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October 2, 2017

VIA eFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

Re: Petitions of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of a Distribution System Improvement Charge Docket Nos. P-2015-2508942, et al. Office of Consumer Advocate v. Metropolitan Edison Company, et al. Docket Nos. C-2016-2531040, et al.

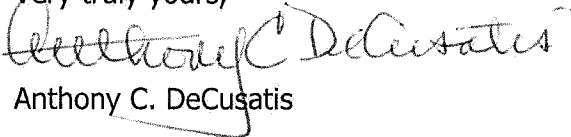
Dear Secretary Chiavetta:

Enclosed please find the **Reply Exceptions** ("Reply Exceptions") of **Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company**, in the above-referenced matter.

As evidenced by the enclosed Certificate of Service, copies of the Reply Exceptions have been served upon Administrative Law Judge Cheskis and all parties of record. In addition, as directed in your letter of August 31, 2017, a courtesy copy has been e-mailed to the Commission's Office of Special Assistants.

Please contact me directly if you have any questions or concerns (215.963.5034).

Very truly yours,



Anthony C. DeCusatis

Enclosures

c: Parties of Record (w/encl. as noted above)

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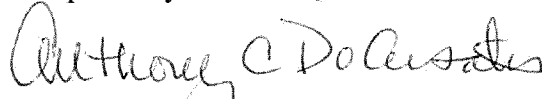
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Dated: October 2, 2017

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITIONS OF METROPOLITAN	:	
EDISON COMPANY, PENNSYLVANIA	:	
ELECTRIC COMPANY, PENNSYLVANIA	:	Docket Nos. P-2015-2508942
POWER COMPANY AND WEST PENN	:	P-2015-2508936
POWER COMPANY FOR APPROVAL OF	:	P-2015-2508931
A DISTRIBUTION SYSTEM	:	P-2015-2508948
IMPROVEMENT CHARGE	:	
	:	
OFFICE OF CONSUMER ADVOCATE	:	
	:	
v.	:	Docket Nos. C-2016-2531040
	:	C-2016-2531060
METROPOLITAN EDISON COMPANY,	:	C-2016-2531054
PENNSYLVANIA ELECTRIC COMPANY	:	C-2016-2531019
PENNSYLVANIA POWER COMPANY	:	
WEST PENN POWER COMPANY	:	

**REPLY OF
METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC
COMPANY, PENNSYLVANIA POWER COMPANY AND
WEST PENN POWER COMPANY**

**To The Exceptions Of The Office Of Consumer Advocate To
The Recommended Decision Of Administrative Law Judge Joel H. Cheskis**

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I. INTRODUCTION

The Recommended Decision of Administrative Law Judge Joel H. Cheskis (“ALJ”) in this case was issued on August 31, 2017 (“Recommended Decision” or “R.D.”). The R.D. addresses issues that pertain to the Distribution System Improvement Charge (“DSIC”) Riders of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (individually, a “Company” and, collectively, the “Companies”). On September 20, 2017, the Companies and the Office of Consumer Advocate (“OCA”) each filed Exceptions to the R.D. By this Reply, the Companies are replying to the Exceptions filed by the OCA.

A. The Background Of This Proceeding

The Companies’ DSIC Riders were approved by the Pennsylvania Public Utility Commission’s (“PUC” or the “Commission”) Orders entered on June 9, 2016 (“DSIC Orders”).¹ In the DSIC Orders, the Commission found and determined that the Companies’ DSIC Riders conformed to the terms of the Model Tariff that the Commission had adopted, pursuant to the dictates of Sections 1353(b)(1) and 1358(d) of the Public Utility Code,² in its Final Implementation Order for the DSIC.³ In addition, the DSIC Orders referred to the Office of Administrative Law Judge (“OALJ”) certain collateral DSIC implementation issues that had

¹ *Petition of Metropolitan Edison Company for Approval of a Distribution System Improvement Charge*, Docket No. P-2015-2508942 (June 9, 2016); *Petition of Pennsylvania Electric Company for Approval of a Distribution System Improvement Charge*, Docket No. P-2015-2508936 (June 9, 2016); *Petition of Pennsylvania Power Company for Approval of a Distribution System Improvement Charge*, Docket No. P-2015-2508931 (June 9, 2016); *Petition of West Penn Power Company for Approval of a Distribution System Improvement Charge*, Docket No. P-2015-2508948 (June 9, 2016).

² 66 Pa.C.S. §§ 1353(b)(1) and 1358(d). Hereafter, all references to a “Section” are to sections of the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.*, unless otherwise indicated.

³ Final Implementation Order, *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Aug. 2, 2012) (“Final Implementation Order”).

been raised by intervenors.⁴ The DSIC implementation issues referred to the OALJ by the DSIC Orders are the subject of the Joint Petition for Settlement of Pending Issues that was filed in this docket on February 2, 2017.

The current proceeding is also the docket to which the Commission referred an issue that was reserved for decision from the Joint Petitions for Partial Settlement of the Companies' 2016 base rate cases.⁵ The reserved issue pertains to the formula for calculating DSIC quarterly charges that was set forth in the Companies' DSIC Riders. That formula replicates the DSIC formula set forth in the Final Implementation Order, as the Commission affirmed in the DSIC Orders.⁶ More specifically, the reserved issue is whether, as the OCA contends, the enactment of Act 40 of 2016 ("Act 40")⁷ requires the Commission to revoke portions of its Final Implementation Order and fundamentally revise the DSIC formula embedded in the Model Tariff.⁸

The R.D. consists of two parts. First, the R.D. recommends that the Commission grant the Joint Petition for Settlement of Pending Issues and approve the settlement set forth therein

⁴ These issues consisted principally of whether the DSIC charge should apply to customers receiving service at "transmission" voltages and whether revenue recovered under certain non-DSIC riders constituted "distribution" revenue for purposes of calculating the 5% DSIC "cap." See Section 1358(a)(1).

⁵ *Pa. P.U.C. v. Metropolitan Edison Co.*, Docket Nos. R-2016-2537349, *et al.*; *Pa. P.U.C. v. Pennsylvania Electric Co.*, Docket Nos. R-2016-2537352, *et al.*; *Pa. P.U.C. v. Pennsylvania Power Co.*, Docket Nos. R-2016-2537355, *et al.*; *Pa. P.U.C. v. West Penn Power Co.*, Docket Nos. R-2016-2537359, *et al.* (Final Order entered January 19, 2017).

⁶ See, e.g., DSIC Order of Metropolitan Edison Co., p. 20 ("Upon review, the Commission finds that the Petition of Metropolitan Edison Company for Approval to Establish and Implement a Distribution System Improvement Charge complies with the requirement of Act 11 and our Final Implementation Order.").

⁷ Act 40 added Section 1301.1 to the Public Utility Code, 66 Pa.C.S. § 1301.1. Section 1301.1, which does not mention the DSIC, precludes the Commission from making consolidated tax adjustments ("CTAs") in determining the federal income tax expense recovered in base rates.

⁸ See Final Implementation Order, pp. 38-39 (affirming that quarterly charges under the DSIC should be determined based on "statutory" federal and state tax rates and without deducting accumulated deferred income taxes from the original cost of "eligible property.").

pertaining to the DSIC implementation issues referred to the OALJ by the DSIC Orders.⁹ No party has taken exception to this recommendation.

Second, with regard to the issue reserved from the Companies' base rate case settlements, the R.D. recommends that the Commission accept the OCA's interpretation of Act 40. Specifically, the OCA has contended that, despite the clearly-expressed purpose underlying Act 40 (i.e., to eliminate the use of CTAs in calculating base rates), Section 1301.1 should be interpreted to require the Commission to add two new elements to the statutorily-prescribed DSIC formula for computing quarterly DSIC charges. One new element would revise the DSIC formula to deduct from the "original cost" of "eligible property" accumulated deferred federal income taxes ("ADIT") deemed to accrue from quarterly additions of DSIC property. The second new element would introduce to the DSIC formula a variable to reflect state income tax deductions that may become available because of quarterly additions of DSIC-eligible property. Neither of the new elements proposed by the OCA has any antecedent in the terms specified by statute for calculating DSIC quarterly charges.¹⁰

B. The Companies' And The OCA's Exceptions

As previously noted, on September 20, 2017, the Companies filed Exceptions to the ALJ's recommendation that the Commission accept the OCA's interpretation of Act 40 and, on that basis, amend the Final Implementation Order by adding two new elements to the DSIC formula. The errors in the OCA's interpretation of Act 40 – and, therefore, the errors underlying the R.D.'s recommendation to accept the OCA's interpretation – are discussed in the Companies'

⁹ R.D., pp. 35-45.

¹⁰ See Section 1351 defining "Eligible property," and Section 1357(b), which requires using the "original cost" of "eligible property" to calculate quarterly DSIC charges. See also Sections 1357(a) and (b), which specify the terms that should be used to calculate quarterly charges under the DSIC and do not include terms for either ADIT or state income tax deductions deemed to be associated with quarterly additions of DSIC property.

Exceptions as well as in their Initial and Reply Briefs filed on September 30 and October 14, 2016, respectively, and in their Supplemental Initial and Reply Briefs, filed on June 5 and 21, 2017. In their Exceptions and in their previously filed Supplemental Initial and Reply Briefs, the Companies also explained that there is not a practical, workable way to implement the wholesale revisions to the DSIC formula the OCA proposes.¹¹ On September 20, 2017, the OCA filed an Exception to the R.D.’s recommendation to place a portion of the “burden of proof” for the contested issue upon the OCA.¹²

In the portion of the R.D. discussing the contested issue, the ALJ addressed the OCA’s contention that the Companies bear the “burden of proof” to show that their DSIC Riders are “just and reasonable.”¹³ The ALJ did not adopt the OCA’s position in its entirety because he determined that the issue of burden of proof should be bifurcated. Therefore, although he recommended that the Commission find that the Companies have the “burden to demonstrate that their DSICs are just and reasonable,” he implicitly recognized it is the OCA – not the Companies – that is proposing to alter the DSIC formula established by the Final Implementation Order and previously approved in the Companies’ DSIC Orders. Accordingly, the ALJ concluded that “the OCA has the burden to prove that one of its proposed methods should be adopted to incorporate that impact [of the OCA’s interpretation of Act 40] into the calculation of the companies’ DSIC.”¹⁴ As previously noted, the OCA has taken exception to the latter recommendation.

¹¹ See Companies’ Exceptions, pp. 20-28.

¹² See R.D., pp. 14-16. The Companies filed an exception to the ALJ’s recommendation imposing any part of the “burden of proof” on them. Companies’ Exceptions, pp. 6 and 10-11.

¹³ R.D. p. 14.

¹⁴ R.D., p. 16.

II. REPLY TO THE OCA'S EXCEPTION

In the R.D., the ALJ articulated the legal proposition that “a party that offers a proposal not included in the original filing [of a utility] bears the burden for such proposal.”¹⁵ The ALJ discerned that this is exactly the kind of case the foregoing legal proposition was meant to address because it is the OCA that is proposing various methodologies to try to accommodate its interpretation of Act 40 (including two alternative methods to try to reflect state income tax deductions).¹⁶ And, of equal importance, when the Companies filed their Petitions for approval of the DSIC Riders, they had no reason to believe they had to offer any “proposal” to modify the DSIC formula to reflect ADIT or state income tax deductions in calculating quarterly DSIC charges. To the contrary, as the Commission determined in the DSIC Orders, the Companies satisfied the only “burden of proof” imposed on them, namely, Section 1353(b)(1)’s requirement to file with their Petitions “an initial tariff that complies with a model tariff adopted by the commission.” In the Final Implementation Order, the Commission had adopted the Model Tariff and had held that the Model Tariff properly accounts for ADIT and state income tax deductions through the revenue requirement analysis a utility must submit each quarter in compliance with the “earnings cap” mandate of Section 1358(b)(3).¹⁷ Notably, that determination was affirmed by the Commonwealth Court in *McCloskey v. Pa. P.U.C.*¹⁸ before the Companies filed their Petitions for approval of their respective DSIC Riders.

¹⁵ R.D., p. 15.

¹⁶ See Companies’ Exceptions, pp. 20-28.

¹⁷ As explained in the Companies’ Exceptions (pp. 7 and 14-15), the “earnings cap” analysis required by Section 1358(b)(3) and the Final Implementation Order is the equivalent of a non-general base rate case. *McCloskey v. Pa. P.U.C.*, 127 A.3d 860, 868-869. See *Popowsky v. Pa. P.U.C.*, 683 A.2d 958 (Pa. Cmwlth. 1996) (approving the Commission’s methodology for analyzing and approving a non-general base rate case). See also Companies’ Initial Brief, pp. 35-39.

¹⁸ 127 A.3d 860 (Pa. Cmwlth. 2015).

The facts supporting the ALJ's finding that the OCA bears the burden to prove that its proposals to alter the DSIC formula "are appropriate and should be adopted"¹⁹ also support – indeed, require – that the OCA bear the burden of proof on *all* aspects of the contested issue. Although the ALJ tried to distinguish between the terms of the DSIC Rider (which mirror the terms of the Model Tariff) and the OCA's proposals for alternative calculations of quarterly charges, that effort is unavailing. The OCA's proposals would do nothing less than substantively revise the DSIC formula embedded in the Commission-approved Model Tariff.

To change the DSIC calculation as the OCA proposes necessarily requires changing the DSIC formula, the Model Tariff that incorporates that formula and the Final Implementation Order that approved the Model Tariff. Consequently, the OCA is making a collateral attack on a final order of the Commission and, as such, it has the burden of proof on all aspects of the contested issue. For the Commission to hold otherwise would contradict the clear statutory mandate set forth in Section 316 that "[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review."

The R.D. correctly places the burden of proof on the OCA to demonstrate that its proposals to revise the DSIC formula are lawful,²⁰ just, reasonable, appropriate, and would not needlessly complicate the Commission's review, administration and auditing of the DSIC.²¹ By

¹⁹ R.D., p. 16.

²⁰ As explained in the Companies' Exceptions (pp. 22-22, 28), the OCA's proposals are not lawful because they directly conflict with the terms for calculating DSIC charges set forth with specificity in the DSIC-related sections of the Public Utility Code.

²¹ For a sense of the complexity the OCA's unworkable proposals would entail, see the Companies' Exceptions (pp. 25-27). Basically, the OCA is proposing several vague changes to the Commission's Model Tariff without actually offering specific language describing concrete amendments that could be implemented on a uniform basis for all utilities that employ the DSIC.

failing to extend this finding to all aspects of the contested issue, however, the R.D. repeats the fundamental error underlying the OCA's argument, namely, that the DSIC is a "proposed rate."²² That proposition is erroneous because it confuses a monetary charge with the entire DSIC adjustment mechanism and implicitly assumes that the former is at issue and the latter is not. Of course, that proposition contravenes the OCA's own position in this case, which seeks nothing less than a fundamental change in the terms of the DSIC Riders and, by necessary extension, a fundamental change in the Commission-approved Model Tariff and the Final Implementation Order.²³

As explained in the Companies' Exceptions (pp. 7 and 13-14), the "rate" for each Company is its *entire* DSIC Rider, and those Riders are no longer "proposed." The Riders are currently in effect pursuant to the DSIC Orders, which found and determined that they conform to the Model Tariff,²⁴ and, therefore, satisfy Section 1353(b)(1). Indeed, for that reason, the real object of the OCA's proposal in this case is not the Companies' DSIC Riders, but the Model Tariff and the Final Implementation Order approving it. As previously explained, pursuant to Section 316, the Commission's findings and conclusions in the Final Implementation Order are "prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby." Therefore, the ALJ erred in not recommending that the OCA, as the party collaterally

²² See R.D., p. 15; OCA Exceptions, p. 3.

²³ The enactment of Act 40 did not alter any of these principles. Act 40 does not even mention the DSIC and was not enacted to force a legislative reversal of *McCloskey*, as the OCA has erroneously suggested. As explained in the Companies' Exceptions (pp. 15-20), there is a solid textual basis within the four corners of Act 40 and irrefutable evidence from the legislative record that Act 40 does not apply to the DSIC. For the OCA – or anyone else – to argue that the enactment of Act 40 somehow revoked the finality or validity of the Model Tariff or the Final Implementation Order simply assumes what the OCA has the burden to prove.

²⁴ Although the DSIC Orders assigned certain issues to the OALJ, none of those issues pertained to the fundamental terms of the Model Tariff or the fundamental terms of the DSIC approved in the Final Implementation Order. In fact, the scope of the assignment was strictly limited to the specific issues delineated in Ordering Paragraph No. 4 of each of the DSIC Orders. The specifically assigned issues are the subject of the Joint Petition for Settlement of Pending Issues that was filed on February 2, 2017.

attacking the Final Implementation Order, the Model Tariff, and the DSIC Orders, bears the “burden of proof” as to *all* aspects of the contested issue.

III. CONCLUSION

For all the reasons discussed above, the Companies do not bear any portion of the burden of proof with respect to the contested issue. For the reasons set forth in the Companies’ Exceptions, those Exceptions should be granted and the ALJ’s recommendations regarding the contested issue, including his recommendation that the Companies bear any portion of the “burden of proof,” should be rejected. Consistent with the R.D., the Joint Petition for Settlement of Pending Issues should be approved without modification.

Respectfully submitted,



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Dated: October 2, 2017