created by placing in service eligible property included in the DSIC.

The Commission received Comments from the OCA, various industry associations, and several impacted utilities. No opportunity for Reply Comments was afforded in the Secretarial Letter and no working group was established.

After considering the Comments, the Commission issued the *Supplemental Implementation Order*. The OCA timely filed its Petition requesting Clarification and Reconsideration of certain aspects of that order. Answers to the Petition were received. The matter is now ripe for our consideration.

When presented with a Petition for Reconsideration and/or Clarification, the Commission applies the standards set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982):

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 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 by the Commission.

Duick, 56 Pa. P.U.C. at 559 (quoting *Pa. R.R. Co. v. Pa. Pub. Serv. Comm’n*, 179 A. 850, 854 (Pa. Super. 1935)).²

Under the standards of *Duick*, a petition for clarification or reconsideration may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior order, in whole or in part. However, such a petition is likely to succeed only when it raises “new and novel arguments” not previously heard or considerations which appear to have been overlooked by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

Duick essentially requires the Commission to perform a two-step analysis. First, the Commission must determine whether the petitioner has offered any new arguments that

² A petition for clarification is also reviewed under the *Duick* standard. See *Application of PPL Electric Utilities Corporation Filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the Pennsylvania Portion of The Proposed Susquehanna-Roseland 500 kV Transmission Line*, Docket No. A-2009-2082652 *et al.*, 2010 Pa. PUC LEXIS 1707 at 3 (Order entered April 23, 2010).

were not addressed by the Commission in its previous order. The Commission will not reconsider its previous decision based on arguments that have already been made. Second, the Commission must evaluate any new arguments or evidence and decide whether modification of its previous order is warranted. However, the Commission will not necessarily modify a prior order just because a petitioner offers a new argument that was not addressed by the Commission in its previous order.

The Commission has administrative discretion regarding whether to grant or deny a petition for clarification or reconsideration of an order filed under 66 Pa.C.S. § 703(g). *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 659 A.2d 1055, 1065 (Pa. Cmwlth. 1995). However, such a petition should only be granted judiciously and under appropriate circumstances because such an action results in the disturbance of a final order. *Id.* As such, the Commission has wide latitude to deny a petition for clarification or reconsideration, and its decision will not be overturned by an appellate court absent a showing that the Commission abused its discretion. *Id.*

Applying these standards to the OCA's Petition, I would find that OCA has met the *Duick* standard and grant clarification and reconsideration on several of the OCA's points. I find significant that no opportunity for Reply Comments or stakeholder meetings were offered in our Secretarial Letter, and consequently, the first opportunity for the OCA to raise these new and novel arguments was in its Petition. The Commission has the discretion to judiciously grant reconsideration and/or clarification. Doing so here would further appropriate actions in response to the Supreme Court's remand.

Accordingly, and consistent with my reading of the court's holding, I would grant the OCA's Petition in part, more specifically, on the following points:

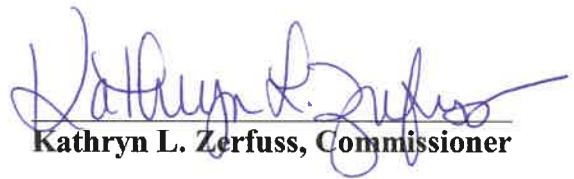
- We should clarify that changes made to the DSIC formula pursuant to *McCloskey* will reduce the rate or have no impact, but not increase the rate.
- Section 1301.1(a) requires that all federal income tax deductions and credits related to investment included in the DSIC rate, not limited to accelerated tax depreciation. Thus, the definition of Distribution System Improvement (DSI) component of the DSIC formula should read: "DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation and related accumulated deferred income taxes."
- Refund issues should be considered in an efficient and overarching generic proceeding, and not in the individual utility DSIC filings. The Commission's Secretarial Letter identified refund issues as an important topic by providing a list of detailed questions and pursuing the answers to those in a generic proceeding would indeed foster a consistent approach as opposed to the twenty-six anticipated utility DSIC formula update filings. The issues would include, but not be limited

to: 1) what are the refund and refund repayment periods; 2) should interest be applied; and 3) at what rate?

All interested entities are benefitted when our orders are clear and unambiguous. Moreover, the efficient and streamlined use of Commission resources, and all interested parties is always a priority for me. OCA has raised new and persuasive arguments. The clarifying and purposeful changes to the *Supplemental Implementation Order* detailed above are advisable to serve the public interest and comply with the court's holding.

For these reasons I respectfully dissent.

DATE: March 2, 2023



Kathryn L. Zerfuss, Commissioner