

# Morgan Lewis

**Kenneth M. Kulak**

Partner

+1.215.963.5384

Ken.kulak@morganlewis.com

June 16, 2023

## **VIA eFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
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 **Status Report**, for filing in the above-captioned matters.

**Morgan, Lewis & Bockius LLP**

1701 Market Street  
Philadelphia, PA 19103-2921  
United States

**T** +1.215.963.5000  
**F** +1.215.963.5001

**Rosemary Chiavetta, Secretary**  
**Pennsylvania Public Utility Commission**  
**June 16, 2023**  
**Page 2**

Copies of the Status Report have been served upon Administrative Law Judge Mark A. Hoyer 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 : P-2015-2508942**  
**for Approval of a Distribution System :**  
**Improvement Charge :**

**Office of Consumer Advocate : C-2016-2531040**  
**v. :**  
**Metropolitan Edison Company :**

**Petition of West Penn Power Company : P-2015-2508948**  
**for Approval of a Distribution System :**  
**Improvement Charge :**

**Office of Consumer Advocate : C-2016-2531019**  
**v. :**  
**West Penn Power Company :**

**Petition of Pennsylvania Electric : P-2015-2508936**  
**Company for Approval of a Distribution :**  
**System Improvement Charge :**

**Office of Consumer Advocate : C-2016-2531060**  
**v. :**  
**Pennsylvania Electric Company :**

**Petition of Pennsylvania Power Company : P-2015-2508931**  
**for Approval of a Distribution System :**  
**Improvement Charge :**

**Office of Consumer Advocate : C-2016-2531054**  
**v. :**  
**Pennsylvania Power Company :**

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of the **Status Report of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power**

**Company, and West Penn Power Company**, on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

**VIA ELECTRONIC MAIL**

The Honorable Mark A. Hoyer  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
400 North Street  
Harrisburg, PA 17105-3265  
[mhoyer@pa.gov](mailto:mhoyer@pa.gov)

Darryl Lawrence  
Erin L. Gannon  
Harrison W. Breitman  
Office of Consumer Advocate  
5th Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
[dlawrence@paoca.org](mailto:dlawrence@paoca.org)  
[egannon@paoca.org](mailto:egannon@paoca.org)  
[hbreitman@paoca.org](mailto:hbreitman@paoca.org)  
*Counsel for the Office of Consumer Advocate*

Sharon Webb  
Office of Small Business Advocate  
Forum Place – 1<sup>st</sup> Floor  
555 Walnut Street  
Harrisburg, PA 17101  
[swebb@pa.gov](mailto:swebb@pa.gov)  
*Counsel for the Office of Small Business Advocate*

Charis Mincavage  
Susan E. Bruce  
McNees Wallace & Nurick LLC  
100 Pine Street  
Harrisburg, PA 17108  
[cmincavage@mcneeslaw.com](mailto:cmincavage@mcneeslaw.com)  
[sbruce@mcneeslaw.com](mailto:sbruce@mcneeslaw.com)  
*Counsel for Met-Ed Industrial Users Group,  
Penelec Industrial Coalition Penn Power  
Users Group*

Thomas J. Sniscak  
William E. Lehman  
Hawke McKeon & Sniscak LLP  
100 North 10th Street  
Harrisburg, PA 17101  
[tjsniscak@hmslegal.com](mailto:tjsniscak@hmslegal.com)  
[welehman@hmslegal.com](mailto:welehman@hmslegal.com)  
*Counsel for The Pennsylvania State University*



---

Kenneth M. Kulak (Pa. I.D. No. 75509)  
Brooke E. McGlinn (Pa. I.D. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
215.963.5384 (bus)  
215.963.5404 (bus)  
[ken.kulak@morganlewis.com](mailto:ken.kulak@morganlewis.com)  
[brooke.mcglinn@morganlewis.com](mailto:brooke.mcglinn@morganlewis.com)

*Counsel for Metropolitan Edison Company,  
Pennsylvania Electric Company, Pennsylvania  
Power Company and West Penn Power Company*

Dated: June 16, 2023

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**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** : **Docket No. P-2015-2508936**  
**Charge** :

**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** : **Docket No. P-2015-2508931**  
**Charge** :

**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** : **Docket No. P-2015-2508948**  
**Charge** :

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

---

---

**STATUS REPORT**

---

## I. INTRODUCTION

This Status Report is being submitted on behalf of 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”) as directed by Administrative Law Judge Mark A. Hoyer (the “ALJ”) on June 5, 2023.

The current proceeding arises from the July 21, 2021 decision of the Supreme Court of Pennsylvania in *McCloskey v. Pennsylvania Public Utility Commission*, 255 A.3d 416 (Pa. 2021) (hereafter, “*McCloskey/FirstEnergy*”), construing Section 1301.1(a) of the Public Utility Code.<sup>1</sup> Under the Court’s interpretation of Section 1301.1(a) in *McCloskey/FirstEnergy*, the formula for calculating quarterly Distribution System Improvement Charge (“DSIC”) updates outlined in the Model Tariff adopted by the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) in its original DSIC Implementation Order<sup>2</sup> required revision.

As explained below, the Supplemental Implementation Order, unanimously approved by the PUC in a statewide proceeding at Docket No. M-2012-2293611 on October 27, 2022 (“*Supplemental Implementation Order*”), adopted the revisions to the Model Tariff required by *McCloskey/FirstEnergy*. Each of the Companies also filed tariff changes consistent with the revised Model Tariff, and those tariff changes have been approved by the Commission. As the PUC and the Companies have resolved all issues presented by *McCloskey/FirstEnergy*, these remand proceedings are now over, and the above-captioned dockets should be closed.

---

<sup>1</sup> 66 Pa.C.S. § 1301.1. Hereafter, all references to a “Section” are to sections of the Pennsylvania Public Utility Code (“Code”), 66 Pa.C.S. §§ 101 et seq., unless stated or the context indicates otherwise.

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

## II. BACKGROUND

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 Model Tariff and approving the DSIC Riders.<sup>3</sup> 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, those issues had been resolved by the Commission and the Commonwealth Court in prior proceedings.<sup>4</sup> 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).<sup>5</sup> 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 that the

---

<sup>3</sup> 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 June 9, 2016) (“DSIC Approval Orders”).

<sup>4</sup> *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. Commw. Ct. 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).

<sup>5</sup> The Companies’ rate increase filings were consolidated at PUC Docket Nos. R-2016-2537349 *et al.*



Commission declined to adopt in the prior proceedings. 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.<sup>6</sup> In the same order, the Commission referred issues concerning the impact, if any, of Act 40 on the previously approved DSIC Riders to these dockets 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 depreciation deductions<sup>7</sup> because it found that Act 40 did not change the DSIC-specific Code sections that delineated the formula for calculating the DSIC.

**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.<sup>8</sup> 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

---

<sup>6</sup> *Pa. P.U.C. v. Metropolitan Edison Co.*, Docket Nos. R-2016-2537349, et al., 2017 WL 395349, at \*23-25 (Jan. 19, 2017).

<sup>7</sup> April 2018 Order, pp. 25-29.

<sup>8</sup> *See McCloskey v. Pa. P.U.C.*, 219 A.3d 1216, 1225 (Pa. Commw. Ct. 2019).

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.** After the Pennsylvania Supreme Court issued its opinion and remand order, the Commission determined that a generic proceeding was the appropriate vehicle to address implementation of DSIC calculations in accordance with Section 1301.1(a) following the Companies’ Petition for Interlocutory Review seeking such relief. To that end, by Secretarial Letter issued April 22, 2022 at Docket No. M-2012-2293611 (“April 2022 Secretarial Letter”), the PUC solicited comments on the changes to the Model Tariff and, by extension, to the tariffs of utilities that employ a DSIC as may be required to comply with *McCloskey/FirstEnergy*.<sup>9</sup> As explained in the Secretarial Letter (p. 3), the principal changes to the DSIC formula set forth in the Model Tariff involve adding variables to the DSIC calculation to capture the effects of book-tax timing differences generated by utilities’ use of accelerated forms of tax depreciation deductions.

### **III. THE SUPPLEMENTAL IMPLEMENTATION ORDER RESOLVED ALL ISSUES IN THIS REMAND PROCEEDING**

In the *Supplemental Implementation Order*, the Commission carefully reviewed the comments submitted by parties<sup>10</sup> in response to its April 2022 Secretarial Letter and emphasized that changes to the DSIC formula should “not require unduly complicated computations but permit reasonable review and audit of DSIC charges and supporting calculations.”<sup>11</sup> In the new Model Tariff approved by the Commission and attached to the *Supplemental Implementation*

---

<sup>9</sup> April 2022 Secretarial Letter, p. 3.

<sup>10</sup> The parties submitting comments consisted of the OCA; electric, natural gas and water utilities; trade associations for energy and water utilities; and an association of eleven energy-intensive industrial consumers. The Companies submitted their own detailed Comments in response to the Secretarial Letter. *See Supplemental Implementation Order*, pp. 5-6.

<sup>11</sup> *Supplemental Implementation Order*, p. 6; see also *id.*, pp. 4-5.

*Order* (“New Model DSIC Tariff”), the Commission adopted revised DSIC language that was carefully crafted to achieve its goal by defining “DSI” (the original cost of distribution system improvements) to include, as an offset, only “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.”<sup>12</sup>

The OCA subsequently filed a Petition for Reconsideration and Clarification (“Petition”) for, among other things, the purpose of deleting language from the definition of DSI that focuses the calculation of tax effects on timing differences related to accelerated depreciation and adopting the definition the OCA proposed in its Comments (p. 8) already considered by the Commission. The OCA contended that book-tax timing differences may include more than accelerated tax depreciation, and all such differences should be encompassed in the DSIC calculations. The PUC Commission again considered OCA’s arguments and denied the OCA’s Petition in its entirety.<sup>13</sup> Specifically, the Commission stated:

The Commission agrees with the EAP that this is not a new or novel argument. The Commission considered this issue, including the OCA’s July 2022 comments, and ruled upon it in the Supplemental Implementation Order. We adopted a definition of “DSI” that captures the income tax effects of the major book-tax timing differences resulting from a utility’s DSIC investment and at the same time avoids unduly complicating the DSIC formula and review of DSIC charges and supporting calculations. To do this, the definition includes as an offset only “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.” Introducing areas with book-tax timing differences beyond ADIT, on which the OCA focused before the Supreme Court and

---

<sup>12</sup> Similarly, the New Model DSIC Tariff defines “STFT” by reference only to “book-tax timing differences between accelerated tax depreciation and book depreciation net of federal tax.”

<sup>13</sup> See Petition of the Pennsylvania Office of Consumer Advocate for Clarification and Reconsideration of the Pennsylvania Public Utility Commission’s Supplemental Implementation Order entered October 27, 2022, Docket No. M-2012-2293611 (Opinion and Order entered Mar. 2, 2022), pp. 9-10 & 12-13 (“*Reconsideration Order*”).

in its July 22, 2022 comments, would unnecessarily complicate the DSIC computation and review by Commission staff. Under the circumstances, it is not appropriate for the Commission to clarify or reconsider the definition of “DSI” because the OCA’s request does not meet the *Duick* standard for clarification or reconsideration and to do so would frustrate our goal of avoiding undue complication in calculating and reviewing the DSIC.<sup>14</sup>

In accordance with the *Supplemental Implementation Order* (p. 2), on December 1, 2022, the Companies filed revised DSIC Riders, which were approved by Secretarial Letter for each Company at Docket Nos. M-2022-3037012 (Met-Ed), M-2022-3037013 (Penelec), M-2022-3037015 (Penn Power) and M-2022-3037016 (West Penn). The Companies’ revised DSIC Riders became effective January 1, 2023.

In its status update to the ALJ on May 8, 2023, the OCA asks that the stay of this Company-specific remand in these dockets be lifted to provide the OCA the opportunity to propound discovery and conduct further proceedings regarding inclusion of additional federal income tax deductions in DSIC calculations.<sup>15</sup> However, as previously explained, the Commission has already considered how best to revise the DSIC formula to conform to Section 1301.1(a) and specifically considered – and rejected – the OCA’s contentions that the Model Tariff should be expanded to include other federal income tax deductions beyond ADIT.<sup>16</sup>

In short, the OCA seeks to address, for a *third* time, an issue that the PUC has considered and properly resolved on a statewide basis in the *Supplemental Implementation Order* and again examined in rejecting the OCA’s contentions in the *Reconsideration Order*. As such, the OCA has failed to set forth any valid basis for continuing these remand proceedings, nor any legitimate

---

<sup>14</sup> *Reconsideration Order*, pp. 17-18.

<sup>15</sup> See E-mail of Erin L. Gannon, Esq., Senior Assistant Consumer Advocate, Office of the Consumer Advocate, to Administrative Law Judge Mark A. Hoyer dated May 8, 2023.

<sup>16</sup> *Id.*; see also *Reconsideration Order*, pp. 12-13 & 17-18.

need for discovery, and the above-captioned dockets should be closed.

Counsel for the Companies are available for a conference to address the status of the proceedings and the Companies' recommendation that the dockets be closed.

Respectfully submitted,



Tori L. Giesler (Pa. No. 207742)  
Darshana Singh (Pa. No. 330971)  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, PA 19612-6001  
Phone: (610) 212-8331  
[tgiesler@firstenergycorp.com](mailto:tgiesler@firstenergycorp.com)  
[singhd@firstenergycorp.com](mailto:singhd@firstenergycorp.com)

Kenneth M. Kulak (Pa. No. 75509)  
Brooke E. McGlinn (Pa. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
215.963.5384 (bus)  
215.963.5001 (fax)  
[ken.kulak@morganlewis.com](mailto:ken.kulak@morganlewis.com)  
[brooke.mcglinn@morganlewis.com](mailto:brooke.mcglinn@morganlewis.com)

Dated: June 16, 2023

*Counsel for Metropolitan Edison Company,  
Pennsylvania Electric Company, Pennsylvania  
Power Company and West Penn Power Company*