

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held March 2, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

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

M-2012-2293611

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) is the Petition of the Pennsylvania Office of Consumer Advocate (OCA) for Clarification and Reconsideration of the Commission's Supplemental Implementation Order entered October 27, 2022.¹ The *Supplemental Implementation Order* (1) 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 (2) 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

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).*

by December 21, 2022, to be effective on January 1, 2023. For the reasons expressed below, the Commission denies the OCA's Petition for Clarification and Reconsideration.

BACKGROUND

The Model DSIC Tariff was revised pursuant to 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 *McCloskey*, 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. As such, the Supreme Court held that 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 also remanded the matter to the Commission to have the appellant utilities—the FirstEnergy Companies² (FirstEnergy) and Newtown Artesian Water Company—revise their DSIC calculations in accordance with its ruling.

On April 22, 2022, 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 Commission initiated this proceeding to comply with the Supreme Court's interpretation of Section 1301.1(a) of the Code in *McCloskey*. 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

² Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company.

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, the Energy Association of Pennsylvania (EAP), the National Association of Water Companies, the Industrial Energy Consumers of Pennsylvania, the Columbia Water Company (Columbia Water), First Energy, PPL Electric Utilities Corporation (PPL Electric), Philadelphia Gas Works, and Duquesne Light Company.

SUPPLEMENTAL IMPLEMENTATION ORDER

A. State And Federal Income Tax Deductions

The Commission first addressed changes to the DSIC calculation needed to determine the state income tax effects of book-tax timing differences created by placing in service eligible property included in the DSIC calculation and ADIT that reflects such differences. The Commission also stated its desire to revise the DSIC formula such that

the DSIC calculation “does not require unduly complicated computations but permit[s] reasonable review and audit of DSIC charges and their supporting calculations.”³

To address state income tax deductions, the Commission determined that utilities with a DSIC mechanism should revise their tariffs to incorporate the State Tax Flow Through (STFT)⁴ into the DSIC calculation under either one of two methods. Method 1 uses a separate calculation to determine the STFT. This amount is not converted to a percentage and the unadjusted statutory state income tax rate is used as a separate component in the DSIC surcharge calculation. Method 2 derives an effective tax rate which is used in the tax gross-up for the PTRR calculation (pre-tax rate of return on DSIC-eligible property). Although either Method results in an identical DSIC surcharge, the Commission stated that it favors Method 2.⁵

For federal income tax deductions, the Commission determined that ADIT should be included in the Distribution System Improvement (DSI) component of the DSIC formula. Further, the Commission found that the definition of “DSI” should be expanded to include the phrase “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.”⁶

B. Changes to DSIC Formula

The Commission modified the DSIC formula to:⁷

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

³ *Supplemental Implementation Order* at 6.

⁴ The Commission accepted the EAP’s definition of STFT: the “pre-tax flow through calculated on book-tax timing differences between accelerated tax depreciation and book depreciation, net of federal tax.” *Supplemental Implementation Order* at 6.

⁵ *Supplemental Implementation Order* at 6-7.

⁶ *Supplemental Implementation Order* at 8.

⁷ *Supplemental Implementation Order* at 10.

Where:

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.**

PTRR = Pre-tax return rate applicable to DSIC-eligible property.

Dep = Depreciation expense related to DSIC-eligible property.

STFT (State Tax Flow Through) = Pre-tax flow through calculated on book-tax timing differences between accelerated tax depreciation and book depreciation net of federal tax [Note that a utility may elect to include STFT calculation in the PTRR component.]

e = Amount calculated (+/-) under the annual reconciliation feature or Commission audit, as described below.

PQR = Projected quarterly revenues for distribution service (including all applicable clauses and riders) from applicable customers.

[NOTE: UTILITY TO MAKE ELECTION AND STATE WHETHER SUCH QUARTERLY REVENUES WILL BE DETERMINED ON THE BASIS OF EITHER THE SUMMATION OF PROJECTED REVENUES FOR THE APPLICABLE THREE-MONTH PERIOD OR ONE-FOURTH OF PROJECTED ANNUAL REVENUES.]

[NOTE: The DSIC calculation does not factor in the plant of acquired troubled companies or the revenue of customers acquired from troubled companies until such plant and customer rates have been part of a base rate case by the acquiring utility.]

T = If applicable, Pennsylvania Gross Receipts Tax rate in effect during the billing month, expressed in decimal form.

Alternatively, the Commission permitted utilities wanting flexibility to report their federal tax adjustment through the PTRR as described above, to modify the DSIC formula to reflect the following definition of pre-tax return:⁸

Pre-Tax Return: The pre-tax return will be calculated using the Company's effective tax rate [rather than its **statutory** state and federal income tax rates].

C. Standards to Establish Reconciliation Process

The Commission determined that there is no need to establish a separate reconciliation process for timing differences and issues to determine the proper level of ADIT and state income taxes for book-tax timing issues created by placing in service

⁸ *Supplemental Implementation Order* at 11.

DSIC-eligible property. The Commission found that the reconciliation of DSIC revenues and costs as provided for in the Model DSIC Tariff is sufficient.⁹

The Commission also directed utilities to adopt PPL Electric's method of tracking and filing adequate documentation to adjust their DSIC rates for STFT and federal ADIT. PPL Electric's process allows utilities to calculate their actual tax depreciation and utilize their actual book depreciation on their DSIC assets to calculate the deferred tax and state flow-through impacts. By isolating the DSIC assets in a separate tax case, PPL Electric's process allows a utility to calculate actual tax depreciation and utilize actual book depreciation on the DSIC assets to calculate deferred tax and state flow-through impacts. Because the tax system calculates an annual tax depreciation amount on monthly book additions, each utility will allocate the annual tax depreciation calculated each period (monthly or quarterly) across the remaining months of the year to be more in line with how book depreciation is reflected. By the end of each year, using PPL Electric's method, the DSIC will be completely supported by the cumulative net book and net tax amounts reflected in the tax system.¹⁰

D. Commission Order

The Commission concluded by ordering, in pertinent part:

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...by December 1, 2022. Upon Commission approval of the pro forma supplement, the utility shall be permitted to implement the proposed tariff changes with its quarterly DSIC update effective January 1, 2023.¹¹

The OCA filed its Petition for Clarification and Reconsideration on November 10, 2022, which was within 15 days after entry of the Commission's *Supplemental*

⁹ *Supplemental Implementation Order* at 11-12.

¹⁰ *Supplemental Implementation Order* at 12-13.

¹¹ *Supplemental Implementation Order* at 14 (Ordering Paragraph No. 2).

Implementation Order (entered October 27, 2022). As such, the OCA’s Petition is properly before the Commission for consideration. *See* 66 Pa.C.S. § 703(g) and 52 Pa. Code § 5.572(c).

DISCUSSION

A. Legal Standards

Under the Public Utility Code, a party to a proceeding before the Commission has the right to seek relief from a Commission order. *See* 66 Pa.C.S. § 703(g) (relating to the rescission and amendment of orders). Such a request for relief must be consistent with Commission regulations. *See* 52 Pa. Code § 5.572 (relating to petitions for relief following the issuance of a final decision).

The standards for granting a petition for reconsideration were 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)).¹²

¹² 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).

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 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.*

We note that any issue we do not specifically address herein has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consol. Rail Corp. v. Pa. Pub. Util. Comm’n*, 625 A.2d 741 (Pa. Cmwlth. 1993);

also *see, generally, Univ. of Pennsylvania v. Pa. Pub. Util. Comm'n*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

B. OCA's Petition for Clarification and Reconsideration

In its Petition, the OCA requests that the Commission clarify and/or reconsider numerous aspects of the *Supplemental Implementation Order*. First, based on the language of Section 1301.1(a), the OCA requests that the Commission clarify that the changes made to the DSIC formula pursuant to *McCloskey* “will *reduce* the rate or have no impact but not increase the rate.”¹³ (Emphasis original.)

Next, regarding STFT, the OCA requests that the Commission clarify that under either Method 1 or Method 2, the inclusion of state income tax deductions in the DSIC formula will *reduce* the DSIC rate. For Method 1, the OCA suggests that the Commission modify the DSIC formula to identify STFT as a negative by making it “- STFT” or “(STFT).” For Method 2, the OCA requests that the Commission require that utilities use the lower of the effective tax rate or statutory tax rate to calculate the PTRR component.¹⁴

The OCA also requests that the Commission clarify or reconsider the inclusion of the phrase “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” in the definition of “DSI.” Instead, the OCA suggests that the definition of “DSI” be modified by adding the phrase, “and related accumulated deferred income taxes” to the original definition. This, according to the OCA, “would clarify that, consistent with Section 1301.1(a), *all* federal income tax deductions related to DSIC-eligible infrastructure investment must be included in the DSIC rate, such as repairs deductions” rather than just

¹³ OCA Petition at ¶3.

¹⁴ OCA Petition at ¶4.

those related to the effect of book-tax timing differences associated with accelerated tax depreciation. The OCA stated that Section 168 of the Internal Revenue Code applies only to accelerated tax depreciation while Section 1301.1(a) of the Public Utility Code does not limit the types of federal income tax deductions and credits that must be included in the DSIC rate.¹⁵

The OCA next addresses the “T” factor in the modified DSIC formula, which was added to address Gross Receipts Tax (GRT). The OCA asserts that including GRT in the DSIC calculation will serve to increase DSIC rates. According to the OCA, this is further reason for the Commission to clarify that the inclusion of income tax deductions and credits related to DSIC-eligible property will reduce—rather than increase—DSIC rates.¹⁶

The OCA also requests that the Commission clarify in Ordering Paragraph No. 2 that each utility with a DSIC surcharge *must* implement the proposed tariff changes identified in its *pro forma* tariff supplement with its quarterly DSIC update effective January 1, 2023. According to the OCA, the language of Ordering Paragraph No. 2—“the utility shall be permitted to implement the proposed tariff changes with its quarterly DSIC update effective January 1, 2023” (emphasis added)—is permissive, rather than mandatory as it should be. As such, the OCA suggests that the Commission remove the words “be permitted.”¹⁷

In addition, the OCA seeks clarification regarding the venue in which refunds stemming from the changes to the DSIC calculation required by *McCloskey* will be addressed. The OCA proposes that refunds be addressed in a generic proceeding rather

¹⁵ OCA Petition at ¶5.

¹⁶ OCA Petition at ¶6.

¹⁷ OCA Petition at ¶7.

than through separate refund proceedings for each utility with a Commission-approved DSIC rate.¹⁸

Finally, the OCA requests that the Commission reconsider and extend the December 1, 2022, deadline for utilities to file their *pro forma* tariff supplements so that the Commission has sufficient time to consider the OCA's Petition.¹⁹

C. Answers to OCA's Petition

PPL Electric, Columbia Water, the EAP, and FirstEnergy filed timely Answers to the OCA's Petition for Clarification and Reconsideration, asking that the Commission deny the Petition. Columbia Water addressed only the OCA's request that the Commission clarify how it will deal with refunds stemming from the *McCloskey* decision. In broad terms, the Answers assert that there is no basis to grant clarification or reconsideration because the *Supplemental Implementation Order* is clear, and the OCA failed to meet the *Duick* standard for reconsideration.

Regarding the OCA's request that the Commission clarify that the modifications to the DSIC formula will reduce the DSIC rate, PPL Electric asserts that there is no basis to grant clarification because Section 1301.1(a) does not require that each individual income tax deduction or credit, on its own, must reduce the DSIC rate.²⁰ The EAP avers that there is no need for clarification because in the generic proceeding to implement the *McCloskey* decision, the Commission did not review an actual DSIC filing. Such an issue, according to the EAP, would only be ripe for Commission review through a future DSIC filing involving an actual dispute as to the DSIC rate.²¹ FirstEnergy states that there is nothing in the New Model DSIC Tariff that suggests the changes made to the DSIC formula will serve to increase DSIC rates. As such, FirstEnergy asserts that the

¹⁸ OCA Petition at ¶8.

¹⁹ OCA Petition at ¶9.

²⁰ PPL Electric Answer at ¶¶15-16.

²¹ EAP Answer at 6-7.

Supplemental Implementation Order is clear and, accordingly, there is no basis to grant clarification.²²

With respect to STFT, PPL Electric argues that the Commission should deny clarification and reconsideration regarding the OCA's proposed changes to Methods 1 and 2 for addressing STFT in the DSIC formula. According to PPL Electric, there is no need for clarification because there is no evidence showing that STFT would make the DSIC charge higher. In addition, PPL Electric notes that the focus should be on the aggregate effect the tax deductions have on the DSIC and not the effect a single component, such as STFT, would have. PPL Electric also states that utilities cannot switch between the effective tax rate and the statutory tax rate to calculate PTRR because to do so would prevent utilities from fully recovering their tax expenses over the lives of their DSIC-eligible assets.²³ FirstEnergy argues that clarification is (1) unnecessary because the *Supplemental Implementation Order* and New Model DSIC Tariff make clear that STFT is a negative value and (2) unwarranted because it would allow the OCA to change its position, which it made known through its comments in the underlying proceeding, that the effective tax rate should be used consistently to reflect book-tax timing differences related to accelerated tax depreciation of new DSIC-eligible assets.²⁴

Next, the Answers address the OCA's request that the Commission reconsider the definition of "DSI" adopted in the *Supplemental Implementation Order*. PPL Electric asserts that the Commission should deny this request because (1) the OCA never mentioned adding repairs and other federal income tax deductions to the definition of "DSI" in its comments in the underlying proceeding and (2) the issue of whether federal income tax deductions other than ADIT should be reflected in the DSIC was not addressed in *McCloskey*, so the issue is beyond the scope of the underlying proceeding.²⁵

²² FirstEnergy Answer at 5.

²³ PPL Electric Answer at ¶¶14-18.

²⁴ FirstEnergy Answer at 5-8.

²⁵ PPL Electric Answer at ¶¶19-24.

According to the EAP, the definition of “DSI” was addressed by the Commission when it decided to adopt the EAP’s proposed definition, so it is not a new or novel concern and therefore fails to meet the *Duick* standard for reconsideration.²⁶ FirstEnergy agrees that reconsideration is inappropriate because the OCA’s request does not meet the *Duick* standard given that the Commission considered and resolved the issue of the definition of “DSI” in the *Supplemental Implementation Order*. According to FirstEnergy, in adopting the EAP’s proposed definition, the Commission considered and balanced the need to reflect the required tax adjustments in the DSIC formula while not unduly complicating the calculation and review of the DSIC rate.²⁷

Regarding the OCA’s request for clarification that, despite the inclusion of GRT in the DSIC calculation, the changes made to the New Model DSIC Tariff will reduce DSIC rates, the EAP avers that clarification is unnecessary. More specifically, the “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*.”²⁸ FirstEnergy asserts that clarification is unnecessary because the Commission’s determination that DSIC revenues are subject to GRT, which is recoverable through DSIC rates as a legitimate cost of providing utility service, is based on Section 2810(b) of the Public Utility Code, 66 Pa.C.S. § 2810(b), rather than on the DSIC-specific provisions of the Code. As such, FirstEnergy argues, “[t]here is no logical connection between the Commission’s allowing electric utilities to recover GRT and the alleged need to reconsider the Supplemental Implementation Order.”²⁹

The Answers also address the OCA’s request to modify the language of Ordering Paragraph No. 2 to make clear that implementation of the proposed tariff changes is

²⁶ EAP Answer at 7.

²⁷ FirstEnergy Answer at 9-12.

²⁸ EAP Answer at 7.

²⁹ FirstEnergy Answer at 8-9.

mandatory. The EAP states that the Commission should reject the OCA’s request because (1) a utility must adhere to its Commission-approved *pro forma* tariff supplement and (2) it is not a “new or novel” argument and therefore does not meet the *Duick* standard for clarification.³⁰ FirstEnergy avers that the OCA has presented no valid basis for clarification or reconsideration of the language of Ordering Paragraph No. 2. FirstEnergy claims that clarification is not necessary because the *Supplemental Implementation Order* is clear and unmistakable when read in its entirety: each utility must implement the Commission approved New Model DSIC Tariff as of January 1, 2023. Otherwise, FirstEnergy notes, a utility could not impose a DSIC at all.³¹

The Answers next address the OCA’s request for clarification as to how the Commission will address refunds stemming from the *McCloskey* decision. Columbia Water, the EAP, and FirstEnergy agree that the Commission should deny clarification because the OCA’s request does not meet the *Duick* standard. According to all three companies, the Commission considered refunds and properly determined that they were beyond the scope of the underlying generic proceeding to implement the *McCloskey* decision, which they note did not address refunds.³² Columbia Water and FirstEnergy argue that if the Commission decides to consider refunds, it should do so on a case-by-case basis, rather than through a generic refund proceeding.³³ PPL Electric also asserts that clarification should be denied because the Commission addressed the topic and decided that refunds were beyond the scope of the proceeding. Further, according to PPL Electric, given the numerous legal and factual questions associated with refunds, if the Commission does address the topic, it should do so in the context of individual utility DSIC proceedings.³⁴

³⁰ EAP Answer at 7-8.

³¹ FirstEnergy Answer at 12-14.

³² Columbia Water Answer at 3-4; EAP Answer at 8-9; FirstEnergy Answer at 14-17.

³³ Columbia Water Answer at 2; FirstEnergy Answer at 16.

³⁴ PPL Electric Answer at ¶¶ 25-30.

Finally, both the EAP and FirstEnergy assert that the Commission should deny the OCA's request that the Commission reconsider the December 1, 2022 deadline for utilities to file a *pro forma* tariff supplement reflecting the updated DSIC calculation. The EAP states that because the OCA's Petition does not meet the *Duick* standard for clarification or reconsideration, there is no reason to delay execution of the *Supplemental Implementation Order*. The EAP further states that delaying implementation would be detrimental to both customers and utilities.³⁵ FirstEnergy states that any delay to the Commission's schedule is unwarranted and would either (1) create significant problems in dealing with the timing of the changes relative to the reconciliation period for DSIC costs and revenues or (2) require delaying implementation of the New Model DSIC Tariff for a year to avoid such problems. Either of these, according to FirstEnergy, would frustrate the Commission's goals of avoiding (1) unduly complicated DSIC calculations and review or (2) further delay in implementing the changes required by the *McCloskey* decision.³⁶

D. Disposition

The Commission agrees with PPL Electric, Columbia Water, the EAP, and FirstEnergy that clarification and/or reconsideration are not warranted with respect to the *Supplemental Implementation Order*. Although the OCA claims through its Petition that it raises "points not previously heard or considered and which the Commission may have overlooked or not addressed,"³⁷ this is not in fact the case. The Commission gave due consideration to all the issues raised by the OCA in its Petition in the *Supplemental Implementation Order*. As such, for the reasons discussed below, the Commission denies the OCA's Petition.

³⁵ EAP Answer at 9.

³⁶ FirstEnergy Answer at 4, 17.

³⁷ OCA Petition at ¶2.

(1) Clarify That DSIC Rates Will Be Reduced

The Commission denies the OCA’s request for clarification that the changes made to the DSIC formula will reduce the DSIC rate because clarification is not necessary. The OCA presented no evidence showing that the new DSIC formula will result in increased rates. And as PPL Electric noted, Section 1301.1(a) of the Code does not require that each individual tax deduction and credit, by itself, serve to reduce the DSIC rate. Section 1301.1(a) only requires that the overall effect of the income tax deductions and credits must be to reduce the DSIC rate. The Commission will ensure this happens on a case-by-case basis through adequate review of future utility DSIC filings. Accordingly, there is no basis for clarification.

(2) Methods 1 and 2 For Addressing State Tax Flow Through

The Commission denies the OCA’s request for reconsideration of the DSIC formula with respect to STFT under Method 1. The OCA suggests that the formula:

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

should be modified to identify STFT as a negative value by replacing the plus sign before STFT with “- STFT” or “(STFT).” However, as pointed out by FirstEnergy, modification of the formula is unnecessary and would have the opposite effect of that intended by the OCA. STFT is the state tax effect to be flowed through to customers based on the difference between tax and book depreciation associated with DSIC-eligible property. Because tax depreciation is greater than book depreciation in the early years of an asset’s life, eligible property is typically reflected in the DSIC only in its early years. In later years, it is rolled into the base rate during a subsequent base rate case. As such, the New Model DSIC Tariff already reflects STFT as a negative value. Consequently, there is no basis to support granting reconsideration of the DSIC formula for Method 1 and we deny the OCA’s request.

The Commission also denies the OCA’s request for clarification that the lower of the effective tax rate or the statutory tax rate be used to calculate the PTRR with respect to Method 2 for addressing STFT. As FirstEnergy noted, Method 2 uses the utility’s effective state income tax rate to compute the gross-up factor used to derive the PTRR in addressing the flow through of book-tax timing differences associated with DSIC-eligible assets.³⁸ The effective tax rate will almost always be lower than the statutory tax rate because it reflects the flow through of the state income tax effects of accelerated tax depreciation, which will exceed book depreciation in the early years of an asset’s life, while the asset is reflected in the DSIC. Further, the OCA stated in its initial comments filed on July 22, 2022, that it recommends utilities use Method 2—which it called “the effective tax rate method”—to address deductions related to state income taxes. The OCA supported use of the effective tax rate, not the statutory rate, to reflect book-tax timing differences related to accelerated depreciation.³⁹ The OCA had a full opportunity to comment on this issue, which the Commission considered prior to entering the *Supplemental Implementation Order*. At no point prior to entry of the *Supplemental Implementation Order* did the OCA advocate for using the lower of the effective or statutory tax rate. Further, as PPL Electric stated in its Answer,⁴⁰ a utility must consistently use either the effective or statutory tax rate or it will be prevented from fully recovering tax expenses on DSIC-eligible assets. Under the circumstances, clarification regarding Method 2 is not appropriate.

(3) Definition of “DSI”

The Commission also denies the OCA’s request that the definition of “DSI” in the New Model DSIC Tariff be modified to remove the limitation on the types of federal

³⁸ FirstEnergy Answer at 7.

³⁹ OCA July 22, 2022, Comments at 2-7.

⁴⁰ PPL Electric Answer at ¶17.

income tax deductions included in the DSIC calculation as follows:

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

The Commission agrees with the EAP that this is not a new or novel argument. The Commission considered this issue, including the OCA's July 2022 comments, and ruled upon it in the *Supplemental Implementation Order*. We adopted a definition of "DSI" that captures the income tax effects of the major book-tax timing differences resulting from a utility's DSIC investment and at the same time avoids unduly complicating the DSIC formula and review of DSIC charges and supporting calculations. To do this, the definition includes 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 per Internal Revenue Code, 26 U.S. Code § 168." Introducing areas with book-tax timing differences beyond ADIT, on which the OCA focused before the Supreme Court and in its July 22, 2022 comments, would unnecessarily complicate the DSIC computation and review by Commission staff. Under the circumstances, it is not appropriate for the Commission to clarify or reconsider the definition of "DSI" because the OCA's request does not meet the *Duick* standard for clarification or reconsideration and to do so would frustrate our goal of avoiding undue complication in calculating and reviewing the DSIC.

(4) Inclusion of Gross Receipts Tax

The Commission denies the OCA's request for clarification that including GRT in the DSIC calculation will reduce the DSIC rate. The pertinent inquiry is not whether any one component of the DSIC calculation increases or decreases the DSIC rate. Rather, the key question is whether all the required income tax adjustments are factored into the DSIC to reduce its rate. As FirstEnergy noted, there is no connection between the Commission allowing utilities to recover GRT and the need to clarify the *Supplemental*

Implementation Order.⁴¹ We addressed the issue of GRT and determined that it is a recoverable cost of providing utility service. Electric utilities must pay GRT pursuant to Section 2810(b) of the Public Utility Code, whether those gross receipts are generated through base rates, the DSIC, or any other alternative ratemaking mechanism. GRT, like other taxes, is subject to recovery from ratepayers. This basic principle of utility ratemaking was not invalidated by the *McCloskey* decision. Under the *Duick* standard, there is no basis for the Commission to grant clarification.

(5) The Language of Ordering Paragraph No. 2

The Commission denies the OCA’s request that we reconsider the language of Ordering Paragraph No. 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. Upon Commission approval of the pro forma supplement, the utility shall be permitted to implement the proposed tariff changes with its quarterly DSIC update effective January 1, 2023. (Emphasis added.)

The OCA seeks removal of “be permitted to” to clarify that implementation of the proposed tariff changes is mandatory, rather than optional.

We agree with both the EAP and FirstEnergy that this change is unnecessary. When read in its entirety, the *Supplemental Implementation Order*, including Ordering Paragraph No. 2, are clear that a utility is required to implement the proposed tariff changes effective January 1, 2023. If a utility would fail to do so, it would not be permitted to impose a DSIC charge on its customers. Under the circumstances, there is no reason for the Commission to grant clarification or reconsideration.

⁴¹ FirstEnergy Answer at 8.

(6) Refunds

We also deny the OCA’s request for clarification regarding how the Commission will address refunds stemming from the *McCloskey* decision. As we stated in the *Supplemental Implementation Order*, after giving due consideration to the comments received, “issues related to refunds that may be required due to the *McCloskey* decision are beyond the scope of this implementation proceeding and cannot be made on the record before the Commission in this proceeding.”⁴² As such, we agree with the EAP, FirstEnergy, and Columbia Water that the Commission considered refunds and made a clearly communicated decision on the matter. Therefore, neither clarification nor reconsideration are appropriate because the OCA’s Petition does not meet the *Duick* standard.

Further, as Columbia Water noted, the General Assembly has already determined that refunds are not appropriate in addressing the application of Section 1301.1(a).⁴³ Pursuant to Section 1301.1(b) of the Public Utility Code, any differential that:

accrues to a public utility resulting from applying the ratemaking methods employed by the commission prior to the effective date of subsection (a) for ratemaking purposes, the differential shall be used as follows:

- (1) fifty percent to support reliability or infrastructure related to the rate-base eligible capital investment as determined by the commission; and
- (2) fifty percent for general corporate purposes.

66 Pa.C.S. § 1301.1(b).

Notwithstanding Section 1301.1(b), we agree with PPL Electric that there are a number of legal and factual questions that would have to be addressed prior to making a final decision on refunds.⁴⁴ These issues include the Commission’s ability to

⁴² *Supplemental Implementation Order* at 2.

⁴³ Columbia Water Answer at 2, 4-5.

⁴⁴ PPL Electric Answer at ¶¶28-29.

retroactively apply Section 1301.1(a) to require refunds; the four-year statute of limitations for refunds under Section 1312(a) of the Public Utility Code, 66 Pa.C.S. § 1312(a); and what circumstances, if any, might justify the Commission’s exercise of its discretion not to order refunds. Under the circumstances, as PPL Electric, FirstEnergy, and Columbia Water stated, if the Commission is to address the topic of refunds, it will be best to do so on a case-by-case basis.⁴⁵

(7) December 1, 2022, Deadline for Filing *Pro Forma* Tariffs

Finally, to allow time for the Commission to consider its requests for clarification and reconsideration, the OCA requests that the Commission establish a new deadline for utilities to file a *pro forma* tariff reflecting the updated DSIC formula as set forth in the New Model DSIC Tariff. Because (1) the December 1, 2022, deadline has already passed and (2) the Commission denied the OCA’s other requests for clarification and/or reconsideration, the Commission denies this request as moot.

CONCLUSION

The Commission has broad discretion to deny the OCA’s Petition. Under the circumstances, the Commission finds that the OCA’s Petition does not satisfy the *Duick* standard governing petitions for clarification and/or reconsideration. The OCA argues in support of its Petition that the Commission should clarify and/or reconsider numerous aspects of the *Supplemental Implementation Order*. The issues raised by the OCA in its Petition are not “new and novel.” Rather, they are issues that were already addressed by the Commission after considering comments from numerous parties, including the OCA. In addition, the Commission finds that clarification or reconsideration are not necessary. In sum, the OCA’s Petition presents no compelling reason for the Commission to clarify or reconsider the *Supplemental Implementation Order*; **THEREFORE,**

⁴⁵ PPL Electric Answer at ¶29; FirstEnergy Answer at 16; Columbia Water Answer at 2.

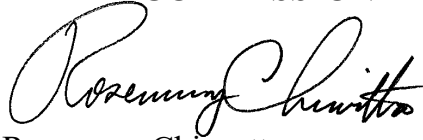
IT IS ORDERED:

1. That the Pennsylvania Office of Consumer Advocate's Petition for Clarification and Reconsideration of the Pennsylvania Public Utility Commission's Supplemental Implementation Order entered October 27, 2022, is denied consistent with this Opinion and Order.

2. That a copy of this Opinion and Order be served on all jurisdictional water and wastewater companies, electric distribution companies, natural gas distribution companies, Philadelphia Gas Works, the Energy Association of Pennsylvania, the National Association of Water Companies, the Industrial Energy Consumers of Pennsylvania, and the statutory advocates.

3. That this proceeding at Docket No. M-2012-2293611 be marked as closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: March 2, 2023

ORDER ENTERED: March 2, 2023