

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding on Motion of the Commission on
Changes in Law that May Affect Rates**

Case 17-M-0815

**COMMENTS OF MULTIPLE INTERVENORS
ON STAFF TAX ACT PROPOSAL**

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PRELIMINARY STATEMENT

Multiple Intervenors, an unincorporated association of approximately 60 large industrial, commercial and institutional energy consumers with manufacturing and other facilities located throughout New York State, hereby submits these Comments to the New York State Public Service Commission (“Commission”) in Case 17-M-0815.¹ Multiple Intervenors’ Comments respond to the *Staff Proposal to Address the Accounting and Ratemaking of the Tax Cuts and Jobs Act of 2017* (the “Proposal”), which was filed herein on March 29, 2018 by New York State Department of Public Service Staff (“Staff”).

In the Proposal, Staff advances recommendations as to how utilities within the Commission’s jurisdiction – including but not limited to investor-owned electric and gas utilities – should approach current and future accounting and ratemaking with respect to the federal Tax and Jobs Act of 2017 (“Tax Act”) that was signed into law on December 22, 2017.² The Tax Act, *inter alia*, reduces the corporate federal income tax rate applicable to utilities from 35% to 21%. (See Proposal at 1.) Although there are other provisions in the Tax Act expected to have varying effects on utilities, the net impacts of the Tax Act are expected to be very favorable for customers. Staff estimates that as a result of the Tax Act: (a) the aggregate federal income tax expense for the State’s major electric, gas, steam and water utilities will be reduced by over \$750 million annually; and (b) those utilities now have excess deferred tax balances totaling \$4.8 billion due to rates paid – and still being paid – by customers based on the previously-higher tax rate. (Proposal at 5.)

¹ Case 17-M-0815, *Proceeding on Motion of the Commission on Changes in Law that May Affect Rates*.

² Multiple Intervenors’ Comments are limited to the appropriate accounting and ratemaking treatment by investor-owned electric and gas utilities with respect to implementation of the Tax Act. Multiple Intervenors advocates no position with respect to how the Tax Act should be implemented by other types of utilities subject to the Commission’s jurisdiction.

Initially, Multiple Intervenors commends the Commission for instituting this proceeding expeditiously – *i.e.*, within a week of the Tax Law being enacted.³ Multiple Intervenors further commends the Commission for instituting the proceeding in a manner that makes clear to all concerned that the cost savings related to the Tax Act will inure to the benefit of customers. (*See, e.g.*, Proposal at 4.)⁴ Now, the Commission needs to ensure that the issues raised in this proceeding are resolved on a timely basis, with the much-needed relief provided by the Tax Act being provided to customers as soon as practicable. As the Commission is aware, with very-limited exceptions electric and gas customers still are paying delivery rates based on the prior, much-higher corporate federal income tax rate.⁵ Thus, upon the receipt and evaluation of the

³ *See* Case 17-M-0815, *supra*, Order Instituting Proceeding (issued December 29, 2017).

⁴ *See id.* at 2 (holding that the goal of this proceeding will be “the preservation of any tax benefits for ratepayers”) and 3 (noting that “it is the Commission’s intent to ensure that net benefits accruing from the Tax Act are preserved for ratepayers, either through deferral accounting or another method, from the first day the Tax Act is put into effect”).

⁵ The recently-adopted electric and gas rate plan governing Niagara Mohawk Power Corporation d/b/a National Grid (“Niagara Mohawk”) reflects the lower corporate federal income tax rate resulting from the Tax Act and the estimated customer savings associated therewith. *See generally* Cases 17-E-0238 and 17-G-0239, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation d/b/a National Grid for Electric and Gas Service*, Order Adopting Terms of Joint Proposal and Establishing Electric and Gas Rate Plans (issued March 15, 2018) at 33-35 (holding, in pertinent part, that the Joint Proposal’s “proposed treatment of the financial impacts resulting from the passage of the Tax Act seeks to protect ratepayers’ interests and ensure that net benefits accruing from the Tax Act are preserved for ratepayers and not serve as a windfall to [Niagara Mohawk’s] shareholders” and that the parties’ proposal provides “significant and immediate financial benefit to ratepayers in the form of lower electric and gas revenue requirements”). The recently-adopted electric and gas rate plan governing Central Hudson Gas & Electric Corporation reflects similar treatment with respect to the Tax Act. *See* Cases 17-E-0459 and 17-G-0460, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Central Hudson Gas and Electric Corporation for Electric and Gas Service*, Order Adopting Terms of Joint Proposal and Establishing Electric and Gas Rate Plan (issued June 14, 2018) at 26 (holding that the Joint Proposal “reflects the Signatory Parties’ best estimate of the impact the Tax Act will have on expenses for the three years of the rate plan.”).

comments submitted in response to the Proposal, the Commission should issue an order resolving the issues raised herein.⁶

In the Proposal, Staff recommends, *inter alia*, that the Commission direct utilities to implement a sur-credit to customers effective October 1, 2018. (Proposal at 21-27.)

Specifically, Staff recommends that:

In order to both incorporate the ongoing net tax benefits into utilities' rates, and to begin to return the deferred regulatory liabilities, in a timely manner, Staff recommends utilities that have not had an opportunity to incorporate the Tax Act changes in a recently approved rate plan, be required to file for a tariff rate change, specifically for the implementation of a sur-credit, to be effective October 1, 2018. This sur-credit would reflect both the immediate and ongoing effects of the Tax Act changes (*e.g.* impact on current federal tax expense of the change in corporate tax rate from 35% to 21%, elimination of bonus depreciation), as well as a proposed plan for pass back or amortization of all deferred benefits, including the pass back of the identified excess accumulated deferred income tax balances.

(Proposal at 25-26.)

Multiple Intervenors' Comments respond to three aspects of the Proposal. In Point I, Multiple Intervenors supports Staff's recommendation that the benefits of the Tax Act should inure entirely to customers. In Point II, Multiple Intervenors supports Staff's recommendation that the implementation of sur-credit mechanisms should be mandated to ensure the timely pass-back of Tax Act benefits to customers. Finally, in Point III, Multiple Intervenors advocates that Tax Act savings should be allocated equitably, and in accord with cost causation principles.

⁶ Inasmuch as the electric and gas rate plans negotiated in the Niagara Mohawk and Central Hudson rate proceedings already address – and allocate entirely to customers – the estimated savings resulting from the Tax Act, Multiple Intervenors' Comments herein are intended to apply primarily to the State's investor-owned electric and gas utilities other than Niagara Mohawk and Central Hudson.

ARGUMENT

POINT I

THE BENEFITS OF THE TAX ACT SHOULD INURE ENTIRELY TO CUSTOMERS

As detailed, *supra*, in instituting this proceeding, the Commission made clear that its goal is “the preservation of any net tax benefits for ratepayers.”⁷ Similarly, Staff recommends that “the net tax benefits resulting from the lower tax expense [resulting from the Tax Act] be preserved for ratepayers in their entirety until they are reflected in rates.” (Proposal at 6.) Multiple Intervenors agrees with the Commission and Staff that the benefits of the Tax Act should inure entirely to customers.

Customers are charged delivery rates by electric and gas utilities that reflect corporate federal income tax expense. Such expense is one that is – and long has been – borne entirely by customers. Thus, to the extent the Tax Act reduces utilities’ federal income tax expense, 100% of the resulting savings should inure to customers. Such outcome also is fair because: (a) prior increases to corporate federal income tax rates have been passed-through by utilities to customers; and (b) utilities are not responsible for the creation of benefits under consideration here; such benefits are due entirely to federal legislation. To their credit, certain utilities, including but not necessarily limited to Niagara Mohawk and Central Hudson, already have recognized (in the form of adopted rate plans) that Tax Act savings should inure to customers.

For the foregoing reasons, it is equitable, and appropriate, that the benefits created by the Tax Act inure entirely to customers.

⁷ Case 17-M-0815, *supra*, Order Instituting Proceeding at 2.

POINT II

THE COMMISSION SHOULD MANDATE UTILITY IMPLEMENTATION OF SUR-CREDIT MECHANISMS TO ENSURE THE TIMELY PASS-BACK OF TAX ACT BENEFITS TO CUSTOMERS

In the Proposal, Staff recommends that those utilities that have not incorporated Tax Act savings into recent rate plans be required to implement sur-credit mechanisms, effective October 1, 2018, to begin the pass-back of Tax Act benefits to customers. Staff indicates that its preferred approach is that “all net benefits [resulting from the Tax Act] will be returned to customers through the sur-credit that is implemented, and in conjunction with the next base rate change.” (Proposal at 26.) Multiple Intervenors strongly supports Staff’s recommendation.

As a result of the Tax Act, the corporate federal income tax rate has fallen from 35% to 21%. That change has been in effect since the beginning of the year. Significantly, however, throughout 2018, New York electric and gas customers have continued to pay delivery rates on the now-superseded, much-higher tax rate. Thus, while utilities have experienced a lower tax rate, their customers have not. This needs to change as soon as possible. Implementing a sur-credit on customers’ bills would begin the process of ensuring the timely pass-back of Tax Act benefits to customers. It also would provide much-needed economic relief for New York utility customers, who pay some of the highest energy costs in the nation.

A sur-credit also is needed because, absent implementation of such a mechanism, it is not clear when certain utilities’ customers otherwise would start to realize any of the intended benefits of the Tax Act. For a number electric and gas utilities, there is uncertainty as to when their next electric and/or gas rate cases will be filed with the Commission. For example, at the Staff-convened Technical Conference held in this proceeding on February 2, 2018, several major utilities indicated that they were unsure as to the timing of their next rate case. Moreover, in New

York, there typically is an 11-month process for setting new rates. Thus, absent implementation of a sur-credit mechanism, the substantial savings projected as a result of the Tax Act might not be experienced by customers until sometime in 2019, 2020 or later. Such an outcome should be seen as unacceptable given that the Tax Act substantially reduced utility federal income tax effective January 1, 2018.

In its Proposal, Staff opined that “an excessive delay of refunds unfairly deprives the customer of benefits” (Proposal at 24.) Multiple Intervenors agrees. Simply allowing utilities to defer all accrued benefits on their books until the next rate case, without any mechanism to effectuate the return of those benefits to customers in a timely manner, would be extraordinarily inequitable. There is no conceivable reason why the Commission should allow electric and gas utilities to retain the financial benefits of a corporate federal income tax reduction indefinitely. It is (or should be) incontrovertible that the benefits resulting from the Tax Act should inure entirely to the benefit of customers. Given widespread recognition thereof, no purpose would be served by delaying the implementation of an effective sur-credit mechanism. Indeed, inasmuch as the Tax Act became effective on January 1, 2018 (with certain provisions having earlier effective dates applied thereto), even the Staff-proposed October 1, 2018 commencement date for implementation of sur-credit mechanisms constitutes a very-long delay.

Accordingly, for the foregoing reasons, Multiple Intervenors urges the Commission to adopt Staff’s recommendation that all utilities that have not already incorporated Tax Act savings into a recent rate plan be directed to implement a sur-credit mechanism to begin returning those savings to customers in a timely manner. Such sur-credit mechanisms should be implemented by no later than October 1, 2018, and preferably earlier than that.

POINT III

TAX ACT SAVINGS SHOULD BE ALLOCATED EQUITABLY AND IN ACCORD WITH COST CAUSATION PRINCIPLES

For the reasons set forth, *supra*, savings stemming from the Tax Act should (i) inure entirely to the benefit of customers, and (ii) be returned to the customers in a timely manner, preferably via a sur-credit mechanism (if not already addressed in a recently-adopted rate plan), that would be implemented on or before October 1, 2018. When Tax Act savings are returned to customers, they should be allocated equitably, and in accord with cost causation principles. For instance, Tax Act savings related to corporate federal income tax expense should be returned to a utility's various service classes using the same allocation factors that were used to collect corporate federal income tax expense in the first place. The same approach should be applied to any other sources of savings related to the Tax Act, such as, potentially, depreciation expense. Such an outcome would be equitable to all customer types and in full accord with cost causation principles.

Prior to the Tax Act, the corporate federal income tax rate was 35%. That expense was – and, in most cases still is – embedded in electric and gas utility delivery rates. Each utility allocated the expense pursuant to some methodology which, upon information and belief, may differ amongst utilities. Irrespective of the methodology used, the same allocation factor that was used to collect corporate federal income tax expense should be used to implement the return of savings resulting from a reduction in the applicable rate to 21%. In other words, savings stemming from the Tax Act generally should be returned to service classes in the same proportion that classes contributed to the now-existing over-recoveries. Such an approach preserves equity among service classes and customer types, and avoids the creation or exacerbation of interclass subsidies. This approach strikes Multiple Intervenors as the best, and arguably the only, way to ensure that

customers receive their equitable share of the Tax Act benefits and do not inadvertently cross-subsidize other customers. Each utility should be able to administer the return of Tax Act savings to customers consistent with Multiple Intervenors' recommended approach, and it would be fairer than attempting to apply some "one-size-fits-all" sur-credit methodology that ignores – or fails to reflect accurately – how the underlying tax expense was collected from a particular utility's service classes.

Accordingly, Multiple Intervenors recommends that the Commission direct each utility to allocate and return Tax Act savings to customers in an equitable manner, consistent with cost causation principles. Simply, Tax Act savings should be returned to a utility's service classes in the same proportion in which the underlying tax-related expenses were collected in the first place.

CONCLUSION

For all the foregoing reasons, Multiple Intervenors urges the Commission to ensure that: (a) the benefits of the Tax Act inure entirely to customers; (b) sur-charge mechanisms are implemented as soon as practicable, and by no later than October 1, 2018, to ensure the timely pass-back of Tax Act benefits to customers; and (c) Tax Act savings are allocated equitably, and in accord with cost causation principles.

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Respectfully submitted,

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