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February 10, 2022

VIA eFILING

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

**Re: Petition of Metropolitan Edison Company for Approval of a Distribution System Improvement Charge – Docket No. P-2015-2508942
Office of Consumer Advocate v. Metropolitan Edison Company
Docket No. C-2016-2531040**

**Re: Petition of Pennsylvania Electric Company for Approval of a Distribution System Improvement Charge – Docket No. P-2015-2508936
Office of Consumer Advocate v. Pennsylvania Electric Company
Docket No. C-2016-2531060**

**Re: Petition of Pennsylvania Power Company for Approval of a Distribution System Improvement Charge – Docket No. P-2015-2508931
Office of Consumer Advocate v. Pennsylvania Power Company
Docket No. C-2016-2531054**

**Re: Petition of West Penn Power Company for Approval of a Distribution System Improvement Charge – Docket No. P-2015-2508948
Office of Consumer Advocate v. West Penn Power Company
Docket No. C-2016-2531019**

Dear Secretary Chiavetta:

On behalf of **Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company**, enclosed is the **Brief in Support of**

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
February 10, 2022
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Petition for Interlocutory Review and Answer to a Material Question (the “Brief”), for filing in the above-captioned matters.

Copies of the Brief have been served upon Deputy Chief Administrative Law Judge Joel H. Cheskis and all parties of record, as indicated on the attached Certificate of Service.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth M. Kulak". The signature is written in a cursive style with a large initial 'K'.

Kenneth M. Kulak

KMK/ap
Enclosures

c: Per Certificate of Service (w/encls.)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Metropolitan Edison Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508942**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531040**
Metropolitan Edison Company :

**Petition of Pennsylvania Electric Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508936**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531060**
Pennsylvania Electric Company :

**Petition of Pennsylvania Power Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508931**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531054**
Pennsylvania Power Company :

**Petition of West Penn Power Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508948**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531019**
West Penn Power Company :

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Brief in Support of
Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania
Power Company, and West Penn Power Company for Interlocutory Review and Answer to
a Material Question**, on the following persons in the matter specified in accordance with the
requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL

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Dated: February 10, 2022

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of Metropolitan Edison Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508942**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531040**
Metropolitan Edison Company :

**Petition of Pennsylvania Electric Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508936**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531060**
Pennsylvania Electric Company :

**Petition of Pennsylvania Power Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508931**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531054**
Pennsylvania Power Company :

**Petition of West Penn Power Company for
Approval of a Distribution System Improvement
Charge** :
: **Docket No. P-2015-2508948**
:

Office of Consumer Advocate :
v. : **Docket No. C-2016-2531019**
West Penn Power Company :

**BRIEF OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC
COMPANY, PENNSYLVANIA POWER COMPANY AND WEST PENN POWER COMPANY
IN SUPPORT OF PETITION FOR INTERLOCUTORY REVIEW AND ANSWER TO A
MATERIAL QUESTION**

Pursuant to 52 Pa. Code § 5.302(b), Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”) and West Penn Power Company (“West Penn”) (individually, a “Company” and collectively, the “Companies”) file this Brief in support of their Petition for Interlocutory Review and Answer to a Material Question

(“Petition”).¹ The material question asks whether the Pennsylvania Public Utility Commission (“PUC” or “Commission”) should initiate a generic proceeding to address changes to the formula for calculating the Distribution System Improvement Charge (“DSIC”) to comply with the Pennsylvania Supreme Court’s July 21, 2021 Opinion and Order² construing Section 1301.1(a) of the Public Utility Code.³

Although the Commission initiated Company-specific remand proceedings, the Court’s decision necessarily impacts the terms of the Model Tariff it adopted, pursuant to Section 1353(b)(1), in its Implementation Order for Act 11 of 2012.⁴ Therefore, continuing this proceeding in its current procedural posture would have significant implications for all DSIC-eligible utilities even though they are not parties to this consolidated case. To remedy that due process deficiency, the Commission should grant the Companies’ Petition, hold these remand proceedings in abeyance, and answer the material question in the affirmative.

I. BACKGROUND

Approval of the Companies’ DSIC Riders. On February 16, 2016, the Companies petitioned the Commission to approve tariff riders (“DSIC Riders”) incorporating the terms of the Model Tariff. The Office of Consumer Advocate (“OCA”), Office of Small Business Advocate and a group of industrial customers participated in the ensuing proceeding. On June 9, 2016, the Commission entered Orders finding that the Companies’ DSIC Riders conformed to the terms of the

¹ Counsel for all other parties have informed the Companies that they either do not object to the Petition or take no position on the material question. Additionally, the parties have agreed that this proceeding should be held in abeyance pending a decision on the Petition.

² *McCloskey v. Pa. P.U.C.*, 255 A.3d 416 (Pa. 2021) (“*McCloskey/FirstEnergy*”).

³ 66 Pa.C.S. § 1301.1. Hereafter, all references to a “Section,” “Chapter” or “Subchapter” are to sections of the Pennsylvania Public Utility Code (“Code”), 66 Pa.C.S. §§ 101 et seq., unless stated or the context indicates otherwise.

⁴ *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611 (Final Implementation Order entered Aug. 2, 2012) (“Implementation Order”), pp. 30-31 and Appendix A (Model Tariff).

Model Tariff and, therefore, approved them.⁵ No party contended that the DSIC formula should be amended to include incremental changes in accumulated deferred federal income taxes (“ADFIT”) and the state tax deductions for accelerated depreciation because, at that time, the issue had been resolved by the Commission and the Commonwealth Court in prior proceedings.⁶ Three days after entry of the DSIC Approval Orders, Act 40 of 2016 (“Act 40”) added Section 1301.1 to the Code.

The OCA’s Subsequent Challenges to the DSIC Riders. On April 28, 2016, the Companies filed proposed base rate increases pursuant to Section 1308(d).⁷ After Act 40 was enacted, the OCA submitted testimony in the base rate cases contending that Section 1301.1(a) required the PUC to revise the DSIC Riders to recognize the tax-related terms the Commission declined to adopt in the Implementation Order and the Columbia Gas Order. The Companies submitted testimony opposing that change, and the issues were extensively briefed.

On January 19, 2017, the Commission entered an Opinion and Order concluding the base-rate aspect of the proceeding by approving a settlement among the parties.⁸ In the same order, the Commission referred issues concerning the impact, if any, of Act 40 on the previously-approved DSIC Riders to the consolidated Docket Nos. P-2015-2508942 et al. in which the DSIC Approval Orders had been entered. In its Opinion and Order entered April 19, 2018 (“April 2018 Order”), the PUC rejected the OCA’s proposals to add elements to the DSIC formula for ADFIT and state tax

⁵ PUC approval was subject to consideration of peripheral implementation issues that were referred to the Office of Administrative Law Judge and subsequently resolved by settlement. See *Petitions of Metropolitan Edison Co., Pennsylvania Elec. Co. Pennsylvania Power Co. and West Penn Power Co. for Approval of a Distribution Sys. 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. (Opinions and Orders entered Jun. 9, 2016) (“DSIC Approval Orders”).

⁶ See *Petition of Columbia Gas of Pennsylvania, Inc. for Approval of a Distribution Sys. Improvement Charge*, Docket No. P-2012-2338282 (Opinion and Order entered May 22, 2014) (“Columbia Gas Order”), *aff’d*, *McCloskey v. Pa. P.U.C.*, 127 A.3d 860 (Pa. Cmwlth. 2015) (“*McCloskey/Columbia*”). *McCloskey/Columbia* was an appeal from a Commission Order approving a DSIC for Columbia Gas of Pennsylvania, Inc. Similar issues were also decided in an unreported opinion issued the same day in the OCA’s appeal from a Commission Order approving a DSIC for Little Washington Wastewater Company. *McCloskey v. Pa. P.U.C.*, No. 1358 C.D. 2014 (Nov. 3, 2015).

⁷ The Companies’ rate increase filings were consolidated at PUC Docket Nos. R-2016-2537349 et al.

⁸ *Pa. P.U.C. v. Metropolitan Edison Co. et al.*, Docket Nos. R-2016-2537349, et al., 2017 WL 395349 at *23-25 (Jan. 19, 2017).

depreciation deductions⁹ because it found that Act 40 did not change the DSIC-specific Code sections that delineated the formula for calculating the DSIC. Consequently, the Commission did not need to consider how to implement the OCA's proposals to recognize incremental ADFIT and state tax attributes in quarterly calculations of DSIC charges.

Appeals of the April 2018 Order and Subsequent Remand to the Commission. The OCA appealed the April 2018 Order to the Commonwealth Court. In an Opinion and Order entered July 11, 2019, the Commonwealth Court reversed the April 2018 Order based on its finding that Section 1301.1 applied to the DSIC and should be construed to revise the instructions for calculating the DSIC set forth in Sections 1351 and 1357-58 of the Code.¹⁰ The Companies and the PUC each filed petitions seeking the Pennsylvania Supreme Court's review of the Commonwealth Court's Opinion, which were granted. After briefing and oral argument, the Court, by a 5-2 decision, affirmed the Commonwealth Court's Opinion and remanded the cases to the Commission "for the purpose of requiring [the 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."

The Remand Proceedings. On January 13, 2022, a Further Call-In Telephonic Prehearing Conference was held before Deputy Chief Administrative Law Judge Joel H. Cheskis (the "ALJ"), to whom the PUC referred the Pennsylvania Supreme Court's remand order. At that time, the parties advised the ALJ of the Companies' intent to seek interlocutory review of a material question asking whether a generic, statewide proceeding should be initiated to address tariff revisions required by the holding in *McCloskey/FirstEnergy*. On January 31, 2021, the Companies filed the pending Petition.

⁹ April 2018 Order, pp. 25-29.

¹⁰ See *McCloskey v. Pa. P.U.C.*, 219 A.3d 1216, 1225 (Pa. Cmwlth. 2019).

II. STATEMENT OF MATERIAL 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?

Suggested Answer: Yes.

III. ARGUMENT

Section 1353(b)(1) provides that “a petition for commission approval of a [DSIC] shall include . . . [a]n initial tariff that complies with a model tariff adopted by the commission.” The Commission adopted the Model Tariff in the Implementation Order and stated that a utility seeking to implement a DSIC must demonstrate that its proposed DSIC provisions conform to the Model Tariff. Consistent with the directives in the Implementation Order and Section 1353(b)(1), the Companies’ DSIC Riders¹¹ approved by the PUC incorporated the terms of the Model Tariff. Section 2.D. of the DSIC Riders includes the following formula for calculating quarterly updates¹² to the DSIC that was obtained from the Model Tariff:

¹¹ The DSIC Riders to the Companies’ tariffs are designated Rider R to Met-Ed’s and Penelec’s tariffs and Riders O and N, respectively, to Penn Power’s and West Penn’s tariffs.

¹² The DSIC is updated on a quarterly basis to reflect eligible plant additions placed in service during the three-month periods ending one month prior to the effective date of each DSIC update. The effective dates of each update in the DSIC are January 1, April 1, July 1 and October 1. *See* DSIC Riders, Section 2.A.

$$\text{DSIC} = \frac{((\text{DSI} * \text{PTRR}) + \text{Dep} + e) \times 1}{(1 - T) \text{PQR}}$$

Where:

- DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation.
- PTRR = Pre-tax return rate applicable to DSIC-eligible property.
- Dep = Depreciation expense related to DSIC-eligible property.
- e = Amount calculated (+/-) under the annual reconciliation feature or Commission audit, as described below.
- PQR = Projected quarterly revenues for distribution service (including all applicable clauses and riders) from existing customers, excluding customers served under Company's Rate Schedule TP, plus revenue from any customers which will be acquired by the beginning of the applicable service period.
- T = Pennsylvania gross receipts tax rate in effect during the billing month, expressed in decimal form.

Additionally, Section 2.B.2. of the DSIC Riders incorporates the language of the Model Tariff, which, in turn, tracks Section 1357(b) of the Code, and states as follows:

Pre-tax return: The pre-tax return shall be calculated using the statutory state and federal income tax rates, the Company's actual capital structure and actual cost rates for long-term debt and preferred stock as of the last day for the three-month period ending one month prior to the effective date of the DSIC and subsequent updates.

The purpose of these remand proceedings is to develop revisions to the DSIC formula in the Companies' respective DSIC Riders to implement the provisions set forth in the first and third sentences of Section 1301.1(a), which state, respectively, as follows:

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.

* * *

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.

Under the interpretation of Section 1301.1(a) adopted in *McCloskey/FirstEnergy*, the formula for calculating quarterly DSIC updates would need to be supplemented by adding variables for: (1)

the state income tax effects of book-tax timing differences created by placing in service eligible property included in the DSIC calculation (pursuant to the first sentence of Section 1301.1(a)); and (2) ADFIT that reflects the book-tax timing differences created by placing in service eligible property included in the DSIC calculation (pursuant to the third sentence of Section 1301.1(a)).

Following the analogous procedures used in base rate proceedings, the principal issue to be addressed by the Pennsylvania Supreme Court's Order on remand is how to revise the formula for calculating the DSIC to reflect, to a reasonable degree of accuracy: (1) the effect on a utility's pre-tax return of recognizing the temporary reduction in state income tax generated by tax-book timing differences attributable to quarterly additions of eligible property; and (2) the adjustment to the original cost of "eligible property" necessary to reflect changes in ADFIT related to quarterly increases in such property. Given the purpose for which the DSIC was created and how it is designed to operate,¹³ the revisions to the DSIC formula that are adopted should not require unduly complicated computations and should permit reasonable review and audit of DSIC charges and their supporting calculations.

Resolving the issues presented by the Court's remand will have effects beyond revising just the Companies' DSIC Riders. A final order in these proceedings would directly affect all investor-owned Pennsylvania utilities (electric, natural gas, water and wastewater)¹⁴ that employ the DSIC. As explained above, the Companies' DSIC Riders incorporate the DSIC formula set forth in the Model Tariff that the PUC approved pursuant to Section 1353(a)(1)'s directive. The statutory provisions that control the process for PUC approval of a DSIC were properly implemented on a

¹³ Section 1353(a) states that the DSIC was established "to provide for the timely recovery of the reasonable and prudent costs incurred to repair, improve or replace eligible property in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service." *See also McCloskey*, 255 A.3d at 420 ("The DSIC rate adjustment process was intended to reduce this regulatory lag and provide a streamlined rate adjustment process between the more complex base rate proceedings."); *McCloskey/Columbia*, 127 A.3d at 870 (Subchapter B of Chapter 13 of the Code created "a simplified framework . . . for a DSIC calculation").

¹⁴ Although the entities that employ the DSIC include a city natural gas distribution operation (*see* 66 Pa.C.S. § 1351), a second-class city authority (*see* 66 Pa.C.S. § 3205(b)) and municipal utility systems furnishing service outside their municipal boundaries (*see* 66 Pa.C.S. § 1301(a)(1)), those entities are not subject to federal or state income tax.

generic state-wide basis, just as Section 1353(a)(1) contemplates, by the PUC proceeding that culminated with entry of the Implementation Order. Consequently, within the statutory and regulatory framework established by Subchapter B of Chapter 13, a decision in these remand proceedings would not be restricted to the Companies alone. As both a legal and practical matter, any changes to the DSIC Riders and the DSIC formula approved in these cases would necessarily result in a revision of the PUC's Model Tariff.

Given their impact on the PUC's Model Tariff, the issues that need to be resolved to comply with the holding in *McCloskey/FirstEnergy* will affect all investor-owned Pennsylvania utilities. Deciding those issues in a Company-specific proceeding would yield a final order susceptible to due process challenges by parties that did not receive notice and an opportunity to participate.¹⁵ The end result could be the need for a complete do-over, with the associated delay and redundant expenditure of money and resources. Accordingly, as 52 Pa. Code §5.302 requires, in this case, there are “compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” In fact, the Commission reached the same conclusion in a prior case where it granted interlocutory review to consider whether complaint proceedings challenging access charges of specific intrastate rural local exchange carriers (“RLECs”) should be referred to a broad-based, state-wide investigation of all RLEC access charges.¹⁶ The Commission determined that it could avoid prejudicing the parties and expedite the resolution of the underlying issues by consolidating the company-specific complaints with its state-wide, generic RLEC access charge investigation.¹⁷ Consequently, there is solid prior precedent for granting the Companies' Petition and answering the material question in the affirmative.

¹⁵ *Pa. Coal Mining Ass'n v. Pa. Ins. Dept.*, 370 A.2d 685, 692 (Pa. 1977) (“Notice is the most basic requirement of due process [citations omitted].”).

¹⁶ *AT&T Communications of Pa., LLC, et al. v. Armstrong Tele. Co. – Pa., et al.*, Docket No. C-2009-2098380 et al., 2009 Pa. PUC LEXIS 1752 (Jul. 29, 2009).

¹⁷ *Id.* at *20-*24.

IV. CONCLUSION

For all the foregoing reasons, the Companies have demonstrated compelling reasons for interlocutory review and to hold these proceedings in abeyance until the material question is answered. Therefore, the Commission should grant interlocutory review; answer the material question in the affirmative; initiate a generic proceeding at Docket No. M-2012-2293611 (the same docket at which the Implementation Order was issued) within 60 days to consider revisions to the

Model Tariff necessary to comply with the Opinion and Order in *McCloskey/FirstEnergy*; and refer the remand in these dockets to, and consolidate them with, that generic proceeding.

Respectfully submitted,



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Dated: February 10, 2022

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