

COMMONWEALTH OF PENNSYLVANIA




OFFICE OF CONSUMER ADVOCATE

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January 6, 2022

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Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Petition of Metropolitan Edison Company for  
Approval of a Distribution System Improvement Charge  
Docket Nos. P-2015-2508942  
C-2016-2531040

Petition of Pennsylvania Electric Company for  
Approval of a Distribution System Improvement Charge  
Docket Nos. P-2015-2508936  
C-2016-2531060

Petition of Pennsylvania Power Company for  
Approval of a Distribution System Improvement Charge  
Docket Nos. P-2015-2508931  
C-2016-2531054

Petition of West Penn Power Company for  
Approval of a Distribution System Improvement Charge  
Docket Nos. P-2015-2508948  
C-2016-2531019

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Prehearing Memorandum in the above-referenced proceedings.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

/s/ Erin L. Gannon

Erin L. Gannon

Senior Assistant Consumer Advocate

PA Attorney I.D. # 83487

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Enclosures:

cc: The Honorable Joel H. Cheskis (**email only**)  
Certificate of Service

\*321862

CERTIFICATE OF SERVICE

Re: Petition of Metropolitan Edison Co. for Approval : Docket Nos. P-2015-2508942,  
of a Distribution System Improvement Charge : C-2016-2531040  
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:  
Petition of Pennsylvania Electric Co. for Approval : Docket Nos. P-2015-2508936,  
of a Distribution System Improvement Charge : C-2016-2531060  
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Petition of Pennsylvania Power Co. for Approval : Docket Nos. P-2015-2508931,  
of a Distribution System Improvement Charge : C-2016-2531054  
:  
:  
Petition of West Penn Power Co. for Approval : Docket Nos. P-2015-2508948,  
of a Distribution System Improvement Charge : C-2016-2531019

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Prehearing Memorandum, 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 6<sup>th</sup> day of January 2022.

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Fax: (717) 783-7152  
Dated: January 6, 2022  
\*319990

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Metropolitan Edison Co. for Approval of a Distribution System Improvement Charge	:	Docket Nos. P-2015-2508942, C-2016-2531040
Petition of Pennsylvania Electric Co. for Approval of a Distribution System Improvement Charge	:	Docket Nos. P-2015-2508936, C-2016-2531060
Petition of Pennsylvania Power Co. for Approval of a Distribution System Improvement Charge	:	Docket Nos. P-2015-2508931, C-2016-2531054
Petition of West Penn Power Co. for Approval of a Distribution System Improvement Charge	:	Docket Nos. P-2015-2508948, C-2016-2531019

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PREHEARING MEMORANDUM  
OF THE  
OFFICE OF CONSUMER ADVOCATE

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Pursuant to Section 333 of the Public Utility Code, 66 Pa. C.S. § 333, and in response to the Third Further Prehearing Order issued on December 9, 2021 in the above-captioned matter, the Office of Consumer Advocate (OCA) provides the following information:

**I. INTRODUCTION**

In these consolidated cases, the FirstEnergy Companies sought to establish Distribution System Improvement Charges (DSICs), which were approved by the Public Utility Commission with certain issues referred to the Office of Administrative Law Judge (OALJ) for hearing and preparation of a recommended decision on, *inter alia*, the matter of whether the proposed DSIC calculations and tariffs complied with 66 Pa. C.S. § 1301.1(a). *Petitions of Metropolitan Edison*

*Co., Pennsylvania Elec. Co. Pennsylvania Power Co. and West Penn Power Co, for Approval of a Distribution System Improvement Charge, Docket Nos. P-2015-2508942 et al. consolidated with Office of Consumer Advocate v. Metropolitan Edison Co., Pennsylvania Elec. Co. Pennsylvania Power Co. and West Penn Power Co., Docket Nos. C-2016-2531040 et al., Orders (June 9, 2016).*

On August 31, 2017, Administrative Law Judge (ALJ) Joel H. Cheskis issued a Recommended Decision agreeing with the OCA that Section 1301.1 applies to DSIC rates. Accordingly, he recommended the PUC direct FirstEnergy to modify the DSIC calculation to include income tax deductions and credits. R.D. at 51.

On April 19, 2018, the PUC entered an Order reversing the ALJ's Recommended Decision regarding Act 40. The Commission concluded that Act 40 does not apply to DSIC rates and, accordingly, that FirstEnergy is not required to include income tax deductions in the DSIC calculation to reduce the DSIC rate. Order at 25-29, 45. Commissioner David W. Sweet dissented from the Order, based on his agreement with the ALJ and OCA that Act 40 requires DSIC rates to include income tax deductions and credits.

In an Opinion dated July 21, 2021, the Pennsylvania Supreme Court affirmed the Orders of the Commonwealth Court reversing the PUC decision and remanding the matters to the Commission "for the purpose of requiring [the First Energy companies] to revise their tariffs and Distribution System Improvement Charge calculations in accordance with Section 1301.1(a) of the Public Utility Code, 66 Pa. C.S. § 1301.1." Subsequently, the cases were referred to the OALJ and further assigned to ALJ Cheskis.

Judge Cheskis issued a Second Further Prehearing Conference Order on October 27, 2021 regarding a further prehearing conference scheduled for December 2, 2021. On November 19, 2021, the parties requested a continuance to provide time "to discuss the procedure going forward,

including whether it is appropriate to request that the Commission address the tariff revisions required by the Court's decision in a generic proceeding in which all utilities that employ, or may seek to employ, a DSIC would be provided notice and have the opportunity to participate and be heard." The request for a continuance was granted via email on November 22, 2021 and a further prehearing was scheduled for January 13, 2022.

## **II. ISSUES**

The OCA's identification of issues is preliminary and the OCA specifically reserves the right to address other issues not identified herein.

In its April 2018 Order in this proceeding, the Commission did not reach the question of how the income tax deductions should be included in the DSIC calculation to reduce the DSIC rate. While that issue was addressed in testimony submitted by the OCA and FirstEnergy that was entered into the record at the evidentiary hearing held on May 12, 2017, the primary focus was on the legal question whether Section 1301.1(a) applied to the DSIC rate. Thus, additional details regarding the necessary changes to the Companies' tariffs and DSIC calculations remain to be addressed.

Generally, the method for including federal income taxes is to reduce the net plant investment (original cost of DSIC-eligible plant net of depreciation) by the directly related ADIT. OCA St. No. 1-Supp at 1. For state income taxes, which differ from federal income taxes because they are flowed through in rates on a current basis, the OCA identified two methods to recognize the impact of the deductions related to the state income taxes recovered through the DSIC. OCA St. 1SR-Supp at 3-4. The first is to adjust the revenue conversion factor (or tax multiplier) used to calculate the pre-tax rate of return (PTRR) in the DSIC formula used by the Companies to flow-through the state income tax deductions related to DSIC investment. Id. at 3-7. Under the second

method, a separate component would be added to the DSIC formula to provide for the allowance for income taxes. OCA St. 1SR-Supp. at 8-9. The OCA supports adoption of the first method, however, both methods will produce the same DSIC rate. Id.

As a practical matter, the Commission's determination of what specific changes are required to include income tax deductions in the DSIC calculation will impact all Pennsylvania utilities that charge a DSIC. The statutory DSIC provisions that control the process for Commission approval of a DSIC were implemented in a series of implementation orders on a generic basis, including the approval of a Model Tariff. *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611, Final Implementation Order, App. A (Aug. 2, 2012). As such, the OCA submits that it is appropriate for the necessary changes to be addressed in a generic proceeding rather than within this proceeding addressing only the FirstEnergy companies. This would serve to allow all stakeholders to participate and also create a proceeding through which all existing DSIC tariffs and rates can be brought into compliance with Section 1301.1(a).

### **III. REQUEST FOR CERTIFICATION OF MATERIAL QUESTION**

For the reasons set forth above, the OCA supports the process proposed by FirstEnergy that the Presiding Officer hold the current proceeding in abeyance and, pursuant to 52 Pa. Code § 5.305, certify to the Commission the following question:

In order to provide all interested parties notice and an opportunity to be heard, as due process requires, should the Commission initiate a generic proceeding within 60 days from a determination on this material question at Docket No. M-2012-2293611 for the purpose of revising the Model Tariff adopted in its Implementation Order entered at that docket number on August 2, 2012, to comply with Section 1301.1(a) of the Pennsylvania Public Utility Code as interpreted by the Pennsylvania Supreme Court in *McCloskey v. Pa. P.U.C.*, 255 A.3d 416 (Pa. 2021) and refer to that generic proceeding the remand proceedings for Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company, at Docket Nos. P-2015-2508942, P-2015-2508936, P-2015-2508931 and P-2015-2508948, respectively?

It is the OCA's understanding that no party to this proceeding objects to this request.

The OCA notes that Section 5.305 provides the opportunity for the parties to submit a brief directed to the Commission "addressing the merits of the question for which an answer is requested and whether a stay of proceedings is required to protect the substantial rights of a party." 52 Pa. Code § 5.305.

#### **IV. SERVICE ON THE OCA**

The OCA designates the following individual for the service list in this proceeding:

Erin L. Gannon, Senior Assistant Consumer Advocate  
Office of Consumer Advocate  
5<sup>th</sup> Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
(717) 783-5048  
[EGannon@paoca.org](mailto:EGannon@paoca.org)

As a courtesy, the OCA also requests that parties serve an email copy of documents to [LMyers@paoca.org](mailto:LMyers@paoca.org).

The OCA respectfully requests that the Presiding Officer permit electronic service without the requirement of a follow-up hard copy. Only to the extent that materials are not available electronically, the OCA requests that one hard copy be served upon Erin L. Gannon at the above mailing address.

#### **V. WITNESSES**

If written testimony is needed in this proceeding, the OCA intends to present testimony by Ralph Smith regarding the accounting and policy issues identified above. Mr. Smith will present testimony in written form and will also attach various exhibits, documents, and explanatory information which will assist in the presentation of the OCA's case. In order to expedite the resolution of this proceeding, the OCA requests that parties e-mail copies of all interrogatory



answers and testimony directly to Mr. Smith as follows:

Ralph Smith  
Larkin and Associates, PLLC  
15728 Farmington Road  
Livonia, Michigan 48154  
E-mail: [rsmithla@aol.com](mailto:rsmithla@aol.com)

The OCA specifically reserves the right to call additional witnesses, as necessary. All parties of record will be notified as soon as the OCA has determined whether an additional witness or witnesses will be necessary for any portion of its case.

## **VI. EVIDENCE**

The OCA will rely on the testimony of its expert witnesses as well as the testimony of other parties to the proceeding and including the testimony that is already part of the evidentiary record. The OCA will also present relevant exhibits to support its own testimony, including but not limited to, materials obtained from FirstEnergy through discovery and cross-examination.

## **VII. PUBLIC INPUT HEARINGS**

At present, it does not appear that a public input hearing in this proceeding is necessary. However, if consumer interest arises, the OCA will promptly notify the Administrative Law Judge and the parties to request public input hearings.

## **VIII. PROPOSED SCHEDULE**

If the process proposed for obtaining Commission approval to initiate a generic proceeding is not adopted, the OCA respectfully requests that the ALJ delay setting a procedural schedule to provide the parties a reasonable opportunity to conduct settlement discussions. It is the OCA's understanding that all parties to this proceeding support or do not object to this request.

## **IX. DISCOVERY**

The OCA does not propose any modifications to the Commission's discovery regulations at this time. The OCA further notes that it anticipates using informal discovery in this case and will work with FirstEnergy to ensure that discovery is completed efficiently and effectively.

## **X. SETTLEMENT**

The OCA is willing to participate in settlement discussions to resolve or narrow the issues presented.

Respectfully Submitted,

/s/ Erin L. Gannon  
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Patrick M. Cicero  
Acting Consumer Advocate

DATE: January 6, 2022  
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