



COMMONWEALTH OF PENNSYLVANIA

February 10, 2022

**E-FILED**

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

**Re: Petition of FirstEnergy Companies for Approval to Establish and Implement a Distribution System Improvement Charge, Consolidated / Docket No. P-2015-2508942, P-2015-2508936, P-2015-2508931, and P-2015-2508948**

Dear Secretary Chiavetta:

Enclosed please find the Brief in response to the First Energy Companies' Petition for Interlocutory Review and Answer to Material Question, on behalf of the Office of Small Business Advocate ("OSBA"), in the above-captioned proceedings.

Copies will be served on all known parties in these proceedings, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Erin K. Fure

Erin K. Fure  
Assistant Small Business Advocate  
Attorney ID No. 312245

*Enclosures*

cc: Robert D. Knecht  
Parties of Record

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Metropolitan Edison Company	:	
for Approval of a Distribution System	:	
Improvement Charge	:	P-2015-2508942
	:	
Office of the Consumer Advocate	:	
	:	
v.	:	C-2016-2531040
	:	
Metropolitan Edison Company	:	
	:	
Petition of West Penn Power Company	:	
for Approval of a Distribution System	:	
Improvement Charge	:	P-2015-2508948
	:	
Office of the Consumer Advocate	:	
	:	
v.	:	C-2016-2531019
	:	
West Penn Power Company	:	
	:	
Petition of Pennsylvania Electric Company	:	
for Approval of a Distribution System	:	
Improvement Charge	:	P-2015-2508936
	:	
Office of the Consumer Advocate	:	
	:	
v.	:	C-2016-2531060
	:	
Pennsylvania Electric Company	:	
	:	
Petition of Pennsylvania Power Company	:	
for Approval of a Distribution System	:	
Improvement Charge	:	P-2015-2508931
	:	
Office of the Consumer Advocate	:	
	:	
v.	:	C-2016-2531054
	:	
Pennsylvania Power Company	:	

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**BRIEF IN RESPONSE TO THE FIRST ENERGY COMPANIES' PETITION FOR  
INTERLOCUTORY REVIEW AND ANSWER TO MATERIAL QUESTION  
ON BEHALF OF THE  
OFFICE OF SMALL BUSINESS ADVOCATE**

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**Date: February 10, 2022**

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## **I. INTRODUCTION**

The Office of Small Business Advocate (“OSBA”) is an agency of the Commonwealth of Pennsylvania authorized by the Small Business Advocate Act (Act 181 of 1988, 73 P.S. §§ 399.41 – 399.50) to represent the interests of small business consumers as a party in proceedings before the Pennsylvania Public Utility Commission (“Commission”).

The OSBA files this Brief in accordance with 52 Pa. Code. § 5.302(b).

## II. PROCEDURAL HISTORY

On June 9, 2016, the Commission entered separate Orders approving petitions for a Distribution System Improvement Charge (“DSIC”) filed by Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), West Penn Power Company (“West Penn”) and Pennsylvania Power Company (“Penn Power”) (collectively, “FirstEnergy” or the “Companies”). In its Opinions and Orders entered on June 9, 2016, the Commission noted that several issues that had been raised during the DSIC proceeding would be reserved for decision at an adjudicated hearing.<sup>1</sup>

On August 10, 2016, a Prehearing Conference was held before Deputy Chief Administrative Law Judge (“ALJ”) Joel H. Cheskis.

On August 11, 2016, an Order was issued consolidating the formal complaints filed by the Office of Consumer Advocate (“OCA”) at each of the above-captioned dockets.

On August 12, 2016, a Scheduling Order was issued, which directed the parties to schedule two or more settlement conferences; the Order noted, however, that if settlement was not reached by September 19, 2016, a further prehearing conference would be scheduled. The parties filed status reports indicating that settlement discussions continued and that a further prehearing conference was not necessary.

On January 19, 2017, the Commission issued an Opinion and Order in the proceeding involving the Companies’ consolidated respective base rate filings. In that Opinion and Order, the Commission referred to the above-captioned proceeding the contested issue concerning the OCA’s claim with regard to the calculation of the Accumulated Deferred Income Tax (“ADIT”) and the Companies’ DSIC riders interpreting the recently enacted Act 40. The Commission also

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<sup>1</sup> The OSBA filed its Answers, Notices of Intervention, Notices of Appearance, and Public Statements in response to the DSIC petitions on each of the above-captioned dockets on March 9, 2016.

transferred to this proceeding various parts of the record from the base rate proceeding that pertained to ADIT issues. The Commission noted that a Recommended Decision had not yet been issued in the above-captioned proceeding and that there was adequate time to resolve the contested issue from the base rate proceeding within the context of this proceeding.

A Joint Petition for Settlement of Pending Issues was filed by the parties on February 2, 2017, which did not address the ADIT and DSIC rider issues.

On March 6, 2017, a further Prehearing Conference was held to discuss how to address the ADIT issue referred to this case in the Commission's January 19, 2017 Opinion and Order. The parties agreed upon a procedural schedule at the March 6, 2017 Prehearing Conference, which was subsequently memorialized in a Briefing Order.

Following the submission of Main Briefs and Reply Briefs, a Recommended Decision was entered on July 16, 2017.

Following the submission of Exceptions and Reply Exceptions, the Commission issued an Opinion and Order on April 19, 2018. A Dissenting Statement was issued by Commissioner David W. Sweet on April 19, 2018.

The OCA appealed the April 19, 2018 decisions to the Commonwealth Court of Pennsylvania,<sup>2</sup> which reversed the Commission's decisions and remanded for the inclusion of federal and state income tax deductions and credits related to the DSIC investments in the DSIC calculations in accordance with Section 1301.1(a).

The Commonwealth Court's decision was reviewed by the Supreme Court of Pennsylvania, which ultimately entered an Opinion dated July 21, 2021.<sup>3</sup> In its Opinion, the Supreme Court determined to remand the matters to the Commission "for the purpose of

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<sup>2</sup> McCloskey v. Pa. PUC, 219 A.3d 1216 (Pa. Cmwlth. 2019).

<sup>3</sup> McCloskey v. Pa. PUC, 255 A.3d 416 (Pa. 2021). ("*McCloskey/FirstEnergy*").

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.”

On October 27, 2012, Notice was issued that a telephonic Prehearing Conference was scheduled for December 2, 2021.

On November 10, 2021, undersigned counsel entered her appearance for the OSBA.

On November 22, 2021, Notice was issued that the December 2, 2021 telephonic Prehearing Conference was cancelled.

On December 9, 2021, Deputy Chief ALJ Cheskis issued an Order scheduling a further Prehearing Conference for January 13, 2022 at 10:00 a.m.

A telephonic Prehearing Conference was held on January 13, 2022, at which time the parties discussed whether a generic proceeding should be initiated by the Commission for the purpose of revising the Model Tariff adopted in its Implementation Order on August 2, 2012 at Docket No. M-2012-2293611.

On January 31, 2022, First Energy filed a Petition for Interlocutory Review and Answer to a Material Question (“*Interlocutory Review Petition*”) in which it requested the Commission review and answer in the affirmative, the following:

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?<sup>4</sup>

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<sup>4</sup> *Interlocutory Review Petition*, at ¶ 4, p. 3.

### **III. SUMMARY OF ARGUMENT**

The OSBA supports the relief requested by FirstEnergy in its *Interlocutory Review Petition*. The decision issued by the Pennsylvania Supreme Court in *McCloskey/FirstEnergy* has implications for all regulated Pennsylvania utilities that employ a DSIC and therefore a generic proceeding is a much more appropriate method to address the impacts *McCloskey/FirstEnergy* has on the Model Tariff adopted in the Commission's Implementation Order for Act 11 of 2012 at Docket No. M-2012-2293611.

#### IV. LEGAL STANDARDS

Section 5.302 of the Pennsylvania Public Utility Code (the “Code”), 52 Pa. Code § 5.302, permits a party, during the course of a proceeding, to file a timely petition requesting the Commission to review and answer a material question which has arisen. The petition must state the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.<sup>5</sup>

Act 11 of 2012 amended the Code to allow jurisdictional water and wastewater utilities, natural gas distribution companies, city natural gas distribution operations, and electric distribution companies to petition the Commission for approval to implement a DSIC. The Commission issued a Secretarial Letter on March 22, 2012, which stated, “The Commission has established **Docket No. M-2012-2293611** as a generic docket number for all Secretarial Letters, Implementation Orders and working groups regarding the implementation of Act 11 and, in particular, issues involving implementation of the DSIC.”

The Fifth and Fourteenth Amendments to the United States Constitution grant the protections of due process and fundamental fairness. Article I, sections 1 and 11 of the Constitution of the Commonwealth of Pennsylvania also provide due process protections. At a minimum, due process requires notice and opportunity for an appropriate hearing.<sup>6</sup> “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>7</sup> In *Mathews v. Eldridge*, the United States Supreme Court determined, “[t]he

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<sup>5</sup> 52 Pa. Code § 5.302(a).

<sup>6</sup> *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

<sup>7</sup> *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965), quoting *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950).

fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”<sup>8</sup>

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<sup>8</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

## V. ARGUMENT

In *McCloskey/FirstEnergy*, the Pennsylvania Supreme Court affirmed the Pennsylvania Commonwealth Court’s decision in *McCloskey v. Pa. P.U.C.*, 219 A.3d 1216 (2019), which held that Section 1301.1(a), 66 Pa. C.S. § 1301.1(a), required public utilities to revise their DSIC calculations to include income tax deductions and credits to reduce rates charged to customers.<sup>9</sup>

The Supreme Court determined that:

Regardless of whether DSICs were an intended target of the General Assembly in enacting Section 1301.1, the words employed in the first sentence plainly encompass DSICs, which provide for "expense[s] or investment[s] . . . to be included in a public utility's rates for ratemaking purposes." 66 Pa.C.S. § 1301.1(a). Moreover, nothing in Section 1301.1 provides a textual indication that DSICs should be exempted from the mandate that "tax deductions and credits shall also be included in the computation of current or deferred income tax expense to reduce rates."<sup>10</sup>

The *McCloskey/FirstEnergy* Court ultimately agreed with the OCA that “Section 1301.1(a), as applied to a DSIC, requires the inclusion of tax deductions and credits specific to the infrastructure expenses and investments which the DSIC is intended to recover and not tax adjustments of the utility as a whole.”<sup>11</sup>

Although the Supreme Court affirmed the orders of the Commonwealth Court, it also remanded the proceeding back to the Commission to require FirstEnergy to revise its tariffs and DSIC calculations in accordance with Section 1301.1(a) of the Code, 66 Pa. C.S. § 1301.1.<sup>12</sup> While the Supreme Court’s remand directive was specific to FirstEnergy, its holding is not; the decision rendered in *McCloskey/FirstEnergy* impacts all regulated utilities in Pennsylvania that employ a DSIC.

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<sup>9</sup> *McCloskey/FirstEnergy*, 255 A.3d at 418.

<sup>10</sup> *McCloskey/FirstEnergy*, 255 A.3d at 427.

<sup>11</sup> *McCloskey/FirstEnergy*, 255 A.3d at 436.

<sup>12</sup> *McCloskey/FirstEnergy*, 255 A.3d at 437.

In its discussion, the Supreme Court included the following background:

The General Assembly enacted detailed statutory provisions regarding the DSIC in Sections 1350-1360, including aspects of the calculation process. It additionally tasked the PUC with the adoption of a "model tariff" to specify what details public utilities must submit in support of their DSIC petitions. 66 Pa.C.S. § 1353(b)(1). In accordance with this provision, the PUC adopted its Model Tariff and other implementing provisions in its *Implementation of Act 11 of 2012*, Docket Number M-2012-2293611, 2012 WL 3249678 (Aug. 12, 2012) (hereinafter "*Act 11 Final Implementation Order*"). The OCA, during the Act 11 implementation process and in at least one prior DSIC proceeding, advocated for modifications to the DSIC calculation to incorporate the tax benefits received by the utilities, through the inclusion of "accumulated deferred income taxes" ("ADIT") and state income tax deductions.<sup>13</sup>

The *McCloskey/FirstEnergy* decision requires changes to be made to the Model Tariff.

As noted by FirstEnergy, "Under the Court's interpretation of Section 1301.1(a) in *McCloskey/FirstEnergy*, the formula for calculating quarterly DSIC updates would need to be supplemented by adding variables for accumulated deferred federal income taxes and certain state tax attributes related to incremental increases in DSIC-eligible property," which would result in a necessary revision of the PUC's Model Tariff.<sup>14</sup>

*McCloskey/FirstEnergy* affects all regulated utilities in Pennsylvania that employ a DSIC, not FirstEnergy alone.

FirstEnergy suggests in its *Interlocutory Review Petition*, that the Commission should initiate a generic proceeding at Docket No. M-2012-2293611 to consider revisions to the Model Tariff and to the DSIC Riders of utilities that employ a DSIC.<sup>15</sup> The OSBA supports this suggestion by FirstEnergy. If a generic proceeding is not established, then litigation would proceed at the above-captioned docket and the record upon which any decisions rendered in this matter would be based on the facts specific to the FirstEnergy

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<sup>13</sup> *McCloskey/FirstEnergy*, 255 A.3d at 420.

<sup>14</sup> *Interlocutory Review Petition*, at ¶ 2, p. 2.

<sup>15</sup> *Interlocutory Review Petition*, at ¶ 3, p. 2.

Companies. The OSBA agrees with FirstEnergy that, “The Commission should not make a decision with such far-reaching implications for all Pennsylvania utilities in a proceeding that involves only the Companies.”<sup>16</sup> Establishing a generic proceeding at Docket No. M-2012-2293611 would afford all interested stakeholders adequate notice and a meaningful opportunity to be heard on how to revise the Model Tariff and DSIC Riders in light of *McCloskey/FirstEnergy*.

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<sup>16</sup> *Interlocutory Review Petition*, ¶ 3, p.2.

## VI. CONCLUSION

In view of the foregoing, the OSBA respectfully requests that the Commission undertake interlocutory review of FirstEnergy's *Interlocutory Review Petition* and answer the material question in the *Interlocutory Review Petition* in the affirmative.

Respectfully submitted,

/s/ Erin K. Fure

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Dated: February 10, 2022



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of FirstEnergy Companies for** : **Docket Nos. P-2015-2508942**  
**Approval to Establish and Implement a** : **P-2015-2508936**  
**Distribution System Improvement** : **P-2015-2508931**  
**Charge, Consolidated** : **P-2015-2508948**

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing have been served via email (*unless other noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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