

COMMONWEALTH OF PENNSYLVANIA



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June 16, 2023

Via Electronic Mail Only

The Honorable Mark A. Hoyer
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
Piatt Place
301 Fifth Avenue, Suite 220
Pittsburgh, PA 15222

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 Judge Hoyer:

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

The Honorable Mark A. Hoyer
June 16, 2023
Page 2

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

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Enclosures:

cc: PUC Secretary Rosemary Chiavetta (via PUC efile)
Certificate of Service

*347891

CERTIFICATE OF SERVICE

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

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate’s Status Report, 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 16th day of June 2023.

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Dated: June 16, 2023

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

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

STATUS REPORT BY THE OFFICE OF CONSUMER ADVOCATE

Responsive to the directive of Administrative Law Judge Mark A. Hoyer, issued by email dated June 5, 2023, the Office of Consumer Advocate (OCA) provides this status report.

On February 24, 2022, the Public Utility Commission (Commission or PUC) entered an Order holding this proceeding in abeyance pending the outcome of the issues resolved in the generic proceeding established (by same order) at Docket No. M-2012-2293611 pertaining to the Distribution System Improvement Charge (DSIC) calculations required under 66 Pa. C.S. § 1301.1 as directed by the Pennsylvania Supreme Court in *McCloskey v. Pa. PUC*, 255 A.3d 416 (Pa. 2021) (*McCloskey*). The OCA submitted a Brief in this proceeding supporting the request by Metropolitan Edison Co., Pennsylvania Electric Co., Pennsylvania Power Co. and West Penn Power Co. (collectively, FirstEnergy) for Interlocutory Review and Answer to a Material Question filed on January 31, 2022. The OCA stated:

[t]he 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 in a decision that has implications for utilities in all industries. Significantly, it would also create a proceeding through which all existing DSIC tariffs and rates can be brought into compliance with Section 1301.1(a). The OCA submits that this would be a more efficient use of the Commission and stakeholder's resources than individually and separately addressing compliance with Section 1301.1(a) for each utility employing a current and future DSIC.

OCA Brief at 4. The generic proceeding did not fully resolve all issues pertaining to the DSIC calculations required by *McCloskey*, however, and it remains necessary to address those issues in this remand proceeding.

A. Outstanding Issues

The generic proceeding was limited to one round of comments by interested parties. No evidentiary record was created and no stakeholder meetings were held.¹ Based on the initial round of Comments, the Commission entered a Supplemental Implementation Order on October 27, 2022 (*2022 SIO*) adopting a revised model DSIC tariff.² On December 1, 2022, FirstEnergy filed a pro forma tariff supplement reflecting the updated formula for calculation of the DSIC as set forth in

¹ The Commission initially indicated there would be stakeholder group meetings, none were held. By Secretarial Letter issued April 22, 2022 in M-2012-2293611, the Commission stated:

In order to provide a forum for discussion and feedback from stakeholders as the Commission begins its implementation of DSIC calculations in accordance with Section 1301.1(a) of the Public Utility Code, 66 Pa. C.S. § 1301.1, *McCloskey/FirstEnergy*, 255 A.3d at 437, the Commission invites interested persons to provide comments and to address the following key topics prior to having a working group meeting:

...

Once comments are received and reviewed, the Commission will invite interested parties to a working group meeting to further discuss these comments.

Secretarial Letter at 3-4.

² The OCA filed a Petition for Reconsideration on November 10, 2022. Answers to the OCA's Petition were filed by the Energy Association of Pennsylvania and three utilities, including FirstEnergy. On March 2, 2023, the Commission entered an Order on the Petition for Reconsideration, in which it denied the OCA's Petition and made no modification to the revised model DSIC tariff adopted in its *2022 SIO*. *Order on Petition of the Pa. OCA for Clarification and Reconsideration of the Pa. PUC's Supplemental Implementation Order entered October 27, 2022*, M-2012-2293611 (Mar. 2, 2023) (*Reconsideration Order*).

the Model Tariff attached to the 2022 SIO and, following Commission approval of that supplement, implemented the proposed tariff changes with its quarterly DSIC filing effective January 1, 2023. *See, e.g.*, M-2022-3037012 (Met-Ed).

Of particular concern to the OCA is the definition of “DSI” in FirstEnergy’s revised DSIC formula. The new language is bolded/underlined:

DSI = Original cost of eligible distribution system improvement projects net of accrued depreciation **and associated accumulated deferred income taxes pertaining to property-related book/tax depreciation timing differences resulting from the use of accelerated depreciation per Internal Revenue Code, 26 U.S. Code § 168.**

Section 168 of the Internal Revenue Code is limited to accelerated tax depreciation. Section 1301.1(a) contains no limitation on the types of federal income tax deductions/credits that must be included in the DSIC calculation beyond requiring them to be “related” to the investment being recovered in the rate. 66 Pa. C.S. § 1301.1(a). The OCA seeks to develop a record and address in this remand proceeding whether the FirstEnergy utilities have “revised 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(a)” as directed by the Court in *McCloskey*. *McCloskey* at 437.

The OCA notes that the 2022 SIO is not a binding norm that has the force of law.³ The 2022 SIO did not result from an adjudication; it is a policy statement setting forth how the

³ As stated by the Commission in its Chapter 14 Implementation Order in a similar context:

Since the Implementation Orders are not adjudications, they should not be construed to have created “binding norms” that have the force of law. If they are so interpreted, then the Implementation Orders would be illegal because they are in the nature of unpromulgated regulations. *See, e.g., Hardiman v. Commonwealth*, 550 A.2d 590 (Pa. Commw. Ct. 1988).

A statement of policy is defined in the Commonwealth Documents Law as: any document, except an adjudication or a regulation, promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public or any part thereof, **and**

Commission intends to interpret the application of Section 1301.1(a) to the DSIC in future adjudications and rulemakings. The current adjudicated proceeding, thus, is the OCA's first opportunity to demonstrate through record evidence that FirstEnergy's tariffs and DSIC calculations do not comply with the requirements of Section 1301.1(a). The Presiding Officer is not bound to reach the same conclusion as the Commission did in the *2022 SIO*.

In addition, the Commission did not address refunds in the generic proceeding. The Commission found that "issues related to refunds that may be required due to the *McCloskey* decision are beyond the scope of this implementation proceeding and cannot be made on the record before the Commission in this proceeding." *Reconsideration Order* at 20, quoting *2022 SIO* at 2. It concluded that "if the Commission is to address the topic of refunds, it will be best to do so on a case-by-case basis." *Reconsideration Order* at 21. The OCA also seeks to develop a record on which the Commission can determine issues related to FirstEnergy refunds.

B. Need for Discovery

As discussed, no evidentiary record was created in the generic proceeding and, as such, there is no record yet, upon which the Courts could review whether the *McCloskey* directive has been met. The OCA submits that record should be made in this proceeding.

At this time, the OCA's position is that the DSIC calculation in FirstEnergy's updated DSIC tariffs do not comply with Section 1301.1(a) because the tariffs do not include all types of

includes, without limiting the generality of the foregoing, any document interpreting or implementing any statute enforced or administered by such agency.

45 Pa. C.S. § 501 ("Statement of Policy") (emphasis added).

These Implementation Orders fit within this definition. Accordingly, the Commission agrees with the argument of the PGW that the Implementation Orders at issue constitute policy statements setting forth how the Commission intends to interpret Chapter 14 in future adjudications and rulemakings.

Chapter 14 Implementation, 2005 PaPUC LEXIS 20, Order at *18-20, quoting *Hardiman v. Commonwealth*, 550 A.2d 590 (Pa. Commw. Ct. 1988), 45 Pa. C.S. § 501.

federal income tax deductions. First Energy has argued that limiting recovery to accelerated tax depreciation captures the income tax effects of the “major” book-tax timing differences generated by DSIC-eligible investment. FirstEnergy Answer to OCA Petition for Reconsideration, M-2012-2293611. The OCA would like to ask FirstEnergy some discovery to investigate that claim and to understand the impact of the limitation on DSIC rates. If the evidence shows that FirstEnergy is correct that other categories of federal income tax deductions, such as repairs deductions, would have minor income tax effects and minor impact on DSIC rates then the OCA’s position regarding FirstEnergy’s compliance with Section 1301.1(a) may change. FirstEnergy has indicated that it will not participate in discovery. The OCA therefore requests that the ALJ direct that discovery may be conducted and reaffirm the discovery deadlines previously established by Scheduling Order dated August 12, 2016, which are reproduced below:

1. Answers to written interrogatories will be served in-hand within ten (10) calendar days of service of the interrogatories except that service of interrogatories on a Friday shall be deemed service on the following business day;
2. Objections to interrogatories will be communicated orally within three (3) business days of service; unresolved objections shall be served on the parties in writing within five (5) business days of service of the interrogatories;
3. Motions to dismiss objections and/or direct the answering of interrogatories will be filed within three (3) business days of service of written objections;
4. Answers to motions to dismiss objections and/or direct the answering of interrogatories will be filed within three (3) business days of service of such motions;
5. Responses to requests for document production, entry for inspection, or other purposes will be served in-hand within ten (10) calendar days;
6. Requests for admission will be deemed admitted unless answered within ten (10) calendar days or objected to within five (5) business days of service;
7. Rulings over motions shall be issued, if possible, within seven (7) calendar days of the filing of the motion;

8. Any discovery or discovery related pleadings such as objections, motions, answers to motions served on a Friday or on any business day preceding a state holiday shall be deemed to have been served on the following business day for purposes of tracking responsive due dates; and
9. Due dates will be “ in-hand” with electronic service on the due date satisfying the “in-hand” requirement and where such service is immediately followed by a hard copy sent by first-class mail.

Scheduling Order at 4-5.

C. Prehearing Conference

ALJ Hoyer inquired of the parties whether a conference would be helpful. The OCA requests that a status conference be scheduled in 45 to 60 days. At that point, with the benefit of discovery, the OCA would be positioned to propose a procedure to resolve or litigate the matter.

Respectfully Submitted,



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Dated: June 16, 2023