

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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September 30, 2016

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

RE: Pennsylvania Public Utility Commission
v.
Metropolitan Edison Company;
Pennsylvania Electric Company;
Pennsylvania Power Company;
West Penn Power Company
Docket Nos. R-2016-2537349
R-2016-2537352
R-2016-2537355
R-2016-2537359

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Main Brief in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

Candis A. Tunilo

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Assistant Consumer Advocate
PA Attorney I.D. # 89891

Enclosures

cc: Certificate of Service
Honorable Mary D. Long, ALJ

226218

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, <i>et al.</i>	:	
	:	
v.	:	Docket Nos. R-2016-2537349
	:	R-2016-2537352
Metropolitan Edison Company;	:	R-2016-2537355
Pennsylvania Electric Company;	:	R-2016-2537359
Pennsylvania Power Company;	:	
West Penn Power Company	:	
	:	

MAIN BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

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DATED: September 30, 2016

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I. INTRODUCTION

In this Main Brief the Office of Consumer Advocate (OCA) addresses one area of ratemaking, specifically, how the Distribution System Improvement Charge (DSIC) should be calculated in light of Act 40 of 2016. During the pendency of these consolidated base rate cases, the FirstEnergy Companies each included a DSIC rate in their tariffs pursuant to Public Utility Commission (Commission) Orders. Specifically, on June 9, 2016, the Commission approved the implementation of DSICs by the FirstEnergy Companies to be effective July 1, 2016, pending the litigation of certain specific issues at Docket Nos. P-2015-2508942 (Metropolitan Edison Company or Met-Ed), P-2015-2508936 (Pennsylvania Electric Company or Penelec), P-2015-2508931 (Pennsylvania Power Company or Penn Power), and P-2015-2508948 (West Penn Power Company or West Penn). On June 20, 2016, Met-Ed, Penelec, Penn Power and West Penn each submitted Tariff Supplements to include a DSIC rate. Met-Ed and Penelec each submitted Tariff Supplement No. 25 to implement a DSIC rate as Rider R. Penn Power submitted Tariff Supplement No. 19 to implement a DSIC rate as Rider O. West Penn Power submitted Tariff Supplement No. 18 to implement a DSIC rate as Rider N. The OCA argues here that Act 40 requires an Accumulated Deferred Income Tax (ADIT) offset to be included in any DSIC rate to be charged to customers.

A. Background.

Metropolitan Edison Company

On April 28, 2016, Met-Ed filed Supplement No. 23 to Met-Ed's Tariff Electric – Pa. P.U.C. No. 52 (Met-Ed Supplement No. 23), at Docket No. R-2016-2537349, to become effective June 27, 2016. Met-Ed serves approximately 560,000 residential, commercial, and

industrial customers in all or portions of fourteen counties in eastern and south central Pennsylvania.

Met-Ed sought Commission approval of rates and rate changes that would modify existing tariff provisions and increase the level of rates that Met-Ed charges for providing electric distribution service to its customers. If Met-Ed Supplement No. 23 had become effective as proposed, Met-Ed would have had an opportunity to recover an estimated annual increase in distribution revenues of \$140.2 million, or an overall increase of 9.53% over Met-Ed's present rates. During the pendency of this proceeding, on July 20, 2016, Met-Ed submitted Tariff Supplement No. 25 to implement a DSIC rate as Rider R.

Pennsylvania Electric Company

On April 28, 2016, the Penelec filed Supplement No. 23 to Penelec's Tariff Electric – Pa. P.U.C. No. 81 (Penelec Supplement No. 23), at Docket No. R-2016-2537352, to become effective June 27, 2016. Penelec serves approximately 590,000 residential, commercial, and industrial customers in all or portions of 33 counties in northern and central Pennsylvania.

Penelec sought Commission approval of rates and rate changes that would modify existing tariff provisions and increase the level of rates that Penelec charges for providing electric distribution service to its customers. If Penelec Supplement No. 23 had become effective as proposed, Penelec would have had an opportunity to recover an estimated annual increase in distribution revenues of \$158.8 million, or an overall increase of 11.42% over Penelec's present rates. During the pendency of this proceeding, on July 20, 2016, Penelec submitted Tariff Supplement No. 25 to implement a DSIC rate as Rider R.

Pennsylvania Power Company

On April 28, 2016, Penn Power filed Supplement No. 17 to Penn Power's Tariff Electric – Pa. P.U.C. No. 36 (Penn Power Supplement No. 17), at Docket No. R-2016-2537355, to become effective June 27, 2016. Penn Power serves approximately 163,000 residential, commercial, and industrial customers in all or portions of 6 counties in northern and central Pennsylvania.

Penn Power sought Commission approval of rates and rate changes that would modify existing tariff provisions and increase the level of rates that Penn Power charges for providing electric distribution service to its customers. If Penn Power Supplement No. 17 had become effective as proposed, Penn Power would have had an opportunity to recover an estimated annual increase in distribution revenues of \$42.0 million, or an overall increase of 9.57% over Penn Power's present rates. During the pendency of this proceeding, on July 20, 2016, Penn Power submitted Tariff Supplement No. 19 to implement a DSIC rate as Rider O.

West Penn Power Company

On April 28, 2016, West Penn filed Supplement No. 10 to West Penn's Tariff Electric – Pa. P.U.C. No. 38 (West Penn Supplement No. 10), at Docket No. R-2016-2537359, to become effective June 27, 2016. West Penn serves approximately 721,000 residential, commercial, and industrial customers in all or portions of 23 counties in western Pennsylvania.

West Penn sought Commission approval of rates and rate changes that would modify existing tariff provisions and increase the level of rates that West Penn charges for providing electric distribution service to its customers. If Supplement No. 10 had become effective as proposed, West Penn would have had an opportunity to recover an estimated annual increase in distribution revenues of \$98.2 million, or an overall increase of 5.74% over West Penn's present

rates. During the pendency of this proceeding, on July 20, 2016, West Penn submitted Tariff Supplement No. 18 to implement a DSIC rate as Rider N.

B. Procedural History.

On May 3, 2016, the OCA filed Formal Complaints against the proposed distribution rate increases requesting, inter alia, an investigation into the justness and reasonableness of the FirstEnergy Companies' existing and proposed rates. Numerous other parties filed Petitions to Intervene or Formal Complaints against the proposed distribution rate increases, including: the Bureau of Investigation and Enforcement; the Office of Small Business Advocate; Citizens for Pennsylvania's Future and Environmental Defense Fund; the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania; the Pennsylvania State University; Wal-Mart Stores East, LP and Sam's East, Inc.; Clean Air Council; the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, and the West Penn Power Industrial Intervenors; International Brotherhood of Electrical Workers, Local 459; AK Steel Corporation; North American Höganäs Holdings, Inc.; Sayre Borough, Athens Borough, and South Waverly Borough, as well as a number of individual formal complainants.

On June 9, 2016 in this proceeding, the Commission suspended the Companies' proposed tariff supplements pending investigation and directed that the Companies announce that their Original Tariffs were suspended until January 27, 2017.¹ The proceeding was assigned to the Office of Administrative Law Judge and specifically assigned to Administrative Law Judge Mary D. Long (ALJ Long). On June 17, 2016, ALJ Long held an initial prehearing conference in these matters. On June 22, 2016, ALJ Long issued a Prehearing Order establishing a

¹ The Companies' Original Tariffs are as follows: Met-Ed Tariff Electric – Pa. P.U.C. No. 52; Penelec Tariff Electric – Pa. P.U.C. No. 81; Penn Power Tariff Electric – Pa. P.U.C. No. 36; and West Penn Tariff Electric – Pa. P.U.C. Nos. 38 and 40.

procedural schedule and setting forth certain modifications to the Commission's regulations regarding discovery matters. The Prehearing Order also consolidated the Companies' base rate cases for the purposes of hearing, briefing, and decision. Public Input Hearings were convened in these matters in the following locations: Reading, East Stroudsburg, Erie, Butler, Greensburg, Washington, and State College during July and August 2016.

On June 12, 2016, Act 40 was signed into law, effective in sixty days (or on August 11, 2016). On July 7, 2016, the Companies served the Supplemental Direct Testimony of Richard A. D'Angelo and Exhibit RAD-68 regarding the impact of Act 40 on the computation of income tax expense for ratemaking purposes in these consolidated base rate cases.

In accord with the procedural schedule established for this matter, on July 22, 2016, the OCA submitted the Direct Testimonies of: Ralph C. Smith, OCA Statement No. 1; David C. Parcell, OCA Statement No. 2; Clarence L. Johnson, OCA Statement No. 3; Roger D. Colton, OCA Statement No. 4; and James S. Garren, OCA Statement No. 5. On August 17, 2016, the OCA submitted the Supplemental Direct Testimony of Ralph C. Smith, OCA Statement No. 1-Suppl. Also on August 17, 2016, the OCA submitted the Rebuttal Testimonies of: Clarence L. Johnson, OCA Statement No. 3-R; and Roger D. Colton, OCA Statement No. 4-R. On August 31, 2016, the OCA submitted the Surrebuttal Testimonies of: Ralph C. Smith, OCA Statement No. 1-SR; David C. Parcell, OCA Statement No. 2-SR; Clarence L. Johnson, OCA Statement No. 3-SR; Roger D. Colton, OCA Statement No. 4-SR; and James S. Garren, OCA Statement No. 5-SR.

The testimonies of OCA witnesses Smith, Parcell, Johnson, Colton, and Garren, as identified above, were entered into the record by stipulation of the Parties at the hearing on September 7, 2016. Prior to the hearing, the Parties entered into a settlement in principle on all

issues except for those related to the calculation of the Companies' DSICs under Act 40 that was raised by the OCA. Cross examination of all witnesses was waived by all Parties, and the outstanding Act 40 issue will be briefed by the Companies and by the OCA.

Pursuant to the ALJ's Prehearing Order dated June 22, 2016 and the ALJ's directive at the September 7, 2016 hearing, the OCA provides this Main Brief.

II. SUMMARY OF ARGUMENT

The OCA submits that the issue of whether the FirstEnergy Companies must include ADIT in their DSIC rate calculations is properly before the ALJ and Commission in this matter. The Companies' DSIC rates became existing rates during the pendency of this proceeding, and therefore, the justness and reasonableness thereof must be determined in this proceeding pursuant to 66 Pa. C.S. § 315(a). There is no dispute regarding the facts relevant to this issue – that the FirstEnergy Companies do not account for ADIT in their DSIC rate calculations.

Act 40 was recently enacted and is clear and unambiguous that its provisions apply to a utility's rates. The DSIC is a "rate" as that term is defined in the Public Utility Code. As such, the requirement in Act 40 that "related income tax deductions and credits shall also be included in the computation of current or deferred income tax expense to reduce rates" applies to the DSIC. As such, it is without ambiguity that accumulated deferred income taxes are a tax deduction or credit which must, pursuant to Act 40, be utilized in the calculation of the Companies' DSIC rates. Consequently, the FirstEnergy Companies should be directed to include ADIT in their DSIC rate calculations.

III. ARGUMENT

A. The Issue Regarding the Tax Treatment within the DSIC Is Properly Before the ALJ and Commission in this Proceeding.

ALJ Long inquired into the appropriateness of litigating the Act 40/ADIT issue in this proceeding (Tr. 663-71). The OCA submits that the legal tariffs that the Commission will approve at the end of these consolidated base rate cases include all of the Companies' proposed and existing rates. As explained infra in Section III. B, during this matter, the Companies added DSICs as existing rates that are currently being charged to customers. As also explained infra in Section III.C, these DSIC riders will be zeroed out and the new rate will be approved by the Commission as part of the final order in this proceeding. Also during the pendency of this matter, the General Assembly enacted Act 40, which, by its terms, must apply to this case. See 66 Pa. C.S. § 1301.1(c)(2).² As explained further infra in Section III.C, Act 40 contains provisions regarding the computation of tax expense for ratemaking purposes. The FirstEnergy Companies submitted supplemental direct testimony in this proceeding to specifically address Act 40 and its implications on this pending matter as it concerns the consolidated tax savings adjustment. The OCA submits, however, that Act 40 had two tax impacts, both of which must be resolved in this pending matter. As such, it is appropriate for the Commission to resolve the issue of the proper calculation of the accumulated deferred income tax in the Companies' DSICs as part of its resolution of this proceeding.

² Of note, FirstEnergy Companies witness Richard A. D'Angelo cites to Representative Godshall's comments regarding Act 40 that the Act "would only go into effect when a utility comes in for a base rate case." See Met-Ed/Penelec/Penn Power/West Penn St. 2-R at 41-42. The OCA submits that should the Act 40/ADIT issue be removed to the Companies' DSIC cases (or any other docket), it would be likely that these same comments of Representative Godshall would be used to support an argument that this issue should have been determined in this base rate proceeding.

B. Burden of Proof.

This case presents unique circumstances, where a new rate became effective during the investigation into the Companies' proposed and existing rates, and a new law was passed, to which the Companies must comply. Typically in a base rate proceeding, the utility bears the burden of proof to establish the justness and reasonableness of every element of the requested rates. As set forth in Section 315(a) of the Public Utility Code:

Reasonableness of rates – In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon the complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

66 Pa. C.S. § 315(a). See also Sharon Steel Corp. v. Pa. PUC, 78 Pa. Cmwlth. 447, 452, 468 A.2d 860, 862 (1983).

Sharon Steel involved a base rate proceeding, wherein the Commission, upon its own motion, instituted an investigation to determine the lawfulness, justness and reasonableness of the company's proposed rates, rules and regulations in its proposed tariff supplement. Id. at 450, 861. In the order instituting the investigation, the Commission also noted that the investigation would include consideration of the lawfulness, justness and reasonableness of the company's existing rates, rules and regulations. Id. The Commission, however, rejected Sharon Steel's argument that, pursuant to 66 Pa. Code § 315(a), the company bore the burden of proof regarding the justness and reasonableness of both the company's existing and proposed rates and instead found that pursuant to 66 Pa. C.S. § 332(a), Sharon Steel had the burden to prove that the company's existing rates were unjust or unreasonable. Id. at 451-52, 862. The Commonwealth Court disagreed and held that when ordering an investigation into the propriety of existing and

proposed rates on Commission motion, the burden of justifying both existing and proposed rates is on the utility. Id. at 452, 862.

Although the Companies' DSIC rates were not in the tariff supplements specifically suspended by the Commission pending the investigation into the justness and reasonableness of the Companies' proposed and existing rates in this base rate matter, the OCA submits that the Companies' DSIC rates, which became tariffed rates during the pendency of this matter, are appropriately addressed here as existing rates, of which the Companies must prove the justness and reasonableness. In this matter, by Order entered June 9, 2016, the Commission directed on its own motion that an investigation be instituted to determine the lawfulness, justness, and reasonableness of the rates, rules, and regulations contained in: (1) Met-Ed Supplement No. 23; (2) Penelec Supplement No. 23; (3) Penn Power Supplement No. 17; and (4) West Penn Supplement No. 10. In addition, the Commission directed that the Companies announce via form filing with the Secretary that their Original Tariffs were suspended until January 27, 2017.

Also on June 9, 2016, the Commission approved the implementation of DSICs by the FirstEnergy Companies to be effective July 1, 2016, pending the litigation of certain specific issues at Docket Nos. P-2015-2508942 (Met-Ed), P-2015-2508936 (Penelec), P-2015-2508931 (Penn Power), and P-2015-2508948 (West Penn). On June 20, 2016, Met-Ed, Penelec, Penn Power and West Penn each submitted Tariff Supplements to include a DSIC rate. Met-Ed and Penelec each submitted Tariff Supplement No. 25 to implement a proposed DSIC rate as Rider R. Penn Power submitted Tariff Supplement No. 19 to implement a proposed DSIC rate as Rider O. West Penn Power submitted Tariff Supplement No. 18 to implement a proposed DSIC rate as Rider N. These Tariff Supplements became part of the Original Tariffs suspended in the Commission's Suspension Order in this consolidated base rate proceeding. See FN 1, supra.

On June 12, 2016, Act 40 was signed into law, effective in sixty days (or on August 11, 2016), and Act 40 states that “this section shall apply to all cases where the final order is entered after the effective date of this section.” See 66 Pa. C.S. § 1301.1(c)(2). On July 7, 2016, the Companies served the Supplemental Direct Testimony of Richard A. D’Angelo and Exhibit RAD-68 regarding the impact of Act 40 on the computation of income tax expense for ratemaking purposes in this base rate case.

In conclusion, generally, pursuant to 66 Pa. C.S. § 315(a) and Sharon Steel, FirstEnergy would bear the burden of proving the reasonableness of every element of its claims and demonstrate that its proposed and existing rates, including the Companies’ DSICs, are just, reasonable and in the public interest. Because the OCA raised the issue regarding the proper calculation of the DSIC pursuant to Act 40 against the tariff supplements filed in these consolidated base rate cases, however, the burden of proving that the DSIC rates are unjust or unreasonable could arguably be on the OCA. The OCA submits, however, that the issues of burden of proof and whether the party with the burden of proof in this matter met its burden may not be dispositive because the issue is a legal issue and therefore, not necessarily tied to the evidence or amount thereof in the record. The OCA further submits that the Parties do not disagree on the facts relevant to the issue – that the FirstEnergy Companies do not account for ADIT in the Companies’ DSIC calculations. As such, determining which party bears the burden of proof and whether that party met its burden is likely irrelevant to the ultimate decision on the Act 40/ADIT issue.

C. Act 40 Requires that ADIT Be Accounted For in DSIC Calculations.

Prior to the passage of Act 40 on June 12, 2016, which amended Chapter 13 of the Public Utility Code, Act 11 of 2012 was signed into law on February 14, 2012. Act 11, inter alia,

permitted certain utilities, including electric utilities, to petition the Commission for approval to implement a DSIC. See 66 Pa. C.S. § 1353(a). In one of the first cases before the Commission seeking approval of a DSIC under Act 11, the OCA asserted that the utility should be required to recognize ADIT tax benefits recovered through the DSIC and generated by the investment in replaced infrastructure. The Commission rejected the OCA's assertions. See Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge, Docket No. P-2012-2338282, Opinion and Order (May 22, 2014). The OCA appealed the Commission's determination, and on appeal the Commission asserted that "in enacting Act 11, the General Assembly envisioned a simple and straightforward process of establishing rates for the DSIC surcharge that would be easy to calculate and audit" McCloskey v. Pa. PUC, 127 A.3d 860, 867 (Pa. Commw. Ct. 2015). In upholding the Commission's decision and discretion to determine the components required for calculation of the DSIC rate, the Commonwealth Court stated:

Had the General Assembly wanted to ... curtail the Commission's discretion to allow utilities to continue to utilize this practice, the General Assembly could have explicitly incorporated such a prohibition or placed a limit on the Commission's discretion at the time it enacted Act 11. However, the General Assembly declined to take such action when the statute was drafted or enacted.

McCloskey, 127 A.3d 860, 870-71.

Shortly after the Commonwealth Court's determination in McCloskey, the General Assembly passed Act 40 of 2016, and the Governor signed Act 40 into law on June 12, 2016. Specifically regarding the computation of utility rates, Act 40 states, in relevant part:

(A) COMPUTATION. – If an expense or investment is allowed to be included in a public utility's rates for ratemaking purposes, the related income tax deductions and credits shall also be included in the computation of current or deferred income tax expense to reduce rates.

66 Pa. C.S. § 1301.1(a). The OCA submits that Act 40 now requires the inclusion of the income tax deduction known as ADIT in the DSIC rate charged to customers because ADIT represents the tax deductions and credits related to the DSIC-eligible plant being included in the DSIC rate.³

As OCA witness Ralph C. Smith,⁴ a Certified Public Accountant and attorney, explained in his Direct Testimony in this proceeding:

A utility DSIC is a form of utility rates. That form of utility rates is commonly referred to as a surcharge. A utility DSIC would typically include costs related to investment in infrastructure. Act 40 provides that if an investment is allowed to be included in a utility's rates, the related income tax deductions and credits shall also be included in the computation of current and deferred income tax expense to reduce rates. Computing the deferred taxes and ADIT impacts of the infrastructure investment-related tax benefits appears to be required by Act 40 to reduce rates. Reflecting the infrastructure investment-related tax benefits to reduce rates would typically take the form of reducing the net plant investment amount by the directly related ADIT. Act 40 appears to modify the Commission's prior decision on this matter and requires a different treatment of ADIT than that previously approved by the Commission.

OCA St. 1 at 110.

As Mr. Smith, testified, the DSIC is a rate. The Public Utility Code specifically defines "Rate" as follows:

Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility ... made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility

³ ADIT arises because the Internal Revenue Code permits a utility to take a tax deduction for accelerated and bonus depreciation, which reduces the income on which taxes must be paid. For ratemaking purposes, income taxes are calculated using book depreciation rather than tax depreciation as a deduction, which results in a difference between taxes actually paid and taxes used for ratemaking purposes and generates deferred income taxes. ADIT is the cumulative balance of the deferred taxes generated over time. See Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution System Improvement Charge, Docket No. P-2012-2338282, Opinion and Order at 18-19 (May 22, 2014).

⁴ Mr. Smith is a Senior Regulatory Consultant at Larkin & Associates, PLLC in Livonia, Michigan. He provides consulting and expert witness services regarding rate cases and regulatory filings on behalf of industry, state attorneys general, consumer groups, municipalities, and public service commission staff. Mr. Smith is also a licensed C.P.A. and attorney in Michigan. A complete description of Mr. Smith's qualifications is provided in OCA Statement No. 1, Attachment RCS-1.

66 Pa. C.S. § 102. (Emphasis added). The Public Utility Code defines “Distribution system improvement charge” as follows:

A charge imposed by a utility to recover the reasonable and prudent costs incurred to repair, improve or replace eligible property that is part of the utility’s distribution system.

66 Pa. C.S. § 1351. (Emphasis added).

This Commission has recognized that Act 11, which permits certain utilities to implement a DSIC with Commission approval, was enacted to provide “ratemaking flexibility for utilities.” See Implementation of Act 11 of 2012, Docket No. M-2012-2293611, Supplemental Implementation Order at 2 (Sept. 21, 2016) (Supplemental Implementation Order). Further, the Commission detailed the requirements of utilities regarding their DSICs during general base rate cases, including resetting the DSIC rate to zero, the filing of earnings reports during the pendency of a general base rate case and references to the DSIC in the compliance tariff filed after the conclusion of the general base rate case. See gen’ly Supplemental Implementation Order. As such, there can be no doubt that the DSIC is a “rate” pursuant to the Public Utility Code and is an existing rate at issue in this consolidated base rate proceeding that will be affected by a final order in this proceeding.

FirstEnergy witness D’Angelo testified that nothing in Act 40 relates to the calculation of the DSIC and cites to Representative Godshall’s comment that Act 40 “applies to base rate cases” to support Mr. D’Angelo’s conclusion that Act 40 does not apply to riders and adjustment clauses. See Met-Ed/Penelec/Penn Power/West Penn St. 2-R at 41-42. The OCA submits that the Companies’ position that Act 40 does not apply to the DSIC and reliance on the Act’s legislative history should be rejected. Act 40 applies generally to a utility’s “rates for ratemaking purposes” and provides no exceptions to the requirement that “related income tax deductions and

credits shall also be included in the computation of current or deferred income tax expense to reduce rates” whenever an expense or investment is permitted to be included in a utility’s rates. See 66 Pa. C.S. § 1301.1(a). The language of Act 40 is clear and unambiguous in this regard, and as such, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b). It is only when the words of a statute are not explicit that factors extraneous to the statutory language may be consulted to ascertain the General Assembly’s intent in enacting the statute. See Pa. Associated Builders & Contrs., Inc. v. Commw. Dept. of General Servs., 593 Pa. 580, 592, 932 A.2d 1271, 1278 (2007). See also Commw. Office of the Governor v. Donahue, 59 A.3d 1165, 1168 (Pa. Commw. Ct. 2013).

As discussed above, the DSIC is a “rate,” as such term is specifically defined in the Public Utility Code, and therefore, must be addressed as part of general ratemaking. When technical words are defined in a statute, they “shall be construed according to such peculiar and appropriate meaning or definition.” 1 Pa. C.S. § 1903(a). See e.g. Pa. PUC v. Seder, 139 A.3d 165, *172 (Pa. 2016) (Commonwealth Court held that it was bound by the definition of “Commission” in the Public Utility Code in construing 66 Pa. C.S. § 335(d)).

Even if the General Assembly’s intent in enacting Act 40 was relevant, it is well-established that when enacting legislation, it is presumed that the General Assembly is familiar with existing law. See e.g. Commw. v. Ramos, 623 Pa. 420, 428, 83 A.3d 86, 91 (2013). It, therefore, must be presumed that in passing Act 40, the General Assembly was aware of several court orders requiring the imposition of the consolidated tax adjustment in determining base rates as well as the recent Commonwealth Court order finding it unnecessary to account for ADIT in calculating the DSIC. Act 40 requires that utilities include all “related income tax deductions and credits” in their computation of their DSIC charges, which therefore, requires the inclusion

of ADIT in their computations. The General Assembly did not limit the application of Act 40 to the consolidated tax adjustment or to “base rates,” and therefore, it must be presumed that Act 40 applies to all “rates” as defined in the Public Utility Code, of which the DSIC is one. As such, the FirstEnergy Companies should be directed to include ADIT in their DSIC computations, as required by Act 40.

IV. CONCLUSION

Based on the foregoing, the FirstEnergy Companies should be directed to include ADIT in their DSIC computations.

Respectfully submitted,



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September 30, 2016
226158

Proposed Findings of Fact

1. On June 9, 2016, the Commission approved the implementation of DSICs by the FirstEnergy Companies to be effective July 1, 2016, pending the litigation of certain specific issues at Docket Nos. P-2015-2508942 (Metropolitan Edison Company or Met-Ed), P-2015-2508936 (Pennsylvania Electric Company or Penelec), P-2015-2508931 (Pennsylvania Power Company or Penn Power), and P-2015-2508948 (West Penn Power Company or West Penn).
2. On June 20, 2016, Met-Ed, Penelec, Penn Power and West Penn each submitted Tariff Supplements to include a DSIC rate. Met-Ed submitted Tariff Supplement No. 25 to Tariff Electric – Pa. P.U.C. No. 52 to implement a DSIC rate as Rider R. Penelec submitted Tariff Supplement No. 25 to Tariff Electric – Pa. P.U.C. No. 81 to implement a DSIC rate as Rider R. Penn Power submitted Tariff Supplement No. 19 to Tariff Electric – Pa. P.U.C. No. 36 to implement a DSIC rate as Rider O. West Penn Power submitted Tariff Supplement No. 18 to Tariff Electric – Pa. P.U.C. No. 40 to implement a DSIC rate as Rider N.
3. On June 9, 2016, at this docket, the Commission suspended the Companies' Original Tariffs, specifically Met-Ed Tariff Electric – Pa. P.U.C. No. 52; Penelec Tariff Electric – Pa. P.U.C. No. 81; Penn Power Tariff Electric – Pa. P.U.C. No. 36; and West Penn Tariff Electric – Pa. P.U.C. Nos. 38 and 40.
4. On June 12, 2016, Act 40 of 2016 was signed into law, effective in sixty days (or on August 11, 2016).
5. The FirstEnergy Companies do not account for ADIT in the Companies' DSIC calculations.

Proposed Conclusions of Law

1. As set forth in Section 315(a) of the Public Utility Code:

Reasonableness of rates – In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon the complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.

66 Pa. C.S. § 315(a).

2. Relevant to this matter, Act 40 states:

(A) COMPUTATION. – If an expense or investment is allowed to be included in a public utility’s rates for ratemaking purposes, the related income tax deductions and credits shall also be included in the computation of current or deferred income tax expense to reduce rates.

66 Pa. C.S. § 1301.1(a).

3. The DSIC is a “rate” as that term is defined in the Public Utility Code. See 66 Pa. C.S. §§ 102, 1351.

4. Act 40 “shall apply to all cases where the final order is entered after the effective date of this section.” See 66 Pa. C.S. § 1301.1(c)(2).

5. The DSIC must be reset to zero at the conclusion of a base rate case. See Implementation of Act 11 of 2012, Docket No. M-2012-2293611, Supplemental Implementation Order (Sept. 21, 2016).

6. The letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S. § 1921(b).

7. It is only when the words of a statute are not explicit that factors extraneous to the statutory language may be consulted to ascertain the General Assembly’s intent in enacting the statute. See Pa. Associated Builders & Contrs., Inc. v. Commw. Dept. of General Servs., 593 Pa.

580, 592, 932 A.2d 1271, 1278 (2007). See also Commw. Office of the Governor v. Donahue, 59 A.3d 1165, 1168 (Pa. Commw. Ct. 2013).

8. When technical words are defined in a statute, they “shall be construed according to such peculiar and appropriate meaning or definition.” 1 Pa. C.S. § 1903(a). See e.g. Pa. PUC v. Seder, 139 A.3d 165, *172 (Pa. 2016).

9. When enacting legislation, it is presumed that the General Assembly is familiar with existing law. See e.g. Commw. v. Ramos, 623 Pa. 420, 428, 83 A.3d 86, 91 (2013).

Proposed Ordering Paragraphs

THEREFORE, IT IS ORDERED:

That, within ten (10) days, the FirstEnergy Companies are directed to make compliance filings for their DSIC tariffs that reset the DSIC to zero and include ADIT as an offset in their DSIC computations.

BY THE COMMISSION

(SEAL)

ORDER ADOPTED:

ORDER ENTERED:

Date: _____

CERTIFICATE OF SERVICE

Pennsylvania Public Utility Commission	:	
v.	:	
Metropolitan Edison Company;	:	Docket Nos. R-2016-2537349
Pennsylvania Electric Company;	:	R-2016-2537352
Pennsylvania Power Company;	:	R-2016-2537355
West Penn Power Company	:	R-2016-2537359

I hereby certify that I have this day served a true copy of the foregoing document, the Office of Consumer Advocate's Main Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code §1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 30th day of September 2016.

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