

COMMONWEALTH OF PENNSYLVANIA



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October 14, 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 Reply Brief in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in cursive script, reading "Candis A. Tunilo".

Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. # 89891

Enclosures

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

226507

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	:	
	:	

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REPLY BRIEF  
OF THE OFFICE OF CONSUMER ADVOCATE

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DATED: October 14, 2016

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## **I. INTRODUCTION**

The reserved issue in this proceeding is whether the first sentence of Act 40 of 2016 means what it says. The first sentence of 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). According to this plain, unambiguous language, anytime an “investment” is allowed to be included in “rates,” the related income tax deductions “shall also be included” in the calculation of current or deferred income tax expense “to reduce rates.”

The FirstEnergy Companies assert that this sentence in Act 40 is limited to certain circumstances even though the General Assembly provided no limiting language or exceptions to this general rule in the Act. The Office of Consumer Advocate (OCA) submits that FirstEnergy’s assertion is not supported by the plain, unambiguous language of Act 40 or the rules of statutory construction. As discussed herein and in the OCA’s Main Brief, by its plain and unambiguous terms, Act 40, inter alia, requires an Accumulated Deferred Income Tax (ADIT) offset be included in any Distribution System Improvement Charge (DSIC) rate charged to customers.

## **II. REPLY ARGUMENT**

### **A. The Reserved Issue Is Properly Addressed in this Base Rate Proceeding.**

In its Initial Brief, FirstEnergy asserts that this case is limited to base rates and associated base rate issues, and that the DSIC, which is an automatic adjustment clause, is legally separate from and operates separately from base rates. FE I.B. at 10-11. FirstEnergy’s argument ignores the Commission’s Supplemental Implementation Order, which details 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 Implementation of Act 11 of 2012, Docket No. M-2012-2293611, Supplemental Implementation Order (Sept. 21, 2016) (Supplemental Implementation Order). The OCA submits that the FirstEnergy Companies' DSICs are existing rates<sup>1</sup> at issue in this consolidated base rate proceeding that will be affected by a final order in this proceeding. 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.

B. Act 40 Overturns the Commonwealth Court's Order in *McCloskey v. Pa. PUC*, 127 A.3d 860 (Pa. Commw. Ct. 2015).

In its Initial Brief, FirstEnergy asserts that Act 40 does not legislatively overrule McCloskey v. Pa. PUC, 127 A.3d 860 (Pa. Commw. Ct. 2015) and does not strip the Commission of its authority and discretion to determine how ADIT will be accounted for in the DSIC calculation. FE I.B. at 18-39. The OCA submits that, as discussed in detail infra, the Companies' arguments must be rejected, as the rules of statutory construction require that the unambiguous language in Act 40 be given effect.

1. The Prior History of the DSIC Is Not Determinative to the Issue in this Proceeding, as the Language in Act 40 Is Clear and Unambiguous.

In its Initial Brief, FirstEnergy provides the background of the creation of the DSIC in Pennsylvania, which began by Commission orders in 1996 and was later that year enacted into law as 66 Pa. C.S. § 1307(g) by the General Assembly (applying to water utilities only). See FE I.B. at 11-15. Later in 2012, Act 11 of 2012 added Sections 1350 through 1360 to the Public

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<sup>1</sup> See OCA M.B. at 8-10 for the OCA's analysis of why the Companies' DSIC rates are "existing" rates, the justness and reasonableness of which are part of the Commission's investigation in this proceeding.

Utility Code, which permitted DSICs for electric, natural gas and wastewater utilities. Id. According to FirstEnergy, the DSIC's history and the language of 66 Pa. C.S. §§ 1357 and 1358 affirm the long-standing practice of not including ADIT in quarterly DSIC calculations. Id. at 15.

FirstEnergy's argument, however, ignores the plain, unambiguous language of Act 40, which 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). As the OCA explained in its Main Brief at pages 14 through 15, 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 (CTA) in determining base rates as well as the background and history of the DSIC and the recent Commonwealth Court order finding it unnecessary to account for ADIT in calculating the DSIC.

There is nothing in Act 40 stating that the Act applies only to the CTA. Conversely, there is nothing in Act 40 stating that the Act does not apply to the DSIC or surcharges generally. Instead, Act 40 is clear in that it applies to a public utility's "rates," which term is defined in the Public Utility Code at Section 102. The DSIC is a "rate" as that term is defined in the Public Utility Code. See 66 Pa. C.S. §§ 102 and 1351. 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)). As such, the letter of Act 40 cannot be disregarded under the pretext of pursuing its spirit. See 1 Pa. C.S. § 1921(b). As such, FirstEnergy’s argument that the background and history of the DSIC supports the continued practice of not including ADIT in the DSIC calculation must be rejected.

2. The Entry of the Final Implementation Order Is Not Relevant to the Resolution in this Proceeding.

In its Initial Brief, FirstEnergy asserts that Act 40 does not apply to the DSIC because the Commission’s Final Implementation Order at Docket No. M-2012-2293611,<sup>2</sup> wherein the Commission adopted the Model DSIC Tariff as required by Act 11 of 2012, and the Commission’s Orders approving the Companies’ DSICs were entered prior to the effective date of Act 40. See FE I.B. at 15-18, 27-31. FirstEnergy further asserts that the Commission’s orders approving DSICs, including the order at issue in McCloskey v. Pa. PUC, 127 A.3d 860 (Pa. Commw. Ct. 2015), included DSIC tariffs that conformed to the Model Tariff adopted in the Final Implementation Order. Id. As such, FirstEnergy asserts that the Final Implementation Order is “precisely the kind of ‘final order’ contemplated by Section 1301.1(c)(2), which demarcates the threshold for the effectiveness of Section 1301.1(a).”<sup>3</sup> FE I.B. at 18.

The OCA submits that the Companies’ assertions are not relevant to the resolution of this issue in this proceeding. As explained in the OCA’s Main Brief at pages 14 through 15, 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

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<sup>2</sup> See Implementation of Act 11 of 2012, Docket No. M-2012-2293611, Final Implementation Order (Aug. 2, 2012) (Final Implementation Order).

<sup>3</sup> Of note, the FirstEnergy Companies agree that Act 40 applies to this proceeding for purposes of the effect on the CTA. See Met-Ed/Penelec/Penn Power/West Penn St. 2-S.

of the Commission's Final Implementation Order adopting the Model DSIC Tariff and McCloskey v. Pa. PUC, 127 A.3d 860 (Pa. Commw. Ct. 2015), upholding the Commission's decision that ADIT need not be included in utilities' computations of DSIC rates. The General Assembly has acted on several previous occasions to amend statutes and legislatively overrule decisions of the judiciary. See e.g. Commw. v. State Conference of State Police Lodges of the Fraternal Order of Police, 525 Pa. 40, 575 A.2d 94 (1990), superseded by statute, 71 Pa. C.S. § 5955. Indeed, both parties are in agreement that Act 40 itself overrules Pennsylvania Supreme Court precedent in regards to the Consolidated Tax Adjustment. Had the General Assembly wished not to disturb the Final Implementation Order and McCloskey, it could have specifically excluded the DSIC computation from the mandates of Act 40 or it could have limited the effect of the first sentence of the Act to base rate cases only.

Further, the OCA submits that it is irrelevant that the Commission's Orders approving the Companies' initial DSICs were entered prior to the effective date of Act. 40. As explained in Section II.A supra and Section III.B of the OCA's Main Brief, the FirstEnergy Companies' DSIC rates are existing rates that will be affected by the final order in this proceeding. As explained in Section II.B.3 infra and Section III.C of the OCA's Main Brief, Act 40 applies to utility "rates," and the DSIC is a rate. Therefore, pursuant to Section 1301.1(c)(2) (in Act 40), which states that the "section shall apply to all cases where the final order is entered after the effective date of this section," Act 40 applies to this case and the tariffs, which will include the Companies' DSICs, that will be approved at the conclusion of this proceeding.

3. Act 40's Legislative History Cannot Be Used to Overcome the Clear and Unambiguous Language of the Act.

In its Initial Brief, FirstEnergy argues that the testimony provided by various interested parties to the Pennsylvania House of Representative Consumer Affairs Committee regarding the House Bill 1436, which became Act 40, supports the Companies' position that Act 40 was enacted solely to eliminate the CTA. FE I.B. at 19-22. Further, FirstEnergy asserts that Act 40 does not purport to amend any of the DSIC-related sections of the Public Utility Code or deprive the Commission of its discretion in designing DSIC procedures. *Id.* FirstEnergy also asserts that Act 40 applies to base rates but not adjustment clauses. FE I.B. at 22-27.

Pursuant to 1 Pa. C.S. § 1921(b), the courts must accept that when the General Assembly selects the words to use in a statute, it has chosen them purposefully, and courts cannot change those words to reflect their own public policy concerns. *See e.g. Commw. v. Scolieri*, 571 Pa. 658, 661, 813 A.2d 672, 673-74 (2002). FirstEnergy's assertions are contradicted by the plain, unambiguous language of Act 40. The phrase "consolidated tax adjustment" is not stated anywhere in Act 40. Similarly, the phrase "base rates" is not used anywhere in Act 40. The term "rate," however, is used in Act 40, and that term is defined in the Public Utility Code. *See* 66 Pa. C.S. § 102. The DSIC is a "rate" as that term is defined in the Public Utility Code.<sup>4</sup> *See* 66 Pa. C.S. §§ 102 and 1351. There is no language in Act 40 stating that the computation of the DSIC or surcharges generally are exempted from the Act. As such, it is not appropriate to insert words or language into Act 40 that the General Assembly did not include.

The OCA submits that FirstEnergy's reliance of the testimony of the Commission's Chairman or the Acting Consumer Advocate relating to House Bill 1436 to explain the "express purpose" of Act 40 is not appropriate in the absence of such language of "express purpose" in the Act itself. House Bill 1436 states as its purpose: "AN ACT Amending Title 66 (Public Utilities)

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<sup>4</sup> FirstEnergy does not dispute that the DSIC is a "rate" as that term is defined in the Public Utility Code. *See* FE I.B. at 29.

of the Pennsylvania Consolidated Statutes, in rates and distribution systems, providing for computation of income tax expense for ratemaking purposes.” Act of Dec. 19, 2015, No. 1436, 2015 P.A. Laws.<sup>5</sup> The CTA is not mentioned in the purpose of the Act. Instead, the general phrase “ratemaking purposes” is used. 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 Supplemental Implementation Order at 2. As such, the language in Act 40 regarding its purpose clearly includes all “ratemaking purposes,” which encompasses base rates and surcharge mechanisms.

4. Act 40 Affects the DSIC Computation in Ways Additional to ADIT.

In its Initial Brief, FirstEnergy asserts that even if Act 40 applied outside of a base rate proceeding, it does not change the Commission’s discretion to determine the appropriate way to account for ADIT in the DSIC because the DSIC rate consists of the entire DSIC adjustment mechanism and not just its individual components. See FE I.B. at 32-39. Further, FirstEnergy asserts that the consumer protections in Act 11, including the earnings cap analysis, are the appropriate way to deal with complexities such as ADIT in the DSIC calculation. *Id.* The OCA submits that FirstEnergy’s arguments are incorrect. First, Act 40 removed the Commission’s discretion as it concerns the application of income tax deductions and credits for investments included in rates. Act 40 states that these deductions “shall also be included in the computation of current or deferred income tax expense to reduce rates.” The Commission does not have the discretion to ignore this statutory mandate as to the tax component of the DSIC.

Second, FirstEnergy ignores the impact of Act 40 on the earnings cap protection of the DSIC. With Act 40, consumers will lose the benefit of the consolidated tax savings adjustment when calculating whether a utility is overearning. Contrary to the Companies’ argument, Act 40

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<sup>5</sup> House Bill 1436 of 2015 is attached hereto as Appendix A.

will work to the Companies' benefit in this regard. When Act 40 is read in its entirety, the General Assembly balances these impacts by also requiring that "related tax deductions and credits" also be included in the calculation to reduce rates.

### III. CONCLUSION

Based on the foregoing and for the reasons articulated in the OCA's Main Brief, the FirstEnergy Companies should be directed to include ADIT in their DSIC computations.

Respectfully submitted,



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October 14, 2016  
226386

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Tanya J. McCloskey  
Acting Consumer Advocate

## **Appendix A**

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 1436 Session of  
2015

INTRODUCED BY GODSHALL, KOTIK, SAINATO, KILLION, SACCONI,  
DUNBAR, QUIGLEY, MARSHALL, GROVE, HARHAI, LONGIETTI, KORTZ,  
PICKETT, BARBIN, EVANKOVICH, COHEN, GIBBONS, EVERETT,  
SCHLOSSBERG, KAUFFMAN, BURNS, MUSTIO, P. DALEY, SCHWEYER,  
DeLUCA AND FARRY, JULY 6, 2015

AS REPORTED FROM COMMITTEE ON CONSUMER AFFAIRS, HOUSE OF  
REPRESENTATIVES, AS AMENDED, DECEMBER 19, 2015

AN ACT

1 Amending Title 66 (Public Utilities) of the Pennsylvania  
2 Consolidated Statutes, in rates and distribution systems,  
3 providing for computation of income tax expense for  
4 ratemaking purposes.

5 The General Assembly of the Commonwealth of Pennsylvania  
6 hereby enacts as follows:

7 Section 1. Title 66 of the Pennsylvania Consolidated  
8 Statutes is amended by adding a section to read:

9 § 1301.1. Computation of income tax expense for ratemaking  
10 purposes.

11 (A) COMPUTATION.--If an expense or investment is allowed to <--  
12 be included in a public utility's rates for ratemaking purposes,  
13 the related income tax deductions and credits shall also be  
14 included in the computation of current or deferred income tax  
15 expense to reduce rates. If an expense or investment is not  
16 allowed to be included in a public utility's rates, the related  
17 income tax deductions and credits, including tax losses of the

public utility's parent or affiliated companies, shall not be included in the computation of income tax expense to reduce rates. The deferred income taxes used to determine the rate base of a public utility for ratemaking purposes shall be based solely on the tax deductions and credits received by the public utility and shall not include any deductions or credits generated by the expenses or investments of a public utility's parent or any affiliated entity. The income tax expense shall be computed using the applicable statutory income tax rates.

(B) REVENUE USE.--IF A DIFFERENTIAL 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.

(C) APPLICATION.--THE FOLLOWING SHALL APPLY:

(1) SUBSECTION (B) SHALL NO LONGER APPLY AFTER DECEMBER 31, 2025.

(2) THIS SECTION SHALL APPLY TO ALL CASES WHERE THE FINAL ORDER IS ENTERED AFTER THE EFFECTIVE DATE OF THIS SECTION.

Section 2. This act shall take effect in 60 days.

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## 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 Reply 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 14<sup>th</sup> day of October 2016.

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